Introduction

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I. BACKGROUND AND AIMS OF THE BOOK

A. ‘Constant Legal Reform’ in EU Public Procurement: Evolution, Dynamics and Challenges

EU public procurement law is of great practical relevance and has an immediate social impact, not only because it affects economic exchanges that represent around 19 per cent of the EU’s GDP,¹ but also because it has a clear influence on the design of the provision of public services and on the approach to the social market economy.² On the back of such deep-rooted economic and social implications, EU public procurement law has evolved from being a relatively peripheral area of EU economic law in the run up to the completion of the internal market in 1992,³ and remaining in that position in the first version of the 2010 Lisbon Agenda as formulated in 2000;⁴ towards taking centre stage in the Europe 2020

¹ Upgrading the Single Market: more opportunities for people and business, 28.10.2015, COM(2015) 550 final, 13.

² See W Sauter, *Public Services in EU Law* (Cambridge University Press 2015) 163. For background and discussion, see A Sanchez-Graells and E Szyssczak, ‘Modernising Social Services in the Single Market: Putting the Market into the Social’, in JM Beneyto and J Maillou (eds) *Fostering Growth: Reinforcing the Internal Market* (CEU Ediciones 2014) 61; and GS Ølykke and P Møllgaard, ‘What is a Service of General Economic Interest?’ (2016) 21(1) *European Journal of Law and Economics* 205.

³ White Paper: Completing the Internal Market, 14.06.1985, COM(85) 310 final, 23–4.

⁴ Presidency conclusions to the Lisbon European Council held on 23 and 24 March 2000, para I.17, available at <http://www.europarl.europa.eu/summits/lis1_en.htm> accessed February 2016.

strategy,⁵ and the more developed Single Market Acts I and II aimed at the recovery of the EU economy in the aftermath of the 2008 financial crisis.⁶ The relevance of procurement as a tool for an adjustment of the welfare state,⁷ and as a booster for economic recovery,⁸ was also prominently displayed in its use within the *bail-outs* of some EU Member States, such as Greece⁹ or Portugal.¹⁰ Very recently, EU public procurement's position within EU economic law has further evolved by being placed at the heart of the renewed 2015 strategy for a deeper and fairer internal market.¹¹

Thus, EU public procurement law has progressively consolidated its position as a core area of EU economic law.¹² This has led to its increasing *politicisation*,¹³ both in terms of making it a high-profile topic

⁵ Procurement is present in several of the flagship initiatives in EUROPE 2020: A strategy for smart, sustainable and inclusive growth, 03.03.2010, COM(2010) 2020 final.

⁶ See the several documents available at <http://ec.europa.eu/growth/single-market/smact/index_en.htm> accessed February 2016.

⁷ M Petmesidou and M Glatzer, 'The Crisis Imperative, Reform Dynamics and Rescaling in Greece and Portugal' (2015) 17(2) *European Journal of Social Security* 158.

⁸ This is one of the 'standard' horizontal policies for which public procurement tends to be sued; see S Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy,' (2010) 10(2) *Journal of Public Procurement* 149, 169.

⁹ See Commission, 'The Second Economic Adjustment Programme for Greece', (2012) Occasional Papers 94, Annex 1, 57–58, <http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf> accessed February 2016.

¹⁰ See the multiple references to procurement reform in the Memorandum of Understanding on Specific Economic Policy Conditionality for Portugal, 3 May 2011, 13:40. <http://economico.sapo.pt/public/uploads/memorandotroika_04-05-2011.pdf> accessed February 2016.

¹¹ See above (fn. 1) and Fact Sheet: A deeper and fairer Single Market, 28.10.2015, MEMO/15/5910, <http://europa.eu/rapid/press-release_MEMO-15-5910_en.htm> accessed February 2016.

¹² A Sanchez-Graells, 'Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?' (2016) 22(2) *European Public Law Journal* 377–394.

¹³ AV Roman, 'Public Procurement Specialists: They Are Not Who We Thought They Were' (2015) 15(1) *Journal of Public Procurement* 38, 40. For normative discussion on the need to (re)politicise technical areas of public procurement, see T Willems and W Van Dooren, '(De)Politicization Dynamics in Public–Private Partnerships (PPPs): Lessons from a comparison between UK and Flemish PPP policy' (2016) 18(2) *Public Management Review* 199.

for political debate,¹⁴ political negotiation¹⁵ and political intervention,¹⁶ as well as increasing its use as a policy lever by both the EU Institutions and the Member States themselves.¹⁷ It has also become a focus of growing importance in terms of oversight and political accountability mechanisms.¹⁸ Probably, the fact that the procurement rules directly regulate Member States' spending of public budgets has made it particularly prone to politicisation.¹⁹ In any case, this change of position within

¹⁴ A Ludlow, 'The Public Procurement Rules in Action: An Empirical Exploration of Social Impact and Ideology' (2013–14) 16 *Cambridge Yearbook of European Legal Studies* 13, 17 ff. For background discussion, focusing on political debate about the openness of procurement markets, see also F De Ville and J Orbie, 'The European Commission's Neoliberal Trade Discourse since the Crisis: Legitimizing Continuity through Subtle Discursive Change' (2014) 16(1) *The British Journal of Politics & International Relations* 149.

¹⁵ PR Schapper, JN Veiga Malta and DL Gilbert, 'An Analytical Framework for the Management and Reform of Public Procurement' (2006) 6(1/2) *Journal of Public Procurement* 1.

¹⁶ For a critical approach to this phenomenon, see DG Dimitrakopoulos, 'Institutions and the Implementation of EU Public Policy in Greece: the Case of Public Procurement' (May 2007) LSE Hellenic Observatory Papers on Greece and Southeast Europe (GreeSE) Paper No2, <http://www.lse.ac.uk/european_institute/research/hellenicObservatory/pdf/GreeSE/GreeSE02.pdf> accessed February 2016.

¹⁷ For discussion, see the contributions on social, innovative and green procurement to G Piga and T Tatrai (eds), *Public Procurement Policy*, 23 *The Economics of Legal Relationships* (Routledge 2016). See also S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (Cambridge University Press 2009); and R Caranta and M Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF, 2010). For a critical account of the use of public procurement as a policy lever, see C McCrudden, *Buying Social Justice. Equality, Government Procurement, and Legal Change* (Oxford University Press 2007).

¹⁸ See, e.g. European Court of Auditors, 'Efforts to address problems with public procurement in EU cohesion expenditure should be intensified', Special report No 10/2015, 15.09.2015, <<http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=32488>> accessed February 2016. For theoretical discussion, see CP McCue, E Prier and D Swanson, 'Five Dilemmas in Public Procurement' (2015) 15(2) *Journal of Public Procurement* 177, 182 ff.

¹⁹ The same kind of politicisation aims to be avoided in the area of State aid law, where the Commission relies on the legal basis in Arts. 107–108 TFEU, on Council Regulation 2015/1589/EU of 13 July 2015 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, which has Art. 109 TFEU as its legal basis providing for a special legislative procedure, where the Parliament only needs to

the EU law spectrum,²⁰ or at least a change of approach towards public procurement beyond its importance as a strictly-economic lever for the creation and consolidation of the internal market, has had an impact on its legal technique and on the scope and content of EU public procurement law.²¹

In part as a result of that evolution, EU public procurement law has been particularly prone to legal reform.²² This is evidenced by the major revisions of the EU rules that have been taking place at an ever quicker pace, and almost on a non-stop basis over recent years, including: a general revision and modernisation in the adoption of the 2004 Directives for both public sector and utilities procurement, an ensuing revision of the remedies mechanisms in 2007,²³ the approval of special rules for defence and security-related procurement in 2009,²⁴ a new reform of the

be consulted, and on soft law (guidelines, communications, etc.). The Commission also utilises its exclusive legislative powers vested in Art. 106(3) TFEU in the field of State aid. For discussion, see H Kassim and B Lyons, 'The New Political Economy of EU State Aid Policy' (2013) 13(1) *Journal of Industry, Competition and Trade* 1; and TJ Doleys, 'Managing the Dilemma of Discretion: The European Commission and the Development of EU State Aid Policy' (2013) 13(1) *Journal of Industry, Competition and Trade* 23. The issue of the level of technical discretion that the Commission retains despite its published State aid policies has been recently examined in *Greece v Commission*, C-431/14 P, EU:C:2016:145.

²⁰ C Harlow and R Rawlings, *Process and Procedure in EU Administration* (Hart, 2014) Chs 6 and 7; R Craven, 'Carol Harlow and Richard Rawlings, *Process and Procedure in EU Administration* (Book review)', (2016) 79(1) *The Modern Law Review* 185.

²¹ This trend had already been identified in relation to the 2004 Directives by S Arrowsmith, 'The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?' (2006) 35(3) *Public Contract Law Journal* 337.

²² Generally, on the impact of new approaches to EU economic policy and their impact on EU legislative processes, see J Priestley, 'Rethinking the Future of Europe', in S Schepers and A Kakabadse (eds), *Renewing European Politics. A Challenge of Governance* (Springer 2014) 148.

²³ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31.

²⁴ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L216/76.

public sector and utilities regimes and the adoption of special rules for concessions in the 2014 Public Procurement Package,²⁵ as well as the on-going revision of the remedies mechanisms undertaken by the Commission in 2015.²⁶ In parallel to the development and review of these 'internal' public procurement rules, the Commission has also been working on the unresolved issue of the 'external' participation by non-EU economic operators in EU covered procurement. This led the Commission to propose the adoption of a regulation on third-country access in 2012,²⁷ which has now been revised in 2016.²⁸ However, even if the revised proposal is adopted, there will be unresolved important issues concerning potential 'extra-territorial' effects of the EU public procurement rules and the possibility to fine-tune or include diverse levels of protection for non-EU economic operators depending on the applicable trade agreements, which prompt even more future legal reforms.²⁹ Having gone through five (or more) major revisions in what is likely to be a period of 15 years is certainly putting significant pressure on Member States' ability to effectively transpose and meaningfully give effect to each set of new EU public procurement rules. It is no exaggeration to stress that '[i]n terms of public contract law, this decade [2004–2014] feels rather like centuries',³⁰ or that trying to keep up with

²⁵ Concessions Directive, 2014 Directive and 2014 Utilities Directive.

²⁶ See the documents related to the July 2015 consultation, <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8244> accessed February 2016. For a critical assessment of the evolution of the regulation of public procurement remedies under EU law, see R Caranta, 'Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation' (2015) 8(1) *Review of European Administrative Law* 75.

²⁷ Proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, 21.03.2012, COM(2012) 124 final.

²⁸ Amended Proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, 29.01.2016, COM(2016) 34 final.

²⁹ Note that this book is only concerned with the 'internal' dimension of EU public procurement reform in 2014. Only some of the issues raised regarding the 'external' dimension are mentioned where relevant and, in particular, in the contributions by Dawar and Skalova, Ølykke and Craven to this book.

³⁰ R Caranta, 'The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works' (2015) 52(2) *Common Market Law Review* 391, 392.

the permanent reforms and developments in the field of EU public procurement law is a Sisyphean task.³¹

Indeed, for a set of rules of such broad application in the EU economy and with such implications in terms of public sector design and reform, this pace of change is certainly costly and troublesome,³² and the undesired effects of EU public procurement law's status of 'almost permanently under revision' can be criticised.³³ Even the Commission seems to have now accepted that the possibilities for any further improvement of EU public procurement law are not in the area of further legal reform (maybe with the exception of the remedies rules), but rather in the area of development of a *culture of legal compliance*, which will require further training, professionalisation and exchange of information and best practices within the public sector (at an EU-wide level).³⁴ Therefore, there is a certain perception, or at least a hope that the 2014 Public Procurement Package will have an element of *crystallisation* of the system, which should allow for it to remain unchanged for a longer period of time than the preceding 2004 Directives.³⁵

Moreover, it is also worth noting that this trend of almost permanent change makes it very difficult for legal operators to adapt to the subsequent waves of legal reform and creates an environment where the 'unsettledness' of the EU rules trigger litigation and demand significant

³¹ S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK – Part 1* (3rd edn, Sweet & Maxwell 2014) viii; A Sanchez-Graells, 'The Law of Public and Utilities Procurement (Book review)' (2016) 1 *Public Law* 176.

³² For a clear discussion, see MP Van Alstine, 'The Costs of Legal Change' (2001–2002) 49 *UCLA Law Review* 789. For a counterintuitive insight into the effect that coordinated legal harmonisation can have on the costs of legal reform, see E Carbonara and F Parisi, 'The Paradox of Legal Harmonization' (2007) 132(3) *Public Choice* 367.

³³ Generally, see Arrowsmith (fn. 31) 197–201.

³⁴ See above (fn. 1) and (fn. 11), and press release: A deeper and fairer Single Market: Commission boosts opportunities for citizens and business, 28.10.2015, IP/15/5909, <http://europa.eu/rapid/press-release_IP-15-5909_en.htm> accessed February 2016.

³⁵ However, there are strong voices proposing more fundamental changes to the regulation of procurement at the EU level, which may end up trickling down into the legislative agenda, particularly if claims for additional flexibility are backed up after the transposition of the 2014 Public Procurement Package. See S Arrowsmith, 'Modernising the European Union's Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility' (2012) 21(3) *Public Procurement Law Review* 71.

interpretive efforts from national review bodies and EU courts.³⁶ Not surprisingly, then, EU procurement rules represent around 3.5 per cent of the cases brought before the CJEU.³⁷ Remarkably, though, the interpretative activity of the CJEU has not necessarily contributed to a slowdown of the reform process or a crystallisation of the applicable rules. Indeed, the CJEU has often created additional legal reform by itself,³⁸ mainly, through recourse to the general principles of EU law to extend obligations beyond the original remit of the EU public procurement rules,³⁹ or by requiring EU law compliant reinterpretations of domestic general legal principles such as *res iudicata*.⁴⁰ At the very least, the case law of the CJEU has prompted further proposals for legal reform where the Commission or Member States wanted to constrain or supersede specific positions taken by the CJEU in its case law,⁴¹ in the so-called ‘juridification of the political’.⁴² Examples include the clear attempt to deviate

³⁶ Even on the question of which public procurement directive applies in a dispute, see e.g. *Bayerischer Rundfunk*, C-337/03, EU:C:2007:786, para 30; *Frigerio Luigi & C.*, C-357/06, EU:C:2007:818, para 18; *Varec*, C-450/06, EU:C:2008:91, paras 26 ff.; *Hochtief AG and Linde-Kca-Dresden GmbH*, C-138/08, EU:C:2009:627, paras 24 ff.; *Combinatie Spijker Infrabouw-De Jonge Konstruktie*, C-568/08, EU:C:2010:751, paras 35 ff.; *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paras 30 ff.

³⁷ Based on most recent data. See Court of Justice of the European Union, Annual Report 2014, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/en_ra14.pdf> accessed February 2016.

³⁸ This has been termed ‘judicial multitasking’ by Harlow and Rawlings (fn. 20) 149 ff.

³⁹ For critical discussion, see S Treumer and E Werlauff, ‘The Leverage Principle: Secondary Community Law as a Lever for the Development of Primary Community Law’ (2003) 28(1) *European Law Review* 124.

⁴⁰ This is a very recent development. See *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067. See also *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742. For critical assessment, see J Kitsos, ‘Public Procurement – Meaning of “Public Works Contract” – Scope of the Principle of “Res Judicata”’. Annotation on the Judgment of the Court of Justice (Second Chamber) of 10 July 2014 in Case C-213/2013 *Impresa Pizzarotti & C. Spa v Comune di Bari and Others*’ (2015) 10(3) *European Procurement & Public Private Partnership Law Review* 207.

⁴¹ As foreseen by JHH Weiler, ‘A Quiet Revolution: The European Court of Justice and its Interlocutors’ (1994) 26(4) *Comparative Political Studies* 510.

⁴² For this terminology; see AM Magnussen and A Banasiak, ‘Juridification: Disrupting the Relationship between Law and Politics?’ (2013) 19(3) *European Law Journal* 325, 332 ff. See also C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17(1) *European Journal of International Law* 187; and C Möllers, ‘The Politics of Law and the Law of Politics: Two

from the *Lianakis* case law on the distinction between selection and award criteria in the 2014 reform of the general rules,⁴³ and the attempt to overrule the CJEU's *Stadt Halle* case law prohibiting private capital participation in in-house arrangements.⁴⁴

Such interaction between legal reform by the EU legislator and legal interpretation by the CJEU has offered anecdotal evidence of a circular fuelling process where legal reform led to more need for interpretation, which then triggered further reform, which in turn required further interpretation, and so on and so forth.⁴⁵ This 'legislation-interpretation-legislation' cycle and interaction have made EU public procurement rules particularly sensitive to a judicially-led dialogue between the CJEU and the EU legislator, especially when the Commission has attempted to play a mediating role.⁴⁶

B. A 'Law And Political Science' Approach to Public Procurement

On the basis of all these general trends and insights, this book aims to take a step back, gain some perspective and offer a critical account of the implications for EU public procurement law that derive from its increasing politicisation, the process of constant legal reform, the possibility of crystallisation of the system, and the judicially-led dialogue of the CJEU with the Member States and the EU Institutions. In order to do so, it focuses on the process of legal reform that started with the 2011 Green Paper and eventually culminated with the adoption of the 2014 Public Procurement Package.

Constitutional Traditions in Europe', in EO Eriksen, JE Fossum and A Menéndez (eds), *Developing a Constitution for Europe* (Routledge 2004) 131, 137 ff.

⁴³ Which was seemingly in vain considering *Ambisig*, C-601/13, EU:C:2015:204. See further on this topic P Bordalo Faustino, 'Award Criteria in the New EU Directive on Public Procurement' (2014) 23(3) *Public Procurement Law Review* 124, 133.

⁴⁴ See GS Ølykke and CF Andersen, 'A State Aid Perspective on Certain Elements of the New Provision on In-House and Public-Public Cooperation' (2015) 24(1) *Public Procurement Law Review* 1, 9 ff.

⁴⁵ S Treumer, 'Evolution of the EU Public Procurement Regime: The New Public Procurement Directive', in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement. The New Directive*, 6 European Procurement Law Series (DJØF, 2014) 9, 17.

⁴⁶ This was particularly clear regarding below thresholds procurement where a legal challenge promoted by Member States followed the Commission's consolidation of the CJEU case law; see *Germany v Commission*, T-258/06, EU:T:2010:214.

The book adopts a ‘law and political science’ approach,⁴⁷ and fits the legal assessment within a specific political science analytical framework centred on the EU ordinary legislative process and the influence of the CJEU upon it.⁴⁸ This methodological approach is meant to provide the necessary tools to carry out an assessment of the reform of the EU public procurement rules in 2011–14 in a way that not only offers useful insights for procurement law scholars and practitioners, but also serves as a valuable case study for legal and political science academics active in other fields of EU studies. Indeed, looking at the 2011–14 public procurement reform through the *magnifying glass* of political science will reveal different details of its *outcome* (i.e. the 2014 Public Procurement Package), as well as offer some interesting lessons from the observation of the legislative *process* itself.

The objective of taking this alternative and novel approach to public procurement scholarship is mainly threefold. First, an aim is to explore what insights might be gained by having a closer look at the negotiations and *travaux préparatoires*, which is something that – in comparison to many national jurisdictions in the EU – does not explicitly have a consolidated role in the European legal method⁴⁹ – if such a method

⁴⁷ For discussion on this interdisciplinary approach, see KJ Alter, R Dehousse and G Vanberg, ‘Law, Political Science and EU Legal Studies—An Interdisciplinary Project?’ (2002) 3(1) *European Union Politics* 113. The adoption of ‘law and social sciences’ methodologies to the study of public law and its institutions is a trend of increasing relevance, as discussed in S Rose-Ackerman and PL Lindseth, ‘Comparative Administrative Law: An Introduction’, in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law*, 1 Research Handbooks in Comparative Law series (Edward Elgar, 2010). More generally, on the role of methodology and theory in the study of public procurement, see A Flynn and P Davis, ‘Theory in Public Procurement Research’ (2014) 14(2) *Journal of Public Procurement* 139.

⁴⁸ The framework is developed in the contribution by Allerkamp to this book. For a very recent overview of this influence of the CJEU, see also J Guth, ‘Transforming the European Legal Order: The European Court of Justice at 60+’ (2016) 12(1) *Journal of Contemporary European Research* 456.

⁴⁹ For discussion, see K Lenaerts and JA Gutierrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’ (2014) 20(2) *Columbia Journal of European Law* 3. For far-reaching attempts at dissecting the CJEU’s legal method, see G Beck, *The Legal Reasoning of the Court of Justice of the EU*, Modern Studies in European Law (Hart Publishing 2013); and G Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge Studies in European Law and Policy (Cambridge University Press 2014). For an overview of these recent contributions, see M Dawson, ‘How

exists⁵⁰ – but is gaining increasing relevance in the reasoning of the CJEU.⁵¹ Second, by taking the political science perspective and closely retracing the legislative process, the intention is to reveal the alliances and strategies in the negotiations for the 2014 Public Procurement Package. More specifically, by assessing this lengthy legislative process and the positions taken by each of the main players involved in the EU ordinary legislative procedure (i.e. the Commission, the Member States within the Council, and the Parliament), the book aims to offer insights into their positions when it comes to the regulation of a technical area of EU economic law with such far-reaching economic and social implications. This can contribute to a better understanding of the way in which the ‘sharing arrangements’ for this ‘regulatory space’⁵² are shaped between the EU and the Member States.⁵³ Third, to close the circle, and taking the analysis one step further than political science would do, an attempt is made to assess the future impact of the negotiations by considering the position that will most likely be taken by the CJEU when

Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice’ (2014) 20(3) *European Law Journal* 423.

⁵⁰ See the contributions to UB Neergaard and R Nielsen (eds), *European Legal Method: In a Multi-level EU Legal Order* (DJØF Publishing 2012). For discussion, more generally, see R Van Gestel and HW Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20(3) *European Law Journal* 292.

⁵¹ Indeed, the use of pre-legislative materials in the interpretation of EU law is gaining traction in litigation before the CJEU, as evidenced in recent cases such as *Inuit Tapiriit Kanatami and Others v Commission*, C-398/13 P, EU:C:2015:535. For discussion, see A Alemanno, ‘Le juge et les études d’impact’ (2014) 149 *Revue française d’administration publique* 179.

⁵² See L Hancher and M Moran ‘Organising Regulatory Space’, in L Hancher and M Moran (eds), *Capitalism, Culture and Economic Regulation* (Oxford University Press 1989) 271; and B Morgan and K Yeung, *An Introduction to Law and Regulation: Text and Materials*, Law in Context (Cambridge University Press 2007) 59 ff. See also R MacKenzie and M Martínez Lucio, ‘The Realities of Regulatory Change. Beyond the Fetish of Deregulation’ (2005) 39(3) *Sociology* 499.

⁵³ For a critical discussion, see S Arrowsmith, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’, in C Barnard, M Gehring and I Solanke (eds), 14 *Cambridge Yearbook of European Legal Studies* (Hart Publishing, Oxford 2012) 1. For theoretical background, see the contributions to C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart 2002).

interpreting the amended and new provisions of the 2014 Public Procurement Package. Hence, this last predictive effort aims to understand to what extent the case law of the CJEU was perceived as a constraint of the legislative process – primarily, by identifying areas of consolidation or deviation from previous case law – and to gauge to what extent the new 2014 Public Procurement Package will be able to *actually* consolidate, limit or reform the existing case law of the CJEU in the area of EU public procurement law. This discussion will be particularly relevant in areas where the Member States or the Commission were dissatisfied with the positions previously adopted by the CJEU and made it clear throughout the legislative process. This may well open the door to additional research on the extent to which the CJEU may consider itself bound by explicit political choices of the Member States.⁵⁴

Lastly, it is worth stressing that, as hinted in the title of the book, a major normative assessment of the resulting legislative product is ventured into, in the context of a legislative reform where the political perceptions and the actual legal implications have not always been properly aligned, as is demonstrated by the analyses in the substantive chapters of the book.⁵⁵ The evaluation of whether a particular amendment or new provision has caused a reformation or a deformation of the EU public procurement rules has been left to the individual authors, on the basis of their expert knowledge. They all provide their own views as to whether the 2014 Public Procurement Package constitutes an improvement over the 2004 Directives, which adds value from a purely ‘legal’ approach to public procurement scholarship. In the concluding chapter, these assessments are collected and discussed in order to take a final position.

⁵⁴ Recent cases have indeed pointed out in that direction. See *Pringle*, C-370/12, EU:C:2012:756; *Dano*, C-333/13, EU:C:2014:2358; and *García-Nieto and Others*, C-299/14, EU:C:2016:114. This is an issue of growing relevance, as highlighted in the context of the UK’s referendum on its membership of the EU and, in particular, on the CJEU’s likely position if seized to rule on the validity of the ‘UK_EU deal’, see P Syrpis, ‘The Legal Status of the Agreement of the Heads of State or Government (re Brexit)’, University of Bristol Law School Blog, 9 March 2016 <<http://legalresearch.blogs.bris.ac.uk/2016/03/the-legal-status-of-the-agreement-of-the-heads-of-state-or-government-re-brexit/>> accessed March 2016.

⁵⁵ For a remarkable mismatch between political process and legal implications of legislative reform, see the contribution by Aspey to this book.

II. CONTENT AND STRUCTURE OF THE BOOK

As mentioned, the book fits the legal assessment within a specific political science analytical framework centred on the EU ordinary legislative procedure and the influence of the CJEU upon it. This framework is laid out by Allerkamp in the first chapter of the book, where she reviews the existing political science literature and offers a structured account of the incentives and constraints that each of the actors involved in the EU's ordinary legislative process have. Her contribution stresses the recent trends towards informality in the EU legislative process (through the so-called trilogues), which trigger the need for further theoretical developments within the political sciences field. Her chapter also stresses the two ways in which the CJEU's case law influences EU legislative processes, on the basis of both an *ex ante* expectation of the CJEU's interpretation and an *ex post* reaction to the application of the rules in practice. The issues raised in this introductory theoretical chapter provide clear lines of argument that are picked up in the remainder of the chapters and, in particular, in the conclusions.

The rest of the book is structured as a sequence of case studies grouped around the legislative actors that promoted each of the different changes in the EU public procurement rules covered in the substantive chapters of the book. To some extent, all legislative actors affected the drafting of the new rules. However, different actors managed to influence different changes to diverging degrees and the book ascribes specific reforms to the institution that played a more definitive role in shaping each of the specific rules under consideration.⁵⁶ In particular, the chapters are organised according to which actor initiated or introduced the amendment in the debate of the 2011 Proposal – which, however, is not necessarily the actor who had the final say on the treatment of that specific issue in the 2014 Public Procurement Package. Thus, the book is divided in three main parts: reforms initiated by the Commission, reforms introduced by the Member States within the Council, and reforms introduced by the Parliament or that came by as a result of other mechanisms of democratic participation – remarkably, the first ever successful European Citizens' Initiative on water. The selection of topics

⁵⁶ These ideas are elaborated upon in the conclusion to this book. Some of the intuitions that support the structure of the book are subjected to some qualifications in the conclusions, once the overview of the developments of all changes is taken into account. Thus, this organisation should only be considered indicative of the weight carried by each of the institutions in the legislative procedure in relation to the discrete issues covered in each chapter.

corresponds to those generally raised as major amendments introduced by the 2014 reform of the EU public procurement regime,⁵⁷ and adds others which are perhaps more specialised.

The reader will note that typically, the first part of each of the chapters is similarly structured and relatively descriptive, whereas the remainder of each contribution is very individualised and analytical. This is intentional: in order to facilitate the making of observations and the extraction of conclusions from a political science perspective, the information on the key aspects of the legislative process of reform of each of the provisions used as case studies must be structured to allow for their horizontal comparison in a focused manner (see section III below).⁵⁸ However, even within that common generic structure, each chapter sheds light on different aspects of the process of revision and reform of EU public procurement law in the period 2011–14. Nonetheless, the reader not interested in the *minutiae* of the legislative process⁵⁹ can skip the introductory sections of each chapter and jump to the analysis which is conducted from a strict legal perspective. Equally, the reader interested in the general trends of the legislative process may want to *first* focus on the conclusions at the end of this book, and then navigate her way back to the chapters that support whichever insights caught her attention. It is hoped that this modular structure will make the book accessible, interesting and useful to readers with different backgrounds (law, political science and other social sciences) and with varying degrees of intensity in their interest in EU public procurement law.

⁵⁷ See, e.g. Harlow and Rawlings (fn. 20) 161 ff, and Caranta (fn. 30) 409 ff.

⁵⁸ The underlying methodology and justification is described in ‘The Method of Structured, Focused Comparison’, in AL George and A Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) 67–124. See also JL Mahoney, ‘Structured, Focused Comparison’, in M Lewis-Beck, AE Bryman, and T Futing Liao (eds), *Encyclopedia of Social Science Research Methods* (Sage 2003) <<http://sk.sagepub.com/reference/socialscience/n984.xml>> accessed February 2016. For an introduction, see S Van Evera, *Guide to Methods for Students of Political Science* (Cornell University Press 1997) 49 ff.

⁵⁹ As the commonly misattributed to Otto von Bismark saying goes, one may be better off by remaining ignorant of the ways in which laws and sausages are made. The oldest attribution is to John Godfrey Saxe in the *University of Michigan Chronicle*, 27 March 1869, <<http://books.google.de/books?id=cEHIAAAAMAAJ&pg=PA164>> accessed February 2016.

A. Reforms Introduced by the Commission

This first group of chapters address changes which the Commission introduced in the 2011 Proposal and, to some extent, managed to keep close to its proposals. Consequently, in these cases, the Commission can be seen as having resisted competing interests from either the Council or the Parliament, or to have interests that were aligned with theirs. Sometimes the final wording of the provisions advocated by the Commission ended up being significantly different from the initial proposal, but the Commission's ability to keep the general changes it wanted in the final version of the Directives is sufficient to evidence its significant role in shaping EU public procurement law. The issues selected for analysis as being advocated by the Commission include both *high-level policy objectives*, such as the coordination of the EU rules with international commitments acquired as part of the World Trade Organisation's Government Procurement Agreement, or the consolidation of general principles of EU public procurement law; and *micro-legal issues*, such as the promotion of e-procurement, the division of contracts into lots, the rules applicable to the treatment of abnormally low tenders, or the initial proposal for the creation of domestic oversight public bodies by the Member States. Thus, the breadth of topics covered in this section offers an interesting mix of issues where the interests of the Commission varied sufficiently as to allow some conclusions regarding its negotiation strategy and its ability to influence Member States and the Parliament on different issues. It also shows its ambivalence towards the CJEU case law depending on whether it could be used to support its intended reforms or, conversely, whether the reforms were seen as a deviation (and implicit repeal) of existing case law.

This part starts off with Dawar and Skalova's assessment of the interface between the 2014 EU Public Procurement Package and the WTO legal framework, with a focus on the rules applicable to fostering small- and medium-sized enterprises' (SMEs) participation in cross-border business opportunities opened by public procurement. This chapter identifies the different ways in which the Commission tried to implement the EU's obligations stemming from the WTO Government Procurement Agreement in the negotiations on the 2014 Directive, and the ways in which such coordination of legal duties complicated the development of coordinated policies and imposed restrictions on some of the SME-friendly goals that the Member States and the Parliament may have wanted to achieve. It also shows the dynamics in the area of

international trade, where the split of competences between EU Institutions and Member States differs from that applicable to the rest of the contributions, which scope is limited to within the internal market.

The second chapter dealing with an initiative led by the Commission is on the topic of the consolidation of the general principles of EU procurement law into the Directives. This chapter by Sanchez-Graells is specifically concerned with the consolidation of the principle of competition, which the Commission derived from the CJEU case law. The chapter shows how the consolidation of the principle eventually deviated from the core conception that could be grasped from the CJEU case law and attempts to offer an interpretation that is consistent with other strings of case law in the area of EU public procurement and within EU economic law more generally.

Still addressing issues of general design of the system, Ferk tackles the treatment of e-procurement in the 2014 Public Procurement Package. In her contribution, she stresses that this was the second attempt of the Commission to push for a significant development of e-procurement in the EU. After the limited developments under the 2004 Directives, the Commission seemed to adopt a cautious approach, which the Member States were generally willing to support. However, a deeper assessment of the rules shows the difficulties the Commission and the CJEU may face in the future in order to drive implementation. Indeed, the analysis of this development shows a clear tension between the Commission's steering efforts and the Member States' concerns with implementation. It also stresses the links with general issues of technical compatibility and interoperability and links the developments within the 2014 EU public procurement rules with connected developments in the area of e-administration, e-invoicing and, more generally, the modernisation of the Member States' public administration.

The following chapter by Herrera Anchustegui returns to issues concerned with SME participation in procurement, this time from a micro-legal perspective, and assesses the rules on division into lots and demand aggregation. Taking the perspective of preservation of competition for public contracts, which links with the previous discussion on the principle of competition, the chapter assesses to what extent the final rules applicable to contracts division and procurement aggregation are compatible and coordinated – or whether, on the contrary, the 2014 Directive establishes a set of inconsistent requirements and incentives that reflect the tensions inherent in the design and implementation of an SME policy that still respects the basic obligations derived from internal market rules.

Moving on to more specific issues where the Commission attempted to introduce technical reforms, Ølykke addresses the amended provision on abnormally low tenders, which introduces an obligation to reject tenders that are abnormally low because they are based on non-compliance with applicable social, environmental or labour law obligations. The obligation to reject such tenders was amicably agreed upon by the EU Institutions and is part of a more general aim of ensuring fair competition for public contracts which has been made significantly more visible. However, an analysis of the case law of the CJEU reveals that the determination of which social, environmental and labour law obligations actually apply to specific procurements will be excessively difficult to determine, suggesting that stakeholders' call for clarity and the objective of fair competition are not straightforwardly achieved.

The final chapter in this first part focuses on one of the very clear defeats of the Commission, which had to give up almost all of its initial goals in terms of establishment of a strong governance and oversight infrastructure through the creation of 'oversight public bodies' in the Member States. Cerqueira Gomes discusses the lost proposal and highlights the strong opposition the Commission faced in this area, where both the Council and the Parliament raised arguments of subsidiarity and the need to preserve the prerogative of internal self-organisation of the Member States. The chapter also explores possible avenues in which the CJEU might establish a link between the creation of effective domestic monitoring structures and the obligation for Member States to provide effective remedies for breach of EU rules. However, Cerqueira Gomes stresses the limited possibilities for the Commission to rescue its lost proposal in the on-going process of revision of the remedies rules.

Overall, this first part contains a mix of victories and defeats for the Commission (mostly victories, though, at least at face value), and offers insights into the negotiation and drafting strategy it followed both in general and specific issues, in areas that are clearly more policy-based and others where the main considerations are rather technical. This provides good evidence for a more elaborate assessment of the Commission's influence over the final 2014 Public Procurement Package in the conclusions to the book.

B. Reforms Introduced by Member States within the Council

Moving on to the group of proposals introduced in the Council's initial and internal negotiations on the basis of the 2011 Proposal, the second part of the book groups issues where Member States either strongly altered the initial proposals of the Commission or took the chance to

introduce additional rules eventually adopted in the 2014 Public Procurement Package. The analysis of these issues shows different motivations for the Member States to shape the reform process in areas that, despite being clearly technical, also have strong policy-making implications in the background. An overall view of the issues under discussion in this part shows how the Member States tried to carve out spaces for regulatory flexibility and practical simplicity – which were two of the overall aims of the procurement reform process – mostly by imposing deviations from the existing case law of the CJEU in areas where they felt the 2004 Directive and its interpretation limited some of the uses of procurement.

In the first chapter in this part Fanøe Petersen and Ølykke focus on the rules concerned with the provision of services of general economic interest (SGEIs). Their chapter shows how Member States within the Council attempted to prevent any restriction on their ability to organise the provision of public services as a result of the 2014 Public Procurement Package. However, this was a politically charged exercise with no perceptible legal consequences because primary law provisions of the Treaty of Lisbon had already delineated Member States' exclusive competence in this area in seemingly clear terms. These topics emerge again when it comes to some of the chapters where the Parliament or EU citizens played a defining role, which raises significant issues about the accessibility and actual understanding of EU law at a constitutional level. Interestingly from a political science perspective, the reopening of the debate about the implications of procurement rules for the organisation of public services ultimately derives from unresolved conceptual issues around the delineation of economic and non-economic activities linked to the provision of public services. Thus, as the chapter stresses, there seems to be significant room for the CJEU to contribute to clarify such conceptual issues in the interpretation of the 2014 Public Procurement Package.

The second chapter in this part focuses on the rules applicable to the use of framework agreements, which the Commission had left significantly unchanged in its 2011 Proposal. Andrecka's analysis demonstrates how Member States within the Council effectively managed to alter the rules applicable to call-offs within established framework agreements, so as to create flexibility for contracting authorities to award contracts on the basis of different mechanisms. Interestingly, the chapter stresses that the new rules lead to significant uncertainty regarding the new mechanisms and aims to reconcile the content of the 2014 Directive with the pre-existing case law of the CJEU. In doing so, the chapter questions whether Member States actually managed to create a flexible and

predictable set of requirements and anticipates significant difficulties in the interpretation and implementation of the new rules.

This is followed by Risvig Hamer's assessment of the new rules on the request of clarifications when the contracting authority considers that the documentation supplied by tenderers is incomplete, ambiguous or contains some obvious error. This is an area where Member States had been taking very different approaches, depending on their understanding of the leeway that the 2004 Directive left for such clarifications. As the chapter discusses, this was an issue only presented to the CJEU for clarification after a provision offering increased flexibility had already been proposed and agreed upon in the Council. The chapter offers an interesting example of the dynamics between law-making and case law. Whereas Member States aimed at increasing flexibility and thereby overruling a suffocating strictness (derived from some interpretations of the 2004 Directive), it appears that, even though the CJEU could be said to have loosened its grip compared to its previous case law, nonetheless, it might already have limited the flexibility provided by the provision proposed by the Council prior to its entry into force. This raises issues of inter-temporal interaction between legal reform and legal interpretation, which also concerns developments in the scope of application of the Concessions Directive, and which will be explored in the conclusions.

This is followed by a discussion of the rules on exclusion and self-cleaning, where de Mars also shows how the Council managed to create additional flexibility in an area where Member States can use procurement rules as a lever to foster compliance with other regulatory regimes, such as taxation or social security contributions, or as tools to protect the interests of the public administration as a buyer or user of goods and services. Her analysis shows how the Member States managed to expand the discretion given to contracting authorities in the application of these rules. However, the chapter also shows how, despite the apparent triumph of the Council in changing the original proposal of the Commission and imposing its views over those of the Parliament, its victory may prove hollow in light of the CJEU's likely future interpretation of the revised rules, which may be narrow so as to prevent contracting authorities' exercise of these new discretionary powers from limiting inter-state trade.

Finally, and still within the line of assessment of modifications introduced by the Council in an effort to create flexibility in the carrying out of procurement activities, Bruyninckx focuses on the rules on contract modification as yet another area where the Member States tried to create flexibility beyond the existing case law of the CJEU. His

contribution highlights how, despite the 2014 Directive's explicit indication that the principal aim of the rules on contract modification is to clarify the existing jurisprudence, it cannot be denied that the regime introduces a considerable degree of flexibility – which seemed not to have been the initial intention of the Commission. The chapter equally stresses the difficulties in reconciling the new rules drafted by the Council with the CJEU case law and with State aid law. The chapter provides a framework to assess the complex trade-offs that contract modifications entail and suggests that, following an analysis of incentives and efficiency, the CJEU may well void the amendments negotiated by the Council.

Overall, this second part shows some rather clear, and probably intuitive, insights about the tension between, on the one hand, the Commission as the guardian of the internal market and promoter of a pro-competitive system of EU public procurement rules and, on the other hand, the Member States as the addressees of the 2014 Public Procurement Package and the agents with a most clear interest in preserving spaces of flexibility and discretion for its contracting authorities (i.e. in preserving 'regulatory space' where they can exercise discretion). Again, this provides good evidence for a more elaborate assessment of the Member State's influence over the final 2014 Public Procurement Package as a result of the negotiations within the Council, to which the conclusions to the book will return.

C. Reforms Introduced by the Parliament, or other Mechanisms of Democratic Participation

The final group of chapters in the third part of the book focuses on rules created as a result of the participation of the Parliament as co-legislator or, in one instance, as a result of citizenship activism channelled through one of the very few successful European Citizens' Initiatives to date. From a political science perspective, this is interesting because it reflects the actual avenues for purely democratic input into the EU legislative process and, as the chapters in this part show, sheds some light on the potential theoretical/practical disconnect in discourses of democratic deficit of the EU's legislative procedures.

The first chapter is concerned with an instance in which the Parliament pushed for reforms aimed at trying to commit to the use of procurement as a policy lever, on this occasion for the pursuance of social goals. Craven assesses these considerations in relation to the new rules aimed at allowing contracting authorities to monitor the supply chain of its contractors, particularly to ensure compliance with social and labour law

protections. As his chapter shows, because of the non-mandatory manner in which the new rules are mostly phrased, they are not ostensibly as impactful as they might otherwise have been (e.g. because of the impingement on the principle of freedom of contract). Moreover, it remains to be seen to what extent the CJEU allows for these discretionary measures in cases where they result in restrictions on the free movement of goods or the freedom to provide services. Some of the issues are very closely connected to those raised in relation to the treatment of abnormally low tenders affected by social and labour-law related concerns, thus establishing a new line of connection between proposals advanced by different actors (in this case, Parliament and Commission).

The second chapter in this part focuses on issues concerning the delineation of the obligations created by the Concessions Directive regarding concessions as a special type of public contract. Wolswinkel's analysis of the Concessions Directive shows how one of the very few areas where this legal instrument led to significant legislative debate concerned the duration of concession contracts. His chapter shows how the Parliament in a very definite manner influenced the creation of a rule on concessions' duration that deviates from pre-existing case law of the CJEU, and thereby creates significant legal uncertainty as to the likely interpretation of these new rules going forward. The analysis also considers possible unintended spill-over effects on certain provisions in the 2014 Directive. However, as the author stresses, once more, there is a clear risk that the CJEU will stick to its previous approach and fundamentally void the reform introduced in the 2014 Public Procurement Package.

Finally, Aspey offers an account of the undesired consequences that the Commission's reaction to the so-called *Right2Water* European Citizens' Initiative (ECI) may have created in terms of regulation of water concessions in the EU, as well as the asymmetrical treatment of water-related procurement under different sets of EU rules. Her chapter shows how complex procurement issues are difficult to convey to the citizenship and how the Commission, by bending to the pressure created by the ECI, may have failed to actually protect the very same interests that the ECI was trying to promote. This chapter also raises interesting questions regarding the treatment of ECIs as part of the legislative process and, more generally, the emergence of a new area of interaction for the Commission as the promoter of EU legislation with the EU's citizens, which should raise the interest of political scientists in coming years.

Overall, the contributions in this part provide good evidence for a more elaborate assessment of the Parliament's and other mechanisms of

democratic intervention in the EU's legislative process influence over the final 2014 Public Procurement Package in the conclusions to the book. Moreover, they reflect many common themes that basically converge on the role of the CJEU in consolidating or voiding the intended reforms through its future case law in the field of EU public procurement law, which is also considered in detail in the general conclusions.

III. GENERAL COMMENTS ON THE BASIS FOR THE ANALYSES CARRIED OUT IN THE BOOK

As mentioned above (in section II), the main theme of the book proceeds around the 'law and political science' assessment of the reform of the EU public procurement rules in the period 2011–14, and the analyses rely on a structured, focused comparison of the specific ways in which selected, salient rules were created or amended within the EU legislative procedure leading to the approval of the 2014 Public Procurement Package. In order to allow for the envisaged analyses, all contributors were asked to thoroughly document the negotiations and to keep track of the specific changes introduced (or not) in each of the successive pre-legislative materials, in order to reveal how the amendments came about.

The basis for documenting the legislative process are the *travaux préparatoires* such as the 2011 Green Paper, the 2011 Proposal, the Council Presidency's Compromise Texts and the Parliament's Report on the 2011 Proposal. The two latter were prepared in parallel⁶⁰ and finalised more or less simultaneously: the last and Sixth Council Presidency's Compromise Text is dated 30 November 2012 and the Parliament's Report on the 2011 Proposal is dated 13 January 2013. It is not possible to determine with any certainty whether the Parliament was inspired for some final details by the intermediate Council Presidency's Compromise Texts, or whether each institution independently came up with similar proposals and therefore is on the 'same page'; where this is an issue, it is noted in the substantive chapters.

However, it should be noted that the public availability of these *travaux préparatoires* should not lead to the false impression that the contributors to this book, and researchers more generally, have access to the justification or rationale for any given legal reform. Regrettably, even

⁶⁰ See A Sanchez-Graells, 'Impossible dialogue on EU public procurement reform? Council and Parliament follow parallel roads', 30 January 2013, <<http://www.howtocrackanut.com/blog/2013/01/impossible-dialogue-on-eu.html>> accessed February 2016.

though all of the abovementioned documents – and many more – are publicly and freely available in compliance with transparency requirements,⁶¹ in actual fact, except for the 2011 Proposal (which was coupled with a full regulatory impact assessment),⁶² very little documentation is available regarding the objectives of/arguments for any specific changes.

In addition, as also observed by political scientists,⁶³ it must be emphasised that the trilogue phase of informal legislative contacts is an unregulated ‘black box’. From the legal perspective, it may be worth stressing that the trilogue is not regulated at all in Article 294 TFEU, which only foresees one instance of ‘informal’ law making negotiations in the conciliation procedure regulated for after the second reading by the Council and Parliament. Therefore, the possibility for the legislative agents to informally meet in a trilogue at a very early stage (and, in the case of the 2014 Public Procurement Package, before first reading), negotiate and eventually reach common positions that allow for a prompt completion of the legislative procedure is quite simply *extra legem*,⁶⁴ or a

⁶¹ Regulation No 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43. Most importantly, Art. 2(4) foresees that ‘documents drawn up or received in the course of a legislative procedure shall be made directly accessible’ and Art. 12 lays down the conditions for their direct access in electronic form or through a register. It must be noted that some exceptions are available in Arts. 4–9 of Regulation 1049/2001, and particularly in the latter in relation to the treatment of sensitive documents. The application of Regulation 1049/2011 to legislative documents has recently been the object of analysis by the CJEU in *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671. For discussion, see S Lea and PJ Cardwell, ‘Transparency Requirements in the Course of a Legislative Procedure: Council v. Access Info Europe’ (2015) 21(1) *European Public Law* 61. See also D Adamski, ‘Approximating a Workable Compromise on Access to Official Documents: The 2011 Developments in the European Courts’ (2012) 49(2) *Common Market Law Review* 521; and I Spahiu, ‘Courts: An Effective Venue to Promote Government Transparency – The Case of the Court of Justice of the European Union’ (2015) 31(80) *Utrecht Journal of International and European Law* 5. See also P Leino, ‘On knowledge as power: transparency of EU law-making procedures’, 10 January 2016, <<http://eulawanalysis.blogspot.co.uk/2016/01/on-knowledge-as-power-transparency-of.html>> accessed February 2016.

⁶² Commission Staff Working Paper, Impact Assessment accompanying the 2011 Proposal, 20.12.2011, SEC(2011) 1585 final.

⁶³ See the contribution by Allerkamp to this book.

⁶⁴ A Bultena, ‘Negotiations in the Ordinary Legislative Procedure: The Perspective of the European Parliament’, in FANJ Goudappel and EMH Hirsch Ballin (eds), *Democracy and Rule of Law in the European Union. Essays in*

manifestation of an ‘informal constitutional practice’ or ‘informal institutional arrangement’.⁶⁵ The ultimate constitutional implication of this law making outside of the formal relations regulated in Article 294 TFEU is that it can exacerbate claims of democratic deficit in the EU (an issue which is also addressed in the conclusions), which would ‘not lie in the *formal* structure of the Union legislator, but in its *informal* bypassing’.⁶⁶ Similarly, from a political science perspective, this raises issues of democratic legitimacy of this mechanism of ‘informal politics’, and has led to relevant proposals for future reform aimed at imposing ‘reason-giving and justification (in addition to reporting back) by trilogue negotiators’,⁶⁷ so that the trilogue stops being a ‘black box’.

For the purposes of the discussions in this book, quite simply, the opaque working mechanism of the trilogue means that the final negotiations leading to the final version of the 2014 Public Procurement Package are not really documented in any thorough way; only those directly involved in closing the compromises will know why and how they were reached. The contributors to this book and, more importantly, the reader can only try to make educated guesses. Generally, though, the contributors have not been asked to push the argument too far, so limited elucubration on the actual determinants of final decisions at the trilogue phase will be included in the specific chapters.

The lack of clarity over the purposes of the amendments and the reasons for the wording of the final texts devoid the *travaux préparatoires* of much value as guidance for the interpreter, i.e. the CJEU. As recognised by political science, in the same manner as unclear language in the texts, this may be entirely intentional on the part of the legislator who relies on the CJEU to ultimately decide on the impact of specific

Honour of Jaap W. de Zwaan (Springer 2015) 93; and P Kaleta, ‘In Times of Lisbon and Crisis: The European Parliament at a Turning Point’ (2013) 16 *Yearbook of Polish European Studies* 153, 162. For discussion of practical implications, see R Braya, ‘Better Legislation and the Ordinary Legislative Procedure, with Particular Regard to First-Reading Agreements’ (2014) 2(3) *The Theory and Practice of Legislation* 283.

⁶⁵ R Schütze, *European Union Law* (Cambridge University Press 2015) 249.

⁶⁶ *Ibid.*, 250, emphasis in the original.

⁶⁷ C Reh, ‘Is Informal Politics Undemocratic? Trilogues, Early Agreements and the Selection Model of Representation’ (2014) 21(6) *Journal of European Public Policy* 822. See also C Reh et al, ‘The Informal Politics of Legislation. Explaining Secluded Decision Making in the European Union’ (2013) 46(9) *Comparative Political Studies* 1112. For extended discussion, see M O’Keeffe, M Salines and M Wieczorek, ‘The European Parliament’s Strategy in EU Economic and Financial Reform’ (2016) 23(2) *Journal of European Public Policy* 217.

wording of the legislative provisions. Hence, in this book, when making assessments as to the likely future interpretation of the 2014 Public Procurement Package, it has been assumed that the CJEU will apply a method of teleological interpretation⁶⁸ and work from the two-fold objective it has derived from the legislative basis and overall purpose of the EU public procurement rules in the past: i.e. the facilitation of free movement and the protection of undistorted competition for public contracts.⁶⁹

IV. ACKNOWLEDGEMENTS

Before leaving the reader free to explore the many interesting contributions to this book, we would like to express our gratitude to the organisations and contributors that helped in facilitating the realisation of this project.

First, we are grateful to *Edward Elgar, Copenhagen Business School* and *Gangstedsfonden* for their support for this project. Having secured a book contract with *Edward Elgar* at an early stage helped us structure the project and work towards clearly specified deadlines and goals. It also helped us signal the quality of the project when we tried to obtain funding for the workshop where we discussed preliminary drafts of the chapters. This proved more challenging than we expected, so we are particularly grateful to *Copenhagen Business School* and *Gangstedsfonden* for their generous financial support and for the vote of confidence to the project and to our ability to manage it.

Last, but by no means least, when we conceived this project, other than worrying about its content and feasibility, we also aimed at using it to support or facilitate some developments that we considered very relevant in the long term. We are committed to promoting diversity in legal academia, particularly in terms of gender balance and diversity of origin at EU level. We are also committed to developing a network of younger academics that can drive procurement research in the coming years, particularly by incorporating new methodologies and an increasing diversity of critical approaches. To that effect, we decided to invite a gender-balanced number of young scholars to the project. We benefitted

⁶⁸ See above (fn. 50).

⁶⁹ First promulgated in *Stadt Halle*, C-26/03, EU:C:2005:5, para 44 and later repeated in many judgments, recent examples include *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, para 22 and *Fastweb*, C-19/13, EU:C:2014:2194, para 65.

immensely from the previous contacts we had made during our PhDs – in particular at the University of Nottingham Procurement PhD students conference – and during the early stages of our academic careers. We were extremely pleased to realise what a strong and diverse network of scholars we belong to. Some of those we invited could eventually not participate in the project, but we remain hopeful that they will contribute in future projects of what is now an incipient group of enthusiastic young European procurement scholars.