Reform of EU public procurement law : intergovermental or supranational policy-making?

Reform of EU Public Procurement Law: Intergovernmental or Supranational Policy-making?

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Declaration: I declare that the enclosed work is my own original research.

Signed:

Abstract

In 2014 three new procurement directives were adopted at European level, replacing the previous generation of directives from 2004. These directives regulate how approximately €2 trillion of public and semi-public money is spent in the member states, aiming to ensure the free movement of goods and services and competition in the award of public contracts. Environmental and social provisions figure prominently in the 2014 directives, including a number of new rules which must be implemented at national level. The 2014 directives embody the concept of a social market economy as set out in the Lisbon Treaty, and represent an increase in EU integration in the public procurement field.

This thesis analyses the role of the European Commission, Council, Parliament and Court of Justice during the reform process, as well as the policy preferences of France, Germany, the UK and civil society groups. It asks whether the EU institutions acted as supranational policy entrepreneurs or as agents of the member states in introducing the new social and environmental provisions, testing hypotheses derived from two competing theories of integration. It draws conclusions about the nature and causes of European integration in this field, and develops the concept of trusteeship in relation to the Court of Justice and European Parliament as a means of understanding democratic governance in the EU.

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Introduction

The award of public contracts sits at the intersection of three politically contested domains within the European Union. The first concerns the role of the state vis-à-vis the market, and the way in which competition is encouraged and regulated. The second is the role of social and environmental protections within Europe's internal market, and their interaction with the free movement principles set out in the Treaties. The third is the division of powers between local or regional, national and supranational authorities. All three of these conflicts came to the fore in the reform of EU public procurement law which took place from 2011-14, leading to the adoption of new directives governing procurement in the public and utility sectors.[1] This thesis evaluates both the process and outcomes of the reform, in order to place it within the broader context of the debates about the nature and democratic legitimacy of EU integration. I argue that the reform of EU public procurement law can be seen as an instance of increasing integration, provided this is understood as involving not only states but also subnational and transnational actors. Analysing the environmental and social aspects of the reform as an instance of integration, I ask whether intergovernmental or supranational theory provides a more convincing explanation of why and how this change happened.

One criticism of theoretical approaches to EU integration is that they have relied too much either on cases which are large-scale and highly politicised such as Treaty changes, or on the other hand on policy areas which are obscure and technocratic. Traditionally, intergovernmentalism has been more concerned with Treaty making and neofunctionalism[2] with day-to-day policy-making. However much of EU law and policy lies somewhere between these two extremes – significant to a range of political and economic actors but only occasionally becoming prominent in national political debates. Public procurement falls within this middle spectrum. Its economic importance is widely recognised (some €2 trillion or 14% of EU GDP is spent on public contracts)[3] and it affects a large number of public and

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[1] Directive 2014/23/EU *of the European Parliament and of the Council on the award of concession contracts* (the Concessions Directive); Directive 2014/24/EU *of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC* (the Public Sector Directive); and Directive 2014/25/EU *on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC* (the Utilities Directive).

[2] The terms 'neofunctionalism' and 'intergovernmentalism' denote the two main strands of theory regarding EU integration. Chapter one distinguishes the more recent incarnations of these theories in supranationalism and new intergovernmentalism from the classic versions put forward by Haas and Hoffmann.

[3] European Commission (2016) *Public Procurement Indicators 2015*. Only around a quarter of the €2 trillion figure is fully covered by the EU directives – many contracts fall below the relevant thresholds or are excluded for other reasons.

private sector bodies, however it is seldom the stuff of high politics. Compared to the neighbouring policy areas of competition and state aid regulation, the procurement rules are both further reaching (affecting contracts worth as little as €135,000)[4] and less reliant on EU institutions for enforcement, due to the existence of a remedies regime which allows companies to enforce the rules in national courts. As such, public procurement reform may be considered a good testing ground for theories of EU integration, because it affects interests which are largely the preserve of member states (decisions about public spending) as well as those which are transnational (interests of companies bidding on a cross-border basis) and supranational (development of the internal market). Plausibly, any of these interests could dominate the reform of the rules, meaning it is not an 'easy case' for either supranational or intergovernmental theory.

History of EU Procurement Law

The EU legal framework for public procurement first emerged in the early 1970s, however it was not until the late 1980s that it became prominent within internal market policy.[5] The primary motive of successive procurement directives has been to remove barriers to the free movement of goods and services, specifically those linked to national or local preferences in public purchasing. This was intended to increase the number of contracts awarded on a cross-border basis and thereby enable efficiencies in supply markets, moving away from the dominance of nationally championed companies.[6] The directives set out rules intended to ensure the equal treatment of bidders and transparency of procedures – objectives derived from the Treaty principles of non-discrimination and free movement of goods and services. However public contracts have always also been seen at national and sub-national level as a means of implementing policies not linked to such market opening objectives, such as the support of particular industries or disadvantaged groups.[7] From the 1990s onwards, the use of public procurement to further environmental and social policies became well established, particularly amongst local authorities. Support for this activity

[4] This is the lowest threshold for application of the 2014 directives to supply/service contracts awarded by central government authorities. However, as noted below, the CJEU has also applied the Treaty principles to public contracts below this threshold, provided they are of certain cross-border interest.

[5] The first procurement directive (70/32/CEE) was concerned with supplies and laid down basic requirements for non-discrimination against imported goods in government procurement; this was followed by a more detailed directive relating to the award of public works contracts (Council Directive 71/305/EEC). In 1989, the Public Sector Remedies Directive (89/665/EEC) was adopted, allowing private enforcement of the EU procurement rules by bidders. This was followed by the Utilities Sector Remedies Directive (92/13/EEC).

[6] See Armstrong and Bulmer (1998) at p 117-143 for an account of the factors driving regulation of public and utilities sector procurement, and linkages with other policy areas such as technical harmonisation, sectoral liberalisation and competition policy.

[7] McCrudden (2012) traces the development of such policies internationally, including in Europe, from the late 19th century onwards. Going back further, it is possible to identify local environmental and social objectives being balanced against broader economic concerns in the procurement of Rome's first aqueduct in 312 BC, by censor Appius Claudius Caecus. See Oakley, S. (2005) at p 367 and Faletti, R. (2010).

came from a variety of NGOs operating both at the local and EU levels. Initially, the European Commission made clear its view that the scope for incorporating such non-market considerations in contract award decisions was limited. It issued guidance cautioning against such practices, and pursued infringement actions against member states applying environmental and social criteria in tenders.[8]

The Commission was obliged to rethink its approach following the judgment of the Court of Justice in the *Concordia Bus Finland* case,[9] just prior to its proposals for the 2004 directives. This concerned environmental criteria in tenders, with the Court clearly endorsing the legitimacy of such criteria. As a result, the 2004 directives contained a number of references to environmental considerations which could be taken into account in the award of public contracts, provided the basic principles of transparency and equal treatment were observed. By the time the *Concordia* judgment was delivered, many local authorities already had green public procurement (GPP) policies in place, with national governments beginning to adopt similar strategies. By 2008, the European Commission was actively promoting GPP, including by developing common criteria to address the environmental impacts of goods and services frequently purchased by the public sector.[10] At the same time, it maintained a restrictive position towards social criteria in public contracts, for example those linked to labour protections.[11] The ability to use public procurement to implement labour protection measures was cast into further doubt by a series of judgments from the Court of Justice regarding the posting of workers and enforcement of collective agreements, including in public contracts.[12]

Despite the restrictions under EU law, the financial crisis which began in 2008 lead many public authorities to place renewed emphasis on using public contracts to achieve social policy goals linked to employment, skills and wages. Such policies were combined with environmental aspects in what became widely known as sustainable public procurement (SPP).[13] This development must be seen in the context of the changing nature of *what* was being procured and *by whom*. The scope of procurement regulation within the EU has grown

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[8] European Commission, COM (89) 400 final *Public procurement: Regional and social aspects*. In Case C-228/98 *Nord-Pas-de-Calais* the Commission challenged the use of award criteria targeting unemployment in the French region (see discussion in Chapter 4). The Commission also issued a reasoned opinion against Austria in 1997 concerning the application of environmental criteria in a contract for the purchase of lorries.
[9] Case C-513/99 *Concordia Bus Finland v Helsingin kaupunki and HKL-Bussiliikenne (Concordia)*
[10] These policies were set out in COM (2008) 400 *Public procurement for a better environment*
[11] This more restrictive position is evident in the Commission's 2010 *Buying Social* guidance.
[12] The four cases comprising the Laval quartet (discussed in Chapter 4): Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet et al* (*Laval*); Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP et al* (*Viking*); Case C-319/06, *Commission v Luxembourg*; and Case C-346/06 *Dirk Rüffert v Land Niedersachsen* (*Rüffert*).
[13] This term incorporates both green public procurement (GPP) and socially responsible public procurement (SRPP). The European Commission's support policy is primarily limited to GPP, as discussed in Chapter 3.

over time, so that it now covers a wide range of service contracts and concessions - including outsourced services which traditionally have been provided by the public sector directly in areas such as health, social care, education and prisons.[14] It also covers contracts and concessions awarded by various semi-state bodies and even private undertakings operating in the utilities sector, if they have been granted special or exclusive rights by the state.[15] Given that service and works contracts awarded by local or regional governments in particular have long been seen as a means of implementing various social policies,[16] it is not surprising that the increased scope of the procurement rules has been accompanied by increased conflict between the free movement principles set out in the Treaty and these policies. Cases such as *Rüffert* caused widespread disquiet amongst local and regional authorities, as well as amongst trade unions in wealthier member states.[17] However the newer accession states for the most part welcomed this confirmation that barriers to free movement could not be erected via public contracts, thus allowing them to realise competitive advantages based on their lower cost base.

From the European Commission's point of view, the 2004 directives had not achieved the creation of a single market in public procurement. In addition to the low rate of cross-border awards, significant difficulties with compliance existed in most member states – despite vigorous use of the remedies regime by businesses.[18] Implementation of the procurement rules in the new accession states was seen as particularly challenging. The Court of Justice has frequently been called upon to interpret and apply procurement law, delivering some 500 judgments on the topic since the mid-1980s.[19] The volume of procurement cases before the CJEU increased significantly in the period preceding the 2004 directives and has averaged between 15-20 new cases each year since that time, the vast majority of which are preliminary references from national courts.[20] These judgments relate not only to the interpretation of the substantive rules set out in the directives but also to the scope of contracts which are covered by them. The directives have never provided for complete harmonisation of all public sector or utilities procurement; they apply only to

[14] It is important to note that the decision about *whether* to outsource a service remains outside of the scope of EU law. However, where a decision is taken to award a contract or concession, the directives will apply if the value exceeds the relevant monetary threshold and if there is no exemption based on the subject-matter.
[15] The first utilities sector directive, covering the water, energy, transport and telecommunications sectors, was adopted in 1992 (Directive 92/13/EEC). Directive 2004/17/EC added postal services to the scope of the utilities regime but removed telecommunications, on the grounds that this sector was subject to adequate competition.
[16] For example, requirements relating to training and apprenticeships on local works contracts have aimed to combat unemployment and skills shortages in the UK, France and Germany amongst other jurisdictions.
[17] For an overview of the response, see Bücker and Warneck (2010).
[18] For discussion of the reasons for and nature of non-compliance see Gelderman, Ghijsen and Schoonen (2010)
[19] These cases are unfortunately not grouped under a single classification in the Court's database. The figure of 500 is based on the author's own compilation of cases concerning procurement (including by EU institutions).
[20] Court of Justice of the European Union, *Annual Report* for 2017 and previous years.

contracts valued above certain monetary thresholds, with numerous exemptions based on the subject-matter of the contract. The Court's jurisprudence in this area is a microcosm of its classic case law on free movement of goods and services. In particular, it developed the idea that contracts which were not covered by the directives might nonetheless be subject to the Treaty principles, if they were of 'certain cross-border interest'.[21] This mirrored its earlier development in the *Dassonville* line of cases of the idea of 'measures with equivalent effect' to quantitative restrictions, to address barriers to free movement which did not take the form of quotas or tariffs.[22]

In both situations, the Court relied upon a purposive interpretation of the Treaty to extend its principles beyond the explicit scope of coverage of internal market legislation. The question of whether a public contract is of cross-border interest, like the question of whether a measure actually or potentially hinders trade, is inherently open-ended and indeterminate. This has allowed the Court to apply stricter or looser versions of these tests over time, without discarding its fundamental approach. In the procurement context, this indeterminacy affects not only national legislative and administrative measures, but the individual decisions of tens of thousands of contracting authorities making purchases on a daily basis. Prior to the Court's cross-border interest jurisprudence, they would have applied purely national rules to contracts excluded from the directives. To date, no presumed or categorical exemptions from cross-border interest have been developed by the Court akin to those applied to selling arrangements in *Keck and Mithouard*,[23] meaning that all public contracts, regardless of value, may in theory be subject to the Treaty principles.[24] The expansion of the scope of EU law in relation to public procurement via the cross-border interest test has not been uncontroversial – in 2006 Germany, supported by six other member states and the European Parliament, brought an application for the annulment of a Commission communication which purported to set out the obligations arising from the Court's case law.[25] While this challenge was unsuccessful, it signalled a rejection at national level of unbounded integration in this domain.

The effectiveness of EU legal integration in public procurement remains open to question. Despite over 40 years of EU directives, the number of contracts awarded on a

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[21]Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG*. The Court's approach in this case was foreshadowed to some extent in Case C-3/88 *Commission v Italy* ('*Re: Data Processing Contracts*') and was further developed in C-231/03 *Consorzio Aziende Metano (Coname) v Cingia de' Botti* and C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG*.
[22]Case 8/74 *Procureur du Roi v Dassonville*.
[23]Joined Cases C-267 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.
[24] In the recent case C-486/17 *Olympus Italia*, the Court did hold that cross-border interest could not be merely hypothetical, with the burden of proof to establish this resting on the complainant.
[25] Case T-258/06 *Germany v Commission*. See discussion in Chapter 4 of this case.

cross-border basis has remained stubbornly low, amounting to under 2% of public procurement across the EU at the time of the 2011-14 reform.[26] A 2017 study found that 'local' companies were over 900 times more likely to be awarded public contracts than 'foreign' bidders (Herz and Varela-Irimia, 2017). Even within the same country, a sizeable local advantage could be observed. These effects cannot be entirely explained by the low frequency with which companies participate in bids outside of their home area. The directives do not require complete harmonisation of procedures, and significant national variations in practices continue to apply. In 2016, more than 80% of all contracts were awarded on the basis of price alone in eight member states (the Czech Republic, Croatia, Greece, Cyprus, Lithuania, Malta, Portugal and Slovakia), whereas in five member states less than 20% of contracts were awarded on price alone (France, Ireland, the Netherlands, Poland and the United Kingdom).[27] These divergences, together with problems with compliance, mean that public procurement remains an unfinished corner of the internal market puzzle, and one in which national interests can be difficult to reconcile.

In 2011, the Commission set out its proposal for new directives which, while increasing references to environmental and social aspects of procurement, stopped short of introducing any new mandatory policies. A two-year negotiation process within and between the Parliament and Council resulted in amendments which significantly expanded the social and environmental provisions of the directives, introducing a number of new mandatory elements. The CJEU's judgment in the *Max Havelaar* case,[28] delivered at a key point in the negotiation, served to legitimise social criteria much as *Concordia* had legitimised environmental criteria a decade earlier. In her opinion in the case Advocate-General Juliane Kokott noted that:

> For a long time the pursuit of environmental and social objectives was disapproved of in public procurement law, as was manifested not least in the use of the phase 'objectives irrelevant to the contract'. However, it is now generally recognised that contracting authorities may also take account of environmental and social factors when awarding contracts…In practical terms, however, the conditions under which, and the form in which, the contracting authorities' environmental and social views may affect a specific award procedure is fiercely disputed.[29]

This case however related to fair trade criteria affecting wages and production practices in third countries – a much less controversial domain than the questions of intra-Union enforcement of wages and labour conditions addressed in the *Laval* quartet. As will be seen, the latter issue remained fundamentally unresolved in the 2014 directives, although signs

[26] European Commission (2010a), p 15.
[27] European Commission (2017a), p 7.
[28] Case C-368/10 *European Commission v Kingdom of the Netherlands (Max Havelaar)*
[29] Case C-368/10, Opinion of Advocate-General Kokott at paras 36-37

have since emerged of a new political and judicial approach which is more favourable to the imposition of host state working standards.[30]

While the 2014 directives go much further than their predecessors in endorsing environmental and social objectives in procurement, they also create more detailed rules in this area and consolidate the power of the Court of Justice to adjudicate disputed uses of SPP. The directives invoke esoteric concepts such as 'characteristics which do not form part of the material substance' of goods or services being purchased, 'factors which are not attributable to an economic operator', and the 'link to the subject-matter' test – all of which invite judicial interpretation. As with the previous revision completed in 2004, the text of the 2014 directives bear the hallmarks of compromise. As Roberto Caranta put it:

> [T]his was not a simple maintenance exercise. Deep changes have been introduced in the EU regulatory framework. All parties involved – EU institutions and the Member States – brought to the process their preferences, agendas and strategies. Conflicts were in plain view and tripartite dialogue was needed to iron them out (or sweep them under the carpet.)[31]

The result is that social and environmental objectives are balanced - sometimes precariously - against the imperatives of competition and free movement. In the period following the adoption of the 2014 directives, many Member States were slow to implement them in national law (the UK was a notable exception, adopting regulations in early 2015). In May 2016, the Commission sent letters of formal notice to 21 Member States who had failed to transpose one or more of the new directives by the deadline, following up with reasoned opinions issued to 15 of those countries in December 2016.[32] As the directives begin to be implemented in practice, the contours of the bargains struck during the legislative process have become clearer, as have the powers which these effectively place in the hands of individual public authorities, national governments, the Commission and the Court of Justice. This allows for analysis of both the process and substantive outcome of the reform in terms of the preferences of these actors.

Research Question

The question I seek to unravel here is – what caused the shift in EU procurement regulation from minimal tolerance of environmental and social objectives to endorsement of their legitimacy and even enforcement of certain common mandatory standards? This

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[30] See discussion of the *RegioPost* case and the Commission's 2016 proposal for revisions to the Posted Workers Directive in Chapter 4.
[31] Caranta (2015) at 409.
[32] On 8 December 2016, the European Commission sent reasoned opinions to Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg, Portugal, Slovenia, Spain and Sweden, requesting them to fully transpose one or more of the three new directives on public procurement and concessions into national law.

change can be observed by comparison of the text of the 2004 and 2014 directives, although legal commentators disagree about the significance of some of the new environmental and social provisions.[33] In Chapter one, I argue that the changes constitute a case of further EU integration in a deeply contested area. As the discussion above suggests, a number of potential proponents and opponents of these changes can be identified, and the role of each of these *dramatis personae* is evaluated in the course of this study. Long term commitment to sustainable procurement amongst local and regional governments, supported by an active network of NGOs, was balanced by less fulsome support at national level in most member states. Businesses tendering for public contracts were generally resistant to onerous environmental or social standards, although some did support greater harmonisation of such measures at EU level. The Court of Justice and Commission had in turn accepted the legitimacy of green procurement, but continued to enforce barriers to social criteria which were seen as a greater threat to the single market, particularly where they concerned wages. This view was supported strongly by the newer accession states, where wages remained below the European average. This meant that support on the Council for deeper integration of minimum social standards in public contracts was not assured at the time of the reform. On the other hand, the European Parliament had expressed its commitment to reforming the social dimension of the procurement *acquis* to allow enforcement of minimum labour standards.[34]

The methodology applied to identify the causes of this change is one of process tracing, defined as "the systematic examination of diagnostic evidence selected and analysed in light of research questions and hypotheses posed by the investigator" (Collier 2011). By deriving specific testable hypotheses from two major theories of EU integration, I seek to compare their explanatory power in this case. Following Popper (1963), I rely upon falsification to evaluate the robustness of the hypotheses – looking for evidence which contradicts them. The evidence I consider is drawn from the legislative file relating to the reform of the procurement directives, from the broader context of EU law and policy during the relevant period, and from primary and secondary national sources. This is supplemented by interviews carried out with key individuals involved in the reform at EU and national level. The primary sources relied upon are catalogued in the appendices. Process tracing is widely deployed in EU studies, international relations and the social and natural sciences more broadly. Compared to quantitative research, it typically offers a more nuanced understanding of causality due to the close attention played to sequences of events and

[33] The contributions in Lichère, Caranta and Treumer (2014) and Sjafjell and Wiesbrock (2015) include a range of perspectives on the meaning and effect of the new environmental and social provisions of the directives.
[34] European Parliament (2010).

possible alternative explanations. However due to the small scale of testing, single cases may be insufficient to prompt reorientation of theory without corroboration from additional cases or large-n studies. In the concluding section, I develop alternative hypotheses based on my findings which are suitable for further qualitative or quantitative research.

Structure of Thesis

Chapter one orients this study within the existing framework of intergovernmental and supranational theory, aiming to define the dependent variable of 'integration' in a way which is conceptually robust. I examine recent refinements to both theories as well as their classic formulations in the work of Ernst Haas and Stanley Hoffmann and development in the work of Wayne Sandholtz, Alec Stone Sweet and Andrew Moravscik, amongst others. I also consider the contribution of other theoretical trends in EU studies, such as multilevel governance and Europeanisation, to answering questions about the causes and nature of integration. Having adopted a working definition of integration and found preliminary evidence of an increase in EU integration associated with the public procurement reform, I turn to potential explanations for this. While supranational and intergovernmental theory offer distinct visions of how and why EU institutions accumulate and exercise power, many of their claims regarding the institutions are not in fact incompatible. This study focuses on two areas where I argue that they do advance incompatible claims. The first is the question of whether EU institutions act as supranational policy entrepreneurs or as agents of the member states. The second is whether the powers they exercise are irreversible, or are subject to recall by the member states. The hypotheses I develop test these competing accounts of the role of EU institutions in integration. Chapter two reviews the literature on each of the EU institutions involved in the reform process, in order to focus the empirical enquiry into their role in the procurement reform. I highlight ways in which each institution might act as a supranational entrepreneur or agent of the member states, and the ways in which their actions are either insulated from or subject to reversal by member states.

Chapters three to six present empirical evidence regarding the role of the Commission, Court, Member States, business and civil society groups, Parliament and Council in the public procurement reform. Chapter three analyses policy developments in the period immediately proceeding the Commission's 2011 Green Paper, including the attempted 'relaunch' of the single market in the wake of the financial and euro crises. It then turns to the specific environmental and social measures contained in the Commission's proposal, asking whether these introduced substantive new obligations on member states and/or individual contracting authorities. Chapter four evaluates the role of the Court of Justice in developing environmental and social criteria in procurement, and the impact which its judgments in this area had on the reform process. These judgments reflect the

Court's evolving attempts to reconcile non-market and market objectives over the past 20 years, and I examine this broader case law alongside its appraisal in the legal and political science literature. Chapter five identifies the domestic policies and preferences for the procurement reform in Germany, France and the United Kingdom, drawing on published and unpublished sources. It also analyses the role of civil society including business associations and environmental and social interest groups in the reform. The impact of the *Right2Water* campaign, the first successful European Citizens' Initiative, on the scope of the concessions directive, is highlighted.

The negotiation of the directives within and between the European Parliament and Council took place over 18 months in 2012-2013, with a further six months spent on legal tidying and translation prior to adoption of the directives in February 2014. Chapter six follows this process, from the preliminary work undertaken by the Parliament's Internal Market and Consumer Affairs (IMCO) committee in 2010 and 2011 through to the trilogues conducted under the Irish presidency of the Council in the first half of 2013. In addition to the interinstitutional file, I draw upon documents released under freedom of information requests and interviews with individuals involved in the negotiation on behalf of both institutions. By comparing the positions taken by the Parliament and Council, as well as the Commission and Court, to the preferences expressed by member states on environmental and social aspects of the procurement directives, it is possible to test the hypotheses regarding entrepreneurship and agency, recall and irreversibility. In Chapter seven, I draw conclusions regarding the capacity of intergovernmental and supranational theory to explain the inclusion of environmental and social objectives in the public procurement directives. Based on my findings, I develop the idea of trusteeship as an alternative model to explain the causal role of the Court of Justice and European Parliament. I then turn to the implications of this analysis for questions of democratic legitimacy and institutional design in the EU.

Why it matters

The research question addressed here speaks to broader questions of how power is exercised in the EU and other jurisdictions. Understanding how and why procurement regulation came to incorporate non-market considerations may cast light upon similar developments in other areas of EU law, under international trade regimes and in national regulatory systems. It elucidates the role of EU institutions and other actors in resolving questions which deeply engage public opinion, such as the balance between the market and the state in allocating resources and determining social outcomes. The engagement of the EU with such questions can be seen as a relatively new phenomenon, and one which remains controversial. Floris de Witte argues that:

> The integration process was meant to expand the size of the (economic) cake, and the Member States were meant to redistribute that cake internally…one integrated market and many different national social policies. In this way, the national political establishment would ensure that the functioning of the internal market remained sensitive to the social demands of the electorate.[35]

This runs counter to the vision of Friedrich Hayek, whose suspicion of national politics was one of the intellectual inspirations for the fundamental freedoms established in the Treaty of Rome. While the Treaty of Lisbon explicitly endorses the idea of a 'social market economy', it does not resolve the question of who decides on the appropriate balance between 'social' and 'market'. The answer to this question has profound implications for democratic governance.

The social and environmental provisions within the 2014 directives form a novel and controversial aspect of the broader procurement *acquis*, and present considerable implementation challenges at national and subnational level. They can and should be seen as part of a larger movement in EU law – as well as in other international regimes – to integrate non-market considerations within instruments which have hitherto been driven purely by market or economic concerns. This movement was given renewed impetus by the global financial crisis, which also spurred the backlash against liberal economic governance which continues to play out in many western countries. However, its origins go back much further, with precedents in the nineteenth century initiatives on fair wages in public contracts cited in Chapter five. In the EU context, the idea is embedded in the Treaty of Lisbon, with Article 3(3) committing Europe to a 'highly competitive social market economy, aiming at full employment and social progress'. The term 'social market economy' (*Soziale Marktwirtschaft*) has its origins in German ordoliberal theory, in particular the mid-century work of Alfred Müller-Armack.[36] Article 3(3) assumes that competition and market freedoms are compatible with social protections. It is important to recognise that this has not always been accepted within the EU legal order; single market orthodoxy was grounded in the idea of unfettered competition, largely following Hayek's suspicion of state intervention.[37] Until 2004, the procurement directives embodied this orthodoxy, and only in 2014 did social market economy principles become clearly embedded in the directives.

The rejection of the Hayekian view is evident not only in the language of the Treaty of Lisbon but also in other substantive areas of EU economic law, such as state aid. The rules on state aid, like those on procurement, have a primary objective of promoting undistorted

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[35] De Witte (2017), p 117.
[36] A member of the Cologne school, Müller-Armack first used the term in 1946 in his *Wirtschaftslenkung und Marktwirtschaft*. For discussion of the origins of the concept see Watrin (1979) and Goldschmidt (2012).
[37] In *The Road to Serfdom* (1944) Hayek argued that extensive redistribution of income via taxation and the welfare state would give rise to authoritarian regimes. Beyond his well-known influence on Ronald Reagan and Margaret Thatcher, Hayek was also profoundly influential on dissenters within the former soviet republics. In the EU context, the central place of the four freedoms within EU law owes an intellectual debt to Hayek.

competition. However, as can be seen clearly from the General Block Exemption (GBER) adopted in 2008, EU state aid law now also acknowledges various other policy goals, from environmental protection through to social inclusion and promotion of research and development.[38] Some EU scholars see the social market principle as becoming embedded in the EU's constitution prior to the Treaty of Lisbon (Paellemarts 2011; De Witte 2012), while others remain sceptical that social objectives have achieved parity with economic freedoms even in the post-Lisbon era (Scharpf 2010). Under the sceptical view, the environmental and social aspects of both state aid and public procurement law amount to tokenistic gestures - giving back a small amount of the policy space which member states have ceded in the name of internal market integration. The question of how social and economic objectives are balanced is one which matters to citizens throughout Europe, and thus plays a central role in establishing the democratic legitimacy of EU policy making. It goes to the heart of why intergovernmental and supranational theory matter – because they allow us to understand who decides upon the appropriate balance between market and non-market objectives within the EU, and how this power is exercised in practice.

These tensions are currently playing out in national politics across Europe and in other western countries. Alongside the rapid expansion of international commerce, a widespread backlash against liberal economic governance has taken place, with the EU providing a particular focal point for this rejection. Political parties on both the left and right have sought to distance themselves from supranational structures and ideas such as freedom of movement – and met with considerable electoral success in doing so. While this may or may not pose an existential threat to the European Union, it is clear that it cannot ignore the increasing chorus of discontent with the principles of economic governance laid down after the second world war, which are widely seen as being responsible for the financial crisis and the longer-term social disruption caused by globalisation. In this context, intergovernmental and supranational theory offer two distinct answers to the question of whether the EU is 'here' or 'over there' – and thus who should be blamed when things go wrong or given credit for policies which successfully reconcile economic, social and environmental interests. The answer to this question tells us not only where citizens, businesses or NGOs should focus their lobbying efforts but also points towards future reforms of EU and national institutions to ensure they are held accountable for the powers they truly exercise.

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[38] For discussion of these dimensions of state aid law see Ferri and Marquis (2011).

Chapter 1 - Defining EU Integration and Identifying its Causes: Theory

Most of the analysis carried out of the 2014 public procurement directives has been from a legal perspective. This includes work mapping the evolution of the social and environmental aspects of the directives, and linking them to relevant Court of Justice judgments and broader changes in EU law.[39] However this analysis tends not to examine the political genesis of the 2014 directives - from Green Paper consultation through a two-year trilogue between the Commission, Council and Parliament, and the (delayed) implementation by member states. Each stage of this process engaged broader questions regarding the balancing of interests: between the state as protector and the state as consumer, and between local or national objectives and the internal market. While on their face the 2014 directives allow more scope for the inclusion of social and environmental aspects in public contracts, in specifying rules and principles they also consolidate the ability of the Court of Justice to mediate between these interests. I argue that the decision to further regulate these highly contested matters at EU level can be seen as a significant transfer of power from member states to the Union.

To explain this transfer of power, two main theoretical perspectives on EU integration offer themselves. Supranationalism focuses on the role of EU institutions, including the Court, in promoting integration. It builds upon the insights of neofunctionalism, first developed in the late 1950s, to explain how these institutions have consolidated their competences over time. In contrast, intergovernmentalism places the interests of member states at the centre of understanding whether, when and to what extent EU integration happens in a particular area. While national interests may be mediated or traded-off against others, they are unlikely to be completely subsumed by supranational projects. Both perspectives have been applied to regulatory areas such as competition law,[40] and some research has also sought to apply them to public procurement regulation.[41] To test the applicability of these theories, I analyse both the specific changes brought about in the 2014 reform and the role of the EU institutions, member states and civil society groups in bringing this about.

This chapter addresses the dependent variable implicated in my research question, namely the degree of integration between EU member states in public procurement rules,

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[39] Amongst others, see Sjåfjell and Wiesbrock (2015); Lichère, Treumer, and Caranta (2014); Caranta (2015).
[40] For example see McGowan (2007) and Maher (2009) (applying a broadly intergovernmental approach and evaluating the relevance of principal-agent theory).
[41] Armstrong and Bulmer (1998) included a chapter on public procurement regulation in their book *The Governance of the Single European Market*, applying a historical institutionalist perspective. This preceded the major consolidation of procurement law which took place with the 2004 procurement directives. More recently, an edited volume has made inroads into examining the 2014 public procurement reform from a political science perspective, see Ølykke and Sanchez-Graells (2016).

and specifically the subset of those rules which relate to social and environmental considerations. This is a necessary first step to situate this study within the broader field of EU integration studies, and to develop an approach to measuring integration in the field of public procurement. I review the definitions of integration applied in supranational and intergovernmental theory, as well as some parallel concepts deployed in the governance literature. The robustness of these definitions and concepts for the purpose of developing and testing hypotheses is examined, including their suitability for understanding cases of non-integration. I then turn to the question of how integration may be defined and measured in the specific context of public procurement, taking account of methods and metrics deployed more generally. This builds upon the account of public procurement regulation sketched briefly in the introduction, and sets the scene for the more detailed account of the reform process in the empirical chapters which follow. The chapter concludes with a preliminary assessment of the changes introduced in the 2014 directives and their impact on integration, and by introducing four hypotheses which test the competing explanations offered by supranational and intergovernmental theory for EU integration.

What is integration?

Despite its centrality within EU studies, the concept of integration often goes undefined. Of the definitions of integration which have been put forward, most seem to presuppose something about causality. For example, Ernst Haas' (1958) frequently cited definition is:

> the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result is a new political community, superimposed over the existing ones.[42]

The idea of a 'new centre' sits well within a neofunctionalist concept of integration but less well within an intergovernmental one. Neofunctional accounts of integration postulate a centre which becomes more than the sum of its parts, whose institutions exercise power of their own, and where the interests of states are subordinated to the self-perpetuating logic of integration. Supranational bodies and private actors play key roles in this process by acting in their own self-interest. Economic and political spillover effects further fuel the engine by encouraging the spread of integration from one substantive domain to another, either to avoid negative externalities or to capture positive ones, for example from the creation of a single market to the creation of a single currency.

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[42]Haas (1958), p 16.

Haas later put forward an alternative description of regional integration (while noting that fifteen years of research on the topic had not generated consensus on a definition):

> The study of regional integration is concerned with explaining how and why states cease to be wholly sovereign, how and why they voluntarily mingle, merge and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts among themselves.[43]

The shift from a 'new centre' to ' new techniques' suggests a more modest process than wholesale transfer of loyalty; this reflected the reality of slower European integration which took hold in the mid-1960s. Haas however was clear on the need to focus on the outcomes of activities, whether in institutional or attitudinal terms, rather than the activities themselves in identifying integration. This followed from the need for theory to be more than descriptive, by pointing towards hypotheses regarding an end-state; although Haas noted that both the explanatory and predictive powers of neofunctional theory had thus far proven limited.

Meanwhile, in the wake of the Luxembourg Compromise Stanley Hoffmann had written an obituary for European integration in which he described it variously as a broken blender and the eating of an artichoke's leaves (symbolising state sovereignty), which nonetheless had left the heart intact (Hoffmann 1966). Rejecting the neofunctional view, he asserted the ongoing primacy of the nation state - not least the Gaullist version. Hoffmann placed geopolitical factors at the centre of his account both of why European integration had happened and why it had apparently stopped. This lead him to believe that only an external threat or shift in the international order could revive European integration. While later generations of intergovernmental theorists have focused on economic rather than geopolitical factors, the rejection of an endogenous logic for integration continues to separate them from those pursuing neofunctional or institutionalist explanations. The logic for integration in intergovernmental theory is supplied by the rational choice of states to pool sovereignty in areas where this generates better outcomes than those which are available to them unilaterally.[44]

Variations in integration over time and across functional areas are explained by the preferences of member states and the bargaining which takes place between them. Supranational actors - in particular the Commission and Court of Justice - are seen as agents

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[43] Haas (1971). Haas was also at pains in this essay to emphasise that the study of regional integration was conceptually limited to *noncoercive* efforts.
[44] This is the view put forward by Andrew Moravcsik (1998). Moravcsik's critics disagree on the role of rational choice in determining state actions and outcomes, however his account remains central to intergovernmental theory.

of the member states. This is not to underestimate their potential power; principal-agent theory expects agents to misbehave periodically and to pursue interests which conflict with their principals' (Pollack 2007). However, it is always possible to trace their power back to an original motive of the principals - albeit that it might not be exercised in exact accord with any one of their preferences. Seen this way, integration between states is not strictly the sum of its parts but is a non-exponential function of them - meaning supranational bodies cannot be the ultimate cause or beneficiaries of integration. New intergovernmental theory seeks to explain state preferences not only in terms of substantive outcomes but in terms of process and democratic imperatives, an approach which has been applied to EU financial and economic regulation as well as the Common Security and Defence Policy and Justice and Home Affairs.[45] It points to a greater instability in EU competences than was postulated by liberal intergovernmentalism, due to growing tension between governments and their societies and the politicisation of EU integration within these cleavages.[46]

Given these fundamentally different accounts of the nature and causes of integration, it is unsurprising that a single definition of the concept has not gained acceptance.[47] However the lack of a definition can also be seen as limiting the relevance of the theoretical debate to the 'normal science' of empirical observation of policy-making in the EU. Without a common definition of integration, it is difficult to agree upon common measures for it, which in turn limits the scope for organising observations into meaningful patterns and testing hypotheses about cause and effect. For example, the extensive literature on governance in the EU encompasses a range of observations about the role of transnational actors in determining policy outcomes. While description and understanding of these roles may be interesting in and of itself, it is difficult to link them to each other without a theory which separates independent and dependent variables. Integration defined in a certain way may or may not be the best-fitting concept, but it does point towards falsifiable hypotheses. These can then be tested against individual observations and rejected or confirmed as appropriate. A string of rejected hypotheses (for example, about the impact of transnational policy networks on integration) should point to the need for a new independent variable, not a new dependent one. At the same time, as the EU evolves it is natural for the focus to shift to novel outcomes, whether they are labelled 'integration', 'disintegration' or something in between.

As the EU has become more complex and variegated, those who study it have chosen

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[45] See Bickerton, Hodson and Puetter (2015) pp 33-36 and chapters by Smith, Wolff and Howarth & Quaglia in that volume. See also Maricut (2016); Bressanelli & Chelotti (2016) and Fabbrini (2017).
[46] *Ibid* pp 36-38. See also Saurugger (2016).
[47] Kohler-Koch and Rittberger (2006) note a similar lack of a common definition for 'governance' in the EU context. Inasmuch as governance approaches reject the centrality of the state, they appear irreconcilable with intergovernmental theory; however, they also typically question the centrality of supranational institutions.

either to develop more nuanced understandings of integration or to abandon the concept altogether. The 'governance turn' described by Kohler-Koch and Rittberger (2006) began in the late 1990s with a focus on concepts such as the regulatory state (Majone 1996; Jachtenfuchs 2001) and new modes of governance (Wallace 2001 and 2005). These seek to explain the EU within the framework of globalised economic and social relationships between public and private actors. Rather than treating EU integration as a dependent variable, the governance approach takes integration as a given and looks at how it influences policies and the exercise of power at national, subnational and supranational levels. It largely eschews grand scale theory to focus on more narrowly-defined research problems (Bulmer 1997). Kohler-Koch and Rittberger trace the evolution of EU governance studies from early work on the role of policy networks through to a more recent focus on regions and civil society, noting an increase in the governance literature associated with the 2004 enlargement. They also note a tendency to focus on first pillar issues as opposed to more intergovernmental areas such as the Common Foreign and Security Policy or Justice and Home Affairs.

From the governance literature emerged the idea of 'Europeanisation', whereby norms first defined and consolidated in the process of EU decision-making are incorporated into domestic policies and practices (Radaelli 2000). Radaelli distinguishes Europeanisation from convergence (convergence *or* divergence may be a consequence of Europeanisation), harmonisation (Europeanisation may lead instead to regulatory competition), and from integration itself, which he sees as being concerned with a prior ontological stage. If Europeanisation is an outcome of integration as Radaelli suggests, can it also be used as an indicator of integration? Perhaps, but it has proven difficult to observe and its effects indeterminate. For example, Andersen and Burns (1996) identified a slightly decreased role for national and regional parliaments and Dyson and Featherstone (1999) identified a slightly increased role for executives linked to Europeanisation. The observed effects on national administrative structures and practices are similarly modest (Page and Wouters 1995). By the early 2000s, questions were being raised about the explanatory power of the EU as an independent variable in studies of national administrative systems (Goetz 2000).

Hooghe and Marks (2001) developed the idea of multi-level governance (MLG), distinguishing it from intergovernmentalism (or the 'state-centric model' as they call it) in part by arguing that supranational institutions had independent influence over EU policy-making which could not be derived from their role as agents of national executives. This perhaps ignores the variation in models of delegation - some of which specifically predict that agents will eventually act independently of their principals (Pollack 2003). The other fundamental insight of multi-level governance - that subnational interests are not always

neatly nested within national interests, is compatible with both intergovernmental and supranational accounts of EU integration. It is an important prophylactic against the more reductive tendencies of both schools: caricaturisation of states as unitary actors in intergovernmentalism and projection of supranational institutions as the exclusive beneficiaries of powers transferred by states in neofunctionalism. Newer versions of both theories appear to take on this insight by placing more weight respectively on domestic political structures[48] and transnational actors.[49] In some respects this harks back to the early work of Bulmer (1983,1985) which focused on the role of domestic politics in European integration.

Latterly Hooghe and Marks have espoused a 'postfunctionalist' approach which encompasses multi-level governance but which points to identity as a key causal factor determining integration outcomes in the EU context (Hooghe & Marks 2008). They distinguish this from neofunctionalist and intergovernmental approaches by arguing that efficient outcomes will not necessarily flow from integration driven by identity. They see political conflict as determinative of integration outcomes; however this seems not to raise a challenge to either the neofunctional or intergovernmental models of causality so much as to restate the questions they address. Given that identity and political conflict have always existed and have always been different at national and European levels, why should integration occur in some areas or at certain times and not at others? Hooghe and Marks observe that as European integration became more prominent in public opinion and electoral politics in the 1990s, it also became more divisive both within and between political parties. The resulting politicisation has caused left/right divisions to become more salient in EU politics - but these do not map precisely onto national political cleavages. While a left/right spectrum certainly exists in EU politics, it is less directly concerned with redistribution of wealth than those which exist at national level. [50]

Amongst scholars who have pursued the idea of integration, Diez and Wiener (2009) opt for a loose definition which only requires the 'creation of political institutions to which member states subscribe.' It is not clear how this definition of integration captures developments within those institutions, after their initial creation. They proceed to define European integration theory as 'the field of systematic reflection on the process of intensifying political cooperation in Europe and the development of common political

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[48] Bickerton (2012), Bickerton, Hodson and Puetter (2015).
[49] Sandholtz, Stone Sweet and Fligstein (2001); Schmitter and Niemann (2009).
[50] See also Hix (1994 and 1998) on left-right and pro/anti-integration dimensions. Micklin (2014) looks at the effect of the euro crisis on these dimensions in national party politics but still finds limited evidence of their alignment.

institutions, as well as on its outcome.' This definition is telling in that it only appears to be concerned with integration in one direction - towards more intense political cooperation. Arguably the opposite phenomenon, whereby states which once were prepared to pool sovereignty in particular areas choose instead to 'repatriate' certain competences or policies, is equally interesting (and perhaps more challenging) from a theoretical perspective. It is true that examples of disintegration are thinner on the ground than examples of integration within the EU, but close examination of many policy areas may reveal a mix of both tendencies. Properly explored, examples of disintegration may even constitute a type of control group, enhancing the falsifiability of integration theories.

Both neofunctional and intergovernmental theorists have developed accounts of disintegration. Schmitter (1970) and Lindberg and Scheingold (1970) developed the idea of 'spillback' as a counterpart to the spillover effect which plays a central role in neofunctional theory. Spillback can be observed in situations where the functional benefits of cooperation no longer outweigh the costs, and may result either in repatriation of competences to states or in devolvement to subnational or transnational actors (Vollaard 2008). Disintegration may be explained in intergovernmental theory by either a failure of bargaining, or a shift in national preferences. Disintegration need not be a dramatic process any more than integration is - however it is indispensable to allow us to define and measure integration, if we consider that not everything the EU does constitutes integration. Due to the EU's unique depth and longevity, it is generally treated as a special case of political integration - but that does not mean it is synonymous with integration. Vollaard points out that while examples of large scale political integration are rare globally (thus the n=1 problem in EU studies), examples of disintegration are much more common.

He develops Bartolini's framework on polity formation (Bartolini 2005) which highlights the mutual dependence between the external consolidation and internal structuring of political formations. External consolidation refers to both the permeability of a polity's boundaries (for example the possibility to exit or partially exit and the costs of doing so) and the congruence between its different types of boundaries (coercive, administrative, legal, cultural, social, economic). Internal organisation is needed to maintain these boundaries and where external consolidation is strongest, more permanent and stable alignments develop. Vollaard applies this logic to various scenarios for EU disintegration, asking if they could be explained by weak external consolidation, uneven distribution of exit and entry options, or weak internal structuring (for example, an insufficiently developed party system).What I wish to draw out from this analysis is the idea that disintegration can be theorised as something other than the reverse of integration - however given that the scenarios examined by Vollaard have until recently been purely hypothetical, it has been difficult to test the theory.

Earlier generations of scholars had to grapple with 'Eurosclerosis' (1970s) and the 'integration paradox' (1990s and 2000s) - developing approaches which helped to explain why integration might take place more slowly, incompletely or in different institutional forms. More recently, the measures adopted in response to the financial crisis have led some to identify an 'authoritarian tendency' in the exercise of power within the EU. Measures such as the fiscal compact adopted under the 2012 Treaty on Stability, Coordination and Governance have the effect of increasing fiscal capacity and fiscal surveillance at EU level. While neofunctional accounts have characterised this as spillover from the monetary to fiscal realms (Vilpisauskis 2013; Niemann and Ioannau 2015), it can also be seen as the product of asymmetrical interdependence between member states, with an emphasis on Germany's preferences (Schimmelfennig 2015) or as the path-dependent result of the initial decisions made to deal with the crisis (Gocaj and Meunier 2013). Kreuder-Sonnen (2016) argues that none of these approaches fully explain the specific political, legal and discursive processes adopted in the face of the crisis and that, by characterising them as 'business as usual' they also reinforce the normative bias of existing theory towards further integration. He points to the more critical account given by legal scholars of the crisis. The specific role of law in furthering European integration has received considerable attention from the 1990s onwards. The next section surveys this literature with a view to further refining the definition of integration.

Legal views of integration

While law has always played a central role the European project, early attempts to theorise integration focused more on institutions and political bargains than on legal foundations. However, from the mid-1960s the role of the European Court of Justice in furthering integration became too prominent to ignore, with cases such as *Van Gend en Loos*, *Costa v ENEL* and *Cassis de Dijon* establishing its power to extend the scope and nature of integration. Joseph Weiler (1981) was one of the first to theorise these developments, applying a broadly neofunctional approach and drawing parallels between the Court and the Commission. The Court had established the ability of private litigants to enforce both Treaty provisions and secondary legislation such as directives.[51] This generated spillover effects as the Court's recognition of individual rights to enforce EU law ensured ongoing demand for integration from various interest groups. Dehousse and Weiler (1990) characterised law as both the object and the agent of integration, identifying its important functional and symbolic roles in developing the internal market. For example, the *Cassis de Dijon* ruling lead to the development of the mutual recognition principle which underlay

[51] In *Van Gend en Loos* and *Van Duyn v Home Office* respectively

much of the 1992 programme culminating in the Maastricht Treaty, but also responded to the political reality of stalled harmonisation. While the dual nature of law as active creator and passive reflector of integration continues to ring true, this dualism makes it more difficult to treat law as either a dependent or independent variable in the study of EU integration. Dehousse and Weiler described its semi-independent influence over integration:

> The legal system is sometimes animated by a dynamic of its own...even if law is not the main catalyst of change in the integration process, many changes are greatly conditioned by legal and institutional elements.

They also drew attention to the lack of correlation between institutional and substantive integration: stronger supranational institutions do not always produce more integrated laws. This suggests that attempts to measure integration based on either institutional or legal analysis alone will give an incomplete picture. Dehousse and Weiler developed a scale to measure legal integration based on competence, decision-making bodies, the effect on national legal orders and use of legal techniques such as harmonisation.[52] On one end of the scale are areas of exclusive supranational competence where decisions are made by procedures which do not require unanimity between member states, which have direct effect in national law and which aim to harmonise practices. On the other end sit areas of mixed competence where the jurisdiction of supranational bodies is limited, decisions require unanimity and must be implemented in national law, and they do not entail harmonisation.

They found that these indicators of integration did not always covary; for example, the Benelux and Western European Union groupings (highly integrated by other measures) used decision-making techniques which required unanimity and so were effectively intergovernmental. They also noted that stronger supranational structures did not necessarily produce more integrated norms; comparing the less harmonised outcomes of the American federal system with those of the EC. In terms of EC legal integration, the development of the concepts of direct effect and supremacy coincided with the erosion of supranational decision-making through reduced powers of initiative for the Commission and creation of new intergovernmental organs such as Coreper and the European Council. The question of whether the Court actively attempted to 'save' integration during times of political deadlock is hinted at but not actively explored by Dehousse and Weiler. To some extent this question looms in the background of most legal studies of EU integration, with Hjalte Rasmussen's 1986 work setting out a critique of what he saw as the Court's unaccountable judicial activism.[53] While disagreement amongst political scientists on the causes of EU integration have inhibited adoption of a common definition in that field,

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[52] Dehousse and Weiler (1990) at 251.
[53] Rasmussen, H. (1986) *On Law and Policy in the European Court of Justice* Dordrecht: Martinus Nijhoff

different views amongst legal theorists about the role of the Court of Justice in integration tend to focus more on normative questions (is judge-made law a good thing?) - rather than the causes of legal integration.

Burley and Mattli (1993) defined legal integration as the 'gradual penetration of EC law into the domestic law of its member states' - encompassing both formal penetration through direct effect and supremacy, and substantive penetration of different regulatory areas. They see this process as fitting well within original neofunctionalist theory, in particular the spilling over of regulation from economic to related domains such as occupational health and safety, social welfare or education. Both the formal and substantive penetration of EU law, and in particular the ECJ's cross-cutting principles of interpretation can be seen as conforming to the neofunctionalist model. Burley and Mattli characterise the drivers of legal integration as subnational and supranational actors behaving in their own self-interest within a politically insulated sphere. Citizens, businesses and interest groups drive legal integration through litigation, while the Court itself protects its decision-making power through politically-conscious interpretations of law. They describe law as a 'mask for politics' - although this tends to imply that the two domains are separated at birth and can only covertly converge - a premise which would be questioned by legal realists amongst others. Burley and Mattli also ignore the restrictions placed by the Court on private applicant standing in cases such as *Plaumann*[54] and *Calpak*[55] which lead many legal scholars to argue that the Court had not in fact protected individual rights effectively.[56]

In contrast to the neofunctional view, Garrett and Weingast (1993) and Garrett, Kelemen and Schulz (1998) argue that ECJ judgments can be understood through analysis of national interests. They draw both on Moravscik's (1993) idea of credible commitments - whereby states agree to bind themselves in the interest of also securing assurances over the future behaviour of others - and on principal-agent theory to understand the Court's role within integration. Armstrong (1998) criticises both neofunctional and intergovernmental accounts of legal integration for focusing on process to the neglect of outcomes, specifically the legitimacy of the Court's attempt to build a European constitution out of relatively thin textual foundations in the Treaties. Armstrong applies an institutionalist analysis to the role of law in EU integration, arguing that the Court's response to its (political) environment has created a path-dependent evolution. While both private litigants and the Court of Justice

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[54] Case 25/62 *Plaumann and Co. v Commission* [1963] ECR 95
[55] Joined Cases 789 and 790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949
[56] See e.g. Rasmussen, H. "Remedying the crumbling EC judicial system" 37 *C M L Rev* 1071 (2000); Albors-Llorens, A. "The standing of private parties to challenge Community measures: Has the European Court missed the boat?" 62 *Cambridge L J* 72 (2003); Schwarze, J. "The legal protection of the individual against regulations in European Union law" 10 *Eur Pub L* 285 (2004).

possess agency, these are mediated through precedent, legal doctrine, and eventually constitutionalism. Armstrong's analysis suggests a bi-directionality in law's effect on integration (meaning it can limit as well as strengthen it); this raises questions of how EU law can be linked back to independent political variables and how its effect on integration can be measured.

Whereas Burley and Mattli describe law as a one-way ratchet towards greater integration, Alter (2001) identifies the potential for 'negative feedback loops' to develop where an adverse ruling from the Court of Justice inhibits future private litigants from relying on EU law, in turn reducing the demand for integration. Court judgments may also create a backlash which leads member states to carve out areas as being beyond the Court's purview - Alter cites the *Barber* protocol to the Maastricht Treaty (limiting the retrospective effect of the Court's ruling on gender parity in pensions), as well as the Irish and Danish protocols to the same Treaty, as examples of this. More broadly, exclusion of the Court's jurisdiction over the common foreign and security policy and justice and home affairs, and limitation of the right of lower national courts to request preliminary rulings under the Treaty of Amsterdam, point to the possibility of legal *dis*integration. However, there is a risk in treating these examples as all symptomatic of a reduction in integration; in the case of the second and third pillars under Maastricht it is rather a case of not transferring *new* powers to the Court. Similarly, while Alter cites the subsidiarity principle included in the Maastricht Treaty as part of the attempt to repatriate legal powers, later studies suggest that the practical effect of subsidiarity has been limited.[57]

While there is no lack of empirical literature on EU law written by lawyers, including the public procurement rules, much of this focuses on the meaning and effect of EU law rather than asking why it exists, or why it has changed over time. This is not mere incuriosity on the part of lawyers; a commitment to the rule of law means that law's legitimacy should be separated from the political projects which generate it.[58] While it may then be natural for political scientists to be more interested than lawyers in what causes EU integration, the novelty of EU law, and in particular the Court's purposive or teleological approach to its interpretation, calls for some understanding of its political genesis. For example, directives are typically prefaced with a number of recitals setting out the objectives and intentions of the legislative text. Political scientists often stop reading after this part; lawyers are more likely to skip the recitals and focus on the binding provisions which follow. However, some

[57] Craig, P. (2012) "Subsidiarity: A Legal and Political Analysis" 50(S1) *Journal of Common Market Studies* 72-87
[58] Whereas political legitimacy, following Locke, is usually understood to arise from the consent of the majority, legal legitimacy draws on the Hobbesian idea of rational justification and may privilege this over majority rule. It is clear even from this very basic account that either conception of legitimacy may, on its own, lead to tyranny.

representatives from either domain have been conscious of the benefits of a more catholic approach.

In updating the neofunctional account of EU law, De Búrca (2005) called for a more nuanced mutual understanding between political science and legal scholars. She highlights the need to look beyond the role of courts in seeking to explain the relationship between law and integration - in particular by understanding the use of law to create competences and constrain their exercise, to structure interpretation by the people and bodies subject to it, to confer symbolic legitimacy, and to provide reasons and incentives for action.[59] In this last role, law also shapes the preferences of political actors. Judgments of the Court of Justice form a relatively small part of the overall corpus of EU law, but play a disproportionately large role in political theories of EU integration. De Búrca's work develops the idea of law as the independent variable and political integration as the dependent variable. She notes the lack of explanatory theories within legal scholarship both generally and in respect of EU integration; likewise neofunctional theory had largely failed to account for the specific role of law in furthering or hindering integration. A more nuanced understanding of law's role beyond court rulings would help to develop causal theories regarding its contribution to EU integration.

The institutionalist theory of integration put forward by Sandholtz and Stone Sweet (1998) and Sandholtz, Stone Sweet and Fligstein (2001) does develop a more detailed account of law's causal role, in part by differentiating between legislation, judgments and general legal principles. This builds upon the earlier work of Sandholtz and Zysman (1989). Sandholtz and Stone Sweet define integration as:

> the process by which the horizontal and vertical linkages between social, economic, and political actors emerge and evolve. Vertical linkages are the stable relationships, or patterned interactions, between actors organized at the EC level and actors organized at or below the member-state level. Horizontal linkages are the stable relationships, or patterned interaction, between actors organized in one member state with actors organized in another. We understand these linkages to be "institutionalized" to the extent that they are constructed and sustained by EC rules.[60]

Historical institutionalism draws upon the idea of path-dependence: once particular decisions or structures are put in place, subsequent developments are shaped in a way which reinforces the original event and makes its reversal less likely. Institutionalism in the context of EU integration allows both for the exogenous influence of geopolitical or economic factors and endogenous effects such as spillover. The application of institutionalism to international relations also points towards a broader appreciation of the dual role of law as agent and

[59] De Búrca (2005) at 218-223
[60] Sandholtz and Stone Sweet (1998) at page 9.

subject of change.[61] Applying these insights to the study of integration allows both comparative statics (between the EU and other polities) and historical dynamics (changes within the EU over time) to be analysed.

Others have applied an institutionalist perspective on integration to specific areas of EU policy. Armstrong and Bulmer (1998) analysed a number of aspects of single market regulation adopted under the 1986 Single European Act, including mergers and acquisitions, the removal of technical barriers to trade, air transport liberalisation and public procurement. Their research also included two areas of social and environmental regulation (the rights of pregnant women in the workplace and transport of toxic waste). Armstrong and Bulmer sought to demonstrate that neither member state interests nor Commission entrepreneurship or ECJ rulings could fully account for these reforms. They emphasise the role of 'contingencies' such as European Council procedural rules as well as the extension of qualified majority voting in enabling the reforms, while also acknowledging the role of global political economy developments in normalising market liberalisation. While offering a relatively convincing account of how and why integration occurred in these areas, Bulmer and Armstrong admit that the institutionalist approach does not get at the 'very mainsprings' of integration, instead offering a middle-range theory which helps to explain how it is mediated within the EU. It thus stops short of answering the 'why?' (or 'why not?') question.

Further research in the institutionalist vein includes Thatcher (2001 and 2006), who analysed the changes to telecommunications regulation from the late 1980s onwards, rejecting the view that the Commission acted unilaterally as a supranational entrepreneur in this area.[62] Domestic institutions based on monopoly supply, public ownership and national regulation were replaced by open markets subject to detailed EU rules. Importantly, the institutionalist view of integration here does not pre-judge questions about the causes of integration, but brings them into sharper focus. Thatcher attributes the changes primarily to transnational technological and economic developments such as digitalisation, which eroded many of the natural monopoly characteristics of the sector. He identifies cases both of conflict and co-operation between the Commission and Member States in the evolution of the EU telecommunications regulation. Thatcher explores the idea of the Commission acting as the agent of the Member States in telecommunications reform, but ultimately characterises the process as a partnership rather than an example of supranational or intergovernmental policy-making. Intuitively, if both theories offer plausible explanations for integration and are not mutually exclusive then there will be cases where both forces can

[61] See Keohane (2002), Chapter 6
[62] As had been suggested by earlier work on telecommunications such as Sandholtz and Zysman (1989), Majone (1996) and Sandholtz and Stone Sweet (1998).

be observed within the same regulatory area. In areas where the interests of member states and the Commission conflict, we would expect to see evidence of trade-offs or compromises; Thatcher points to re-regulation to protect 'essential requirements' such as employee safety or network security as one such compromise. The hypotheses I develop below are based on what I argue are incompatible explanations for regulatory change offered by supranational and intergovernmental theory, based on the ideas of policy entrepreneurship and agency respectively.

Adopting a Working Definition

Based on the above critical review of approaches to understanding European integration, it is possible to identify some criteria for a robust definition to be applied in this study. First, the definition of integration should not presuppose causality or privilege certain independent variables over others. Second, it should make it possible to test hypotheses about causality, by identifying a distinct and measurable phenomenon which can be observed over time and across more than one arena in which the same independent variables operate. Third, it should be measurable in both directions - integration and non-integration. Non-integration refers to cases where powers are not transferred to the EU, which should be distinguished from cases where powers previously exercised as EU level are repatriated (disintegration) and from cases where areas *potentially* subject to EU competence are legally insulated (anti-integration), seen most clearly in the protocols to the Maastricht Treaty mentioned above. It makes sense to focus on non-integration in testing hypotheses about the causes of integration, as absence of the identified causal factors would be expected to result in non-integration - whereas disintegration and anti-integration are more likely to demonstrate a resistance to attempted integration by other actors. Fourth, a working definition of integration must be plausible and neither over- nor under-inclusive. Characterising everything the EU does as integration, for example, is an over-inclusive definition which elides the distinction between cooperation and transfers of sovereign power.

Of the definitions reviewed above, that put forward by Sandholtz and Stone Sweet (1998) seems to best satisfy these criteria:

> [EU integration is] the process by which the horizontal and vertical linkages between social, economic, and political actors emerge and evolve. Vertical linkages are the stable relationships, or patterned interactions, between actors organized at the E[U] level and actors organized at or below the member-state level. Horizontal linkages are the stable relationships, or patterned interaction, between actors organized in one member state with actors organized in another.

By invoking the somewhat anodyne class of 'social, economic and political actors' their definition avoids conferring primacy on either supranational or national actors at the outset. Elsewhere Sandholtz and Stone Sweet ascribe a central role to 'transnational actors' -

a term generally understood to exclude states. However, it is not necessary to adopt this causal hypothesis in order to make use of the above definition. Other causal hypotheses can easily be imagined, for example that member states would forge horizontal linkages in order to lower transaction costs amongst themselves. Does it describe a distinct and measurable phenomenon? The definition refers to a process rather than an end-state, which makes it easier to observe in the context of an ever-changing polity. Vertical and horizontal linkages or interactions are certainly susceptible to measurement. Stone Sweet, Sandholtz and Fligstein (2001) focus on institutionalisation as measured by precision, formality and authority. Precision refers to detailed guidelines on behaviour whereas formality is present where there are established procedures or bodies with rule-making powers. Authority exists where there are sanctions for breaking rules and enforcement procedures. The next section looks at how these measures can be applied to the changes to EU public procurement law adopted in 2014.

While the definition focuses on the emergence and evolution of linkages, it seems both theoretically and empirically possible for the absence or dissolution of such linkages to be studied. For example, in the course of this study I will identify some areas where the precision of the EU procurement rules have decreased in comparison with the previous generation of directives - as well as many where it has increased. This bidirectionality raises questions of quantification - how can we say whether a given area is more or less integrated when indicators point in different directions? Institutionalisation proposes that the creation of EU rules in a given area indicates integration. However the above definition also requires linkages to be *stable* in order for them to form the basis of integration. In the course of this study I will evaluate both the direction and the stability of the various rule changes studied. Stability is understood not as permanence (all EU rules are capable of being changed) but as relative 'stickiness' - measured according to the political cost associated with change. A rule which the Court identifies as emanating directly from the Treaty is highly sticky/stable because of the political cost of Treaty changes. Conversely a rule which is set out in a Commission communication is generally much less stable - unless there are high political costs associated with changing it. Another way of expressing this idea is as the revocability or reversibility of EU measures, which informs my development of testable hypotheses below.

In terms of plausibility, tentatively applying the measures proposed by institutionalisation to the reform of EU public procurement rules indicates that these allow for a reasonably comprehensive assessment both of the detail and the overall direction of the reform. The definition would be over-inclusive if it characterised observations as integration which more plausibly relate to another phenomenon. For example, stable horizontal relationships and patterned interaction between bidding companies and contracting

authorities in different states might be seen as part of the more general phenomenon of globalisation, rather than EU integration specifically. This can pose problems in terms of developing and testing causal theories, if the dependent variable is in fact part of a bigger phenomenon which the specific causal factors proposed are not capable of affecting. This however is primarily a problem for studies which address meta-problems such as why integration has occurred. In the context of this study, which contrasts two sets of rules adopted within a period of ten years, macro-effects such as globalisation may be deemed to be relatively stable – and in any case they would not explain the higher degree of EU public procurement integration than applies under the WTO Government Procurement Agreement, for example.[63] Under-inclusivity does not appear to be a serious risk within the institutionalist definition of integration, as it encompasses a large set of relationships which cover the known terrain of integration.

Finally, while the definition refers to a process, the concept of institutionalisation also potentially reaches towards a Haasian end-state. If stable vertical and horizontal relationships are observed, it should be possible to predict the effect of different independent variables on levels of integration. One critique of historical institutionalism (although it is a critique shared by almost all theories in the social sciences) is that it tends to operate retrospectively rather than prospectively. The difficulty lies partly in the proliferation of causal hypotheses which institutionalism invites - however careful testing of these can help to develop an understanding of integration which allows specific future scenarios to be rejected or even predicted. This is particularly the case where the rules and relationships observed are highly stable - for example where they form part of a constitutional settlement or treaty. It is not the project of this thesis to predict future developments in the EU public procurement rules but to compare the explanatory power of supranational and intergovernmental theory when applied to the most recent changes.

Applying the Working Definition to the Case

Applying the institutionalist definition and measures of integration may help to link this study to broader theoretical debates about the nature and causes of EU integration. The 2014 procurement directives set out detailed rules for how contracting authorities can include social and environmental factors in procurement decisions. These rules operate in different ways, which in turn entail different degrees of institutionalisation when compared to the previous procurement directives adopted in 2004. However even in areas where the new directives create additional flexibility or allow derogation from internal market

[63] For comparison of the relative flexibility of the EU and WTO rules on environmental and social aspects of public procurement, see Semple (2017).

principles, they often appear to introduce or increase precision, formality and authority. The picture is made somewhat more complex by the existence of a four-way balance of power under the directives, between EU insititutions, member states, individual contracting authorities and economic operators. This contrasts with the two-way power balance between the EU and member states which is typically envisioned by integration theories emerging from classic international relations scholarship. Sandholtz and Stone Sweet's definition explicitly contemplates roles for multiple actors at the EU, national and subnational levels - meaning we should not be confined to a two-dimensional analysis.

As outlined in the introduction, the reform of the procurement directives was driven by a set of policy objectives which were variously espoused by the member states, Commission, Parliament and Court. Subnational and transnational actors (in this case, primarily regional and local government authorities, business associations, unions and NGOs) also played a clear role both during the initial Green Paper consultation and the negotiations over the new directives. While on their face the 2014 directives include a wider range of social and environmental provisions than their 2004 predecessors, a number of questions remain regarding the interpretation of these provisions. In particular, the requirement for a 'link to the subject-matter of the contract' (discussed in Chapter 4) may be interpreted more or less strictly by the Court, and there is ongoing debate over the ability to include non-statutory minimum wages in public contracts. These questions touch upon deeper debates as to the idea of a social market economy and the legitimacy of social protection measures being applied by Member States both domestically (including to posted workers) and to workers abroad who produce goods and services consumed by the public sector. EU law in this area aims to strike a balance between internal market interests and diverse local and national interests. The process of compromise between these interests can be clearly seen in the history of the reform which is examined in the empirical part of this thesis.

On first glance, the increased volume of procurement rules (three directives amounting to some 450 pages, replacing two directives which covered 250 pages) might seem to answer the question of whether integration has increased. However, many of these rules give contracting authorities more flexibility in running tender procedures, while some of them give states more choice over which rules to apply. So mere volume of rules cannot be used as a proxy for integration. Likewise, in the specific area of focus for this study - the rules on social and environmental aspects of procurement - some of the rules serve to reinforce the autonomy of contracting authorities or member states whereas some clearly hold them to common EU standards. The picture is complex, however it is possible to break the changes down based on the levels of precision, formality and authority compared to the *status quo*

ante (i.e. the 2004 directives). The rule types found in the 2014 are summarised in Table 1.1.

Rule Type	Characteristics	Examples
1. Buyer decides if and how to apply environmental/social factors	Increased discretion of individual contracting authorities to derogate from internal market principles.	Ability to reserve contracts for sheltered workshops/ employment programmes; light touch regime (discretion shared with MS); rules on subcontractors (shared with MS)
2. Buyer decides if (but not how) to apply environmental/social factors	Increased ability for contracting authorities to apply SPP measures, but reduced discretion over how to apply them.	Rules on environmental and social award criteria, life-cycle costing and labels; rules on references to production processes and methods in technical specifications.
3. Member state decides if and how to apply environmental/social factors	Policy decisions to be taken at national (or regional) level within the limits defined in the directives	Ability to restrict lowest price award; light touch regime (shared with buyers); possibility to make discretionary exclusion grounds mandatory; rules on subcontractors (shared with buyers)
4. Buyer must apply environmental/social factors	Mandatory rules which must be applied by all contracting authorities	Exclusion of companies convicted of child labour and people trafficking; mandatory social clause (Art. 18.2); requirement to reject abnormally low tenders which do not comply with environmental and social laws or collective agreements.

Table 1.1 Social and environmental rules under 2014 EU Procurement Directives

Comparing the rules under each of these types to their predecessors (if any) under the 2004 procurement directives, it is possible to make a preliminary evaluation of their impact on the three indicators of integration proposed by Sandholtz and Stone Sweet, as shown in Table 1.2.

Rule Type *Indicator of Integration (Δ+ compared to 2004 directives)*	1 Buyer decides if and how to apply	2 Buyer decides if (but not how) to apply	3 Member States decide if and how to apply	4 Buyer must apply
Precision	No	Yes	No	Yes
Formality	Yes	Yes	Yes	Yes
Authority	Yes	Yes	Yes	Yes

Table 1.2 Preliminary analysis of rule types against institutionalisation indicators

A more detailed analysis of the changes under each of these headings is given in the empirical chapters. It is worth noting that there are certain areas where the flexibility or margin of appreciation enjoyed by either individual contracting authorities (buyers) or

member states has increased. This is most clearly seen in the rules relating to reservation of contracts for sheltered workshops or employment programmes. However even in areas where the directives expressly grant contracting authorities or member states discretion over social and environmental aspects of procurement, they regulate the scope of that discretion and establish principles or limits enforceable by the Court of Justice, as well as by domestic courts. For this reason, while they cannot always be seen as increasing precision in comparison with the 2004 directives, they do increase the levels of formality and authority.

Each of the above rules builds vertical linkages between EU institutions and national or sub-national actors, and horizontal linkages between procurement markets in different member states – although the strength of these linkages varies depending on the rule type. At the strongest end of the spectrum are mandatory rules which must be applied by all contracting authorities (Type 4) – such as the exclusion of bidders convicted of child labour or people trafficking. These create vertical linkages by enabling the Commission and Court to enforce their application, and horizontal linkages because the same approach must be applied in each member state and by each contracting authority. At the weaker end of the spectrum are rules which are merely permissive and do not specify how environmental or social factors are to be applied (Type 1). For example, the light touch regime allows member states and/or individual contracting authorities to decide on the procedures to be followed in awarding social or healthcare service contracts. However even these minimally prescriptive rules create vertical linkages due to their susceptibility to interpretation and enforcement by the Court and Commission. Likewise, while they fall well short of harmonising practices between member states, they do establish the 'outer limits' of acceptable practices by reference to general Treaty principles such as transparency and equal treatment, and define the list of services which fall within and without this lighter set of rules.

Precision

Precision in the context of the above rule types can be understood as the level of detail with which the directives regulate actions taken by member states, contracting authorities or economic operators. Caporaso and Stone Sweet (2001) point out that while precision is often key to the operational effect of EU law, it is not always so; many of the rules set out in the Treaty on free movement are vague, but due to their formality and authority have had far-reaching integration effects. Indeed it is those rules which are most vague which have often been the source of judicial integration. While precision may therefore be an indicator of integration in some cases, it should not be seen as a necessary condition for integration. In Table 1.2, it can be seen that those rules which allow either individual buyers or member states to decide if and how to apply them do not demonstrate an increase in precision over the 2004 directives. However, because these rules are encapsulated within the

directives and subject to interpretation and enforcement by the Court, they do imply integration at least in terms of the boundaries of what contracting authorities may do. For example, Article 20 of the Public Sector Directive provides in relation to reserved contracts that:

> 1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.
>
> 2. The call for competition shall make reference to this Article.

The discretion to reserve contracts is clearly limited by the specific requirements for organisations benefitting from the reservation to have a particular aim, and to employ a minimum percentage of disabled or disadvantaged workers. Compared to the previous rules on reservation of contracts under the 2004 directives, the inclusion of 'disadvantaged' workers is new - and this term is not defined within the directives. While this might be seen as a decrease in precision, the provision in the second clause effectively allows for supervision both by the Commission and economic operators of the use of the reservation. Ultimately the CJEU would decide on the meaning of 'disadvantaged workers' if a member state or contracting authority were challenged on its use of this provision. As noted in the introduction, challenges to application of the procurement rules are not a mere theoretical possibility but occur frequently both at the domestic and EU levels, and thus have a considerable impact on practice. Lack of precision in legislation may in some cases lead to more, rather than less integration - inasmuch as it renders it more vulnerable to challenge and, ultimately, to CJEU interpretation of the rules.

In other areas, there has been a clear increase in the detail associated with SPP rules in the directives. This is most clearly seen in relation to the rules on award criteria and use of third-party certifications (labels). The 2014 directives set out which labels can be requested in tenders and the circumstances in which an operator can submit alternative evidence. Previously, the directives simply stated that it was possible to use such labels, without setting any constraints on the type of label used. Legal commentators have highlighted the relatively restrictive nature of these new rules in an area which many see as fundamental to SPP.[64] This was driven in part by concerns about 'green-washing' and the difficulty of determining compliance with basic environmental and labour conditions across global supply chains in the absence of third-party certification linked, for example, to audits and factory inspections.

[64] See Ihamäki, van Ooij, and van der Panne (2014) and Caranta (2015)

It can be seen as an attempt to bolster the credibility of certification schemes by distinguishing those which are based on transparent criteria and accessible to all operators, from those which are effectively industry fig-leaves. As discussed in Chapter 4, a Commission challenge to the use of labels by a Dutch authority in the *Max Havelaar* case led the Court to develop rules on labels which are reflected in the text of the directives.

In relation to award criteria, the article setting out rules for this fundamental part of all procurement procedures has been considerably expanded to include both new examples of the type of criteria which can be applied and to provide a (partial) definition of the link to the subject-matter requirement. This accretion of rules in an area where the Court had previously accorded a relatively high degree of discretion to contracting authorities has been criticised by Arrowsmith (2015) amongst others. While many of the rules on award criteria are permissive rather than prescriptive, the scope for member states or contracting authorities to derogate from these rules is limited by the principles of equal treatment and transparency, as developed by the Court in its procurement jurisprudence. The light touch regime applies a much-reduced set of rules to contracts for social and other specific services which are deemed to be of lesser cross-border interest. However member states are not given free rein over award criteria, as can be seen in Article 76 of the Public Sector Directive:

> 1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.
>
> 2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.

While the first paragraph expresses the intention to limit the scope of EU regulation in relation to these contracts, the second paragraph introduces requirements for award criteria which go beyond those which apply to fully covered contracts. For example, there is no requirement on member states or contracting authorities to ensure that the specific needs of disadvantaged or vulnerable users are taken into account in award criteria for fully-covered contracts. As with the new reservation clause cited above, the new provisions on award criteria in the 2014 directives appear to give member states flexibility with one hand, but effectively take it away with the other, through an increase in the precision of the relevant measures.

Formality

The rules set out in the directives are inherently formal; they have been adopted by the Parliament and Council and must be implemented in national law. The question for the purpose of this study is whether the various rules examined display an increase in formality, i.e. they relate to matters which were not previously regulated by the procurement directives or by another equally formal instrument. While informal sources such as Commission guidance on procurement[65] still play a role in this area, environmental and social matters are dealt with more exhaustively in the 2014 directives than in the 2004 regime. Many of the rules relating to environmental and social considerations are new - this is the case for the mandatory social clause, light touch regime, life-cycle costing, trading conditions in award criteria, rules on abnormally low tenders and selection and exclusion grounds relating to child labour and human trafficking. It is also worth noting that the 2014 reform includes an entirely new directive relating to concession contracts,[66] which were previously unregulated at EU level, although the Court had established their susceptibility to the general Treaty principles in a number of cases from the late 1990s onwards.[67] While detailed consideration of the new rules on concessions falls outside of the scope of this study, their inclusion in the 2014 procurement reform means that the overall formality of the EU rules has expanded considerably.

In the environmental and social provisions, increased formality is perhaps most obvious in the new rules on life-cycle costing (LCC). LCC is a technique for evaluation of the total cost of ownership of an asset[68] which enables a more sustainable approach by including the costs of energy or water use, replacement, disposal and associated emissions, amongst other factors. LCC was not prevented under the 2004 directives but was not mentioned explicitly, leading many contracting authorities to develop their own methodologies for calculating LCC, which varied widely. This was a source of concern to some bidding companies who feared inconsistent or discriminatory use of LCC, a concern which appears to have been adopted by the Commission as it included new rules on LCC in its proposal for the directives. Article 68 of the Public Sector Directive now prescribes detailed rules for the use of LCC, including transparency requirements and the need to apply common EU methodologies where these have been developed for a particular sector.[69] While these rules may assist contracting authorities by providing firm legal footing for LCC, they also create the possibility of challenges by bidders who consider that the methodology chosen does not

[65] In particular the *Buying Green Handbook* (3rd edition, 2016) published by the European Commission.
[66] Directive 2014/23/EU on the award of concession contracts.
[67] Over 25 cases relating to concession contracts were decided by the Court between 2000 and 2013.
[68] Also sometimes referred to as Whole-life Costing (WLC).
[69] Currently only the case in respect of vehicles under Directive 2009/81/EU (Clean Vehicles Directive)

conform to the detailed rules set out in the directive. As such, the rules have been greeted as a mixed blessing by advocates of sustainable public procurement.[70]

In addition to the formal and binding rules set out in articles, the directives contain a lengthy list of recitals which set out the intentions of the legislators. While these are not in themselves binding, they are often referred to by courts in interpreting substantive provisions. The volume of recitals has increased significantly over the 2004 directives - from 51 in the old public sector directive to 138 in the new one - and they provide insight into the sometimes agonised compromises between the Council, Parliament and Commission over environmental and social matters. In areas where the Parliament, for example, was not happy with the text proposed by the Commission but failed to gain support in the Council for changes, the recitals aim to provide a gloss which accommodates its position to the extent possible without changing the text. The recitals therefore may not be an indicator of integration in the same way as formal legislative text, but they can be seen as the threads hanging out of a woven tapestry which provide clues as to its crafting.

Authority

To some extent, even the permissive rules or exemptions which are included in the procurement directives have the effect of increasing judicialisation (and therefore the formality and authority) in this area - as it is not uncommon for a bidding company or the Commission to challenge the way in which such flexibilities are used. The European Commission initiates enforcement actions against member states for violations of the rules, often acting on complaints from companies. Separate directives regulate the availability of remedies in the member states themselves.[71] These do not provide for full harmonisation of remedies - divergences in judicial systems across member states make that an impossibility. Instead they set out certain principles and minimum requirements regarding the procedures by which operators may seek to challenge contract award decisions. These include requirements to notify bidders of the outcome of procedures, to allow a minimum 'standstill period' between notification and award of the contract, and to suspend the contract award process where a challenge has been brought. In practice, the frequency of challenges depends on factors such as the costs associated with accessing the relevant court or tribunal in each country.[72] Points of EU law which are not adequately clear must be referred to the Court of Justice, and these preliminary references account for more than half of its procurement case

[70] See for example, Dragos and Neamtu (2013)

[71] Directives 89/665/EC, 92/13/EC and 2007/66/EU

[72] Sweden for example, where complaints can be brought through the Competition Authority, has a far higher rate of challenge than the UK or Ireland where proceedings must be brought through the higher courts.

law. All provisions of the directives may be subject to CJEU interpretation, and so the increase in formality for each of the rule types corresponds to an increase in authority. This is reinforced where provisions are unclear or lack precision, as they are more likely to form the subject of references to the Court.

While challenges to sustainability measures in public procurement appear to be relatively infrequent in practice, there is a small body of CJEU case law in this area, discussed in Chapter 4. The question of whether the volume of case law has or will increase under the 2014 directives is rather more difficult to assess, due to the length of time needed to progress claims through most domestic law systems. In jurisdictions which allow procurement challenges to be brought through administrative tribunals rather than through the courts, such as Denmark and Sweden, a number of claims regarding the environmental and social provisions set out in the 2014 directives have already been advanced and determined.[73] As several of these concern provisions which did not form part of the previous generation of directives, at least a modest increase in judicialisation and authority in this area can be seen. While these domestic claims do not form part of the empirical focus of this study, I examine national sustainable procurement practices and policies in Chapter 5, including debates regarding the enforcement of these rules.

Developing hypotheses

Having specified the dependent variable of integration and identified preliminary evidence that the environmental and social aspects of the 2014 public procurement reform marked an increase in EU integration, we can turn to the question of which independent variables might have caused this change. While many of the claims of intergovernmental and supranational theory are not in fact mutually exclusive, I argue that two sets of claims advanced under these theories are incompatible: that EU institutions act either as supranational policy entrepreneurs or as agents of the member states, and that their actions are either irreversible or subject to recall by member states. Supranational entrepreneurship and principal-agent theory offer fundamentally different accounts of the causes of integration. While no actions of the EU institutions are irreversible in the absolute sense, the barriers to member states overturning certain actions and decisions are so high as to make reversal unrealistic. This has clear implications for the principal-agent model upon which intergovernmental theory depends, because to qualify as a principal, an actor must be able to both grant authority and to rescind it (Hawkins et al. 2006). If member states cannot in practice recall powers exercised by EU institutions, then the agency model comes into

[73] See for example Andrecka (2017) on the Danish cases and Sundstrand (2018) on the Swedish experience.

question and alternative explanations of EU integration must be considered.

The concept of agency is widely deployed in international relations theory to explain the relationship between states and the international organisations they have established.[74] It seeks to explain the dynamics under which delegated power is exercised, and to a lesser extent the situations in which it may be recalled by the principals. Importantly, agents are rarely seen as being completely obedient in P-A theory, with the concept of 'agency slack' being applied to explain situations where agents deviate from the preferences of their principals (Pollack 2003; Hawkins et al 2006; Heldt 2017). This slack arises where discretion is written into the delegation contract and can lead to agents behaving in a way which is both unintended by principals and which cannot be effectively controlled by them, at least in the short term. This behaviour is described as 'shirking' (where agents fail to deliver fully against their principals' preferences) or 'slippage' (where agents pursue their own policy preferences). P-A theory generally predicts that where such slack occurs, principals will expend additional resources in an attempt to control their agents (Hawkins et al 2006; Heldt 2017). It is assumed that the costs of such control measures are still outweighed by the benefits of delegation, otherwise the contract will be withdrawn or redrawn. P-A theory seeks explanations for the behaviour of agents in either the preferences of the principals, the design of the delegation contract, or the credibility of threats to recontract; the actions of the agent are thus treated as a dependent rather than independent variable in analysing international decision-making.

The term 'supranational policy entrepreneur' refers to a capacity to promote new policies which have not yet been accepted at EU level, and to assume the risks associated with this. Entrepreneurship implies potential rewards associated with being the 'owner' of a policy, as well as risks associated with getting the policy adopted within the EU's multipolar power structure, and taking the blame if it fails. Supranational accounts of EU integration ascribe a key role to the policy entrepreneurship of the Commission and Court based on their marshalling of interest groups (Sandholtz and Zysman 1989; Sandholtz 1992; Stone Sweet 2012). Intergovernmental theorists have been more sceptical of this role; Moravscik (1998,1999) has challenged the idea that the Commission plays the part of supranational entrepreneur in Treaty negotiations and more recent intergovernmental analyses also question the Commission's pre-eminence in areas such as eurozone governance (Hodson 2011, 2013) and the Common Foreign and Security Policy (Puetter 2014). The supranational entrepreneur idea persists, with analyses of the Commission's role in internal security

[74] Principal-Agent (P-A) theory was first developed in the field of organisational economics in the 1970s; since that time it has been applied extensively in economic theory as well as in law and political science.

(Kaunert 2011), higher education (Batory and Lindstrom 2011), energy policy (Maltby 2013) and mobile roaming charges (Cini and Šuplata 2017) all finding evidence of policy entrepreneurship. However, both the precise conditions under which supranational entrepreneurship takes place, and the extent to which other EU institutions – in particular the Parliament – take on this role remains underdeveloped in the theoretical literature.

Kingdon (1984) developed the idea that policy entrepreneurship occurs when a window opens due to the alignment of problem, policy and politics. For example, the Commission had long supported the idea of a common EU energy policy – however it was only when the increasing prices and volumes of energy imports, together with disruptions in the supply of gas from Russia, put this issue firmly on the political agenda that the Commission was (partially) successful in having its policy adopted (Maltby 2013). The role of a policy entrepreneur is distinct from that of an agent because its ability to exercise power is not dependent on the extent to which it serves the interests of the principal(s). An entrepreneur is generally seen to act primarily out of self-interest, although it may also resolve collective action problems in doing so. While principal-agent theory can account for many actions on the part of the agent which appear to be self-motivated or which contradict the immediate interests of the principal, if an EU institution is the first to recognise and exploit a policy window, it is difficult to characterise it as acting as an agent of the member states. Essentially the principal-agent relationship loses its power as an interpretative device if it is stretched to cover situations in which an EU institution is acting on its own initiative, for its own benefit and without or prior to the support of the member states. For this reason, where convincing evidence of supranational entrepreneurship is found this calls intergovernmental theories of EU integration into question.

Likewise, where EU institutions act only within the realms of expressed member state preferences then this calls supranationalism into question. These preferences must be understood with reference to the particular bargaining structures and decision rules which apply to collective decision-making within the EU. In the context of Treaty negotiations, for example, many unrelated issues are considered at the same time and require unanimity in order to be adopted. In the context of a directive, the scope is narrower (although there is still typically room for trade-offs between various member state interests) and only a qualified majority of member states is needed in most cases. This means that the same policy promoted by an EU institution might constitute supranational entrepreneurship in the context of treaty negotiations and agency in the context of negotiations over a directive – even assuming constant member state preferences. This is so because in treaty negotiations every state has a veto, meaning the risks attaching to promotion by an EU institution of a policy which even one objects to are higher than those which apply in the context of qualified

majority decision making. Member state preferences may be expressed in a variety of ways and are of course subject to change over the course of negotiations, making it important to trace EU decision-making processes in their entirety rather than relying upon individual provisions. This raises the question of the legitimacy of a study such as this one focusing on a particular aspect of a directive which includes many other elements. The justification which I offer for this is two-fold: first, as will be seen in the empirical chapters, the environmental and social aspects of the procurement directives were especially controversial and there were clear differences in the views put forward by the various protagonists during the reform. Second, even if member state interests were traded-off against those relating to other aspects of the reform, this would not fundamentally undermine a finding of entrepreneurship or agency in this specific policy domain, provided the requisite characteristics for either exist.

Narrowing down the enquiry in this way allows the following specific hypotheses to be formulated:

(H1) EU institutions acted as supranational policy entrepreneurs in the reform of environmental and social aspects of public procurement law;

OR

(H2) EU institutions acted as agents of the member states in the reform of environmental and social aspects of public procurement law;

AND

(H3) EU institutions acted in a way which was irreversible by member states in the reform of environmental and social aspects of public procurement law;

OR

(H4) EU institutions acted in a way which was subject to recall by member states in the reform of environmental and social aspects of public procurement law.

(H1) and (H2) are mutually incompatible, as are (H3) and (H4). Note however that (H1) is not incompatible with (H4) – it is possible for the actions of supranational policy entrepreneurs to be recalled by member states. Likewise, it is possible for EU institutions which act as agents of member states to nevertheless act in a way which is irreversible by their principals, meaning the (H2) and (H3) are also not incompatible.

Merely characterising EU institutions as supranational or intergovernmental, or analysing their interests regarding integration, does not help to falsify the main claims of intergovernmental and supranational theory. Neither does finding that supranational institutions were empowered at the expense of intergovernmental ones, or vice-versa. In order to falsify the supranational entrepreneur hypothesis (H1) I look for evidence that EU

institutions acted only within the bounds of expressed preferences of member states. In order to falsify the agency hypothesis (H2), I look for evidence that EU institutions acted outside of the bounds of member state preferences, understood collectively according to the requirements of a qualified majority or unanimity depending on the decision rule in the specific area. The irreversibility hypothesis (H3) can be falsified by showing either that actions were actually reversed or that there was a realistic chance of this based on precedents in similar areas and/or the applicable decision rule and revealed preferences of member states. The recall thesis (H4) can be falsified by showing that there was no realistic prospect of member states reversing decisions or revoking powers gained by EU institutions in the reform process based on the same considerations as H3. In chapter 7 I consider the balance of evidence in respect of these four hypotheses and draw conclusions about the explanatory power of the theories behind them, proposing refinements based upon the role which the EU institutions played in the public procurement reform.

Chapter 2 - Theorising the Role of EU Institutions in Policy-making

This chapter reviews the theoretical literature on each of the institutions involved in the reform process, making links to the supranational and intergovernmental theories of EU integration introduced in Chapter one. The aim is to provide a basis for understanding the powers and constraints of each of the institutions, the ways in which they might act as policy entrepreneurs or as agents of the member states, and the extent to which their actions are either subject to recall by member states or are irreversible. In sketching the architecture and decision-making processes of the EU institutions here, the objective is not to characterise them as either purely supranational or intergovernmental. As will be seen, all of the institutions have both elements woven into their design and operating procedures. For example, the Commission has broad powers under the Treaty to propose, embed and enforce internal market rules. However, it is dependent on the member states and Council both for the initial approval of its legislative programme and to progress individual directives. In practice it is relatively easy to amend or withdraw Commission initiatives in some areas – for example rules on product labelling or standardisation – and devilishly difficult to amend or withdraw them in others – for example rules on agricultural subsidies.

Analysing the way in which each of the institutions makes, amends and withdraws rules (or has them amended or withdrawn by others) provides clues as to whether they are behaving in a way which is autonomous, or which depends on the preferences of the member states. One of the central claims of supranational theory is that the Commission and Court do behave autonomously[75] – despite their mandates being initially granted by the member states and in theory subject to removal via Treaty amendments. If rules are irreversible or subject to unfeasibly high costs of recall then the fact that the member states originally delegated power to EU institutions to make those rules is largely irrelevant, as for most intents and purposes the EU institutions are able to act independently in exercising that power. It is not entirely irrelevant, as even where institutions are able to exercise their powers autonomously they must be conscious of the constitutional order which bestowed those powers upon them, and the need to respect its boundaries. The extent to which each of the EU institutions can be seen to act as a supranational entrepreneur or as an agent of the member states in the 2011-14 reform of public procurement law, and the susceptibility of the actions taken by each institution to reversal by member states, will be assessed in Chapter 7.

[75] Stone Sweet (2012) identifies "supranational organizations with autonomous capacity to resolve disputes and to make law" as one of the key tenets of the supranational theory of integration.

The Commission

The European Commission sits at the fulcrum of the EU institutions, carrying out executive, legislative and civil service functions. Its 31 directorates-general answer to the College of Commissioners and the President of the European Commission, a post held by José Manuel Barroso during the period covered by this study. Barroso's second presidency (2009-2014) was characterised primarily by its response to the financial crisis, as well as by the implementation of the institutional changes adopted in the Treaty of Lisbon. Barroso's effectiveness in achieving other policies championed during his leadership of the Commission was limited (Müller 2017). However the second Barroso Commission did succeed in furthering two of its major policy initiatives: the Europe 2020 strategy and the 'relaunch of the Single Market' via the Single Market Act, following the recommendations of the 2010 Monti Report. These two policies form the framework within which public procurement reform took place, and their impact upon the content of the Commission's proposals will be examined in Chapter three.

The Commission plays a key role in both supranational and intergovernmental theories of EU integration. From its origins in the High Authority of the European Coal and Steel Community, the Commission has been understood as a supranational body, albeit one with an institutional design which reflects the desire of member states to exert control over it. The presence of one Commissioner from each member state, despite repeated attempts to reduce the size of the Commission, acts as a reminder of this control. The independence of Commissioners and the collegial basis of their appointment and decision-making has occasionally been called into question, but both by design and in practice the Commission cannot be seen to directly represent the Member States or national interests. The extent to which it indirectly represents these interests, as an agent of the member states, is a point on which intergovernmental and supranational theory diverge. Supranational theory emphasises the entrepreneurial role of the Commission, predicting that this will routinely produce outcomes that the Member States would not have produced on their own and which conflict with the revealed preferences of the most powerful states (Stone Sweet 2012). In contrast, liberal intergovernmentalism portrays the Commission as an agent, largely unable to pursue an agenda of its own (Moravscik 1998), while new intergovernmentalism has highlighted the tendency of member states to create new agencies rather than further empowering the Commission (Bickerton et al 2015).[76]

Amongst the various functions which the Commission carries out, five are of particular

[76] Although others have pointed to the Commission's ongoing ability to expand its mandate in areas such as economic governance (Bauer and Becker 2014) and foreign economic policy (Peterson 2015) and questioned the idea of a Commission in decline (Nugent and Rhinard 2016).

relevance for the purposes of this study. They are i) the right/duty to initiate legislation; ii) the development and implementation of EU policy, including by assembling interest groups and funding projects; iii) acting as mediator between the Council and Parliament in codecision procedures; iv) the enforcement of EU legislation against member states; and v) the coordination of external action on behalf of the EU. The extent to which the Commission carries out these activities by itself or shares power with other EU institutions varies between policy areas. For example, the Commission is only partly responsible for coordinating foreign and security policy, as the High Representative reports equally to the Council. In the trade arena, the Commission takes the lead on the negotiation of trade deals with third countries, but the Council, European Parliament and (increasingly) national and subnational parliaments must approve either the negotiating mandate, the final deal or both.

i) Initiating legislation

The Commission enjoys a near-monopoly over the right to initiate EU legislation under Article 17(2) TEU, but in a number of areas this amounts to a duty exercised at the behest of others. From a theoretical perspective, initiating legislation is often equated with agenda-setting, although it is important to distinguish between formal and informal aspects of agenda setting (Pollack 2002).[77] While the Commission proposing legislation may be seen as an act of formal agenda setting, it is almost always preceded by a political mandate from the Council or Parliament. Such mandates may be embedded in multi-annual work plans or emerge in response to political developments. Majone (2002) concluded that only about 10 percent of legislation proposed by the Commission was the result of an autonomous use of its own initiative.[78] Under Articles 225 and 241 TFEU the Parliament and Council both have the right to request legislative proposals from the Commission, which has a duty to provide reasons where it does not do so. The European Citizens' Initiative introduced by the Treaty of Lisbon also requires the Commission to respond to invitations to legislate where signatures are gathered from at least one million citizens from seven or more member states; this power was used during the public procurement reform in order to amend the scope of the Concessions Directive to exclude water services.[79]

The emergence in 2014 of the *Spitzenkandidat* process for appointment of the Commission President may be seen to increase the European Parliament's power over the

[77] Moravscik (1999) describes informal agenda-setting as a process in which "the entrepreneur launches a discussion by highlighting problems, advancing workable proposals, underscoring potential material benefits, or linking the outcome to symbolic values" (p 272)
[78] The remainder arise from international agreements; amendments to existing legislation; responses to specific requests from other Community institutions, member states or private actors; or from areas in which the Commission enjoys no discretion in exercising its right of initiative.
[79] The *Right2Water* initiative, discussed in Chapter 5, was the first ECI to meet the Lisbon Treaty requirements.

political direction taken by the Commission, including its priorities for the proposal of legislation. Majone (2002) considered that the (then much lesser) powers of the Parliament over the appointment and political direction of the Commission amounted to 'parliamentarization' of the Commission – risking increased politicisation and reduced credibility for EU policies. Observing that new EU competences did not necessarily imply increased powers for the Commission (an idea further developed by new intergovernmentalism), Majone cited the dilution of the Commission's monopoly on legislative initiative in common foreign and security policy and justice and home affairs, and more generally due to increased use of codecision. While the Commission continues to exercise powers in codecision procedures as discussed below, the Parliament has undoubtedly taken a stronger role with consequences for the Commission's room for manoeuvre in framing legislative proposals.

Commission legislative proposals may also respond to case law of the Court of Justice - this can be seen clearly in several provisions included in the 2014 procurement directives which will be examined in Chapter 4. Analysing competition law proposals, Schmidt (2000) sees the Commission using actual or potential CJEU judgments as a lever to alter member state positions towards legislation, divide opposition and increase costs of failure to agree. Precedent for this may be seen in the Commission's invocation of the *Cassis de Dijon* case law to support its proposals for the Single European Act (Dehousse and Magnette 2017). In responding to CJEU case law, legislative proposals put forward by the Commission may codify the Court's position or conversely aim to overrule or modify it. Where Court judgments are based on Treaty provisions, the Commission does not have the power to overrule or modify the Court's interpretation – this may only be done by the member states through Treaty amendments. In some cases, the CJEU specifically calls upon the Commission to bring forward legislative proposals in an area, for example in response to 'actions for failure to act' brought by member states, other EU institutions or private litigants under Article 265 TFEU.

Regardless of the various prompts to which it responds, the Commission's control over the timing and content of legislative proposals undoubtedly allows it to shape outcomes, if not to fully determine them. The use of consultations and impact assessments prior to the publication of draft legislation can strengthen the credibility of Commission's proposals, while at times constraining their scope or altering their emphasis. The increasing push for transparency amongst all EU institutions may be seen to disproportionately affect the Council and Parliament in the context of codecision procedures; the Commission is not generally required to provide a line-by-line justification of its legislative proposals or to publish all preparatory documents, although in some cases it does so voluntarily. In contrast,

the Commission has been the focal point for pressure to reduce the overall volume of EU legislation, seen most clearly in its withdrawal of 73 pending legislative proposals in 2015 as part of an effort to 'cut red tape'.[80] This was presented under the rubric of the Juncker Commission's attempt to apply a 'new and more focused approach' to regulation, in part as a reaction to the results of the 2014 European elections, which saw the election of an unprecedented number of eurosceptic MEPs. The novelty of this approach may be questioned given the similar initiatives undertaken by the Barroso and Santer commissions.[81]

The withdrawal and amendment of Commission proposals suggests that its exercise of its right of legislative initiative is subject to recall, and that this happens on a reasonably regular basis. Even in areas where the Commission is empowered to adopt regulations directly without the approval of the Council and Parliament, and therefore might be considered to act as an entrepreneur rather than an agent, pressure from member states to reduce the overall volume of regulation, or to amend or withdraw specific regulations, has been effective. Are any of the Commission's legislative proposals irreversible? Arguably those which confer direct rights on third parties, such as private companies or individuals, are most difficult to reverse. This can be seen in the slow and uncertain reform of the Common Agricultural Policy – partly due of course to lack of agreement amongst member states but also due to the reliance of farmers upon specific regulations propagated by the Commission, the withdrawal or adjustment of which implies financial loss. Nevertheless in areas where member state consensus has been achieved – such as ending sugar production quotas and the reduction and regionalisation of payments under the Single Payment Scheme –EU rules were reversed despite losses to large agricultural companies with extensive lobbying power both at EU and national level.[82] This indicates that even in areas where transnational interests might be expected (under supranational theory) to entrench the Commission's control over legislative proposals, integration is not irreversible.

The Commission's interests in furthering EU integration, especially in terms of the

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[80] European Commission – press release "Commission confirms withdrawal of 73 pending proposals announced in 2015 work programme" Brussels, 7 March 2015

[81] The Regulatory Fitness and Performance (REFIT) programme launched by the second Barroso commission in 2012 identified laws and legislative proposals for repeal, withdrawal, amendment and impact assessment – with just under 200 such initiatives underway by 2014. The Juncker Commission has continued REFIT, and introduced a considerably smaller number of proposals than the Barroso Commission. The Santer Commission launched its 'SLIM' initiative in 1996 with the stated goal 'to do less in order to do it better' (European Commission, *Simpler Legislation for the Internal Market (SLIM)* COM (1996) 204 final). As Stephen Weatherill (2007) put it: "EC red tape is a tempting target for EC and particularly national politicians anxious to find a scapegoat for economic underperformance…at least since the Delors' Commission's relaunch of the Single Market, policy-makers have coupled their regulatory initiatives with ceremonial self-flagellation concerning the inflexibility of EC regulation and the need to 'simplify' and 'improve' it."

[82] This occurred following the 2013 reform of the CAP. See Ciaian, Kancs, and Swinnan (2014) for analysis of the negative impact of the 2013 reform on land values.

internal market, are balanced against its desire to maintain its own credibility by avoiding institutional overreach and the need to steer proposals towards adoption by the Council and Parliament. Nevertheless, in this core agenda-setting function it is clear that the Commission sometimes acts against the revealed preferences of powerful member states. For example, in 2013 parliamentary bodies in 11 member states – including the French and Dutch senates and UK House of Commons and House of Lords – objected to the Commission's proposals on the creation of a European Public Prosecutor's Office. The German Bundestag also passed a resolution which was critical of the proposals.[83] The Commission proceeded with the proposal despite this opposition, but on the basis of 'enhanced cooperation' between certain member states, rather than unanimity. This perhaps encapsulates the role of the Commission in proposing legislation: not always a hostage to member state preferences, but also not at liberty to disregard them. Wider empirical analysis of the Commission's use of its right of initiative between 1991 and 2007 found that

> …the codecision procedure and the political influence of the European Council, have undoubtedly pushed the Commission's main role more and more from that of a powerful initiator to that of an "honest broker", on the one hand, and from that of an autonomous initiator to that of a reactive initiator, on the other.[84]

The manner in which the Commission carries out its role as 'honest broker' or mediator, as opposed to representing its own interests, is considered further below.

ii) Developing and implementing EU policy

The formal legislative process is often preceded by activities undertaken by the Commission to test and build support for proposals. These activities may continue during and after the legislative process, for example via work undertaken by expert groups and the funding of projects linked to implementation of EU law and policy. In characterising the Commission as a policy entrepreneur, Sandholtz and Stone Sweet (2012) draw attention to the Commission's convening and support of private and third-sector groups at the pre-legislative stage. Pollack (1997) also identified the Commission's support of significant non-governmental actors as one of the conditions enabling it to act as a policy entrepreneur. Hodson (2013) points to the failure of the Barroso Commission to act as an entrepreneur during the financial crisis, attributing this to a mix of structural and partisan factors. The

[83] For discussion of the subsidiarity process, see Fromage (2017)

[84] Corona, Hermanin, and Ponzano (2012) This study evaluates 53 innovative directives proposed by the second Delors, Santer, Prodi and first Barroso Commissions, comparing the initial proposals with the text ultimately adopted by the Council. Where proposals were adopted quickly with minimal amendments this was taken to amount to a weak exercise of the Commission's right of initiative, whereas proposals which encountered more resistance from the Council and Parliament were taken as a strong exercise of initiative. Comparing the results from the third year of each of the colleges showed a progressive weakening of the Commission's use of its right of initiative. The study also took account of the Commission's use of its power to amend or withdraw proposals.

Commission's uneven record of entrepreneurship has led some scholars to describe its role as 'purposeful opportunism' (Cram 1993, 1999; Nugent and Rhinard 2016; Camisão and Guimarães 2017) – suggesting that the Commission has clear objectives but is flexible on when and how to achieve them.

The support provided by the European Commission to green public procurement (GPP) from 2008 onwards illustrates the role of its policy-development activities. In addition to issuing various guidance documents and common criteria to address environmental impacts in procurement procedures, the Directorate-General for the Environment commissioned research on the impact of GPP, provided a helpdesk service, published regular newsletters, and provided financial support to dozens of international projects, conferences and training initiatives.[85] It also convened a GPP Advisory Group, comprising public sector, business and NGO representatives. From these activities there emerged a community of practitioners involved in implementing GPP, many of whom took part in the legislative reform process by lobbying for stronger provisions on environmental aspects of procurement. This community included local, regional and national public bodies, environmental NGOs, product labelling organisations, academics and consultants, as well as businesses wishing to establish the environmental credentials of their products and sell them to the public sector. While hardly unique as an interest group wishing to influence EU policy, the extent to which this group was fostered by the Commission's own actions and expenditure is notable. In contrast, the Commission gave very little support, either directly or indirectly, to the inclusion of social aspects in public procurement.[86]

The non-legislative and discretionary nature of most of the Commission's policy support initiatives suggests that they should be relatively easy to reverse. However, the ability of member states to recall policy support powers exercised by the Commission is ambiguous, mainly because these have often not been clearly granted by the member states in the first place. Other than a few lines buried in a multiannual budget, there may be little formal basis for policy development activities carried out by the Commission. In relation to GPP, the Council did endorse the Commission's 2008 Communication and the specific support activities proposed. If member states strongly objected to these activities, financial and political support could in theory be withdrawn - but the disinvestment of an established policy community would likely prove even more difficult than the reversal of legislative proposals. The Commission's policy support actions, whether undertaken as an agent or entrepreneur, may be less susceptible to recall by member states than legislation due to their

[85] The outputs of these initiatives are available at http://ec.europa.eu/environment/gpp
[86] See discussion in Chapter 3

informality and broad involvement of civil society actors. However, the Commission itself may not be able to control the policy communities it creates or supports.

iii) Participating in the legislative process

The Commission has always played a role in 'mediating' between the Parliament and Council during the legislative process. With the expansion of codecision to over ninety areas under the Treaty of Lisbon, the use of trilogues to secure interinstitutional agreement on first reading for EU legislation has become the default practice.[87] Trilogues involve representatives of the Parliament, Council and Commission meeting to discuss legislative proposals and to formulate compromise texts acceptable to all three institutions. Although not mentioned in the Treaties, the use of trilogues was endorsed by the three institutions in a Joint Declaration adopted in 2007.[88] The Declaration notes the informal framework in which trilogues take place, flexibility regarding the timing and levels of representation involved, and the right of each institution to define its negotiating mandate and choose its representatives. Despite this flexibility, certain conventions have emerged regarding the conduct of trilogues which are seldom departed from – in particular regarding the location of meetings and the preparation of the four-column documents which track progress during negotiations (Roederer-Rynning & Greenwood 2015).

The role of the Commission in trilogues was subject to relatively little scrutiny prior to the launch of the European Ombudsman's own-initiative inquiry into the process in 2015. This involved a public consultation, inspection of files and requests for specific information from the Commission, Council and Parliament. In its response to the inquiry, the Commission expressed reservations about whether such an inquiry fell within the Ombudsman's remit, given that no specific allegations of maladministration had been raised. The inquiry proceeded, with the Ombudsman's 2016 report making a number of recommendations to enhance the transparency of the trilogue process.[89] In its response to the Ombudsman's report, the Commission indicated its broad acceptance of the recommendations, while emphasising that their implementation rested primarily with the

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[87] In the 2009-14 legislative session, 85% of all codecision procedures were adopted on first reading (European Parliament (2014) *Activity Report on Codecision and Conciliation 14 July 2009 – 30 June 2014 (7th Parliamentary Term)* at p 8.)

[88] European Parliament, Council and Commission (2007) *Joint Declaration on Practical Arrangements for the Codecision Procedure (Article 251 of the EC Treaty)* 2007/C 145/02.

[89] The Ombudsman recommended (inter alia) the establishment by the three institutions of a joint database to publish: trilogue dates and agendas (in advance of meetings); the initial positions adopted by the Parliament and Council; four-column documents (as soon as possible after negotiations have concluded); lists of other documents tabled at trilogues (to facilitate public access requests); and the names of representatives responsible for political decisions taken in trilogues, including where this power is delegated to a civil servant. In relation to the last point, the Commission noted in its response that 'decisions' were never formally taken during trilogues.

Parliament and Council. However, it also observed that:

> …the Institutions need a space for exchange and explanation in a spirit of trust and confidence. Over-formalising them could become counterproductive in terms of transparency as it could push the "real" negotiation into other forums. Much of the value of the trilogue process lies in its informality and flexibility. Greater transparency should not come at the price of making the process excessively rigid and formal.[90]

The flexibility and informality of trilogues may suit the Commission as much as the co-legislators. One reason for this is that the Commission does not always act as a neutral arbiter within trilogues, but rather as champion of its own position as put forward in the legislative proposals or as adapted in response to the Parliament and Council. In this way, the Commission may be able to secure a 'second bite at the cherry' rather than being hostage to the outcome of political negotiations between the co-legislators. It can threaten to withdraw legislation (which it has a unilateral right to do) or seek a unanimous vote of the Council if negotiations do not go its way. There is nothing in the Treaties to prevent the Commission taking such an active role in the legislative process beyond its initial proposals; to do so however implies an element of risk and fits within the idea of the Commission acting as entrepreneur, rather than agent of the member states or neutral consensus-finder.[91] Liberal intergovernmental theory posits that the Commission is primarily empowered in order to enforce credible commitments on the part of member states (Moravscik 1998) – however in trilogues it sometimes pursues an agenda which goes beyond any existing commitments of the member states, and which is actively opposed by them. The fact that it often does not succeed in having its positions adopted reinforces the perception that they are not pre-approved by the member states.

Given that the Council and Parliament are responsible for adopting legislation via codecision, in principle any powers exercised by the Commission may be recalled, by refusing to accept the Commission's position. It is important to distinguish here between reversing a particular manifestation of the powers exercised by the Commission, and recalling the power itself. The Council and Parliament could in fact move to exclude the Commission from the trilogue process if both institutions agreed on this, by revoking the Joint Declaration. In contrast, the Commission could not exclude either of the other two institutions from the process, as their role in codecision is established under the Treaties. Formally then, the Commission's powers as mediator or participant in the legislative process

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[90] European Commission, 16 December 2016, *Reply to the request for information in relation to the Ombudsman's owninitiative inquiry OI/8/2015/JAS concerning transparency of trilogues*

[91] This idea is perhaps further supported by the fact that Commission delegations in trilogues tend to be at high level (Heads of Unit, Deputy Director-General or even Director General – Michel Barnier attended a trilogue meeting on the public procurement directives). If the Commission were merely helping the co-legislators to draft appropriate compromise wording, such high-level representation might be deemed overkill.

can be recalled, although in practice the barriers to doing so would be high. This stems in part from the technical resources and legal expertise which the Commission holds in many areas, which is still often unrivalled by that within the Council or Parliament (Hooghe and Rauh 2017). It also stems from the Commission's deep involvement in the stages which precede and follow legislative negotiations – namely the development of legislative proposals and the enforcement of EU law. As the Commission does exercise formal powers granted by the Treaties in these areas, excluding it entirely from the deliberations over legislation would be likely to undermine the authority of EU law. In particular, while the Parliament and/or Council sometimes favour 'constructive ambiguity' in legislative texts, the Commission is less likely to do so where it is directly responsible for enforcement, as such ambiguities present a considerable challenge for effective and resource-efficient enforcement.

iv) Enforcing EU law

The enforcement of EU law once it has been adopted forms a key part of the Commission's workload, and this role is particularly pronounced in the fields of competition and public procurement. In the first instance, the Commission supervises the implementation of directives by member states. If national implementation is not undertaken within the designated period, or if the Commission considers the national implementing measures to fall short, it will issue a notification and then a reasoned opinion to the member states concerned. If implementation is not achieved within a further specified period, the Commission may refer the member state to the CJEU, with financial penalties being levied in cases of continued non-compliance. As Nic Shuibhne (2017) notes, in theory it is possible for member states to initiate actions against each other to enforce EU law, but in practice this role is carried out by the Commission. The Commission enjoys complete discretion over whether and when to launch an infringement procedure, [92] although it does provide grounds for decisions not to pursue an infringement to the complainant(s). It is also able to launch infringement actions based on its own initiative. The Commission undertakes enforcement activities very frequently - in 2016, it launched 986 new procedures by sending a letter of formal notice (including 847 late transposition cases) and issued 292 reasoned opinions.[93] This included reasoned opinions issued to 21 member states regarding failure to fully transpose the 2014 procurement directives.

The overall number of open Commission infringement actions has increased steadily over time, placing a considerable demand on its resources. In December 2016 it published a communication announcing a 'more strategic approach to enforcement', including less

[92] This was confirmed by the Court in Case T-571/93 *Lefebre and others v Commission*
[93] European Commission (2017*) 34th Annual Report on Monitoring the Application of EU Law* COM(2017) 370

reliance on the EU Pilot problem-solving mechanism (which had come to be seen as a lengthy prelude to infringement actions rather than a way to avoid them); stepping up cooperation with networks and independent regulators at national level in areas such as electronic communications, financial services, competition and environmental law; supporting improvements to national justice systems through reforms and training; giving priority to infringement actions that reveal systemic weaknesses in member state legal systems; and systematically requesting the CJEU to impose lump sum fines as well as penalties for non-transposition of directives.[94] The Communication also notes that infringement actions taken by the Commission are not intended to provide individual redress for breaches of EU law, and emphasises the role of national courts in this regard. While it is too early to judge the impact of the 2016 Communication on the actual volume of enforcement activity undertaken by the Commission, the intention to distance itself from its image as 'the policeman of Europe' is clear.

Where does the motivation for this less centralised approach to enforcement of EU law come from? Is it an expression of a preference on the part of member states for 'less Europe' or does it reflect the Commission's own desire to safeguard its resources and credibility? If the Commission is an agent of the member states whose powers are subject to recall, the former explanation makes more sense. If it acts as an entrepreneur empowered primarily by the Treaties, the latter explanation has more currency. The truth is probably that both factors are influential. At other times or in other domains the Commission may be seen to increase its enforcement activities, for example in relation to competition law or environmental regulation. It is relatively easy to find examples which support either a supranational or intergovernmental analysis of the Commission's enforcement activities, and to find an equal number of counterexamples. However, it is clear that decisions on the part of the Commission to exercise its enforcement powers to a greater or lesser extent are reversible without Treaty change or other major barriers.

v) Representing EU interests externally

The above sections have considered the Commission's role vis-à-vis the member states and other EU institutions, that is other internal stakeholders within the Union. It also plays a unique, if not exclusive, role in representing the Union's interests vis-à-vis external third parties. The High Representative for Foreign Affairs and Security Policy, who is jointly responsible to the Commission and Council, is a prominent example of power in this area being shared amongst the institutions. Likewise, the controversies over TTIP and CETA

[94] European Commission (2017) *EU Law: Better Results through Better Application* (2017/C 18/02)

brought to public attention the role which both the European Parliament and national parliaments can play as 'deal breakers' when it comes to external trade agreements. However much of the day-to-day responsibility for external action remains firmly vested in the Commission, including under the European Neighbourhood Policy, trade negotiations, and other aspects of international affairs such as the Paris Agreement on climate change. These activities are important not only in themselves as examples of the type of 'high politics' traditionally reserved for nation states, but also for the leverage which they afford to the Commission over other, more internal, aspects of EU law and policy. For example, during the public procurement reform process the Commission repeatedly invoked the EU's commitments under the WTO Government Procurement Agreement as precluding certain reforms favoured by the Council and Parliament.

The extension of EU competence over international trade and, more recently, investment agreements, may be seen as a classic case of spillover – as the single market and customs union harmonised the key tariff and non-tariff barriers to trade, it became increasingly logical for external trade policy to also be coordinated at EU level. This did not however determine which of the EU institutions should exercise this power, and to what extent they should act as policy entrepreneurs or agents of the member states. Supranational theory would point to the well-defined interests which transnational actors such as multinational companies, industry associations and NGOs have in trade policy, and the extent to which these actors have focused their lobbying efforts on Brussels. An intergovernmental perspective would conversely emphasise the power which member states and the Council retain in terms of granting a negotiating mandate to the Commission and ratifying trade agreements. Woolcock (2016) draws attention to the increased influence of the European Parliament over trade policy, limiting the extent to which the European Commission is able to act as an entrepreneur in this area, although formally the Parliament has only the power to veto trade agreements. The Council on the other hand holds extensive formal powers in this area, exercised via the Trade Policy Committee which works closely with the Commission in negotiations.

Beyond trade, the Commission leads on implementation of association agreements with potential accession states. This is a highly politically sensitive area, and one in which the member states exercise extensive control via the Council. Association agreements generally provide for the approximation of law with the EU *acquis*, without making specific commitments regarding accession. Commission delegations are set up in the partner countries, and funding made available for implementation of reforms. The delicate balancing of domestic politics with EU commitments in this area is illustrated by the rejection of the EU-Ukraine Association Agreement by Dutch voters in a referendum held in 2016. Following

the Euromaidan revolution of 2014, Ukraine's new leadership had moved quickly to ratify the Agreement and began implementing reforms with EU support. But a campaign in the Netherlands which exaggerated the prospects for Ukraine joining the EU and its entitlement to military assistance lead to Dutch voters rejecting the accession agreement, and the Dutch government was faced with a dilemma.[95] Support for Ukraine amongst most member states remained high, and eventually the Council produced a declaration regarding interpretation of the agreement which the Dutch parliament accepted as meeting the dictates of the referendum. The Commission was largely a helpless hostage during this détente, its delegation in Kyiv keeping a low profile while the diplomatic machinery churned in Berlin and the Hague. Ultimately, the text of the association agreement itself was not changed and EU ratification took place in July 2017.

Of the five areas of the Commission's power examined here, the outcomes of the exercise of its mandate in the field of external affairs are perhaps least susceptible to reversal by member states. The mandate itself may be withdrawn, amended, or subjected to additional controls; but once the Commission has exercised its powers, and the member states have ratified the outcomes (where necessary), the barriers to reversal are extremely high, because the outcomes are embedded in international agreements. To illustrate, following the UK's notification in March 2017 of its intention to withdraw from the Union under Article 50 of the Treaty, it was clear that the country wished to begin negotiations with third countries in order to secure its trading relationships following its departure. The existence of trade agreements between the EU and most of these third countries prevents the UK from engaging in such negotiations until its withdrawal is complete. Even following withdrawal, the scope for the UK to negotiate deals may be limited by its ongoing relationship with the single market and customs union. The ability for a member state to recall powers which the EU has exercised externally is thus constrained even where it ceases to be a member – and in the case of member states, may be considered as close to irreversible as any power exercised by the EU. International agreements are of course subject to renegotiation from time to time, but this requires agreement of the other side, and can be a painstaking process.

The Council and the Committee of Permanent Representatives

The Council is invariably identified as the most intergovernmental of EU institutions, although it is worthwhile distinguishing between its constituent parts and formations to evaluate this claim. The European Council, comprising heads of state and government plus

[95] The referendum held in April 2016 attracted a turnout of 32.2% of voters, of whom 61.1% voted against the agreement. The referendum was held under a Dutch law requiring a referendum to be held where at least 300,000 signatures are gathered, and the result was advisory rather than binding on the Dutch parliament.

the president of the Commission, met 42 times during the 2009-2014 period, excluding Euro summits.[96] The unprecedented frequency of these meetings, which took place only three times per year between 1975 and 1996, is generally attributed to extraordinary events: the financial, Greek and migration crises. An alternative view is that the frequent Council meetings speak more to the increasing breadth and politicisation of the EU's activities and corresponding need for political engagement at the highest level; it is difficult to argue that the events of 2009-14 in themselves were more extraordinary than those that took place for example during the 1979 Iranian revolution and oil crisis, during the collapse of the Soviet Union a decade later, or the reunification of Germany shortly thereafter. The difference is in the level of EU involvement and authority in such areas and the corresponding need for leaders to coordinate responses via the Council.

Alongside this increase in highly politicised activity, the creation of a more independent role for the Council President under the Lisbon Treaty has altered the intergovernmental mechanics of the Council. The President's role is now entirely separate from the rotating presidency of the Council of the EU held by member states for six-month terms. Elected by a qualified majority of member states, the President sits for a two-and-a-half-year term (renewable once) and has his or her own cabinet, as well as being able to draw upon the services of the General Secretariat of the Council. The two occupants of this office to date, Herman van Rompuy and Donald Tusk, were both re-elected for second terms, in Tusk's case despite the opposition of his home country Poland. Van Rompuy was widely perceived to be a non-threatening occupant of the newly created post, and empirical evaluation of his presidency suggests that he did not exercise much in the way of independent power but was effective as a mediator during the eurozone crisis in particular (Dinan 2017). There are some signs that Tusk's presidency may set a precedent for both a higher profile and lower level of deference to member states. This can be seen most clearly in his outspoken support for sanctions against Russia in response to the annexation of Crimea in 2014 – an issue on which consensus on the Council was by no means well established at that point.[97]

The importance of the Council Presidency is also apparent in the frequency with which member states direct lobbying efforts at this office. Panke (2012) identified the Presidency as being the body most frequently lobbied by member states on economic,

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[96] Attended only by the heads of state/government of the Eurozone countries.
[97] In particular, Germany and Italy, both of which are dependent on Russian gas and oil imports, and France, which had a contract to supply two warships to Russia, were less immediately supportive of far-reaching sanctions than the Eastern European and Scandinavian countries. In remarks made to the media in March 2015, Tusk accused certain national leaders of 'appeasement' and 'naiveté or hypocrisy' in their reluctance to extend sanctions ("Donald Tusk: Putin's policy is to have enemies and to be in conflict" *The Guardian*, 15 March 2015)

agricultural and environmental matters, exceeding both the Commission and Parliament. Despite the increased independence and importance of the Council President, both the European Council and Council of Ministers remain under the control of national politicians. While qualified majority voting (QMV) formally applies to the majority of decisions taken by the Council, in practice seeking consensus is the norm. References to 'consensus' within the Council need to be unpacked. Novak (2013) questions whether the apparent existence of consensus within the Council actually means that agreement has been reached between all member states. Based on empirical evidence including interviews with a cross-section of Council participants, Novak found that the role of the rotating presidency (chair) in many cases consists not in seeking unanimity but in avoiding a blocking minority. The chair may intervene to prevent adoption of a measure by QMV where a large member state objects or any member state argues that it threatens their vital interests - however Novak also notes counterexamples where measures have been adopted despite such opposition.[98] Novak identifies blame avoidance as a driving factor behind apparent consensus on the Council, because voting against a measure which is subsequently adopted is likely to attract negative attention in the domestic arena.

Contested votes within Council meetings are rare – normally the president of the Committee of Permanent Representatives (Coreper) only sends a legislative text to the Council President when it is clear that majority backing has been secured. Sometimes voting occurs by e-mail only after adoption in a meeting at which national views are aired. Voting records can thus not be taken as an indication of national interests without detailed analysis of preceding meetings. As Hayes-Renshaw (2017) puts it:

> while roll-call votes represent a precise public choice on the part of national representatives in the Council, they constitute only one part of a member state's preferences and bargaining behaviour at EU level.[99]

Puetter (2014) emphasises the role of deliberative intergovernmentalism in the work of both the European Council and the Council of Ministers, although his analysis focuses on areas which are primarily non-legislative, such as the Common Foreign and Security Policy (CFSP) and governance of the eurozone. Puetter's main argument is that integration via the type of deliberative intergovernmentalism seen in the Council is as important as legislative integration via the classic Community method. He draws conclusions from this for the role of supranational institutions, identifying in particular a reduced role for the Commission. Puetter's choice of traditionally intergovernmental policy areas upon which to rest this

[98] The example of the End of Life Vehicles Directive being adopted in 1999 over strong opposition from German delegation (and auto industry) is cited by Kleine (2013) at p 139-140
[99] At p 98

argument weakens its persuasiveness as a general analysis of EU policy-making. He presents no evidence of a reduced role for the Commission in traditional 'first pillar' areas linked to the single market, Common Agricultural Policy, competition or consumer protection, for example. Even in areas where the Commission's ability to act autonomously has been reduced (Puetter argues this is the case for the CFSP), he acknowledges that the capacity of others to act without the Commission has also been reduced.[100] The Commission holds at least one seat within each Council formation and in addition to this formal representation a rich network of bilateral contacts are maintained between the Council and Commission (Hayes-Renshaw and Wallace 2006).

A large part of the work involved in preparing for Council meetings and legislating is carried out by the country holding the rotating presidency, and by Coreper. Coreper meets in two different formations (Coreper I and II) comprising national permanent representatives from each member state and their deputies. Research indicates that members often depart from instructions from their principals in national governments or make recommendations for instructions to be changed (Lewis 2014; 2017) – meaning they have a fairly wide margin of manoeuvre. As in other parts of the Council, formal voting is rare. Coreper has its own well-developed institutional culture and norms and it is common for permanent representatives to outlast national administrations, in some cases by decades. While its proceedings are characterised by a lack of transparency, this can be seen as instrumental in preventing posturing by member states and allowing compromise and consensus. Kleine (2013) characterises this type of informal governance as a means of accommodating political uncertainty and thus giving member states more flexibility (in particular, to respond to domestic pressure groups). In contrast, Lewis (2017) places more emphasis on the autonomous nature of the norms developed within Coreper and the dual identities of the permanent representatives as national agents and members of a supranational body. Despite this degree of institutional autonomy, it is difficult to see permanent representatives acting as policy entrepreneurs, as any risks or rewards associated with their work ultimately vest in the member states. Rather they can be seen as agents who exercise a significant degree of discretion on some matters, and occasionally go rogue.

In what way might the Council be seen as exercising supranational entrepreneurship? Undoubtedly it has an institutional identity beyond the representatives of the member states, with its General Secretariat and various formations which include the President as well as representatives of the Commission. While member states still hold the majority of seats and votes, the use of QMV (even if often hypothetical) calls into question the directness of the

[100] Puetter (2014) at p 230

relationship between the national policy preferences of any given member and the decisions and actions taken by the Council. Permanent representatives may also not be perfectly faithful agents of the interests of national administrations, although they probably represent national interests in the long-term sense. Likewise, the country holding the rotating presidency, which chairs trilogues, may act as a supranational entrepreneur rather than as an agent of collective national interests. What is clear however is that member states are able to recall powers delegated to agents within the Council, and do so on a regular basis. The President of the Council is subject to a relatively short term which must be renewed by member states – although it has been seen that this does not require unanimity. While the increased frequency of Council meetings and higher profile of the President may imply a more politicised Council, it also indicates the unwillingness of member states to delegate powers to this institution which are not subject to regular review by national leaders.

The European Parliament

The European Parliament does not fit easily into either intergovernmental or supranational theories of the EU. Pollack (2003) characterised the EP as an outlier in his application of principal-agent theory to EU institutions. He suggested that there had been a lack of delegation of powers to the Parliament by member states in areas where they perceived that the Parliament would move political outcomes away from their collective preferences. The increase of the EP's powers under the Lisbon Treaty challenges this assessment – especially as its political composition has been volatile over the same period, meaning it was not consistently aligned with national governments. While its powers have increased in recent years, the EP has not always used these powers to further EU integration – indeed there has been a notable eurosceptic element in successive parliaments since 2009. However, this must be balanced against the emergence of relatively stable pan-European party groupings on the left, right and centre of the political spectrum (Raunio 2017). Writing in 2007, Hix, Noury and Roland observed high levels of cohesion within these groupings, with membership thereof outweighing nationality in determining MEP's voting patterns. These contradictory and shifting attributes of the Parliament have led to its relative neglect by integration theorists, apart from occasional flurries of interest such as during the *Spitzenkandidat* standoff.[101]

Rittberger (2005) analysed the Parliament's powers in terms of its ability to place

[101] The Treaty of Lisbon requires the Council to propose a candidate for Commission president 'taking account of the European elections.' In 2014 this provision was used by the party groupings within the EP to put forward their preferred candidates prior to the elections. When the EPP grouping emerged with the most votes, it made it clear that it expected its candidate Jean-Claude Juncker to be put forward by the Council and would not support another candidate, despite strong opposition on the Council to Juncker's candidacy. Juncker was duly proposed by the Council (with the UK and Hungary voting against him) and elected as President of the Commission.

constraints on the executive, an established approach in the comparative analysis of national parliaments. Tracing the development of the EP's powers to modify and veto EU legislation and budgets, he argued that national governments had chosen to empower the Parliament in order to resolve legitimacy problems associated with the pooling of sovereignty. By creating a body capable of exercising some control over the Commission and Council, member states compensated for the declining legislative role of national parliaments as powers were transferred to the EU. Rittberger applies the delegation model and treats the Parliament as an agent of the member states, but one created for the specific purpose of enhancing democratic legitimacy. While his historical analysis is persuasive, Rittberger concedes that national concerns for procedural legitimacy do not translate automatically into institutional design and the EP was only one of many potential solutions – increasing scrutiny of EU legislation by national parliaments would have been an alternative. Haroche (2018) develops the idea that the EP was in fact empowered by an interparliamentary alliance in key budgetary and legislative domains. The Parliament's assertion of powers even prior to the first direct elections in 1979, particularly in the environmental and social policy fields, has been noted by others (Meyer 2014; Roos 2017). The conventional logic of delegation by member states provides very little to explain why the EP has been so much more influential in some areas than others, or at certain times, even in the absence of formal powers.[102]

Once powers have been delegated to the EP in the Treaties, it is difficult for member states to recall these powers, due in part to the Parliament's status as the only EU institution directly elected by citizens. Paradoxically, Germany has been the most consistent advocate of increased powers for the Parliament, despite its citizens being most underrepresented in terms of the number of MEPs. Hix and Høyland (2013) raised the question of how effectively the European Parliament exercises its powers given its tendency to adopt legislation on first reading – however more recent quantitative research indicates that first reading agreements can actually empower the EP over the Council (Laloux 2017; Laloux and Delreux 2018). As will be seen in the analysis in Chapter 6, adoption at first reading by no means implies that the Parliament has not made vigorous use of its role as co-legislator. The work which takes place in committees prior to, during and after trilogues (leading to a plenary vote) is often politically fraught and attracts the lobbying efforts of businesses, NGOs and even national governments (Panke 2012). Unlike the deliberations of the Council or Commission, most EP committee meetings are held in public and they often attract large attendance. Of the 11,500 lobbying organisations on the common register held by the Commission and Parliament,

[102] See Roos (2017) for discussion of the powers exercised by the Parliament over social policy from the 1950s to the 1970s, in the absence of any formal Treaty basis for this.

over 7,000 hold EP accreditation.[103]

Given its fulsome exercise of the powers granted to it under the Treaties – including some which the member states did not intend to grant – the Parliament cannot easily be seen as an agent of the member states. More plausibly, it is an agent of EU citizens themselves. However most of the outcomes of the Parliament's exercise of its powers, as opposed to the powers themselves, can be reversed or modified by member states through the Council. While the Parliament was able to propose a candidate for the Commission presidency, it was open to member states to reject this candidate – a power which they may be more prepared to exercise in the future. While the Parliament takes its own views on legislation informed by the political balance on its committees, the Council must agree to these views in order for them to be adopted as EU law. It is therefore possible to exaggerate the extent to which the Parliament truly wields independent power within the Union. Regardless of the powers which it exercises in the legislative process and in other areas such as approving agreements with third parties, the Parliament lacks agenda-setting powers in comparison with the Commission and Council. Beyond approving the Commission's work programme, the EP exercises little control over the timing or content of legislative proposals, or the decision to withdraw them.

Nevertheless, in certain areas the Parliament can be seen to act as a policy entrepreneur, taking on risks and seeking to consolidate its own interests. The extent to which it played this role in championing social considerations in the public procurement reform will be assessed in Chapter seven. The ability of the EP to effectively act as a policy entrepreneur may depend on its political orientation differing from that of the Commission or Council, rather than being aligned with them. Where the political make up of EP committees is notably to the left or right of the Commission – or where it differs on other major issues such as the environment or civil liberties – this may enable it to gain the 'first mover' advantage and exploit windows of opportunity as a policy entrepreneur. This can occur where interest groups find the relevant EP committee to be a more receptive target than Commission or member state representatives, and therefore focus their efforts upon its rapporteurs or other MEPs. This points to a paradox in the EP's ability to consolidate its powers: it may have an advantage as a policy entrepreneur where its political alignment is distinct to that of other EU institutions, but it is also more likely to encounter resistance to its attempts to exercise power in such situations. This suggests that the Parliament's ability to act as an entrepreneur is likely to be cyclical, waxing as a distinct political orientation emerges amongst its members

[103] Statistics collected from http://ec.europa.eu/transparencyregister on 27.10.2017

and waning as resistance builds up within the Council and Commission.

The Court of Justice

From the time of its seminal 1960s judgments in *Van Gend en Loos* and *Costa v ENEL*, the ability of the Court to shape EU integration has been widely recognised. More than any other EU institution, it has left its mark on the single market through its interpretation of the fundamental freedoms set out in the Treaties. As noted in Chapter one, classic debates about the political power of the Court of Justice were framed not in terms of supranational or intergovernmental theory but around questions of the separation of powers, judicial activism, and the nature of the EU constitution. From the late 1980s however, the Court began to play a more central role in political theories of EU integration. Burley and Mattli (1993) applied a neofunctional analysis to the growth of the Court's powers over time, identifying the spillover of EU law from economic to related domains such as occupational health and safety, social welfare, and education. Moravscik (1993, 1997, 1998) sees member states as choosing to empower the CJEU to secure credible commitments from their counterparts. This leaves open the question of why member states have chosen to exercise less rather than more control over this power by including general principles in the Treaties which are open to wide interpretation by the CJEU. Intergovernmental theory generally interprets such 'incomplete contracts' as one of the rational outcomes of bargaining (better to have a vague provision which may accommodate your preferred position than a precise one which does not); neofunctional and supranational theory sees it as an unintended consequence of the desire to empower the Court to act in specific areas.

Garrett, Kelemen and Schulz (1998) developed the idea of member states delegating the role of filling in the details of incomplete contracts to the CJEU. They see the Court as being careful not to overstep the mark in exercising this power, as it needs member states to acquiesce to its judgments to preserve its authority. This perhaps underplays the importance of the preliminary reference procedure in creating a direct link between the CJEU and national courts, meaning it is not dependent on national governments to enforce its interpretations of EU law. Pollack (2003) sees the Court as an agent of the member states, responsible for monitoring compliance and filling in the details of incomplete contracts. However, this is difficult to reconcile with the transformative character of many of the Court's judgments, as well as the ongoing contention of its powers by member states - both through litigation and other means, for example Theresa May's 'red line' regarding CJEU jurisdiction after Brexit.[104] In Chapter four, I review several large scale studies which purport

[104] As set out in May's 2017 speech at Lancaster House in the following terms: "…we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union

to show a link between the preferences of a qualified majority of member states and the Court's decisions, finding that these are unpersuasive in establishing a causal relationship.

In contrast to the intergovernmental view, Slaughter, Stone Sweet and Weiler (1997) presented the Court as advancing its own agenda against member state interests. Sandholtz and Stone Sweet (1997, 1998, 2012) developed the idea that transnational actors have driven EU integration through law, by pursuing private interests which have been effectively vindicated in Luxembourg. The latter account, in which the Court's powers are not advanced through its own will but through the instrumental use of its jurisdiction by others, sits more comfortably with traditional legal conceptions of the role of courts. Carrubba and Murrah's (2005) quantitative research supports the idea of transnational actors using preliminary references to expand economic activity within the EU. While the principle of horizontal direct effect requires enforcement of EU law by national courts, the Article 267 procedure enhances the ability of the CJEU to promote its consistent application. Preliminary rulings complement the decentralised nature of EU law enforcement; these cannot readily be 'gamed' by either EU institutions or member states as they rely upon the initiation of an action in national courts and the decision by a national court to refer questions to the CJEU. While courts of final appeal are obliged to refer questions regarding the interpretation of EU law to the CJEU, they retain some room for manoeuvre in determining whether or not the point is *acte clair* (obviating the need for a reference). In practice the number of preliminary references made to the CJEU varies widely between member states, with Germany and Italy topping the table and the Scandinavian countries at the bottom.[105] In a number of areas including public procurement, enforcement of EU law at national level is further buttressed by common rules on the domestic remedies which must be available for infringements of EU law.

At times, the CJEU can be clearly seen as acting to consolidate its own powers - for example in Opinion 2/13 regarding the EU's accession to the European Convention on Human Rights (ECHR). The Commission and a number of member states had long favoured the EU acceding to the ECHR in its own right, to copper-fasten the protection of fundamental rights within the Union.[106] The Council requested an opinion from the Court on ECHR accession in 1994, at which time the Court held that there was no legal basis in the Treaties for the EU to accede. This was addressed in Article 6(2) of the Treaty of Lisbon,

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will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country."

[105] Source: European Court of Justice, *Annual Report 2016 – Judicial Activity*, p 107-111

[106] As all EU member states are required themselves to accede to the ECHR, and the EU Convention on Fundamental Rights replicates most of its provisions, the additional protection associated with the EU's accession is arguably marginal.

leading the Council to give the Commission a mandate to begin negotiations on accession. With the negotiations complete, the Commission requested the Court's opinion on the draft instrument of accession, which it duly delivered in December 2014. The Court rejected the proposed terms of accession on the basis that they undermined the autonomy of EU law in various ways, notably by allowing the European Court of Human Rights (in Strasbourg) to interpret it. While this decision was widely criticised due to the perception that the Court had put protection of its own jurisdiction before protection of fundamental rights, it is also possible to see the Court as protecting the integrity of EU law against the more political jurisprudence of the Strasbourg court.[107] Regardless, the CJEU's willingness to protect its own bailiwick may be seen as the act of a policy entrepreneur – and was not without risks that the Commission and Council would proceed with accession despite its negative opinion.[108]

The idea of the CJEU as a purposeful or entrepreneurial actor may overstate its powers however as i) it does not control which cases come before it and ii) it does apply at least a loose precedent doctrine, limiting its ability to respond to political imperatives.[109] Standing requirements for judicial review cases brought by member states or EU institutions before the CJEU are less strict than those which apply to similar actions in many national legal systems, as there is no need for such applicants to show that the law complained of has a particular legal effect on them. However standing requirements for private applicants (i.e. individuals, companies or third sector bodies) have traditionally been strictly construed by the Court, raising a debate about access to justice amongst EU law scholars. The test of 'direct and individual concern' which applies to private applicants acts as a relatively high bar to initiating actions, and has effectively limited the Court's role as an enforcer of individual rights, especially where these are affected by directives.[110] While Kelemen (2011) sees the beginnings of US-style adversarial legalism in the EU, other scholars have argued that Europe's litigation culture is more conservative (Kagan 2008).

At other times the Court has acted to uphold the rights of member states vis-à-vis EU institutions. In the *Tobacco Advertising* case,[111] the Court annulled a directive which banned

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[107] For discussion of the ECHR court's sometimes controversial approach see Christoffersen and Madsen (2013).
[108] In the event, this has not (yet) come to pass.
[109] For discussion of the Court's approach to precedent see Tridimas (2012) and Jacob (2014).
[110] Because directives are addressed to member states, who must implement them in national law, private applicants cannot argue that they are of *direct* concern to them. While private applicants may in theory challenge regulations before the CJEU, the requirement to demonstrate *individual* concern limits the scope for this. The CJEU has interpreted 'individual concern' as requiring membership of a closed class of persons affected by a regulation or other legal act (see Case C-25/62 *Plaumann v Commission*) While Art. 263(4) of the Lisbon Treaty removed the 'individual' requirement for challenges to regulatory acts, the Court has continued to apply a high bar for challenges brought by private applicants in cases such as T-18/10 R *Inuit Tapiriit Kanatami v European Parliament and Council* and C-546/13 *Sugars Ltd and Sidul Acuzares, Unipessoal Lda v European Commission*
[111] Case *C-376/98 Germany v Parliament and Council (Tobacco Advertising I)*

all consumer advertising of tobacco products. Germany had argued that the directive overstepped the legal basis in the Treaties on which it had been adopted, by aiming to harmonise public health measures rather than simply to ensure free movement of goods. The Court accepted this argument, however it subsequently upheld the very similar replacement directive proposed by the Council and Parliament in *Tobacco Advertising II*,[112] on the grounds that this respected the legal basis in the Treaties. The different outcomes in these cases should serve as a cautionary tale against simplistic attributions of political motives – whether pro-integration, pro-member-state, or pro-business – to the Court. In both cases identical interests were assembled on either side, however the Court relied upon the precise wording and legal basis of the directives to reach two different conclusions. While the Court's undoubted role in furthering EU integration is often cited by political scientists, its role in limiting integration, or restricting the powers exercised by the political institutions of the EU is less widely referred to. The two *Tobacco Advertising* cases aptly illustrate this dual role.

Overall, intergovernmental or principal-agent interpretations of the Court appear to underestimate its role not just in enforcing EU law, but in creating it. As the discussion of the case law on environmental and social aspects of public contracts in Chapter four will explore, the legislative response to CJEU case law by other EU institutions and member states ranges from codification through to non-adoption or override. Where the Court bases its decisions on interpretation of the Treaties their options are restricted – until and unless the member states agree to Treaty change or the Court itself changes its interpretation. There are relatively few instances in which member states have adopted Treaty changes in order to counteract Court of Justice rulings, one prominent example being the *Barber* protocol to the Maastricht Treaty which aimed to limit the effect of the Court's jurisprudence on equal treatment of men and women in pension entitlements.[113] The Court might plausibly be seen as a policy entrepreneur, albeit one which operates in a relatively obscure legal penumbra and is thus often able to 'test' ideas in an environment insulated from the full repercussions of policy experimentation – a task which is harder for the Parliament and Council. The way in which the Court at times appears to defer to political imperatives, and at times appears to ignore or actively seek to transform them, will be traced in its evolving jurisprudence on social and environmental aspects of public contracts in Chapter four.

Conclusions

This chapter has explored theoretical conceptions of the EU institutions involved in the public procurement reform of 2011-14. Building upon the intergovernmental and

[112] *Case C-380/03 Germany v Parliament and Council (Tobacco Advertising II)*
[113] Including in Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group*

supranational theory introduced in Chapter 1, it is possible to identify ways in which each of the institutions may act as an agent of the member states or conversely as a policy entrepreneur pursuing its own interests. The objective here is not to neatly label each of the institutions as agent or entrepreneur, but to understand both the theoretical basis and empirical evidence associated with these characterisations. Later chapters will examine the broader implications for EU integration and democratic accountability of the way in which the institutions and member states exercised power during the reform process. The Commission, despite its energetic and wide-ranging policy initiatives, can be seen primarily as an agent of the member states. Its much-vaunted power of initiative is most often used at the behest of others. With the exception of the international agreements it negotiates (subject to extensive *ex ante* and *ex post* controls by member states and other EU institutions), very few of the outcomes of the Commission's exercise of its powers cannot be recalled by the principals – and in fact this happens frequently with the amendment, repeal and withdrawal of directives and regulations. While some of the policy support activities undertaken by the Commission are less readily reversed due to its cultivation of interest groups, it does not have a monopoly on such activities.

The Council has traditionally been seen as a proxy for the member states, and remains both formally and informally an intergovernmental institution. However, it has also developed an institutional culture which is more than the sum of its parts. This can be seen in the prevalence of pseudo-consensus rather than unanimity in most of its decision-making processes, as well as the more active role of the Council President in recent years. It can also be seen in functional autonomy of permanent representatives who often both shape the positions of their national administrations and outlive them. Nevertheless, the occasions on which the Council can be seen to act as a policy entrepreneur pursuing its own interests and taking risks not sanctioned by the member states are few and far between. The increase in Council meetings in recent years may be a sign of the institution's centrality in responding to crises, but it also speaks to the indispensability of heads of state and ministers in resolving these crises.

The European Parliament's role as co-legislator places it on formally equal terms to the Council in many areas, and it has actively sought to maximise its power including through the cultivation of interest groups. As a directly elected chamber, and one which is organised according to ideological rather than national affiliations, it perhaps has more claim than any other EU institution to democratic legitimacy. The effectiveness of this can be seen both in innovations such as the *Spitzenkandidat* process and in the prevalence of adoption of legislation on first reading following trilogues, suggesting that Parliament's committees are largely successful in gaining support for their positions. Arguably the

Parliament is most successful where its political orientation differs to that prevailing within the Commission and/or Council – because in these situations it is more likely to attract lobbying and support for its positions from businesses, civil society groups and even national politicians. However, the Parliament's powers should not be exaggerated: outside of the areas where it acts as co-legislator it is still often treated as an apprentice rather than a respected colleague, and it enjoys little to no powers of initiative or agenda-setting.

The Court of Justice holds a unique power of interpretation over EU law – and has only rarely been subject to the recall or limitation of this power through Treaty amendments. More frequently, EU legislation is amended or repealed where a qualified majority of member states find the Court's interpretations unpalatable, but even this is undertaken with caution giving the importance of the rule of law within the EU's constitutional order and the difficulty in finding consensus on alternatives. The Court acts to preserve its own authority in a number of ways, both through the incremental development of legal doctrine to avoid political confrontations, and through direct defence of its jurisdiction - as seen in Opinion 2/13 on the European Court of Human Rights. The extent to which it is able to act as a policy entrepreneur is constrained by its inability to control which cases are brought before it, by its sensitivity to the separation of powers within the EU, and by the application of precedent. However, in a number of areas, notably gender equality and equal pay, free movement of goods and services and more recently environmental protection and the posting of workers, the Court has pursued what many see as a radical or interventionist approach. Despite strong objections by powerful domestic interests to the Court's jurisprudence in such areas, the Court has not faced sanctions from member states in the form of curtailment of its powers or resources.

These paradoxical features of the Parliament and the Court present challenges for the two main theories of EU integration. Unlike the Commission and Council, it is difficult to depict them as either agents of the member states or supranational entrepreneurs without some contortions of these concepts. It is clear that they were created by the member states and that it is possible for the impact of their decisions to be limited by states acting collectively. It is also clear that they frequently exercise independent influence over highly contested questions of law and politics, and do so in a way which is contrary to the preferences of a majority of member states. The extent to which these elements featured in the reform of the procurement directives will be explored in the chapters which follow. This will allow evaluation of the four specific hypotheses derived from intergovernmental and supranational theory, and refinement of the descriptive account of the role of EU institutions in integration.

Chapter 3 – The European Commission and Origins of the Reform

This chapter begins to test the applicability of four specific hypotheses derived from supranational and intergovernmental theory to the reform of EU public procurement law. It focuses on the origins of the reform in the period after the financial crisis took hold in Europe, in 2008-9. The reform happened in the context of severe constraints on public spending in many EU member states, as well as declining trust in EU and national authorities.[114] Reform of public procurement was seen as a policy lever at both national and EU level to stimulate growth and to achieve a number of other objectives such as support for particular industries/sectors, addressing unemployment, stimulating innovation, and increasing trade both within and outside the EU's borders. This chapter is primarily concerned with the actions of the European Commission in 2010-11, when it initiated the reform. Subsequent chapters trace the legislative process and the specific contributions of the Court of Justice, European Parliament and Council to the environmental and social provisions of the directives – as well as the positions adopted by Germany, France, the United Kingdom and prominent interest groups.

The two pairs of specific hypotheses tested in each of the empirical chapters are: (H1) EU institutions acted as supranational policy entrepreneurs in the reform of environmental and social aspects of public procurement law or (H2) EU institutions acted as agents of the member states in this reform; and (H3) EU institutions acted in a way which was irreversible by member states and (H4) EU institutions acted in a way which was subject to recall by member states. As set out in Chapter one, these claims derive from supranational and intergovernmental theory respectively, and unlike many of the other claims of these theories, (H1) and (H2) are mutually incompatible, as are (H3) and (H4). In order to falsify the supranational entrepreneur hypothesis (H1), in this and subsequent chapters I look for evidence that EU institutions acted only within the bounds of expressed preferences of member states. To falsify the agency hypothesis (H2), I look for evidence that EU institutions acted outside of the bounds of member state preferences, understood collectively according to the requirements of a qualified majority. The irreversibility hypothesis (H3) can be falsified by showing either that actions were actually reversed, or that there was a realistic chance of this based on precedents in similar areas and/or the applicable decision rule and preferences of member states. The recall thesis (H4) can be falsified by showing that there was no realistic prospect of member states reversing decisions or revoking powers exercised by EU institutions in the reform process. In chapter 7 I consider the balance of evidence in

[114] See Roth, Nowak-Lehmann, and Otter (2011) and Armingeon and Ceka (2014) for discussion of these trends. Various editions of the Eurobarometer since 2007 show a general decline in trust in both EU and national institutions following the financial crisis.

respect of these four hypotheses and draw conclusions about the explanatory power of the theories behind them, as well as noting any adjustments which appear to be justified by the public procurement case.

The first EU public procurement directive was adopted in 1970.[115] Successive directives adopted in the 1980s and 1990s introduced minimum requirements for the remedies[116] available to disappointed tenderers in domestic courts and extended the regime to cover services and works contracts[117] as well as supplies, and to cover utilities[118] as well as the public sector. In 1998, work began on what would become the 2004 procurement directives – consolidating supplies, services and works contracts and repealing the earlier directives (with the exception of the Remedies Directives, which remain in force to date as amended). The 2004 directives contained a number of innovations in terms of procedures, award criteria and use of electronic means of communication. From an environmental perspective, they incorporated the CJEU's 2001 judgment in the *Concordia* case, which endorsed the use of environmental award criteria, subject to certain constraints. They also contained a brief reference to the possibility of including social considerations in contract performance clauses, or setting aside contracts for fulfilment by sheltered workshops employing disabled people.[119] The adoption of the 2004 directives was accompanied by an increase in the prominence of public procurement as an area of EU activity, in part due to the Commission's active programme of enforcement actions against member states.

The motivation for the Commission's heightened attention to public procurement from the late 1990s onwards appears to be rooted in concerns about the relatively low number of public contracts awarded on a cross-border basis, that is to companies based in other member states. As such, public procurement was seen as a 'missing piece' of the single market puzzle, and a sizeable one at that. The value of public procurement was estimated by the Commission at 17-18% of EU GDP in 2010, although a large part of that spending fell

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[115] Commission Directive 70/32/EEC of 17 December 1969 *on provision of goods to the State, to local authorities and other official bodies*. This was followed by Directive 71/305/EEC of 26 July 1971 *concerning the coordination of procedures for the award of public works contracts*

[116] Directive 89/665/EEC *on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts* and Directive 92/13/EEC *coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors* (the Remedies Directives).

[117] Directives 92/50/EEC, 93/36/EEC and 93/37/EEC on services, works and supply contracts respectively.

[118] Directive 93/38/EEC *coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors*. The utilities rules apply both to state owned or controlled enterprises and to those which have been granted a special or exclusive right by the state, e.g. a local water monopoly.

[119] Articles 26 and 19 of Directive 2004/18/EC *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.*

outside of the common rules.[120] A measly 1.5% of covered procurement contracts were awarded directly cross-border, with a slightly higher percentage awarded indirectly through subsidiaries or subcontractors.[121] Such low levels were interpreted by the Commission as evidence that substantial barriers to competition for public contracts still existed within the single market. EU countries showed a marked decline in penetration ratios for imports to meet public sector demand in the period 2009-10.[122] This probably reflected the effect of stimulus packages which increased demand primarily for domestically produced goods and services, due either to explicitly protectionist objectives or to the particular sectors of the economy in which they applied. While in most countries the decline was short-lived, with penetration rates increasing again from 2010, European public procurement markets remained less open to international competition than most others worldwide.[123]

The Monti Report, Green Paper consultation, and evaluation of the 2004 directives

In October 2009 Commission President Barroso requested a report from Mario Monti, a widely respected former Commissioner and future prime minister of Italy, on the relaunch of the single market. In his letter to Monti, Barroso highlighted the renewed threat of economic nationalism arising from the financial crisis, as well as the mandate in the Lisbon Treaty to deliver a "highly competitive social market economy" within the EU. Monti's report, delivered six months later, noted that "The single market today is less popular than ever, while Europe needs it more than ever."[124] He identified both integration-fatigue and market-fatigue as amongst the factors impeding consensus on the direction and deepening of the single market. Monetary union, enlargement and institutional reform had taken up much of the EU policy agenda in the pre-Lisbon period. Based on consultation with representatives of national governments, EU institutions, business and civil society groups, Monti identified distinct attitudes towards and expectations of the single market in continental social-market economies, "Anglo-Saxon" countries,[125] Central and Eastern European countries, and the Nordic countries. Compromises between the priorities of these groups would be required.

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[120] This is due both to the exclusion of some types of contracts from the procurement rules and also to the minimum thresholds which apply under the directives, meaning the majority of public contracts are not covered.
[121] European Commission (2010), at p 15
[122] Messerlin (2015) draws upon two sources of data, a study conducted on behalf of the European Commission in 2012 by Ramboll Consulting Management and the World Input-Output Database. His findings contradict the argument put forward by the Commission in its trade policy, that EU public procurement markets are inherently open to outside competition.
[123] *Ibid*
[124] Monti (2010), at p. 6
[125] It is not clear from the report which countries other than the UK Monti placed in this group, in particular whether it includes Ireland, the Netherlands or Germany.

Monti also identified three levels of support for the single market: radical critics, conditional supporters and unwavering supporters. Amongst the conditional supporters, his report highlights concern about how social and environmental objectives are reconciled with free movement of goods and services. In order to successfully relaunch the single market, these concerns would need to be addressed without undermining the competitive principles highly valued by the unwavering supporters. The report dismisses the idea that consensus amongst member states is not necessary to further develop the single market, or that this could be driven by the Commission and Court of Justice alone. Areas in which Monti suggests specific initiatives are needed to address the concerns of conditional supporters include the free movement of workers in light of the *Viking* and *Laval* judgments; the place of social services within the single market; and the integration of broader policy goals in public procurement. At the same time, the report notes concern from business groups regarding the fragmentation of markets across the EU, excessive regulation, and insufficiently robust external trade policy. Monti's recommendations encompassed not only policies traditionally understood as part of the single market such as competition, but also industrial, consumer, energy, transport, digital, social, environment, climate change, trade, tax and regional policy – and even justice and citizenship.

In its October 2010 Communication setting out its response to the Monti report, the Commission noted that:

> …the single market is not an end in itself. It is a tool for implementing other policies. All of the public and private measures, the responses to the challenges concerning growth, social cohesion and employment, security and climate change, will be more likely to succeed if the single market works as it should. [126]

This can be read as either a relatively anodyne statement of the single market's potential utility or as a rather more radical argument for extending EU competences beyond the construction and maintenance of the single market, into more politically contested policy domains. By 2010 the EU's presence and power within these domains was already well established, but the language in the Communication (which is by no means exceptional) casually fuses various objectives in justifying intervention, not all of which lie within the EU's internal market competences under the Treaties. A more formalistic approach might justify further action based purely on the mandate given in the Treaties to create an internal market; notably absent is any reference to the desires or preferences of the member states in this regard. It is clear then that Communication (together with the Green Paper on public procurement considered below) seeks to convince member states and to consolidate the

[126] European Commission (2010), at p 4

Commission's single market mandate, rather than simply to execute it.

The Commission sought to test this mandate by setting out 50 proposals to implement Monti's recommendations in areas ranging from transport and energy policy, support for small and medium sized enterprises, intellectual property, electronic commerce and coordination of national tax policies.[127] An extremely ambitious timetable to achieve these reforms by the end of 2012 was proposed – however in the event only one of the 50 proposals was adopted in that period.[128] Single market reform continued to lack the political prominence or urgency attached to the ongoing fallout of the financial crisis and eurozone governance issues. On public procurement, the Commission stated its intention to bring forward new legislation in 2011-12 with an emphasis on simplifying the rules, allowing more flexibility and including 'other' policies in procurement. At this stage it did not commit to any of the specific ideas put forward by Monti, such as allowing public sector contracting bodies to use the negotiated procedure or qualification systems (a streamlined method for bidder selection available to the utility sector under the 2004 directives). Nor did it specifically mention environmental or social aspects of procurement. Six studies had been commissioned into various aspects of the current procurement framework, including levels of cross-border competition, accessibility of public contracts to SMEs and use of environmental, social and innovation-related criteria in tenders. These studies were published in June 2011, at the same time as the synthesis of the consultation carried out by the Commission and were used to justify specific proposals in these areas.

The reform of the procurement directives fell primarily within the remit of the Directorate-General for the Internal Market, then headed by Michel Barnier. The consultation was launched by a Green Paper in January 2011, setting out the overall objectives of the reform and seeking responses to specific questions regarding the scope and content of the new legislation. The majority of this document focuses on how the rules might be amended to encourage greater competition for public contracts (in particular by SMEs) and to provide contracting authorities with greater flexibility/choice in procurement procedures. A number of questions relate to the implementation of Court of Justice rulings in the period since the previous reform, for example on post-award modifications and 'in-house' contracts awarded by one public entity to another. A relatively brief section sets out

[127] Coordination of national tax policies was highlighted by Monti as an important part of a new single market consensus, as the continental social market economies and Nordic countries would seek this from the Anglo-Saxon and Central and Eastern European countries in return for allowing further competition in their markets. In the event, tax coordination has proven largely illusory in the period up to 2017, although 11 countries agreed in 2013 to progress a common financial transactions tax. The UK challenged the use of enhanced cooperation to implement the tax; the challenge was dismissed by the CJEU but at time of writing progress appears to be stalled.
[128] On the establishment of a European network of employment services to promote mobility of workers, which was implemented by Commission decision 2012/733/EU.

the Commission's views regarding environmental, social and innovation-related aspects of procurement, and solicits input on these topics. The Green Paper frames these questions in the context of the Europe 2020 objectives to improve energy-efficiency, increase the share of renewable energy and spending on research and development, as well as reducing unemployment, social exclusion and poverty.[129] While reiterating the Treaty prohibition on discrimination against bidders from other member states, the questions posed by the Commission are relatively far-reaching, contemplating the potential to limit the use of lowest price awards, to allow derogation from the rules in certain circumstances, to loosen the 'link to the subject-matter' requirement, and to introduce common EU requirements regarding the use of life-cycle costing or the purchase of energy-efficient goods or services.[130]

A total of 623 responses were received to the consultation, of which the largest number came from businesses and business associations (40% of responses). The remainder came from public sector bodies (33% of responses), including 22 national governments; civil society organisations (17%); academics and legal experts (7%); and individual citizens (3%).[131] Ninety-two of the responses were from multi-country associations and interest groups. The geographical spread of responses was roughly proportionate to population, with the UK being heavily overrepresented and France slightly underrepresented.[132] Although the respondents for the most part welcomed the reform, sharp divergences existed in the approach to the questions posed by the Commission. For example, on the question of whether the 'link to the subject-matter' requirement ought to be abandoned, 80% of civil society organisations expressed support as opposed to less than 20% of member state governments and businesses. Significant divergences also applied between local/regional public authorities and national governments on the desirability of a separate regime for social services – with the former almost twice as supportive of this as the latter. Support for common EU 'what to buy' requirements was strong amongst civil society groups (62%) but attracted less than 25% support amongst the other respondent groups.[133] The positions of the German, French and UK governments on these questions are analysed in Chapter five.

Of the six studies published by the Commission in June 2011 evaluating various aspects of public procurement, one looked in depth at the use of environmental and social criteria.[134] It sought to identify the framework conditions in the member states for pursuit of

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[129] This policy is set out in European Commission (2010b)
[130] European Commission (2011a)
[131] European Commission (2011d), at p 3
[132] *Ibid*, pg. 4. 90 responses were received from the UK; 81 from Germany and 59 from France.
[133] *Ibid*, pg. 7
[134] Essig, Frijdal, Kahlenborn, and Moser (2011)

such policies via procurement, the way in which these were implemented by individual contracting authorities, and the impact of such activities. The study found that 20 member states had adopted national action plans on green public procurement (GPP), of which 10 included mandatory elements.[135] The priority product groups and criteria adopted in many cases were based on the common EU GPP criteria. Construction, transport and IT equipment were the largest markets for green products based on national policies. A large gap existed between national policies and awareness/implementation by contracting authorities: on average only 56% were aware of their national policy – but 64% were found to be implementing some aspects of GPP in tenders.[136] The study found no standalone policies on socially responsible public procurement in the member states; however social objectives in procurement were addressed in a range of other policies and legislation, such as that on labour and disability rights. Despite the absence of dedicated policies and criteria, the study identified widespread uptake of socially responsible procurement (49% of respondents), in particular amongst local and regional authorities.[137]

Alongside the six studies and synthesis of the consultation, the Commission published its evaluation of the impact and effectiveness of the 2004 directives in June 2011.[138] This drew upon data gathered from the procurement notices published in the Official Journal (OJEU) as well as analysis of legislation and practices at member state level. Amongst the key findings of the evaluation were that only about 20% of public expenditure on goods, services and works was covered by the EU rules, and that while there was an average of 5.4 bidders for each covered contract, this varied widely between member states.[139] The cost of complying with the rules averaged at 1.3% of the value of contracts – although the Commission was keen to point out that some of these costs would also be incurred under purely national rules.[140] According to the econometric analysis carried out, the average savings associated with increased competition through applying the EU rules ranged from 2.5%-3.8%, depending on the procedure used.[141] The overall conclusion was that the EU procurement rules had resulted in measurable increases in transparency, competition and financial savings, despite the very modest level of cross-border tendering. The evaluation report also announced the Commission's intended timetable for bringing

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[135] *Ibid*, pg. 2-3
[136] *Ibid,* pg. 7
[137] *Ibid,* pg. 9
[138] European Commission (2011c)
[139] *Ibid,* pg 19
[140] *Ibid.*
[141] *Ibid*, p 20. The report also notes a high level of variance between member states in the amount of time and cost associated with running procurement procedures, and the net savings once these costs were accounted for.

forward the new procurement directives: draft proposals would be published by the end of 2011, with the expectation that the legislation would be adopted by the Council and Parliament by the end of 2012. In the event, although the Commission published its proposals in December 2011, it was not until February 2014 that the new directives were adopted.

Commission proposal for new directives

The Commission's initial proposal for a new public sector procurement directive ran to 246 pages, including an explanatory memorandum. The memorandum identified two overarching objectives for the reform: to increase efficiency/competition (including through increased participation of SMEs and cross-border tenders) and to:

> Allow procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.[142]

The Commission noted the support for these objectives expressed during the Green Paper consultation, as well as their complementarity to the Europe 2020 targets. The impact assessment published alongside the legislative proposal sets out the various options for reform and the costs and benefits imputed to each. The impact assessment identified a lack of convergence in the use of environmental and social criteria amongst member states, meaning that bidders faced many different standards when responding to tenders.[143] Addressing this might help to avoid market fragmentation. Two options for increasing uptake of SPP were compared: a facilitation or enabling approach, and a mandatory approach based on quotas or the definition of common environmental and social requirements for all tenders. The latter option was rejected on the basis that it would place a disproportionate administrative burden on contracting authorities, increase costs and potentially reduce competition, including by SMEs.[144]

Both the definition of options and their evaluation in the impact assessment can be seen as biased against far-reaching reform to support SPP. The two options presented lie at the extremes of possible interventions – the first approach being largely passive and the second involving radical change. Intermediate options, such as the provision of incentives to engage in SPP, were not considered. The analysis of the 'facilitation' option fails to fully evaluate the costs of ongoing fragmentation in the market for environmentally and socially

[142] European Commission (2011f), p 2
[143] European Commission, Impact assessment, p 25-26
[144] *Ibid*, p 66-69

sustainable goods and services; or the benefits in terms of cross-border trade which might arise from further harmonisation of SPP criteria. The evaluation of the mandatory option does not consider evidence based on the sector-specific environmental requirements which applied under existing EU legislation, such as the Energy Star Regulation and Clean Vehicles Directive. While the possibility to pursue further such sector-specific initiatives is mentioned in the impact assessment, the benefits of including such requirements directly in the procurement directives were not assessed – this might be expected both to increase uptake and to reduce the administrative burden on both contracting authorities and businesses of identifying and applying such obligations.[145]

Based on the impact assessment, the Commission proposed a number of measures related to SPP in the draft directive. These measures are listed in Figure 3.1. Only new elements which did not form part of the 2004 directives are listed; the proposal also maintains the environmental and social provisions which applied under the old directives. For example, the ability to address environmental characteristics in award criteria and the requirement to include accessibility for disabled persons in technical specifications were maintained. In several cases however, more detailed rules were proposed to regulate the application of environmental and social criteria. This is particularly the case in relation to third-party labels (such as organic certification) and life-cycle costing, which was tacitly but not explicitly permitted under the 2004 directives. The Commission's proposal of more detailed and explicit rules in these areas can be seen as an increase in precision and formality as discussed in Chapter one; the extent to which these reforms support SPP or actually make it more difficult is analysed in the sections dealing with each proposed reform below.

[145] Germany chose in its implementation of the directives to include these obligations in the same legislation. See §67 and §68 of the 2016 *Vergabeverordnung* (VgV).

Procurement stage	Description of measure
Contract definition – special regimes for certain contracts	Reserved contracts – extension of ability to reserve contracts for performance by disabled or disadvantaged workers (17)
	Light touch regime for social services (74-76)
Bidder selection/exclusion	Mandatory exclusion for non-payment of tax or social security (55.2)
	Discretionary exclusion for violation of EU or international environmental, social and labour law (55.3)
Technical specifications	Ability to refer to specific processes of production or provision in technical specifications (40.1)
Verification	Ability to require third-party labels attesting to social and environmental characteristics of goods/services (41)
	Ability to reject tenders for non-compliance with EU or international environmental, social and labour law (54.2)
	Environmental management systems may be requested for all contracts (61.2)
Award of contract	Award criteria may refer to specific production processes or processes for other life-cycle stages (66.2)
	Rules for life-cycle costing (67)
	Rejection of abnormally low tenders which do not comply with EU or international environmental, social or labour law (69.4); Rules on subcontracting (71)

Table 3.1 Environmental and social measures in COM (2011) 896
Note: Numbers in brackets refer to Article numbers in Commission proposal

Reserved contracts

Internationally it is relatively common for public procurement rules to allow certain contracts to be 'set aside' or reserved for a particular type of business – for example Canadian law allows contracts to be set aside for businesses run by First Nations people, and South Korean law allows reservations for businesses run by veterans. Such arrangements are permitted as exceptions to the general rule of open competition under the GPA and other international procurement agreements. Under the 2004 directives, it was possible for contracting authorities to reserve a contract for competition by 'sheltered workshops' which employed a minimum of 50% disabled staff. Such workshops exist in several member states, although their prevalence has declined over time as programmes which aim to integrate disabled workers into mainstream workplaces have become more popular. The reservation is not a derogation from competition – contracts must still be advertised in the OJEU and the procedural rules applied, however competition may be restricted to those organisations which meet the employment condition.

The Commission's proposal extended the scope of the reservation to include not only disabled but also disadvantaged workers, while also reducing the minimum number of such workers who must be employed by the businesses benefitting from the reservation to 30% from 50%. This represents a significant relaxation of the conditions for the reservation; the

rationale for this and its expected impact on competition or cross-border trade are nowhere mentioned in the proposal or impact assessment, nor were they mooted in the Green Paper.[146] The idea to extend the reservation clause may have come from one or more of the member states, although analysis of the responses from Germany, France and the UK to the Green Paper shows that no reference was made to such a policy at that stage. In any event, the revised and more generous reservation clause survived the legislative process intact and was adopted in the 2014 directives. Unlike several of the other provisions discussed here, the reservation clause provides for a relatively straightforward increase in the ability of contracting authorities to pursue social aims via procurement. But its impact on competition is limited due to the low number of sheltered workshops/employment programmes in most member states. A more far-reaching reservation, in favour of public service mutuals, was proposed by the UK in the course of the trilogues, and ultimately adopted despite concerns from the Commission regarding its impact on competition, following extensive amendments by the European Parliament which enhanced its 'social' character.[147]

Light touch regime for social and other specific services

The 2004 directives distinguished between 'priority' and 'non-priority services', which were listed in two separate annexes to Directive 2004/18/EC. Priority services were those subject to the full rigours of the directives, whereas non-priority services were those considered to be of less cross-border interest, and thus only subject to minimal procedural rules. These included health and social, education and community, and hotel and restaurant services, and also a residual category of 'other services', meaning many contracts fell within this lighter regime.[148] The Commission proposed three major changes to the treatment of such services: an increase in the threshold for application of the EU rules to €500,000;[149] the removal of 'other services' from the scope of the lighter regime; and a requirement for member states to put in place specific procedures for such contracts. The last element included the following text:

Member States shall ensure that contracting authorities may take into account the

[146] The 'non-paper' sent by the Commission to the Council in January 2012 states that the previous reservation was considered too restrictive and out of step with practices and legislation in some member states (European Commission (2012), p 34-35)

[147] As originally envisioned by the UK, the reservation was primarily intended to facilitate privatisation of public services by making it easier for companies spun out of the public sector to win contracts. During the trilogues, the EP inserted requirements that such companies serve a public interest, reinvest their profits in the service and are governed by employees. The Commission's hesitation is evident in the final text of Article 77 of the Directive, which makes the public service mutual reservation subject to review by the Commission over a five-year period, and also limits the duration and frequency of contracts awarded under it.

[148] These services were also excluded from the scope of the EU's market access commitment under the GPA.

[149] This was increased to €750,000 in the final version of the Public Sector Directive, and €1 million in the Utilities Directive.

> need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.[150]

On the one hand, the proposal increases the discretion available to contracting authorities in the award of such services by applying a higher threshold. However, it also restricts the scope of contracts subject to this lighter treatment,[151] and requires member states to come up with national rules. The latter element is curious in light of the responses of the UK, Germany and France to the consultation – none of which expressed a desire for separate national rules on social service contracts. Germany and the UK both expressed satisfaction with the status quo, while France was in favour of a common EU approach to award of social service contracts.[152] It is possible that the Commission was responding to the submissions of unions and other civil society groups in formulating the light touch regime, or that it was sensible of the preferences of the European Parliament in this regard, already expressed in its resolution of May 2010.[153] Due to the exclusion of the relevant services from the GPA, the Commission may also have considered this an area where greater concessions to the social agenda could be made without threatening the EU's trading relationships.

Mandatory exclusion grounds

The procurement directives had long included both mandatory and discretionary grounds for the exclusion of bidders (debarment provisions). The mandatory grounds under the 2004 directives concerned convictions for fraud, corruption, money laundering or similar offences.[154] The Court had held that such grounds must be strictly construed to ensure an even application of the basic conditions for participation in public tenders across the single market.[155] Whereas exclusion for non-payment of tax or social security had been discretionary under the 2004 directives, the 2011 Commission proposal made this mandatory where a judgment had been entered against a company, but subject to new rules on the ability of companies to 'self-clean'.[156] Further mandatory exclusion grounds, relating to child labour and human trafficking, were added by the European Parliament during the

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[150] Article 76.2 of COM (2011) 896 final

[151] In its final version, the light touch regime was extended to cover certain legal services as well as social, health, educational and community services.

[152] SGAE (2011), p 64-66

[153] European Parliament (2010a)

[154] Article 45.1 of Directive 2004/18/EC.

[155] Joined cases C-226/04 and C-228/04 *La Cascina Soc. coop. arl and Zilch Srl v Ministero della Difesa and Others and Consorzio G. f. M. v Ministero della Difesa and La Cascina Soc. coop. arl*

[156] As set out in Article 55.4 of the proposal

trilogue process.

The self-cleaning provision was intended to balance the ability of contracting authorities to exclude disreputable bidders against the right of companies not to be unfairly blacklisted, for example where they have fully addressed the causes of previous misconduct. The Green Paper had raised the prospect of harmonising rules on self-cleaning, however it did not mention tightening the grounds relating to tax and social security. Germany had expressed its support for common EU rules on self-cleaning, while France and the UK were against this.[157] Ultimately, while both the mandatory tax and social security exclusion and the self-cleaning rules were maintained in the final version of the directive, their effect was softened by providing for the tax and social security exclusion to be waived where it would be disproportionate, or where a period of five years had passed from the date of conviction.[158]

Discretionary exclusion grounds

A new discretionary ground of exclusion was proposed for bidders who did not comply with EU environmental, social or labour law or certain international instruments. The latter were limited to the core International Labour Organisation (ILO) conventions and several environmental conventions ratified by all member states. This formed the germ of what would later become the 'mandatory social clause', following heavy amendment and extension by the European Parliament – in particular to include national laws and collective agreements.[159] The scope and the effect of this provision are subject to ongoing debate,[160] with some commentators taking the view that it is of little significance as it merely states the ability to enforce general legal obligations in the context of public contracts. This observation seems correct in respect of the Commission's original proposal, which did not create any new obligations on contracting authorities. However, the wording in the adopted directives does create a general duty on member states to ensure that such laws are respected in the performance of public contracts – thereby increasing both the visibility and the enforceability of environmental, social and labour obligations in public contracts. More concretely, the obligation to comply with environmental, social and labour laws and collective agreements can form the basis for requiring the replacement of a subcontractor or for rejecting a tender, and such rejection is mandatory where a tender is found to be abnormally low due to non-compliance with environmental and social rules.

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[157] Bundesregierung (2011), p 4; Cabine Office (2011), p 21; SGAE (2011), p 68.
[158] Unless the judgment itself provides for a longer period of exclusion, as set out in Art. 56.7 of Directive 2014/24/EU.
[159] Article 18.2 of Directive 2014/24/EU
[160] See Wiesbrock (2015), Semple (2015a), Andrecka and Mitkidis (2017).

Production processes in technical specifications

A longstanding debate had taken place between the Commission, Court, member states and various academic commentators regarding the possibility to address production processes and methods in technical specifications.[161] The Commission's original position was that such methods could only be specified if they were somehow discernible in the end product, a concept which it described as 'affecting the material substance' of what was being purchased.[162] Forgiving the arcane terminology momentarily, the Commission's objective seemed to be preventing discrimination between identical products based on factors likely to be linked to their origin, which would have the potential to undermine the free movement of goods. However, this restriction also had the effect of casting doubt upon many environmental criteria, which by definition were concerned with production processes as much as the final product – renewable electricity and organic food being indistinguishable in most respects from their conventional counterparts, for example. The Court's judgment in the *EVN and Wienstrom* case appeared to place a nail in the coffin of the Commission's approach, as it endorsed the use of an award criterion based on renewable energy.[163]

The Commission's proposed new provision on technical specifications not only endorsed references to production processes, but also to other stages of the life-cycle (for example the use period or end-of-life). The importance of these elements in delivering GPP had become increasingly important through the work done to develop common criteria. However, the loosening of the rules on specifications was accompanied by a new reference to the requirement for a link to the subject-matter, an idea which had previously only applied in relation to award criteria. This was explained by The Commission as precluding requirements for general corporate social or environmental responsibility commitments, for example – however it may in fact place more profound restrictions on environmental and social criteria as many production stage impacts cannot be meaningfully addressed at the level of individual products or services.[164] The final text of the directives contains an explicit refutation of the requirement for specifications to have an effect on the 'material substance' of a product or service; this appears to have been inserted by the Council for good measure.[165]

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[161] For a summary of this debate see Kunzlik (2009)

[162] This distinction appears to have been inspired by the 1991 ruling of the GATT dispute resolution panel in *United States—Restrictions on Imports of Tuna*, DS21/R (*Dolphin-Tuna I*), which held that restrictions on imports based on production methods which had no discernible impact on the end-product violated the equal treatment requirement under the GATT.

[163] Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527

[164] For discussion of the potential limitations of the link to the subject-matter requirement, see Semple (2015a).

[165] Council of the European Union (2012q); Article 42.1 of Directive 2014/24/EU.

Labels

The importance of third-party certification schemes in supporting GPP had become clearer in the period since the adoption of the 2004 directives. Significant resources had been invested in the development of such labels both at national and EU level (through the development of the EU Ecolabel). Given the inability of contracting authorities to verify all environmental claims made about products and services during tender procedures, the importance of objective and reliable labels was recognised by the Commission and member states. The labelling organisations themselves were also active lobbyists and took a keen interest in the consultation and reform process. The Commission's proposal seeks to strike a balance between increasing the ability of contracting authorities to insist upon third-party labels, and avoiding foreclosure of markets by restricting references to labels which are proprietary or otherwise unavailable to the market as a whole. It does this by setting down a number of procedural and transparency requirements for the types of labels which may be referred to in tender documents. The German federal government in particular had expressed its support for such a position.[166] Amendments during the trilogue resulted in a slightly stronger ability on the part of contracting authorities to insist on third-party certification.[167] However both the original wording proposed by the Commission, and the final version adopted, add considerably to the complexity of using labels in procurement, thus potentially undermining the objectives of the provision.

Possibility to reject tenders for non-compliance with environmental, social and labour law

The proposal contained an option for contracting authorities to reject tenders which did not comply with the same EU and international laws referred to in the discretionary ground of exclusion discussed above.[168] Whereas the exclusion ground discussed above is retrospective (i.e. it relates to events prior to the tender competition), this provision appears to be based upon the evaluation of tenders, for example to determine whether they comply with EU directives on employment equality or working time. However the Commission's draft of this provision only refers to EU law and certain international conventions, limiting its impact. This clause became more powerful in the course of the trilogues at the instigation of the European Parliament, as explained above and further explored in Chapter six.

Environmental management systems

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[166] Bundesregierung (2011), p 3

[167] In particular, by limiting the situations in which bidders may rely on 'technical dossiers' (self-declarations) in lieu of a third-party label to situations in which they have no opportunity to obtain a label, for reasons which are not attributable to the bidder. Article 43 of Directive 2014/24/EU.

[168] European Commission (2011f), Article 54.2

The Commission's proposal included the apparent widening of the ability to select tenderers based on their ability to apply environmental management measures, and to request third-party evidence of this. Under the 2004 Directives, this was possible only for service and works contracts, whereas the proposal extended this to all forms of contract including supplies.[169] This relatively subtle change was not highlighted anywhere in the Green Paper or documents accompanying the proposal. Its origins may lie in the Commission's desire to promote the application of the EU's own environmental management scheme, EMAS.

Award criteria

The relaxation of the 'material substance' requirement in relation to technical specifications was also extended to award criteria. This effectively meant that factors relating to production or to any other life-cycle stage could be taken into account when distinguishing between bids and awarding marks. The Commission's proposal maintained the link to the subject-matter requirement first articulated by the Court in the *Concordia* case, which prevents general corporate practices being taken into account.[170] France had expressed its support for a relaxation of this requirement[171], while Germany and the UK favoured retaining it.[172] It was not until the Court issued its judgment in *Max Havelaar*, mid-way through the negotiation process for the new directives, that the Council and Parliament moved to include social characteristics, such as fair trade production, in the provisions on award criteria. The Commission's proposal referred only to environmental and innovative characteristics.

Life-cycle costing

The directives had never contained prescriptive rules regarding how costs are to be evaluated, however under the 2004 directives if the 'lowest price' basis was chosen for award then only price, and not any other costs, could be taken into account. Life-cycle costing involves assessment of all of the costs of ownership of a particular asset, for example the cost of electricity used by IT equipment or fuel used by cars, as well as maintenance and disposal costs. It is generally considered to favour environmentally sustainable goods and services,

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[169] European Commission (2011f), Article 61.2 and Annex XIV Part II (f)

[170] For example, while an award criterion might evaluate the carbon emissions associated with production and use of the particular product being purchased, it could not evaluate the overall carbon footprint of the company.

[171] SGAE (2011), p 43-44

[172] Bundesregierung (2011), p 2 and p 4. The UK submission argued in favour of maintaining the LtSM requirement on the basis that "Procurement is about buying goods / services that are needed and if you lose the link to the subject matter of the contract, then there is a risk that procurement becomes more about pursuing other agendas rather than serving the purpose of procuring the goods/service that is needed. Procurement should remain about what is being procured, but if other policy aims that are relevant to the procurement can be achieved at the same time, then that is a bonus. We do not think that procurement should be used as a main lever to achieve a particular policy line." (Cabinet Office 2011, p 18)

which may have a higher up front purchase price (such as the higher cost of insulation in an energy-efficient building) but save costs in the longer term. As such the inclusion of explicit rules on life-cycle costing in the proposal was presented by the Commission as a major step in supporting GPP. The rules set out aimed to ensure that methods for life-cycle costing would be transparent and that bids would be compared on an equal basis. They also specifically allowed the inclusion of 'external environmental costs' – such as those attributed to greenhouse gas emissions. As with the provision on labels, the Commission's draft article on life-cycle costing seeks to balance promotion of its use with avoidance of discrimination against bidders through the gerrymandering of methodology. The resulting provision was complex in its wording, and became more so in the course of the legislative process.

Subcontracting

The Commission acknowledged in the Green Paper that some stakeholders had called for stronger rules on subcontracting in public contracts. The ability under EU law for operators to subcontract some or even all of a contract had long been seen as a way of circumventing various rules, including environmental or social requirements such as wage agreements. This arose for example in the *Rüffert* case, discussed in Chapter four. However the Commission's proposed new provision on subcontracting was relatively anaemic, stating only that contracting authorities could require bidders to indicate the share of the contract they proposed to subcontract and the names of subcontractors. There was also an acknowledgement that direct payments could be made to subcontractors – a measure intended to support SMEs. In the course of the negotiations, and largely at the instigation of the European Parliament, the provisions on subcontracting became more extensive and stronger, allowing the application of exclusion and selection criteria to subcontractors and explicitly requiring their compliance with environmental, social and labour law. This reflected concerns in the richer member states about subcontracting being used to circumvent labour law and collective agreements.

Abnormally low tenders

A final feature of the Commission's proposal which addresses environmental and social concerns is the inclusion of an explicit requirement to reject tenders which are 'abnormally low' if this is due to non-compliance with the same EU and international obligations referred to in the discretionary exclusion grounds and compliance clause. An abnormally low tender was defined in the proposal by reference to the average value of the other tenders received – a definition which was removed during the trilogues, leaving it up to individual member states or contracting authorities to identify abnormally low bids. The objective of preventing social dumping can be discerned in the Commission's original text, however this is very much weaker than the provision ultimately adopted, again due to the

inclusion of national law and collective agreements in the final text.

Agency or entrepreneurship?

Did the Commission play the part of a supranational policy entrepreneur in introducing new social and environmental aspects in the draft procurement directives? Or did it rather act as an agent of the member states, putting forward only those policies which either already had support at national level or were likely to garner such support in the legislative process? The Monti report and the Commission's response in October 2010 suggested that a window of opportunity had opened for advancing the single market, but that progress was dependent upon securing buy-in from more sceptical member states, in particular through the deeper integration of environmental and social policies within the fabric of the single market, including the public procurement rules. The Green Paper consultation tested the appetite for such measures amongst member states, businesses and civil society groups, establishing basic parameters for the legislative proposals which were to follow. The Commission also drew upon extensive research regarding the impact of horizontal policies on procurement outcomes such as cost and cross-border competition, which provided some reassurance that such policies were not inimical to the values of free movement and open markets.

Taking a broad view of the mandate set out in the Lisbon Treaty to create a social market economy, the Commission's proposals seems to sit well within the competences bestowed upon it by member states. It is also clear that France, Germany and the United Kingdom (as well as many other member states) were generally supportive of SPP, although their views differed on the specific mechanisms for pursuing this under the directives and the extent to which further EU harmonisation was desirable. The Commission could have pursued a much stronger approach to integrating horizontal policies in its proposal, for example by introducing mandatory common criteria, or by incorporating sector-specific requirements set out in other EU legislation in the text of the draft directive. On the other end of the spectrum, it could have avoided introducing any new SPP provisions. Instead it chose a relatively conservative, incremental approach – balancing modest increases in the ability of contracting authorities to pursue SPP with a number of new safeguards, including the self-cleaning rules and an expanded link to the subject-matter requirement. While the fact that it acted conservatively does not completely rule out the possibility that it acted as a policy entrepreneur, it suggests that the Commission did not take any significant risks.

As noted in chapter 2, the Commission devoted considerable resources to promoting green procurement in the years leading up to the reform of the directives. Strong support for

this existed at national level in only a handful of member states prior to 2008.[173] Support for, and implementation of SPP was higher amongst local and regional authorities.[174] Efforts to bring national governments on board proceeded during the period 2008-2011, with the Commission's Directorate-General for the Environment coaxing member states to adopt the national action plans on GPP envisioned in its 2008 communication. The Council had endorsed the Commission's communication in 2008, adopting a 'political indicative target' for 50 percent of all procurement procedures to comply with green criteria.[175] While an evaluation carried out in 2012 indicated that this target had not been met,[176] the existence of a prior policy commitment was used by the Commission to support the inclusion of further-reaching environmental provisions in its 2011 proposals for new directives.

In contrast, the Commission was distinctly less supportive of the inclusion of social considerations in public procurement in the period preceding the reform. This reflected its concern that social criteria would be used by member states as an excuse not to open their procurement markets to cross-border bidders, and in particular to undermine competitive advantages held by the new accession states. This concern is perhaps most evident in the 2011 *Buying Social* guide published by the Directorate-General for Employment, Social Affairs and Equal Opportunities. While acknowledging the possibilities to address issues related to employment opportunities, labour rights and social inclusion in public contracts, the guide makes little mention of wage guarantees or fair trade procurement, although by 2010 these were well established, in particular amongst local authorities (Barnard 2011). It also proffered a restrictive interpretation of the judgment in the *Nord-Pas-de-Calais*[177] case, in which the CJEU had rejected a complaint brought by the Commission against the use of public contracts to combat local unemployment in the economically deprived French region. Support for projects, training, common criteria or targets for social procurement was not forthcoming from the Commission, despite the strong interest in this from local and regional governments, NGOs and trade unions.[178]

Environmental and social aspects in public contracts engage different interests, with a clearer potential for intra-Union 'losers' where social criteria are applied. This can be seen most clearly in the tension between low and higher-wage member states in the *Laval* quartet

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[173] Notably in Austria, Finland, Denmark, Sweden and the Netherlands.
[174] For example the cities of London, Copenhagen, Helsinki, Barcelona and Vienna and the Lombardy, Piedmont, Catalan and Basque regional governments all had active policies in the period prior to 2011.
[175] Council of the European Union (2008)
[176] Centre for European Policy Studies/College of Europe (2012)
[177] Case C-225/98 *Commission v France*
[178] This can be seen in many of the submissions to the 2011 consultation on the draft directives, which note the lack of support at EU level for social procurement. The content of these submissions is discussed in chapter 5.

of cases, discussed in the next chapter. Linking the award of public contracts to support for local unemployment projects also has the potential to disadvantage not only cross-border bidders, but also those based in competing regions within the same country. In contrast, the use of environmental criteria does not tend to discriminate against bidders from elsewhere within the EU, especially as the market for sustainable goods and services has grown over time. Environmental protection became mainstreamed within EU policy during the late 1990s and early 2000s, meaning there were clear links to be made between GPP and other areas of Commission activity. While the same might be said in relation to employment equality and combatting social exclusion, these issues tend to engage debates on the left-right spectrum which are a primary focus of national politics in most member states. In the absence of consensus regarding the legitimacy of using public contracts to support social objectives, any policy adopted by the Commission in this domain would carry distinct risks.

The contrasting actions taken by the Commission in these two policy areas appear to reflect the collective preferences of the member states – with consensus on the validity of green procurement but divisions on the validity of social procurement. The also reflect the Commission's primary concern with the internal market, and its gradual acceptance of other policy considerations where these do not impede free movement of goods and services. Plausibly, the member states may have empowered the Commission to act as guardian of single market principles, even where these conflict with their more immediate political interests, or those of regional and local authorities. The logic of delegation here calls for some scrutiny; should we expect member states to be more or less willing to delegate policy development to the Commission where this is likely to conflict with powerful domestic interests? While member states may have empowered the Commission to act as guardian of the single market, it is difficult to argue without some contortions that their interests are behind litigation taken by the Commission against them on allegedly protectionist procurement practices, or the choices made by the Commission regarding which interest groups to support. While member states delegated general powers to the Commission to build and enforce single market rules, they may not have fully appreciated how evolving horizontal policy demands on public procurement would challenge these rules. These actions appear to fall within the realm of 'unintended consequences' contemplated by neofunctional theory.

However close comparison of 2011 proposal for new directives, and the text ultimately adopted by the Parliament and Council in 2014, also invites scepticism about the extent to which the Commission acted as a supranational entrepreneur. By definition, none of its proposals were irreversible, as all were subject to negotiation within the codecision process. The most significant GPP measures introduced by the Commission, relating to labels, life-

cycle costing and the link to the subject-matter, are primarily concerned with limiting the discretion available to contracting authorities in order to ensure transparency and protect free movement within the single market. Despite its investment of resources to support GPP, the Commission did not take risks by proposing common mandatory criteria or by relaxing rules on competition in order to deliver environmental benefits in particular sectors. This applies *a fortiori* to the social measures included in the proposal; only the reservation for disabled and disadvantaged workers could be described as an innovation in this regard – and many of the Commission's more modest proposals were expanded upon by the Parliament. While the 2011 text did mark an evolution compared to the Commission's earlier stance on social procurement, it is difficult to see it as a first mover or entrepreneur in this regard, as social procurement was already well established (if legally fraught) in many member states.

More plausibly, the Commission can be seen acting as an agent of multiple principals in its attempt to balance horizontal objectives with its core task of building the single market. Where agents are responsible to multiple principals, one of their core tasks become mediating between these interests to facilitate collective decision-making. As the Monti report was at pains to show, there was a lack of consensus amongst member states regarding the legitimacy of deeper single market integration if this did not take sufficient account of environmental and social policies – but also a lack of consensus about the content of such policies. As will be seen in Chapter four, the potential for conflict between public procurement rules, free movement of workers, and minimum social protections had been brought to the fore by the CJEU's 2008 judgment in the *Rüffert* case. This judgment, together with those in *Laval* and *Viking*, opened a fault line between those member states sending workers abroad (primarily in the east and south) and those receiving them (primarily in the west and north). The Commission would have been highly conscious of treading along this fault line in proposing new rules on procurement, and avoiding any new cracks. While green procurement was not as divisive, mandatory measures which introduced new costs or administrative challenges would have faced opposition in member states undergoing financial austerity, as well as those still struggling to implement the basic requirements of the EU public procurement *acquis*.

A rational agent in such a situation would attempt, as the Commission did, to introduce rules which accommodated SPP to the extent that these did not interfere with the basic free movement principles or impose unacceptable costs on member states. Did its proposals further EU integration? The rule types and increases in precision, authority and formality identified in Chapter 1 were all present in the Commission's original draft of the directives. Despite the voluntary nature of the SPP measures included in the proposal, where member states or contracting authorities do opt to use these provisions, detailed rules which are

legally binding and subject to the CJEU's supervision apply. In rejecting the idea of common mandatory measures, the Commission stopped short of promoting harmonisation in this politically and economically important policy domain. It also did not claim significant additional powers for itself, other than those which follow from its role in enforcing the procurement rules. This approach fits well with the idea of a conditionally empowered agent which seeks to manage policy externalities and facilitate collective decision-making (Hawkins et al 2006). While the Commission's actions may correspond in a general sense with the idea of an agent mediating between member state interests regarding deepening of the single market and environmental and social policies, it remains to be seen if its actions specifically aligned with the preferences of the three largest member states – or perhaps with other actors interested in the reform. This question is the focus of Chapter 5.

Conclusions

Returning to the four hypotheses outlined at the beginning of this chapter, analysis of the Commission's actions in the period 2010-11 casts serious doubt upon hypothesis H1 in respect of the Commission (that it acted as a supranational policy entrepreneur in its proposed public procurement reforms.) Even without knowing the detailed preferences of the largest member states or other actors, it is clear that the Commission was neither the first mover on SPP, nor did it take any significant risks in the measures it proposed in the draft directives. If we stretch the idea of a policy entrepreneur to include cautious or risk-adverse entrepreneurs, we would still expect to find evidence of the Commission advancing its own interests or increasing its own powers in some way. While the introduction of more precise and formal rules might be expected to increase the Commission's workload in terms of providing guidance and enforcement, ultimately the power to interpret and apply such rules vests in the Court of Justice, not the Commission. Only if we accept the idea of a 'joint venture' between the Commission and Court can the 2011 proposals plausibly be seen as an act of supranational entrepreneurship. As Chapter four will show, in fact the Court repeatedly placed itself in opposition to the Commission on the role of environmental and social concerns in public procurement, including during the reform process itself.

Conversely, based on analysis of the Commission's actions alone we cannot reject hypothesis H2 that it acted as an agent of the member states in proposing new SPP measures. While many of the proposed measures appear to be novel and cannot readily be linked to the responses of France, Germany or the United Kingdom to the Green Paper, this does not mean they were fully 'made in Brussels'. An agent may sometimes anticipate the preferences of its principals, or may glean them based on past interactions. Any agent with multiple principals will have to depart from some of their preferences some of the time (but is unlikely to depart from all of their preferences any of the time). In this case the

Commission had insight into both the level of ambition regarding SPP amongst the member states, and the constraints or competing policy interests which they faced. The need to find compromises between those states with higher and lower levels of ambition and tolerance, particularly in the fraught area of social conditions and free movement of workers, would have pointed a diligent agent towards measures which allowed individual member states and contracting authorities to strengthen horizontal policies in procurement, without making this mandatory. Ultimately, many of the Commission's carefully worded provisions were modified by a European Parliament which had stronger ambitions in the social field, and some of these changes were accepted by the Council. This does not in itself undermine the idea that the Commission acted as an agent of the member states in proposing less ambitious provisions; national preferences may have shifted during the negotiation process and trade-offs been sanctioned to achieve bargaining priorities.

The process leading up to the Commission's proposal for new procurement directives in December 2011 was marked by its renewed ambitions for the single market. The extent to which the member states shared this enthusiasm was largely untested at the time of the proposal, and the Commission's agenda certainly was not realised within its envisioned time frame. Member states had recently fought back against the perceived overreaching of the Commission in the public procurement field, with Germany challenging a Commission Interpretative Communication on the rules applicable to contracts outside of the directives.[179] What emerges clearly from analysis of the public procurement proposal is that while the Commission took seriously Monti's counsel that environmental and social concerns would need to be addressed to maintain support for the single market, it eschewed a mandatory approach and in many areas sought out compromises between these objectives and its more traditional preoccupation with competition, which ultimately led to a significant increase in the complexity of EU procurement law. To what extent did this approach reflect the policy preferences of the three largest member states? To what extent did it play into the hands of the Court of Justice and European Parliament, which stood ready to fill in any gaps in the emerging directives? These questions will be examined in the chapters which follow.

[179] Case T-258/06 *Germany v Commission*. See discussion of the case in Chapter 4.

Chapter 4 - The Court of Justice and Non-market Objectives in Public Procurement

The questions to be addressed in this chapter are i) whether the Court of Justice can be seen to act as a supranational policy entrepreneur or as an agent of the member states in its procurement jurisprudence and ii) whether its judgments are irreversible or subject to recall by member states. I seek to test the same two sets of incompatible hypotheses applied in Chapter three. To do this, I analyse four key judgments issued by the Court in the period 2001-2012, which dealt with environmental and social aspects of public procurement. The first two cases, *Concordia Bus v City of Helsinki*[180] and *EVN Wienstrom v Austria*[181], were decided prior to the adoption of the 2004 directives but continued to shape procurement law and practice on environmental aspects during the period of the 2011-14 reform. The two later cases, *Rüffert v Lower Saxony*[182] and *Commission v The Netherlands* (*Max Havelaar*)[183] were decided in 2008 and 2012 respectively – the latter in the middle of the procurement reform process. In each of these cases, the Court had to decide if non-market objectives were compatible with the Treaty principles of free movement, non-discrimination, transparency and proportionality as these apply to the award of public contracts. In all but one (*Rüffert*) it based its judgments on detailed analysis of the text of the procurement directives as well as on these principles.

The impact of these judgments was felt beyond the relatively narrow realms of EU procurement law, and they played a role in expanding the number of civil society groups active in this field. Many public bodies, from small local authorities through to national governments, followed the Court's case law closely in this area, as did the other EU institutions.[184] The four procurement cases discussed here should be seen in the context of the Court's wider jurisprudence in this period which concerned the interaction between market and non-market objectives under the Treaties. This includes prominent judgments relating to renewable energy support schemes (*PreussenElektra,*[185] *Ålands Vindkraft*[186] and *Essent Belgium*[187]) and the Posted Workers Directive (*Laval*,[188] *Viking*[189] and *Commission v*

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[180] Case C-513/99 *Concordia Bus Finland v Helsingin kaupunki and HKL-Bussiliikenne (Concordia)*
[181] Case C-448/01 *EVN AG and Wienstrom GmbH v Republic of Austria (EVN)*
[182] Case C-346/06 *Dirk Rüffert v Land Niedersachsen (Rüffert)*
[183] Case C-368/10 *European Commission v Kingdom of the Netherlands (Max Havelaar)*
[184] This is evident from the responses by local and regional governments to the Green Paper consultation on public procurement (discussed in Chapter 5) and the European Parliament's own initiative reports on public procurement in 2010 and 2011 (discussed in Chapter 6).
[185] Case C-379/98 *PreussenElektra AG v Land Schleswig-Holstein (PreussenElektra)*
[186] Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten (Ålands Vindkraft)*
[187] Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt (Essent Belgium)*
[188] Case C- 341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet et al (Laval)*
[189] Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP et*

Luxembourg[190]), amongst others. In *PreussenElektra*, *Vindkraft* and *Essent Belgium* the Court had accepted that the restrictions placed on free movement by renewable energy support schemes which were available only to national suppliers were proportionate to the objective of environmental protection, in the absence of a fully harmonised EU energy market. Conversely, in the *Laval* quartet of cases, the Court found that measures aimed at protecting wages and working conditions which interfered with the free movement of workers under the Posted Workers Directive were not justified. While these cases varied in terms of the specific questions they addressed, they show a pattern of the Court being relatively more lenient in its review of environmental measures compared to labour protection measures. This pattern extended to its public procurement jurisprudence, and can be seen to influence the Commission's differentiated approach to green and social procurement, noted in Chapter one.

Market and Non-market Objectives

The terms 'non-market' or 'non-economic' are used in the EU context to refer to objectives which fall outside of the Union's basic competence to regulate the internal market. This includes everything from environmental protection and human rights through to health and safety, cultural diversity and animal welfare. The majority of these areas now have an explicit legislative basis in the Treaties, for example the requirement under Article 11 TFEU to integrate environmental protection requirements into the Union's policies and activities, and the adoption of the Charter of Fundamental Rights under the Treaty of Lisbon. Before these explicit Treaty bases existed, the Court had interpreted EU competences in a way which encompassed certain non-market objectives; environmental, social and regional policies were all first developed under the general competence clause (Article 100 EEC).[191] In *Internationale Handelsgesellschaft* the Court held that human rights formed 'an integral part of the general principles of law protected by the Court of Justice' which were protected within the 'structure and objectives of the Community.'[192] In *Tobacco Advertising I*, the Court appeared to establish a limit to the use of the internal market competence, holding that this did not permit EU regulation based exclusively on health concerns.[193] Nevertheless, many non-market objectives continue to be addressed in legislation which is formally

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al (Viking)

[190] Case C-319/06 *European Commission v Grand Duchy of Luxembourg* (*Commission v Luxembourg*)

[191] The first EU Environmental Action Plan was adopted in 1973, although a formal Treaty basis did not exist until the Single European Act in 1986.

[192] Case 11/70 at para. The context for this case was provided by increasing unease within national constitutional courts (in particular in Germany and Italy) during the late 1960s that fundamental rights were not adequately protected within the EU legal order. The Court's stance can therefore be seen as defensive or reactionary as much as activist in its assertion that such rights do form part of EU law.

[193] Case *C-376/98 Germany v Parliament and Council (Tobacco Advertising I)*. See discussion of this and the *Tobacco Advertising II* case in Chapter 2.

adopted under internal market powers, with the procurement directives providing a clear example of this.

The dividing line between market and non-market objectives is often blurred. De Witte (2012) notes that while pursuing non-market objectives may have an economically beneficial effect in some cases, economic cost/benefit analysis is not their driving concern. In the procurement context, measures promoting employment on public contracts of disadvantaged workers pursue both social and economic objectives, and life-cycle costing is a measure which pursues both economic and environmental aims. For this reason, the term 'non-market' is preferred here to 'non-economic' to designate objectives which fall outside of the EU's internal market competence as defined by the Court. The conflict between the essentially deregulatory agenda associated with removing barriers to free movement on the one hand, and environmental and social protections on the other, has also come before other international courts and tribunals, such as the WTO dispute settlement body.[194] Reid (2017) notes that while the CJEU has often given effect to non-market interests even where they conflict with internal market rules (usually by applying a proportionality test), it has not done so in a consistent way in reviewing acts of the EU institutions. She also finds an asymmetry in the way the Court has applied the proportionality test where market and non-market objectives conflict: asking whether environmental or social protection measures can be justified despite interfering with market freedoms, rather than asking whether market freedoms can be justified despite interfering with other rights which the Treaties place on equal footing.[195]

The potential for conflict between market and non-market aims might be expected to come into sharper relief during times of slower growth, such as that which took hold in Europe following the financial crisis and sovereign debt crises of 2008-2010. On the one hand, national governments experienced stronger demands in terms of social protection and welfare spending, while the EU was expected to take greater responsibility for supervising fiscal responsibility. Environmental programmes and commitments were not abandoned, but these were generally seen as less pressing than the restoration of growth and employment. The tensions between these agendas were clearly noted in the Monti report. At the same time, the effects of the 2004 and 2007 enlargements of the Union were only just becoming clear during the period 2008-2010, when the *Laval* quartet of cases interpreting

[194] Kelemen (2001) compares GATT/WTO case law on trade-environment disputes with that of the ECJ, finding that the relative strength of political and legal pressures on both bodies may explain their rulings in this area.
[195] Reid (2017) at 80-85. In Case 271/08 *Commission v Germany,* which concerned the direct award of public contracts to pension providers, the Court applied a more balanced proportionality test based on an equal ranking for social rights and economic freedoms.

the Posted Workers Directive were decided. It is in this context that the Court's role in adjudicating social and environmental claims under the procurement rules must be placed, in order to understand the political impact of its judgments.

Evaluating the Court's Role – Theoretical and empirical approaches

Given the fraught task of reconciling market and non-market objectives, as well as the contested boundaries of EU integration, the Court's legitimacy as a political, as well as judicial actor, in the areas of social and environmental policy has attracted considerable debate and scholarship. As discussed in Chapter two, early approaches to the Court, and those informed by comparison with the U.S. Supreme Court in particular, focused on the extent to which ECJ judges were 'activist' in their interpretations of EU law. More recently, theoretical and empirical work has focused on the question of whether the Court can be seen to act as an agent of the member states in furthering EU integration. Carrubba, Gabel and Hankla's (2008; 2012) research tests the theory put forward by Garrett (1992) and Garrett and Weingast (1993) that the Court is constrained by the preferences of the most powerful member states. They do so by analysing a large data set of infringement, annulment and preliminary reference cases from 1987-1997 and the observations submitted by member states, which they code as either supporting or opposing the Court's position. They argue that their findings provide systematic evidence that threats of legislative override and of non-compliance by member states have a substantively large effect on the Court's rulings.

Stone Sweet and Brunell (2012) refute the claims made by Carrubba, Gabel and Hankla and question their research design. In particular, they argue that credible threats of legislative override are extremely rare in the EU context, and that even where such credible threats do exist, they are not necessarily the cause of Court decisions which favour positions supported by a qualified majority of member states. Carrubba, Gabel and Hankla assume that the threat of non-compliance constrains the Court's decisions in all cases except where its position is supported by a qualified majority of other member states, as only in such cases would a non-compliant member state be 'punished.' Analysing the same data set, Stone Sweet and Brunell argue that a credible threat of override only existed in a tiny proportion of the cases. However, neither analysis takes into account the positions of member states which did not submit observations in a case[196] – because reliable data on this is very difficult to come by. Carrubba, Gabel and Hankla and Stone Sweet and Brunell also disagree on the

[196] Carruba, Gabel and Hankla assume that where one or more member states attach high significance to an issue they will be able to assemble a qualified majority or even unanimity through 'logrolls', where concessions in one area are traded for favours in another. Although examples of this do exist, it clearly does not apply in all cases where a member state has a strong preference. Cases in which more than a handful of member states submit formal observations are rare.

significance of the fact that so few real cases of legislative override occur in the EU context – for the former this suggests that the Court has systematically adjusted its rulings to avoid this outcome. This view is intriguing from a separation of powers perspective, as it means that the Court effectively pre-empts the political resolution of collective action problems. But it is also impossible to test, unless the Court itself states that its decision takes account of the risk of override.

More recent empirical work carried out by Larsson and Naurin (2016) relies upon the reports for hearings which were prepared for most CJEU cases prior to 2012, and which include a summary of the positions taken by different member states. Analysing a large sample of these reports from 1997-2008, they look for evidence of a systematic impact of member state preferences on judgments. Their research design takes account of the fact that in most situations the Court does not have enough information about the political risks of either non-compliance or legislative override to engage in sophisticated strategic action vis-à-vis member state preferences. Nevertheless, they find "a strong correlation between member states' signalled preferences and the decisions of the CJEU, in a pattern that goes beyond legal merit, and that is difficult to explain without reference to the override mechanism." They find evidence to support hypotheses that member states' observations have more influence over CJEU decisions where override can be pursued by qualified majority (rather than requiring unanimity) and where it can be pursued by the Council without seeking approval from the Parliament. They also find that member state observations are more influential where they support, rather than oppose, further integration.[197] But Larsson and Naurin's summary of their own findings is relatively modest: 'State governments are crucial parts of the broader audience that defines the political boundaries of judicial discretion.' It would be very surprising if this were not the case.

What is more controversial, and which is implied by the theory that member state preferences constrain the Court's jurisprudence, is the idea that the Court begins with an analysis of the likely political impact of a decision and reasons backwards to arrive at its judgments regarding the interpretation and application of law to individual cases. This is controversial because it is the exact opposite of the way the CJEU presents its own legal reasoning in judgments, suggesting that such reasoning is fundamentally disingenuous.[198]

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[197] Larsson and Naurin hypothesise that this will be the case because, assuming that the Court favours more integration in most cases, support for this position from only a small number of MS will be enough to block legislative override. Their data shows that the correlation between pro-integration observations and judgments is four times larger than that between anti-integration observations and judgments. However the broader implication of this finding for intergovernmental theory is that the Court effectively promotes integration even in the face of member state opposition.

[198] Compared to other supreme or constitutional courts, analysis by the CJEU of the political impact of its own rulings is exceedingly rare.

Stating that the CJEU takes member state positions (as expressed in their observations) into account is not controversial – but it also does not suggest that political concerns trump legal doctrine. It is equivalent to stating that the political organs of the EU take the Court's position into account when formulating or revising legislation. Neither observation provides much support for either supranational or intergovernmental accounts of EU integration, because they effectively cancel each other out. Crucially from the perspective of the hypotheses I test here, the fact that the Court takes account of Member State observations does not invalidate the idea that it acts as a policy entrepreneur. Taking account of the positions and interests of member states in itself does not imply a principal-agent relationship. In fact, it may be a sign that no such relationship exists, because if it did then the Court would be obliged to conceal it to maintain its credibility. The CJEU often adopts positions which do not have the support of a qualified majority of member states; a clear example in the procurement context is provided by *Rüffert*, discussed below.

Blauberger and Schmidt (2017) argue that empirical studies showing a relationship between state preferences and Court judgments do not undermine the independence and power of the Court, due to the EU's 'over-constitutionalisation' (Grimm 2016). This arises from the scope and detail of the Treaties and the relative difficulty in amending them, as well as the Court's unique role in interpreting the Treaties. They also question the premise that national governments intervene rationally in all cases which affect them – they may not intervene due to lack of resources, domestic disagreements on desirable outcomes from CJEU cases, or a desire to shift blame for a particular policy change to the EU.[199] Domestic 'non-decisions' may also result from CJEU case law (particularly in areas of negative integration), but are very difficult to trace on a large scale. An example of this in the procurement context can be seen in the UK government's issuing of guidance on steel procurement in 2015.[200] The clear intention of this policy was to protect the UK steel sector from price competition from lower cost foreign producers, however discrimination based on nationality was ruled out by the Court's interpretation of the Treaty requirements of free movement and non-discrimination in its procurement case law (as well as the directives). The policy therefore focuses on application of criteria linked to health and safety, environmental compliance and life-cycle costing as ways of counteracting the price advantages of foreign steel. In the absence of CJEU case law, a 'Buy British' approach might well have been adopted.[201]

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[199] Granger (2004) identifies an unequal influence of Member States on Court proceedings due to different participation policies as well as human, material and organisational resources.
[200] Cabinet Office, Procurement policy note 16/15 *Procuring steel in major projects*
[201] The steel sector has been identified as one of those which the UK Government may wish to target with

Neither Carrubba, Gabel and Hankla nor Naurin and Larsson test a control hypothesis such as: *where little or no risk of legislative override exists, the Court will issue pro-integration rulings despite revealed MS preferences against this*. As well as offering insight into the relative strength of supranational and intergovernmental explanations of the Court's actions, such a hypothesis would allow a larger n analysis due to the relative prevalence of scenarios where no real risk of override applies. Davies (2014) observes that the risk of legislative override is small in the EU context relative to other jurisdictions such as the United States, due to the frequency with which the Court links its judgments to Treaty interpretations. Despite this, he identifies three techniques adopted by the Court to avoid legislative constraints: annulment, emasculatory interpretation, and avoidance. Davies presents examples from the Court's jurisprudence on EU criminal law (*Pupino*[202]), consumer rights (*TestAchats*[203]), work-related benefits (*Vatsouras*[204]), patient mobility (*Decker* and *Kohll*[205]) and citizens' rights (*Surinder Singh*[206] and *Ruiz Zambrano*[207]) in which the Court has employed one of the three techniques. Questioning the legitimacy of these techniques where they directly undermine the expressed policy choices of the EU legislature, Davies argues in favour of 'co-interpretation' of Treaty principles by the Court and legislative institutions. For example, in the internal market sphere, this might involve adopting interpretative legislation to define 'measures of equivalent effect to a quantitative restriction' or 'the subjects of application of free movement law'. However, this misses the point that it is often precisely because of lack of political agreement that member states and other EU institutions delegate interpretative powers to the Court in such sensitive areas.

Martinsen (2015) points to a lack of systematic studies of how CJEU case law affects EU policies. She identifies an excessive focus on legislative override, even though this is the least common reaction. Drawing on case studies on working time, patient mobility and posted workers, Martinsen distinguishes four political responses to the Court's jurisprudence: codification, modification, non-adoption and override. She finds codification to be the most frequent response in technical areas, with modification prevalent in more contested areas. She identifies only two instances of override in the social policy field, both of which predate the increased role of European Parliament as co-legislator. Nevertheless,

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protectionist procurement and other policies following Brexit. 69% of steel imported by the UK comes from other EU countries (Rhodes and Booth 2015)

[202] Case C-105/03 *Pupino*

[203] Case C-236/09 *Association Belge des Consommateurs Test-Achats v Conseil des minstres*

[204] Joined Cases C-22 and C-23/08 *Vatsouras v Arbeitsgemeinschaft Nurnberg*

[205] Case C-120/95 *Nicolas Decker v Caisse de maladie des employés privés;* Case C-158/96 *Kohll v Union des Caisses de Maladie*

[206] Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*

[207] Case C-34/09 *Gerardo Ruiz Zambrano v ONEm*

Martinsen contests the idea (put forward by Davies amongst others) that EU legislative politics is too fragmented to respond to Court rulings. Although examples of deadlock are relatively common, there are also many areas in which it is overcome to enable substantial modification of Court judgments. In terms of the factors influencing which of the four approaches is most likely to prevail, Martinsen draws attention to the role of time – with legislators being less likely to codify CJEU judgments as time passes and the immediate context of the judgment fades. This is relevant to the discussion below of *Max Havelaar*, where judgment was delivered in the thick of political negotiations on the directives – and this judgment was partially codified in the directives. Other factors influencing the likelihood of codification are the decision-making rules which apply to legislation in the relevant area; the position taken by the Commission and the extent to which it actively 'adopts' the judgment; and the political positions taken in the Council and Parliament both before and after Court judgments. Martinsen concludes that the Court is not an independent source of political change due to the conditioning effect of these factors.

Martinsen's categorisation of legislative responses to judgments can be applied to the four judgments discussed here and their impact upon the 2004 and 2014 procurement directives. As will be seen, these provide examples of non-adoption, modification and partial codification – but not of legislative override. What do these responses say about the role of the Court vis-à-vis the political institutions? Codification of a Court judgment might be seen as the most supine legislative response – but this does not necessarily mean that the Court has acted as a supranational entrepreneur (H1) rather than as an agent of the member states (H2). On the contrary, codification may be the most likely response where the Court's judgment reflects a pre-existing political consensus. Likewise, modification or non-adoption may demonstrate that the Court has pushed beyond the boundaries of politically acceptable solutions. Martinsen's categories are perhaps more useful in evaluating the extent to which Court judgments are either irreversible or subject to recall (H3 and H4). Both codification and 'light' modification indicate that the Court's interpretation is unlikely to be subject to recall by the member states, at least in the short term. Conversely non-adoption (as I argue took place with *Rüffert*), substantial modification and override indicate that the Court's judgment is subject to, or has actually been reversed by the political institutions. Ultimately all Court judgments can be superseded by Treaty change, although the difficulty of achieving political consensus for this is indicated by the tendency for individual member states to adopt Treaty protocols in response to lines of CJEU jurisprudence which discomfit them.

Cases concerning environmental criteria in public procurement

Prior to 2004, the EU procurement directives contained no references to environmental matters. A number of public authorities began pursuing green public

procurement in the late 1990s and early 2000s, however the legal basis for this was unclear and there was a risk of challenge by bidders. Kingston (2016) points out that the increase during the early 2000s in market-based environmental instruments, such as emissions trading schemes and green certificates, naturally led to cases coming before the Court on the compatibility of such schemes with the internal market. In *PreussenElektra*, which concerned state aid in the renewable electricity sector, Advocate General Jacobs considered the meaning of the Treaty commitment to sustainable development, finding that it imposed legal obligations and that therefore special account must be taken of environmental concerns in interpreting the Treaty provisions on the free movement of goods.[208] He considered that environmental measures may be justified even where they are discriminatory in nature, due for example to the requirement to rectify harm at its source. The case concerned a German law which obliged energy supply companies to purchase renewable electricity generated in their area of supply, at specified minimum rates. The Court held that the measure was compatible with the Treaty, given its aim which was to combat climate change and the lack of integration of markets for renewable electricity at that time.[209] In doing so, it did not apply the normal proportionality test by asking first if the measure was appropriate to achieve its legitimate objective, and then whether it went beyond what was necessary to achieve it. It was unclear whether this indicated a special approach which the Court would apply to all such environmental measures, or was confined to the case at hand.

The first challenge to environmental measures in procurement to come before the Court was the case of *Concordia Bus Finland v City of Helsinki*. In its procurement of bus services, Helsinki had sought to encourage suppliers to reduce emissions by applying contract award criteria which assigned more marks for buses with lower emissions. An unsuccessful tenderer challenged this on the basis that the award criteria did not help to establish 'the most economically advantageous tender' – the only acceptable basis for awarding contracts under the directives other than lowest price. Helsinki defended its approach by arguing that, as it was responsible for providing healthcare to local residents, lowering bus emissions would confer a direct economic benefit on it. Observations were submitted by the Finnish, Greek, Dutch, Austrian, UK and Swedish governments as well as by the Commission. While each of these interventions supported the principle that environmental criteria could be applied in tenders, a number proposed strict limitations on the scope of such criteria. In particular, the Commission, Dutch and Austrian governments considered that such criteria must always have an economic dimension or be economically

[208] *PreussenElektra*, Opinion of Advocate General Jacobs at paras 232-236.
[209] *PreussenElektra*, paras 73-81 of judgment. This differed from the approach of Advocate General Jacobs, who considered that the measure would not be justified if allowing renewable electricity produced in other Member States would be equally effective in reducing greenhouse gas emissions.

quantifiable.[210] The Court however did not hold that an economic benefit was required. It did hold that the criteria must be linked to the subject-matter of the contract, not confer an unrestricted freedom of choice on the contracting authority, be advertised in advance, and comply with the Treaty principles – in particular non-discrimination.[211]

In comparison to the assessment of state aid measures in *PreussenElektra*, the Court took a more restrictive approach to environmental measures in procurement in *Concordia*. The emphasis placed on the link to the subject-matter and the principle of non-discrimination suggested that it would not be possible to justify environmental award criteria if these had a discriminatory effect. Aside from the basic advertising requirement, the limitations applied by the Court all offered ample room for further judicial interpretation, particularly the link to the subject-matter requirement and the idea of criteria not conferring an unrestricted freedom of choice on the contracting authority. The following year in 2003, further light was cast on the link to the subject-matter requirement in *EVN Wienstrom,* concerning the purchase of renewable electricity by the Austrian government. The Court found that an award criterion which looked at suppliers' overall capacity to deliver electricity from renewable sources, rather than the specific quantities required under the contract, lacked the necessary link. It also cited the authority's inability to effectively verify performance under the criterion in determining that it was illegal.[212] However it held that there was nothing to prevent a contracting authority from attaching a heavy weighting to an environmental criterion provided it was linked to the subject-matter of the contract and capable of verification, regardless of whether the criterion actually served to achieve the objective pursued.[213] The *EVN* judgment was thus greeted with mixed sentiments by the burgeoning green procurement movement, with some concern that it created an especially high standard for environmental award criteria.

At first glance the rules developed by the Court in *Concordia* and *EVN* for the application of environmental award criteria appear to have been directly codified in the 2004 directives.[214] However examination of the preparatory texts for the 2004 directives shows that references to environmental characteristics and the link to the subject-matter already appeared in the Commission's 2000 proposal for the directives (i.e., prior to the *Concordia* judgment).[215] The Court adopted the Commission's terminology in setting limits for environmental criteria, while reserving its right to interpret this concept. A number of

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[210] Summary of observations, Opinion of Advocate General Mischo, *Concordia*
[211] *Concordia*, judgment at para 64
[212] *EVN*, paras 67-71.
[213] *EVN,* para 51.
[214] Recital 1 and Art. 53(1) of Directive 2004/18/EC; Recital 1 and Art. 55(1) of Directive 2004/17/EC.
[215] European Commission, COM (2000) 275 final, 10.5.2000

amendments aimed at including social and employment related matters in the list of acceptable award criteria were rejected in the process leading to the 2004 directives, despite the Court's apparent support for this in *Nord-Pas de Calais*.[216] In 2011, the Commission's Green Paper raised the question of whether the link to the subject-matter requirement ought to be dropped. The test had met with criticism on the grounds that it potentially restricted the ability to address environmental and social criteria in tenders. For example, the requirement of a subject-matter link appeared to prevent public authorities from awarding marks based on the existence of a general corporate social responsibility policy, if this went beyond the scope of the contract. This interpretation of the limits set by the subject-matter link requirement was confirmed by the Court in 2012 in *Max Havelaar*.[217] That case concerned a tender for the supply of tea and coffee in which a Dutch authority awarded marks to products carrying fair trade and organic certification. It also applied criteria relating to the 'sustainability of purchases and socially responsible business' of bidders.

The Commission challenged these criteria on the basis of a lack of transparency and the authority's restrictive references to particular labels, as well as the lack of a subject-matter link. Although the Court upheld the Commission's claim on the transparency grounds, it rejected the argument that organic and fair trade criteria were not linked to the subject-matter of the contract. This was significant because previous Commission communications had sought to limit the use of criteria which related to the production process rather than to the end product.[218] Such a strict interpretation of the subject-matter link would effectively preclude many environmental and social production techniques, including renewable generation of electricity and organic or fair trade production of food and textiles. While the judgment in *EVN* had appeared to approve award criteria linked to renewable electricity production (which does not leave any discernible 'mark' on the end product), the wording of the 2004 directives suggested that award criteria must relate to characteristics of the end product itself. The 2004 directives also excluded any reference to social award criteria.

The Court's judgment in *Max Havelaar* clearly endorsed the use of both environmental and social award criteria, even where these had no discernible impact on the end product. It was quickly recognised both by civil society groups and by the European Parliament[219] as an important development which could be built upon in the reform of the directives. In the compromise text published by the Council secretariat in July 2012, new

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[216] See Hebly (2007), pg 1260-1309. The volume of amendments proposed by member states as well as the European Parliament, Committee of the Regions and Economic and Social Committee emphasise the political importance of the provisions on environmental and social award criteria. See discussion of *Nord-Pas de Calais*.
[217] Case C-368/10 *Commission v Kingdom of the Netherlands ('Max Havelaar')*.
[218] For a discussion and refutation of the 'material substance' theory see Kunzlik (2009)
[219] European Parliament (2012b)

references to fair trade and social award criteria can be found, along with a proposed definition of the link to the subject-matter which makes clear that this includes criteria which apply at the production phase, even if they have no impact on the 'material substance' of what is being purchased.[220] These provisions were largely unchanged during the remainder of the reform process and can be found in the 2014 directives. The reference to 'material substance' is particularly puzzling to anyone unfamiliar with the legislative and judicial history of this provision, however it is a clear codification of the Court's judgment in *Max Havelaar* and rejection of the 'impact on the end product' requirement once espoused by the Commission. The definition of the link to the subject-matter, on the other hand, represents a modification of the Court's judgments in *Concordia* and *EVN* – the Court had declined to provide any definition of the concept in either case.

Cases concerning labour protections in public procurement

While the Court's endorsement of fair trade award criteria in *Max Havelaar* opened the door to their inclusion in the 2014 directives, its approach to other social aspects of public procurement was less encouraging. In particular, its case law in relation to the application of labour conditions under the Posted Workers Directive[221] (PWD) cast doubt upon the ability of contracting authorities to enforce wage agreements in public contracts. The Court had previously displayed a willingness to acknowledge the wider social function of public procurement, beginning with the *Beentjes* judgment in 1988.[222] That case concerned a tenderer for a Dutch works contract who had lost out to a more expensive bid which was considered by the authority to be more advantageous. One of the reasons for this was the preferred bidder's ability to meet a condition included in the tender documents regarding the employment of long-term unemployed persons in executing the works. The Court held that such a condition was acceptable provided it had no direct or indirect discriminatory effect on tenderers from other Member States, and was mentioned explicitly in the contract notice.[223] In *Nord-Pas-de-Calais*, the Commission challenged the award of a number of school-building contracts in the French region which included an 'additional award criterion' relating to local employment.[224] The criterion was based upon an inter-ministerial circular setting out French government policy on reducing unemployment, which required this to be taken into account when evaluating two tenders of equal value. The Court accepted that such

[220] Council of the European Union (2012k)
[221] Directive 96/71/EC *concerning the posting of workers in the framework of the provision of services.*
[222] Case 31/87 *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 04635
[223] *Beentjes*, para 37.
[224] Case C-225/98 *Commission v French Republic (Nord-Pas de Calais)*

a criterion could be applied, provided it was consistent with the fundamental principles of Community law, in particular the principle of non-discrimination.[225]

By the beginning of the current century then, the Court had recognised a limited scope for social considerations, particularly those related to employment, to be incorporated as award criteria and/or contract performance clauses in procurement procedures. It was clear however that where such provisions were found to be discriminatory they would not survive scrutiny.[226] Given that schemes to combat unemployment are generally national or regional in character, such measures and related schemes such as sheltered workshops for disabled workers were vulnerable to challenge. Kilpatrick (2012) points out that the Commission and Council did not feel obliged to implement the Court's case law on social award criteria in the 2004 directives. Instead references to social matters were relegated to the recitals and provisions on contract performance conditions. This omission became significant when the application of wage conditions in public contracts was challenged under the PWD, leading to the *Rüffert* judgment. The wider context of this judgment is worth recounting, as it illustrates the highly politicised territory into which the Court entered.

The 1996 Posted Workers Directive - intended to determine which employment terms would apply to workers temporarily working in other Member States - came under considerable strain in the period following the 2004 and 2007 enlargements of the Union. There was a 45% increase in the number of posted workers between 2004 and 2007.[227] The basic tension between member states with high wages and social security costs and newer, poorer member states tested the principle of free movement underlying the PWD. Unions and political parties objected to the 'social dumping' associated with companies using low cost workers to fulfil contracts while avoiding contributions to the pension funds and other entitlements long enjoyed by workers in richer countries.[228] The newer accession states for the most part supported the right of their companies to rely upon their cost advantages, especially where these companies made social security contributions and paid taxes in their home countries. CJEU case law, in particular the *Laval* quartet discussed below, served primarily to highlight the need for a more comprehensive political settlement which balanced free movement of workers with social protections.

In its 2007-2008 term the ECJ delivered four significant judgments dealing with various aspects of the relationship between EU law and collective bargaining rights. The first of these, the *Viking* case, arose out of the attempted reflagging of a ferry between Finland

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[225]*Nord-Pas-de-Calais*, paras 49-54 of judgment.
[226] This followed in particular from the Court's judgment in Case 45/87, *Commission v. Ireland* [1988] ECR 4929 (*'Dundalk Water'*)
[227]European Commission, *Impact Assessment regarding reform of the posted workers directive* SWD (2016) 52
[228] See Novitz (2018) for an overview of this debate.

and Estonia, with the intention of reducing wage costs. The Court held that measures taken by the International Transport Workers Union to prevent this amounted to a restriction on the freedom of establishment under the Treaty. Such a restriction could be justified by an overriding reason of public interest, such as the protection of employees, but only if the restriction was proportionate to the objective pursued. In the *Laval* judgment, delivered one week later, the Court held that attempts by a Swedish trades federation to ensure the application of a local collective agreement to Latvian workers constituted an unjustified restriction on the freedom to provide services. As Sweden lacked both a minimum wage and a mechanism for making collective agreements universally applicable, negotiated wage rates did not fall within the scope of minimum conditions which could be enforced under the PWD. Both judgments were delivered by the Grand Chamber, underlining their political importance in the context of Estonia and Latvia's recent accession to the EU alongside ten other central and eastern European countries.[229]

The Laval judgment met with strong resistance in Sweden and Denmark, in part due to the reliance on collective agreements rather than a statutory minimum wage in these countries to regulate wage levels (Blauberger 2013b). It was however supported by interest groups such as the Confederation of Swedish Enterprise, which helped to fund the case brought by the Latvian company. The Commission did not take immediate action to enforce the *Laval* ruling in Denmark or other states where similar practices restricting the rights of foreign trade unions were the norm. Nevertheless, the Danish and Swedish governments, seeing little chance of legislative override at EU level, appointed commissions to advise on the scope of domestic legislative change needed to comply with the Court's judgment. Both countries adopted such legislation in 2008-2009 which allowed them to preserve their models of collective bargaining while accepting the right of companies to employ workers on other terms where these fell outside of the minimum permissible protections under the PWD as interpreted in *Laval*.

Neither *Viking* nor *Laval* dealt with contracts subject to the public procurement rules,[230] however the Court had an opportunity to consider this in the *Rüffert* judgment delivered in April 2008. Since 2004, the recitals to the Procurement Directives had referred to the PWD in the context of determining which employment terms could be applied in public contracts. *Rüffert* concerned a works contract which had been terminated by a

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[229] Poland, Czech Republic, Malta, Cyprus, Estonia, Latvia, Lithuania, Hungary, Slovakia and Slovenia joined on 1st May 2004; Bulgaria and Romania joined on 1st January 2007.
[230] In *Laval* the Swedish trade unions undertook to blockade construction sites for schools, which were presumably subject to the award of a public contract. However, the case arose out of the actions of the trade union rather than any attempt by a contracting authority to enforce minimum terms and conditions of employment; there is no mention in the judgment of the contract award process.

German authority due to the failure of a subcontractor to comply with minimum rates of pay set out in a collective agreement. Public authorities are obligated under German law to comply with such agreements and to ensure compliance by contractors and subcontractors. The case turned upon the compatibility of this obligation with Article 3 of the PWD and Article 49 of the Treaty, on freedom of establishment. The PWD requires that where workers are posted from one Member State to another, they must be guaranteed certain minimum terms and conditions of employment. The minimum terms are those set out in laws, regulations, or administrative provisions, as well as those contained in collective agreements which have been declared universally applicable, meaning they must be observed by all undertakings in the geographical area and in the profession or industry concerned. The Court held that as the German law in question referred to collective agreements which were not universally applicable, and did not itself fix minimum wage rates, the authority was not entitled to impose the higher rate of pay on posted workers.[231]

Article 3(7) PWD provides that the above-mentioned 'minimum conditions' shall not prevent the application of terms and conditions of employment which are more favourable to workers. This clause points to the tension at the heart of the PWD: is it about worker protection or is it about allowing access for posted workers to host state markets? While the answer is undoubtedly 'both', the approach taken by the CJEU in the *Laval* quartet of cases (including *Rüffert*) focused on the latter element, effectively removing the ability of host states to apply higher levels of protection to posted workers. The Court in *Rüffert* emphasised that imposing higher wage requirements on posted workers had the potential to undermine the competitive advantage of undertakings based in lower-wage member states and to impede the free movement of services. It did not consider case law arising under the procurement directives such as *Beentjes* and *Nord-Pas-de-Calais*—which point to a wider discretion over terms and conditions of employment in the context of public contracts. Criticism of the judgment emphasised this omission as well as the Court's failure to consider the equal treatment implications where collective agreements are binding only on domestic contractors.[232] Prior to the *Laval* quartet, many host member states understood the PWD as setting a floor, rather than a ceiling, for the working conditions applicable to posted workers.

The impact of *Rüffert* was to cast doubt upon the relatively widespread practice of requiring that contractors pay collectively agreed wages to all employees on public contracts,

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[231] *Rüffert*, paras 24–35.
[232] McCrudden highlights the legal and political background to the case both within Germany and at EU level, as well as the trade union reaction to the ruling. He argues that the Court did not adequately consider the effect of the procurement directives and relevant case law, and that as both the PWD and procurement directives embody political compromises between the Treaty freedoms and social protections, the two must be placed on equal footing in resolving cases such as *Rüffert* (McCrudden (2011), pg 130–133).

and to alert unions and other bodies to the risk that EU law would undermine collective agreements and conditions of employment in richer countries. In Germany, where many Länder had similar laws to that challenged in *Rüffert*, responses to the case varied according to political stripes. Compared to the *Viking* and *Laval* rulings, the Commission appeared more actively to support the Court's analysis in *Rüffert*, raising the risk of infringement actions. The initial reaction from the Länder was to disapply the contested provisions; several then sought to revise them to make them compatible with the ruling while preserving the principle of collectively agreed wages being mandatory in public sector contracts. In the longer term, right and centre-right administrations generally abolished wage requirements in public contracts, whereas left and centre-left ones maintained them (Blauberger 2013b). A federal minimum wage was also introduced in Germany in 2015. The European Parliament adopted a resolution in 2008 directly challenging the Court's PWD jurisprudence and calling upon the Commission to adopt new legislation safeguarding the rights of workers.[233] It subsequently made revision of the PWD a condition of its support for Barroso's re-election to the Commission presidency. However, the PWD enforcement directive, adopted in 2014, merely provides for more uniform application of the minimum working conditions which are enforceable under the PWD, without attempting to redefine the scope of enforceable conditions as interpreted by the Court.[234]

At the same time, the *Rüffert* judgment and the failure to significantly reform the PWD meant that the question of which labour conditions could be enforced in public contracts was foremost in the mind of some member states and MEPs during the process leading to the 2014 directives. Compared to the Commission's initial draft, the final texts adopted by the Council and Parliament contain a number of new provisions relating to enforcement of labour law, including collective agreements.[235] There is no explicit requirement that the collective agreements be universally applicable, although the recitals to the directives do state that this provision must be applied in conformity with EU law in general and the PWD in particular.[236] Regarding subcontractors, Article 71 of Directive 2014/24/EU makes clear that contracting authorities may require compliance with applicable labour and social laws and collective agreements on the part of subcontractors,

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[233] European Parliament (2008)
[234] Directive 2014/67/EU *on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services***.** The Commission did propose revisions to the PWD in its *Monti II* regulation in 2012, however these met with considerable political disagreements in both the Council and Parliament, with member states largely split according to their length of EU membership. Agreement on reform of the PWD appears to have finally been reached in February 2018.
[235] Arts 18(2) and 56(1) Public Sector Directive; and Arts 36(2) and 76(6) Utilities Directive. Where a tender is abnormally low due to non-compliance with an applicable collective agreement, there is an obligation to reject it under Art 69(3) Public Sector Directive and Art 84(3) Utilities Directive.
[236] Recital 37 Public Sector Directive; and Recital 52 Utilities Directive.

and require tenderers to replace any subcontractors who do not so comply. Member States are also free to enforce more rigorous systems for the supervision and joint liability of subcontractors in their implementation of the directives under the terms set out in Article 71. While far from amounting to codification of the Court's case law in this area, the new provisions also do not aim to modify it. Rather they skirt around it and confine direct references to the Court's case law to the recitals – amounting to non-adoption. The clear implication is that a new political settlement was expected, although not yet achieved, at the time of the reform.

The outpouring of criticism of the *Laval* quartet, it should be noted, was primarily confined to Northern and Western European circles with more sympathy for the Court's rulings evident in the newer accession states.[237] Nevertheless, sustained criticism combined with wavering commitment to free movement in the wake of the eurozone and migration crises left the *Laval* quartet open to retrenchment. This appears to have taken place, at least in part, with the Court's judgment in the *RegioPost* case in late 2015.[238] In March 2016, the Commission published proposals for revisions to the PWD which would enhance the ability to apply host Member State conditions.[239] This lead 11 national parliaments to invoke the 'yellow card' procedure seeking to stop the proposals on the grounds that they infringed the principle of subsidiarity.[240] The Commission issued a response in which it rejected the subsidiarity argument, on the basis that the posting of workers necessarily involved cross-border transactions which were best regulated at EU level.[241] At the time of writing, the Commission's proposals look likely to win the necessary support within the European Parliament and Council. If adopted, the changes to the PWD would enhance the ability of host states to enforce wage requirements, including in respect of subcontractors.

Would this amount to a legislative override of the Court's PWD jurisprudence? In part yes, but the Court appears to have already embarked upon this process itself with the *RegioPost* judgment. In this challenge to a new law in Rhineland-Palatinate requiring application of collectively agreed wages in public contracts, the Court held that it was possible to justify a measure restricting free movement based upon the objective of protecting workers, even where the measure in question applied only to public sector

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[237] See for example Carevic, Kis, and Kuhta (2008)
[238] Case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*. For discussion of this case see Sanchez Graells (ed) (2018). Note that not all commentators see this case as a significant change in direction.
[239] European Commission (2016d)
[240] The parliaments were mainly from Member States responsible for sending posted workers: Poland, Romania, Czech Republic, Croatia, Bulgaria, Estonia, Latvia, Lithuania and Hungary. The Danish Parliament also objected on the grounds that the proposal did not make explicit reference to the competence of Member States to define pay and terms and conditions of employment.
[241] European Commission (2016e)

contracts. It thus distanced itself from its more restrictive interpretation of which labour conditions can be enforced in public contracts in *Rüffert*. While in strict legal terms the Court was able to distinguish rather than overrule *Rüffert*, it is hard to imagine that the Court was not conscious of the emerging political consensus in favour of changing the PWD. It is sometimes suggested that the Court has no 'reverse gear' and is only capable of pushing towards deeper integration. In its PWD jurisprudence at least, it appears that the Court is capable of more politically nuanced positions – although this does not resolve the question of whether it adopts these positions as an autonomous supranational entrepreneur, as an agent of the member states, or whether neither of these concepts fits its role in furthering EU integration.

Testing the Hypotheses

Applying Martinsen's taxonomy to the procurement cases discussed above gives the following results:

Case	Legislative response in 2014 directives
C-513/99 *Concordia*	Modification
C-448/01 *EVN Wienstrom*	Modification
C-246/06 *Rüffert*	Non-adoption
C-368/10 *Max Havelaar*	Partial codification/modification

Figure 4.1 Legislative response to CJEU cases on non-market considerations

Other than the lack of legislative override, there is no consistent pattern in these responses, nor notable differences between the 2004 and 2014 legislative reforms. The latter might be expected if the presence or absence of a qualified majority on the Council willing to overturn social and environmental rulings by the Court was a significant factor. Does the above analysis say anything about the relationship between the member states and the Court, and specifically about our four hypotheses? If the Court were acting as a supranational entrepreneur, meaning it was the first to champion a particular policy, any of Martinsen's four responses might apply – depending on the substance of the policy put forward by the Court. But if it were acting as an agent of the member states, we would not expect to see either modification or non-adoption amongst the responses, as these suggest that the Court's position differed from a qualified majority of member states. On this basis, the above results may be seen to falsify the agency hypothesis (H2) without necessarily falsifying the supranational entrepreneur hypothesis (H1). However as noted in Chapter 2, applying the description of 'supranational entrepreneur' to the Court is somewhat problematic because i) it does not control which cases come before it and ii) it does apply at least a loose precedent doctrine, preferring to distinguish previous cases (as in *Regiopost*) rather than explicitly reverse them. Both these factors limit its ability to exploit policy windows or to take the type of risks which supranational entrepreneurship implies.

Turning to the second two hypotheses, are the Court's judgments here better seen as irreversible or subject to recall by the member states? While all four of the judgments invoke the fundamental Treaty principles of non-discrimination and transparency, the decisions rest upon the wording of the specific directives they interpret. The fact that the link to the subject-matter requirement, which formed the crux of the *Concordia* and *EVN* judgments, was subject to modification in the 2014 directives clearly indicates that the legislature did not feel constrained to defer to the judicial interpretation put forward in these cases. Likewise, while the 2014 do reflect the Court's ruling in *Max Havelaar* to the effect that social considerations could form part of award criteria, the rules on labels modify the Court's ruling by allowing references to labels themselves, rather than just their underlying specifications. Finally, both the non-adoption of the *Rüffert* judgment and the imminent reform of the PWD indicate that the Court's interpretation of the minimum labour conditions which can be applied to posted workers in the context of public contracts is subject to recall by the member states. This means that the Court's judgments were *not* irreversible (H3) and *were* subject to recall (H4).

The below table summarises the evidence in relation to each of the four hypotheses as evaluated in this chapter:

Hypothesis	**Falsified by analysis of CJEU jurisprudence and legislative response?**
(H1) The Court acted as a supranational entrepreneur in the reform of environmental and social aspects of public procurement law	Not falsified – some positive evidence based on partial codification of *Max Havelaar* in rules on award criteria
(H2) The Court acted as an agent of the member states in the reform	Falsified
(H3) The Court acted in a way which was irreversible by member states	Falsified
(H4) The Court acted in a way which was subject to recall by member states	Not falsified – some positive evidence based on non-adoption of *Rüffert* and subsequent proposed reforms of PWD

Figure 4.2 Summary of hypotheses in relation to CJEU

The two falsified hypotheses (H2 and H3) emanate from intergovernmental and supranational theory respectively, meaning that analysis of the Court's role alone does not allow us to prefer either theory as a means of making predictions about EU integration in this particular area. Although the sample is small, it is clear that one of the central mechanisms proposed by each theory – agency (intergovernmentalism) and irreversible constitutionalised Court judgments based on Treaty interpretation (supranationalism) - are absent in an area where clear political importance was attached to judicial pronouncements.

The importance which member states attach to the Court's jurisprudence on procurement can be seen in a case brought by Germany in 2006 seeking to annul a

Commission interpretative communication on the scope of public contracts subject to EU law.[242] Germany, supported by six other Member States and the European Parliament, brought an application for the annulment of the Commission's 2006 *Interpretative Communication on the Community law applicable to contracts not or not fully subject to the directives*, which purported to clarify the rules on low-value contracts, service concessions, and other forms of contract not explicitly covered by the 2004 directives, based upon the Commission's interpretation of the Court's case law on this topic. Germany argued that the *Interpretative Communication* in fact went beyond the Court's jurisprudence and so should be annulled. In a lengthy ruling dismissing the challenge, the General Court reviewed the content of the *Interpretative Communication* against previous jurisprudence and found that it did not create any new legal obligations, and so Germany's action was inadmissible.

The significance of this case is that it illustrates the paradox of trying to characterise the Court as either an agent of the member states or a supranational entrepreneur. While Germany and other countries clearly favoured the Court's rulings over the Commission's perceived attempts to expand the scope of the public procurement rules, they ultimately did not receive the support of the Court in their attempt to establish limits to the Commission's alleged entrepreneurship. A Court acting as an agent of the member states might be expected to uphold the interests of its principals against any alleged usurpation of power by another EU institution. A Court acting as a supranational entrepreneur might be expected to defend its own remit against such usurpation, by actively reaffirming its own case law rather than deeming the case inadmissible. In this case, as well as the environmental and social cases considered above, portraying the Court as either an agent or a supranational entrepreneur fails to capture its distinct role in developing EU law. In Chapter seven I examine the idea that the Court acts as trustee, exercising powers delegated by the member states for the benefit of European citizens and being answerable to standards of legal professionalism, the rule of law and separation of powers, rather than to the preferences of member states or to its own policy agenda.

Conclusions

The United Kingdom's adoption of a 'red line' regarding future CJEU jurisdiction in the Brexit negotiations points to the perceived importance of the Court as a source of integration which is outside of immediate political control. Independent courts are an essential part of any democracy – courts which lack independence from the political organs of the state are not able to uphold constitutional principles and individual rights where these

[242] Case T-258/06 *Germany v Commission*

conflict with majoritarian or executive preferences. While the strength of judicial review power varies between jurisdictions, the basic principle of majoritarian legislatures and executives being subject to the rule of law, rather than defining the rule of law, is an essential tenet of liberal democracy. The separation of powers between the legislative, executive and judicial branches aims to prevent the dominance of any one organ of the state. Courts operate in a political setting, but this is not the same as saying they are subject to political control. Kelemen (2001) argues that compared to the U.S. Supreme Court, for example, the CJEU is relatively well-insulated from various forms of political interference such as jurisdiction stripping, resource deprivation or court packing. He finds that:

> adjudication by supranational courts does not simply bend with the political winds. Rather because of the need to maintain their status as neutral, independent arbiters, supranational courts also strive to make decisions that are consistent with well-established legal norms and case-law precedents.[243]

Wasserfallen (2010) suggests that the importance of the CJEU in integration can be measured by the extent to which 'its considerations and doctrines become incorporated in the policy-making process' and it is able to 'promote distinct European policies and eventually shape legislative outcomes.' By these less onerous measures, the Court's jurisprudence on environmental and social aspects of procurement was certainly influential on the legislative process. However, when more granularity is sought, this influence appears to be both transient and inconsistent. The Court's major role in this area, as in others, is to evaluate the specific meaning of legislative provisions and to apply these to the facts of cases brought before it. To say that it does so in a political context is trite; when stronger hypotheses about the precise nature of political influence on the Court, or the Court's influence on politics, are put forward it becomes possible to test these both on a large-scale quantitative and small-scale qualitative basis. As both the discussion of large n empirical studies and the examination of specific legislative responses to case law in the procurement context have shown, there is no easy answer regarding the Court's political role. But serious doubts are raised about the central mechanisms proposed by intergovernmental and supranational theory – the Court-as-agent and Court-as-entrepreneur hypotheses. This suggests that neither theory is entirely able to account for the Court's role in EU integration.

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[243] Kelemen (2001), at p 648.

Chapter 5 – Domestic Policy Preferences and Interest Groups

This chapter explores the policy preferences of the three largest EU member states - Germany, France and the United Kingdom - concerning the reform of public procurement law in the period 2011-14. The focus is on the positions taken on environmental and social aspects of procurement regulation, both during the EU legislative process and in the context of domestic political debates. While these positions were to some extent made public during the reform process itself, further documents relating to the procedure at the national and EU levels have been obtained via freedom of information requests, and interpretation of this material has been aided by interviews carried out with individuals involved in the process. Statistical and media reports concerning procurement policy and practices in each member state have also been consulted. While the focus here is on the three largest member states, I also consider the views put forward by other national governments where these were particularly influential or differed significantly from the 'big three', as was the case for the Scandinavian countries in relation to environmental aspects of the reform and the 2004/7 accession states in relation to social aspects. Beyond national governments, I examine the key role played by a number of interest groups active during the reform, including the *Right2Water* European Citizens' Initiative which succeeded in amending the scope of the Concessions Directive.

The size and nature of government procurement in each of the three member states at the time of the EU reform is first set out. I then turn to the specific views put forward at national level during the Green Paper consultation run by the Commission, analysing the level of support expressed for environmental and social proposals. Finally, I look at the choices made in the national implementations of the directives, which provide further clues regarding domestic preferences. As will be seen, the priorities and the preferences of the three largest member states on environmental and social questions diverged, pointing to the need for compromises to be made during the negotiation. Evidence regarding how these positions evolved during the course of the reform is presented here and in Chapter six, which focuses on the role of the Council and European Parliament. Identifying the preferences of member states is critical to testing the hypotheses regarding agency and supranational entrepreneurship. If the EU institutions acted only within the bounds of member states' preferences, this tends to falsify the supranational entrepreneurship hypothesis. Conversely, if the EU institutions acted outside of the bounds of member state preferences, understood collectively according to the requirements of a qualified majority within the Council, then this tends to falsify the agency hypothesis.

Germany

The largest economy within the EU, spending on public contracts in Germany amounts to some €434.5 billion per year, or 15.1% of German GDP.[244] This represents about 23% of total public sector spending on goods and services across the EU. However, as a federal state with highly devolved administrations, the vast majority of public procurement in Germany occurs below the EU thresholds. This does not mean it is not affected by EU law, as the Treaty principles of transparency and equal treatment apply to all contracts which are of 'certain cross-border interest' as interpreted by the CJEU. It does mean that many German public authorities are not directly concerned with applying the rules set out in the directives in most of their procurements.[245] This can be seen in the value of German notices published in the Official Journal, which is less than half of those published by France and the UK, despite the total value of German public contracts being considerably higher than either country.[246] On the other hand, German businesses are disproportionately affected by the EU public procurement rules, as many of them operate on a cross-border basis in sectors where public spending is significant, such as transport, infrastructure, defence, and pharmaceutical products. Some 26% of contracts awarded directly on a cross-border basis under the EU rules between 2007 and 2009 were awarded to German companies.[247] The German Federal government might well be expected then to take an interest in how the EU procurement rules are applied in other EU countries, as well as at home.

Coalition governments lead by Angela Merkel's centre-right CDU party were formed in Germany in 2009 and 2013. Responsibility for procurement policy at Federal level primarily rests with the Ministry for Economy and Energy (*Bundesministerium für Wirtschaft und Energie* or BMWi), which also plays a key role in EU affairs including instructing the German representative on Coreper I. The Ministry was held by the FDP (Rainer Brüderle; Philipp Rösler) from October 2009 through December 2013 and by the SDP (Sigmar Gabriel) from December 2013 until January 2017. During most of the relevant period for this study then, responsibility for Federal procurement policy vested in a liberal

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[244] European Commission (2016), p 8-9. The figures are averaged across the years 2012-2015 and exclude utilities and defence spending.
[245] 5.7% of public expenditure in Germany is published in the OJEU, compared to the EU average of 25.7% (*Ibid*, p 14)
[246] *Ibid*, p 10. The OJEU publication rate for German expenditure on goods and services is by far the lowest in the EU. In addition to the devolved structure of procurement, this can be partly accounted for by the inclusion of certain reimbursement payments (e.g. for health insurance taken out by citizens) which are not covered by the procurement rules in the German total public expenditure on goods and services.
[247] Sylvest et al (2011), p 48. Direct cross-border procurement is measured by the number of contract award notices showing a winning bidder located in another member state. The same report also measured indirect cross-border procurement, where award is made to a local affiliate of a company based in another member state. German companies won 25% of indirect cross-border awards 2007-2009. A more recent study of cross-border procurement shows that German companies continued to win the highest number of contracts from other EU countries between 2009 and 2015 (European Commission (2017), p 44-45)

party supporting free markets and broadly in favour of further EU integration. EU integration enjoyed relatively widespread support across the political spectrum in Germany during the period in question, despite concerns about fiscal irresponsibility in other eurozone countries and Germany's potential liability for bailouts.[248] Public support for environmental and social policies, such as those in the Europe 2020 targets, was also high in Germany according to the Eurobarometer survey carried out in May 2011.[249] Energy policy was under intense focus in Germany following the Merkel government's adoption in 2010 of legislation to support the *Energiewende*, or transition to renewable energy. In addition to climate change concerns, support for the *Energiewende* increased following the Fukushima disaster in March 2011, which lead to Germany abandoning nuclear as a bridging technology. This posed a considerable policy challenge; nuclear power accounted for 18% of the German grid in 2011 and phasing this out at the same time as reducing greenhouse gas emissions strained capacity. As Germany imported more than half of its energy, support for a common EU energy policy including ambitious targets for renewables made sense.

The *EVN* case (discussed in chapter four) had established the principle that public procurement could be used to support the development of renewable energy capacity, but within the relatively strict bounds of the link to the subject-matter requirement. Many German public authorities specified energy from renewable sources in their own contracts, an approach supported by the common EU GPP criteria developed in 2012.[250] Beyond energy supply, concern about the life-cycle environmental impact of goods and services purchased by the public sector – in particular food, timber products, IT equipment, buildings and cleaning products – was clear in the GPP/SPP policy commitments undertaken by local and regional authorities.[251] At Federal level, rules on life-cycle costing and procurement of energy-efficient products were adopted in 2008, [252] and mandatory criteria for sustainable timber products in 2010.[253] The Federal Environment Agency (*Umweltbundesamt* or UBA) took responsibility for developing common GPP criteria, which drew heavily on the German national eco-label Blue Angel. Uptake of these criteria by public authorities was middling,

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[248] Behr and Helwig (2012), p 5.

[249] Standard Eurobarometer 75, Spring 2011. The survey found for example high levels of support in Germany for reductions in greenhouse gas emissions and for reducing the number of Europeans living below the poverty line (74% supported the Europe 2020 targets under these headings or thought they should be more ambitious). 43% of Germans thought the first priority for EU spending should be climate change and the environment, compared to 22% across the EU-27. (*Eurobarometer 75 Key Indicators Results for Germany*, pp 3-4)

[250] European Commission (2012) *EU GPP Criteria for Electricity*

[251] In particular in Berlin, Bremen and North Rhine-Westphalia. See Schmidt and Dubbers (2014)

[252] Federal Gazette of Germany (2008), *Allgemeine Verwaltungsvorschrift zur Beschaffung energieeffizienter Produkte und Dienstleistungen* (AVV-EnEff) (General administrative regulation for the procurement of energy efficient products and services).

[253] Federal Gazette of Germany (2010) *Gemeinsamer Erlass zur Beschaffung von Holzprodukten* (Joint decree on the procurement of wood products)

with some 46% of German tenders being 'green' according to a 2010 evaluation.[254]

On the social side, the varying reaction at Länder level to the 2008 *Rüffert* judgment has been noted in Chapter four. By 2011, several Länder had new laws in place which aimed to ensure the continuing application of collectively agreed wages to workers on public contracts. Wage guarantees in public contracts had been in use in Germany from the early twentieth century at least.[255] Beyond wage guarantees, provisions requiring the delivery of apprenticeships or other vocational training on public works contracts had also long been included in public contracts. Dubbers and Schmidt (2014) identify a marked increase in both the number and range of policies and laws at Länder level promoting social procurement following *Rüffert*. These related not only to wages and apprenticeships but to equal pay, equal opportunities, employment of the long-term unemployed, enforcement of the ILO conventions, fair trade, family-friendly work policies and measures aimed at the inclusion of disabled people.[256] By 2014, 14 of the 16 Länder had public procurement laws including such social criteria. At Federal level, social criteria did not play a prominent role in procurement policy, however the ability of the Länder to legislate in this area was recognised.[257] The Bundesrat, which represents the Länder at Federal level and in some EU negotiations,[258] took an active interest in the reform of the directives, submitting a response to the Green Paper and issuing a number of recommendations seeking clarification and expansion of the possibilities under EU law for social criteria to be included in public procurement. The individual responses to the Green Paper submitted by certain regions, such as North Rhine-Westphalia, also emphasised the need for an EU legal framework to support application of social criteria, including fair trade and reservations for sheltered workshops.[259]

The German Federal government response to the Green Paper consultation expressed the view that simpler and more flexible EU legislation was needed. It identified the promotion of competition as a core objective of public procurement and endorsed a conservative approach to changing EU law in this area – arguing that this should only be

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[254] Evans, Ewing, Nuttall, and Mouat (2010), p 40

[255] According to Schulten (2012): "As long ago as 1907, the German Imperial Statistical Office produced comprehensive documentation that included dozens of regional and municipal procurement regulations, all of which had some reference to the pay and working conditions of workers under public contracts (Kaiserliches Statistisches Amt 1907). Most of these procurement provisions required contracting companies to pay "prevailing" wages, and some of already referred to existing collective agreements."

[256] *Ibid*, p 10.

[257] In part IV of the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB). For discussion of the role of the Bundesrat in inserting this provision in the GWB in the 1990s, see McCrudden (2011).

[258] Under Article 23 of the Basic Law, the *Act on Co-operation between the Federation and the Federal States in Matters concerning the European Union* (EUZBLG) and the *Agreement between the Federation and the Federal States* (BLV), the Bundesrat can appoint Länder representatives to participate in negotiations in the EU Council where fundamental interests of the Länder are at stake. Where an EU proposal relates solely to an area of Länder authority, no Federal representative will take part in the negotiations.

[259] North Rhine-Westphalia (2011)

done where analysis of the existing regime revealed specific gaps or shortcomings. The government's response does express support for environmental and social goals in public procurement:

> …provided this does not detract from the efficiency of procurement procedure[s] and cost-effective purchasing, there is a link with the contract subject matter and compliance is assured with the principles of transparency and non-discrimination. At the same time, procurement law must remain understandable and practicable. It can and should not prescribe the pursuit of other policy goals, but only facilitate their implementation.

The submission goes on to note that the 2004 directives already allowed environmental objectives to be pursued, but called for more legislative support for life-cycle costing, high energy efficiency standards and for use of eco-labels in procurement. As has been seen these are areas in which German legislation already existed – German businesses would therefore be well placed to respond to such requirements. The response also canvasses the idea of regional or seasonal food being specified in procurement procedures for environmental reasons. The response contains a single reference to social criteria:

> The Federal Government supports the consideration of social criteria in awarding contracts (such as accessibility), provided these are linked with the contract subject matter.

It goes on to emphasise that such criteria should not be used to 'seal off markets or restrict competition'. The absence of any reference to wage guarantees in public contracts is striking given the heated debate in Germany over *Rüffert*. Overall then, the initial position set out by the Federal government supports the idea of limited reforms to support environmental and social criteria in procurement, but rejects the idea of mandatory measures which might interfere with competition and avoids the controversial territory of wage guarantees. The link to the subject-matter is presented as a bulwark against discriminatory procurement.

Did the German government's position evolve in the course of negotiations over the directives? The opacity of the trilogue process makes it difficult to identify the positions taken by individual member states within the Council at each stage. Some clues emerge from close analysis of the successive 'compromise texts' published by the Council during 2012, and from interviews with individuals directly involved in the process.[260] A freedom of information request to the BMWi also lead to the release of documents prepared and received by the Ministry during the legislative process.[261] These sources point towards an active hostility within BMWi towards the objective of supporting environmental and social policies via

[260] For a list of interviews carried out please see Appendix D.
[261] These documents are indexed in Appendix C.

procurement. This is presented as antithetical to the objective of increasing efficiency and flexibility in procurement, and the risk of new mandatory measures increasing burdens on bidders or contracting authorities is clearly set out. [262] Strong support for such measures did not appear to be forthcoming from other political quarters: a 'Kleine Anfrage' (written parliamentary question) submitted by members of the Green Party to the Cabinet in April 2011 was primarily concerned with the scope of the Concessions Directive,[263] which was to become the key German political battleground during the procurement reform following the *Right2Water* European Citizens' Initiative, discussed below. The provisions on public-public cooperation (or 'in-house' contracts) were also of key concern both at Federal and Länder level due to a series of CJEU judgments which cast doubt upon the ability to award such contracts without competition.

The Commission's initial proposal for the directives in December 2011 aligned relatively well with the positions expressed in the Federal Government's Green Paper submission on environmental and social aspects of procurement. It did not include any new mandatory measures but encouraged the use of life-cycle costing and other non-cost criteria in procurement. It also extended the ability of contracting authorities to insist upon third party certification in the form of eco-labels, although as has been seen the final text of the directives went further in endorsing the use of social criteria and labels based in part on the Court's judgment in *Max Havelaar*. An information note prepared by BMWi for its Minister in March 2012 highlights the potential for political conflict regarding the environmental and social aspects of the draft public sector directive, including the question of whether minimum wage clauses comply with the link to the subject-matter requirement and the risk of protectionism associated with exclusion of bidders who violate environmental and social obligations.[264] An update issued in July 2012 noted strong support in the European Parliament for such measures and ongoing concern that these would result in new administrative burdens on contracting authorities.[265]

In November 2011, a further BMWi memo was prepared outlining progress within the Council working group and the intention to proceed to trilogues based on an agreed compromise text. The memo notes that while the draft had been improved, it does not meet the objective of simplification and more thorough and lengthy discussions within the

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[262] BMWi (2011a), p 2. Handwritten notes on this document express this view most succinctly, with 'Increase efficiency and flexibility of procurement' marked "*Gute Idee!*" and 'Increase use of public contracts to support other policies' marked "*Schlechte Idee!*"

[263] BMWi (2011b)

[264] BMWi (2012a)

[265] BMWi (2012b)

working group would have been desirable.[266] It also states that German approval for the directive within Coreper will be dependent on the Federal government's preferred position on in-house contracts being included in the draft.[267] The memo is more concerned with internal divisions amongst Federal government departments than those on the Council, including the view of the Ministry for Family Affairs that the link to the subject-matter requirement should be dropped to allow the gender balance of companies bidding for public contracts to be taken into account. It notes a lack of support for this position amongst other member states. The Ministry of the Interior had also argued for an exemption from the directives for certain contracts deemed 'secret' (such as the printing of identity cards) but BMWi rejected the idea of making its approval of the compromise text dependent on this.

The final text of the directives, by including the mandatory social clause set out in Article 18.2, explicitly contradicts the preferences expressed by the German Federal government. The evolution of this clause is traced in Chapter 6, highlighting the role of the European Parliament in introducing it. In implementing the 2014 directives Germany limited the scope of the discretionary exclusion for non-compliance with environmental, social and labour law by only referring to non-compliance in public contracts.[268] This is particularly notable given the general German approach to transposition which is to maintain strict parity with the directives. The national implementing laws at Federal level[269] do not introduce any new specific environmental or social criteria, leaving this to the discretion of the Länder and/or individual contracting authorities. In other areas such as life-cycle costing, the final text of the directives largely aligns with German interests as expressed at the outset of the process. Germany did not succeed however in achieving special treatment in respect of regional food procurement, which would have conflicted with the agricultural export interests of other member states, including France, and threatened the single market in a key sector.

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[266] BMWi (2012c)

[267] The preference related to the proportion of private business which can be undertaken by an entity while still remaining eligible for the in-house exemption from the procurement rules. Germany, together with the UK, French and Austrian delegations, was in favour of raising this to 20%.

[268] §124(1)1 GWB. It is debatable whether such a limitation is implied by the wording of Articles 57.4(a) and 18.2 of Directive 2014/24/EU – neither the UK nor France have adopted this limitation in their national transpositions.

[269] The GWB and *Vergabeverordnung* (VgV) as amended in 2016. The latter does include provisions implementing the specific requirements for energy-using products and road transport vehicles set out in earlier EU directives, see §67 and §68 VgV.

France

Public spending on goods and services in France amounts to some €316.6 billion per year, or 14.9% of French GDP.[270] This represents about 16% of total public sector spending on goods and services across the EU. France publishes by far the highest number of OJEU contract notices, averaging over 42,000 per year between 2012 and 2015.[271] Less than 2% of these contracts are awarded directly to companies outside France, although a further 17.6% are awarded to French subsidiaries of international companies.[272] Only 5% of EU contracts awarded directly on a cross-border basis between 2007 and 2009 were awarded to French companies, despite the international success of firms such as Veolia, Alstom and Airbus.[273] Procurement policy is coordinated by the Ministry of Economy and Finance (Minefi), which produces regulations, provides legal advice to other government departments and agencies, and collects data on procurement. Other major spending departments, such as the Ministries of Defence and Transport, are also closely involved in the development and implementation of procurement policy. As in Germany, the award of public contracts is highly dispersed amongst a large number of local and regional authorities – although two central purchasing agencies also play a key role.[274] The *Secrétariat general des affaires européennes* (SGAE) is responsible for interministerial coordination of EU policy dossiers, including on public procurement, and sits within the Prime Minister's office.

Presidential elections were held in France in April-May 2012, resulting in a shift in power from the centre-right government of Nicolas Sarkozy to the socialist government of François Hollande. The premiership passed from François Fillon to Jean-Marc Ayrault, who had been convicted of a corruption offence in relation to the award of a public contract while Mayor of Nantes in the 1990s.[275] Both Sarkozy and Hollande were highly critical of the EU in the 2012 presidential election campaign, evidently in an effort to court potential Front National voters. Sarkozy threatened to withdraw from the Schengen agreement if efforts to stop illegal immigration were not stepped up, and Hollande argued that the recently agreed Fiscal Compact should be renegotiated.[276] Sarkozy also argued for tighter restrictions on

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[270] European Commission (2016), p 8-9. The figures are averaged across the years 2012-2015 and exclude utilities and defence spending.
[271] *Ibid*, pg 11
[272] European Commission (2017), p 29
[273] Sylvest et al (2011), p 48. French companies do somewhat better in indirect cross-border procurement, winning 12% of such contracts in the EU (*ibid*, p 50)
[274] L'Union des groupements d'achats publics (UGAP) and the Service d'achats d'Etat (SAE)
[275] Known as l'Affaire Omnic, the scandal involved the award of a contract for the printing of a local newspaper. Convicted in 1997, Ayrault was considered rehabilitated by the time he was appointed prime minister in 2012.
[276] Vaïsse (2012). Hollande's criticism of the Fiscal Compact lead Angela Merkel to refuse to receive him during the campaign, in a break with normal Franco-German protocol during presidential elections.

companies from third countries accessing EU public procurement markets.[277] However during his presidency, Sarkozy had largely supported deeper EU integration, securing agreement on a new climate and energy package during France's 2008 Council presidency and arguing in favour of qualified majority voting within the Eurogroup.[278] Hollande's presidency in contrast was marked by frustration with EU policies which were seen to provide insufficient incentives for growth, as well as long-running splits within the *Parti socialiste* regarding France's role within Europe. Hollande appointed two prominent socialist supporters of the '*non*' side in the 2005 referendum, Laurent Fabius and Bernard Cazeneuve, as his Ministers of Foreign and European Affairs respectively. Whereas the Franco-German relationship had been paramount during Sarkozy's tenure, Hollande sought to align France with Spain and Italy on questions of EU policy. [279]

French popular support for further EU integration stood at 40% in 2012, with 65% wishing to retain the euro.[280] On environmental issues, support for the Europe 2020 goals on renewable energy was even higher than in Germany, although fewer thought it should be the top priority for EU spending.[281] The 2012 elections to the *Assemblée nationale* returned 17 *Europe Écologie Les Verts* (EELV) members, making them the third largest party and essential to Hollande's parliamentary majority. EELV was formed in 2010 and lead by Eva Joly, an MEP who was able to build upon the Greens' success in local, regional and European elections. Broad participation by NGOs, unions and business associations, as well as the various tiers of government, in the 2007 *Grenelle de l'environnement* initiative had led to the adoption of a law in 2008 promoting extensive reforms to energy and consumption policies in France, including requirements for public contracts.[282] A national action plan on sustainable public procurement had been adopted in 2007 and in December 2008 *État exemplaire* guidelines were issued by the Prime Minister to all Ministries setting targets for SPP in specific product groups.[283] The Ministry of Ecology was responsible for monitoring implementation and publishing official reports, methods and practical tools on a dedicated

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[277] *The Economist*, 22 March 2012, "Protect Trade or Protect Sarkozy?". Restrictions on third-country access to EU public procurement are set out as part of France's EU policy in Service général des affaires européenes (2011) *Position française sur la stratégie UE 2020*, p 9.

[278] Nicolas Sarkozy, Speech given at Toulon on 1.12.2011.

[279] Kaca, Lizsyzk, and Parkes (2012).

[280] Institution français d'opinion public (IFOP)/Le Figaro, Septembre 2012, *Les Français et l'Europe 20 ans après Maastricht : Résultats détaillés,* p 20,30

[281] Eurobarometer 75 Key Indicator Results for France. 77% of French respondents supported the Europe 2020 renewable energy targets or thought they were not ambitious enough. Social affairs and employment was ranked as the top priority in EU spending by 47% of respondents.

[282] Loi 2009-967 (Grenelle I)

[283] *Circulaire du 3 décembre 2008 relative à l'exemplarité de l'Etat au regard du développement durable dans le fonctionnement de ses services et de ses établissements publics.*

platform. However much of the momentum for SPP came from regional and municipal governments, with a number of voluntary networks actively supporting this activity.[284]

On social issues, the use of public contracts to address wage issues and local and regional unemployment had a long history in France.[285] In the 1990s, two inter-ministerial circulars encouraged the use of award criteria and contract clauses to address unemployment,[286] although an attempt to place this on a statutory footing was rejected by the Conseil Constitutionnel.[287] In 1998, the Commission challenged the employment measures in various public works contracts for the construction and maintenance of school buildings in the Nord-Pas-de-Calais Region and the Département du Nord.[288] The Court of Justice upheld the Commission's complaint on transparency grounds, but also found that criteria addressing unemployment could be included in the determination of the most economically advantageous tender.[289] Article 5 of the *Code de marchés publics*, updated in 2006 to implement the 2004 procurement directives, specifically required sustainable development considerations to be taken into account in defining the requirements of public contracts.[290] Article 15 referred to the employment of disabled and unemployed workers on public contracts, and a separate law made it mandatory to include accessibility considerations in public contracts.[291] Ethical issues such as fair trade and concerns about factory conditions in developing countries were also prominent at both local and national level, leading to the adoption of a decree in 2014 requiring contracting authorities spending over €100 million per year to take social responsibility into account in their procurement.[292]

France's Green Paper response was submitted by the SGAE. Compared to the German and British responses, SGAE's submission is longer and more detailed, expressing definite preferences on a greater range of topics linked to the proposed reform. It is also more clearly the product of consultation with contracting authorities at various levels. It opposes any

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[284] Such as the *Réseau Grand Ouest* and *Reseaux Territoriaux Commande Publique & Developpement Durable*.
[285] McCrudden (2007) traces this to the 19th century socialist Minister of Commerce, Alexandre Millerand. The Millerand Decrees of 1899 enforced working conditions based on collective agreements in public contracts, and also limited the proportion of foreign workers who could be employed in public contracts. Paris had introduced a minimum wage provision in public contracts in 1888, at the instigation of Édouard Vaillant.
[286] *Circulaire interministérielle CAB-TEFP 14/93 du 29 décembre 1994 sur la prise en compte de critères additionnels relatifs à l'emploi dans l'attribution des marchés publics; Moniteur du Bâtiment et des Travaux Publics* 17 février 1995.
[287] Decision No 98-43-DC du 29 juillet 1998.
[288] Case C-225/98 *Commission v French Republic* (« *Nord-Pas-de-Calais* »)
[289] *Ibid*, paras 50-54 of judgment.
[290] This was based upon the Charter for the Environment adopted as an annex to the French constitution in 2005, which set out a broad duty to integrate sustainable development in all public sector activities.
[291] *Loi 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées.*
[292] *Loi n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire*

major changes in the scope of EU public procurement law but supports additional flexibility, such as by permitting greater use of the negotiated procedure. On environmental and social matters, the SGAE submission argues in favour of dropping the link to the subject-matter requirement,[293] in contrast to German and UK support for maintaining this. [294] It explains that the requirement appears to restrict use of production-phase environmental and social criteria, and argues that the rules on technical specifications should specifically refer to conditions of production.[295] The French submission also suggests that a number of new 'supplemental' award criteria be introduced, for example linked to employment, climate change and energy, education, or poverty eradication.[296] It opposes new rules on contract clauses, but supports the development of common EU rules on social services, provided these take into account the need to ensure quality. All of these provisions should be voluntary for contracting authorities.[297]

Does the final text of the 2014 procurement directives reflect French preferences regarding environmental and social concerns? The link to the subject-matter requirement has been retained, and in fact extended to apply explicitly to selection criteria, technical specifications and contract clauses as well as to award criteria. At the same time however, the definition adopted in Article 67.3 makes clear that specific processes of production, provision or trading, and other life-cycle stages are to be considered as linked to the subject-matter, meaning fair trade and other similar criteria can be used. Article 42 on technical specifications also allows production or other life-cycle phase considerations to be included, although it stops short of the French preference to explicitly include social conditions. The wording on contract performance clauses has also been revised contrary to the position set out in the SGAE paper, although in this case the new restriction implied by the link to the subject-matter requirement is balanced by an acknowledgement that social and employment-related considerations may be included in contract clauses.[298] While the French, like the Germans and British, originally opposed any new mandatory environmental or social provisions, their opposition to Article 18.2 appears to have been less pronounced. This is evident in the choice to make exclusion for violations of labour law mandatory in its national transposition, whereas under the directives these are discretionary.[299] This contrasts sharply

[293] SGAE (2011), p 43-44
[294] Bundesregierung (2011), p 2 and p 4; Cabinet Office (2011) p 18.
[295] SGAE (2011), p 42.
[296] *Ibid*, p 41
[297] *Ibid*, p 43
[298] Article 70, Public Sector Directive
[299] Article 45(4), *Ordonnance No. 2015-899 du 23 juillet 2015 relative aux marchés publics*

with the UK approach, which omitted Article 18.2 from the 2015 Public Contracts Regulations.

United Kingdom

Spending on public contracts in the UK amounts to some €309.5 billion per year, or 13.9% of GDP. [300] This represents about 16% of total public sector spending on goods and services across the EU. Seventeen percent of contracts awarded directly on a cross-border basis under the EU rules between 2007 and 2009 were awarded to British companies – the second highest percentage after Germany. The UK awards just 2% of public contracts to foreign companies, but when indirect awards (for example, via subsidiaries) are included this increases to 22%, compared to 19% for France and 17% for Germany.[301] In contrast to Germany and France, there is a tendency in the UK to aggregate requirements leading to very large value contracts – in 2015 the UK alone accounted for 70% of contract awards over €100 million advertised in the OJEU.[302] The majority of procurement spending occurs within local government and the National Health Service, as opposed to central government departments. The Conservative-Liberal Democrat coalition government (2010-2015) adopted a policy to increase the proportion of public contracts awarded to SMEs across central government to 25% (from 6.5%), while also introducing rules to ensure the prompt payment of subcontractors.[303] An Efficiency and Reform Group was set up within the Cabinet Office to generate cost savings and encourage greater cooperation between government departments on procurement. The reform of the EU directives was seen as an opportunity to simplify procedures while also pursuing specific government policies linked to supporting SMEs and public service mutuals – employee-owned organisations spun out of the public sector which continued to provide public services.

Despite the coalition's embrace of green policies in other areas such as energy and finance, support for GPP/SPP at central government level was minimal during this period. This contrasted with the establishment and funding of a dedicated central government sustainable procurement team within the Department for the Environment (Defra) during the previous Labour government, and adoption of common criteria and targets for GPP.[304] Overall responsibility for procurement policy transferred to the Cabinet Office in 2010, led

[300] European Commission (2016), p 8-9. The figures are averaged across the years 2012-2015.
[301] European Commission (2017), p 30.
[302] European Commission (2016), p 10.
[303] Policy archived at https://www.gov.uk/government/publications/2010-to-2015-government-policy-government-buying/2010-to-2015-government-policy-government-buying (accessed 21 March 2018)
[304] The Greening Government commitments, archived at http://webarchive.nationalarchives.gov.uk/20140827204312/http://sd.defra.gov.uk/gov/green-government/commitments (accessed on 21 March 2018)

by Conservative Minister Francis Maude. This marked a shift in priorities towards cost-cutting and efficiencies, and away from environmental and social aspects of procurement. At local government level, and in Scotland, SPP remained a policy priority, supported by voluntary networks and initiatives such as the Living Wage movement.[305] As in Germany and France, there was a substantial 'pre-history' in the UK regarding the issue of fair wages in public sector contracts, with a Fair Wages Resolution adopted by Parliament in 1891 aimed at preventing sweatshop conditions on contracts for the supply of army and navy uniforms, as well as public works.[306] In the 1960s and 1970s, linkages were developed between procurement and racial and gender equality legislation, as well as with anti-discrimination legislation in Northern Ireland. While the pursuit of social policies via procurement was substantially restricted by the Local Government Act 1988, the Equality Act 2010 reintroduced a public sector equality duty which extended to procurement. In 2012, the Social Value Act created an explicit responsibility for public bodies to consider the environmental and social impact of public contracts, although it did not prescribe mandatory standards, targets or reporting requirements.[307]

The UK government's priorities for the reform of the EU directives were driven by a cost-saving and pro-business agenda, with environmental and social objectives firmly in the background. The UK submission in response to the Green Paper expresses scepticism about the role of procurement in supporting broader societal objectives, as this creates "a risk that decisions could undermine value for money and impose uncompetitive requirements on contracting authorities and businesses."[308] It states that such objectives are best achieved through efficient use of public money, stimulating private sector growth and allowing flexibility for contracting authorities. On the link to the subject-matter requirement, the UK argues in favour of maintaining this on the basis that:

> Procurement is about buying goods/services that are needed and if you lose the link to the subject matter of the contract, then there is a risk that procurement becomes more about pursuing other agendas rather than serving the purpose of procuring the good/service that is needed. Procurement should remain about what is being procured, but if other policy aims that are relevant to the procurement can be achieved at the same time, then that is a bonus. We do not think that procurement should be used as a main lever to achieve a particular policy line.[309]

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[305] The Living Wage Foundation, established in 2011, grew out of an earlier London-based grassroots campaign. The Living Wage is calculated based on the cost of meeting basic needs given prevailing prices in different parts of the UK, including a small margin for unexpected expenses. The Living Wage has typically been 20-30% higher than the national statutory minimum wage, with the separate London Living Wage being 30-40% higher.

[306] For discussion of this history see McCrudden (2007) pp 42-47.

[307] Public Services (Social Value) Act 2012

[308] Cabinet Office (2011), p 1

[309] *Ibid*, p 18

The submission does express support for clarification of the rules on life-cycle costing, while rejecting the idea of a mandatory or common EU methodology for this. It also rejects the idea of any common EU rules on social issues in procurement. The government's preference for a dedicated provision to allow direct award of contracts to public service mutuals is set out – a policy which was to find little support from the EU institutions or other member states until late in the negotiation process.

A Cabinet Office Procurement Policy Note (PPN) published in August 2011 stated that the government wanted a "radical simplification of the public procurement regime to free up markets and facilitate growth."[310] It reiterated the priorities of enabling public service mutuals and SMEs to win contracts, but mentioned broader environmental or social goals only in the context of value for money. The note explicitly calls upon organisations and individuals to promote the UK's objectives, while indicating that the government was engaging with 'key strategic EU stakeholders' and other member states. A further PPN published in December 2011 acknowledged the Commission's legislative proposal and sought input in order to further develop the UK's negotiating position.[311] It welcomed a number of the proposed reforms but expressed uncertainty regarding the sustainable procurement measures and disappointment at the lack of any provision on public service mutuals. The coalition government had set a target for one million public sector workers to be shifted to mutuals by 2015. The majority of these operated in the health sector, education and social housing. By 2012, it was clear that the target would not be met without further specific support measures for mutuals.[312]

Meanwhile the Commission's proposal to require national oversight bodies for procurement to be set up had attracted the ire of the House of Commons European Scrutiny Committee, leading it to issue a reasoned opinion in March 2012 that this violated the subsidiarity principle.[313] Eventually this provision was amended to avoid the obligation to set up any new national bodies.[314] While many EU countries already had a dedicated oversight body for public procurement which was also responsible for adjudicating complaints, in the UK and Ireland procurement challenges can only be brought in the higher courts. The Committee objected to the combination of administrative and judicial functions in the proposed oversight bodies, which could be seen to usurp the role of the courts. There was no

[310] Cabinet Office (2011a)
[311] Cabinet Office (2011b)
[312] Financial Times, 25.6.12, "Public mutuals aim likely to be missed"
[313] House of Commons (2012)
[314] A number of other member states, including Germany, also objected to this provision.

appetite in the UK for establishment of a new quasi-judicial body to superintend public procurement. In his evidence to the Committee (chaired by prominent eurosceptic Bill Cash), Francis Maude suggested that this might set a precedent for EU interference in national judicial systems. The reasoned opinion also objects to the Commission's proposed light touch regime on the basis that this would apply to a smaller set of services than the previous 'non-priority' (Part B) designation, reducing flexibility for contracting authorities.

In August 2012, the Cabinet Office published an update on the negotiations to date, stating that a number of the UK's priorities had been achieved in the Council's compromise text, linked primarily to the 'simplification' agenda.[315] It also set out the government's support for the draft life-cycle costing provisions while rejecting the idea of mandatory measures on SPP. On the light touch regime for social and other specific services, the note states that the UK did not originally support this change, but given the support of a strong majority of other member states, it would focus on avoiding any reduction in the flexibility available to contracting authorities. The final Cabinet Office update published during the negotiations, in July 2013, states that "The revised package represents an excellent overall outcome for the UK, with progress achieved on all of our priority objectives."[316] While noting the new environmental and social provisions in the agreed text, these are presented as discretionary on the part of buyers with no reference to the mandatory social clause or obligation to seek explanation of abnormally low tenders and reject these if they violate environmental, social or labour laws or collective agreements.

Drafting of the UK implementing regulations began in 2013, before the directives had even been adopted by the Council and Parliament. This eagerness, which lead to the UK being the first member state to implement the new directives in early 2015, demonstrates the extent to which the government felt it had succeeded in achieving its objectives in the negotiation. Was this feeling justified? The inclusion of several provisions pushed for by the UK, such as the public service mutuals clause (Article 77 of the Public Sector Directive) certainly lends some credence to this view. However, most assessments of the 2014 directives concur that, far from being a simplification of the rules, they introduce significant new complexities – something the UK very much wished to avoid. On social and other specific services, while 'light touch' rules were adopted, these apply to a smaller set of contracts than were covered by the non-priority regime under the 2004 directives, representing a reduction in flexibility.[317] Most tellingly, the UK government chose to exclude

[315] Cabinet Office (2012)
[316] Cabinet Office (2013)
[317] Notably, the category of 'Other services' is missing from the new light touch regime.

the mandatory social clause from its transposition in the Public Contracts Regulations 2015, suggesting that it did not agree with this provision.[318] This does not in fact deprive it of its effect due to the primacy of EU law and the cross-references to the specific environmental, social and labour laws included in Article 18.2 elsewhere in the Regulations, including the provisions on exclusion of bidders, rejection of abnormally low tenders and scrutiny of subcontractors. This suggests that in pursuing a small number of priorities for the reform, the UK either consciously sacrificed or was inattentive to social and environmental measures which went against its express preferences for simplicity and flexibility.

Other Member States

Strong support for enhanced environmental and social provisions in the new directives existed in Sweden, Finland and Denmark. These countries had begun implementing GPP in the late 1990s or early 2000s and had developed national criteria which set extensive minimum mandatory standards for the environmental performance of goods and services. Concern about social aspects of procurement had grown in the wake of the *Laval* quartet of ECJ decisions, reflecting widespread fears regarding cheap labour from eastern Europe. A centre-left coalition took power in Denmark in 2011, whereas in Sweden and Finland centre-right governments were dependent upon the Greens for support. A Committee of Inquiry had been established in Sweden in 2010 chaired by former MEP Anders Wijkman, tasked with evaluating the public procurement rules from an economic and social policy perspective. In its response to the Green Paper, this Committee argued in favour of clarification of the EU rules and compulsory life-cycle costing for energy-using products, but was in favour of maintaining the subject-matter link.[319] It also called for clarification of the relationship between the procurement rules and Posted Workers Directive – views echoed in the separate submission of the Swedish Department for Social Affairs.[320] Interviews with representatives from the Commission and Parliament indicated that strong support from Scandinavian countries was one of the factors driving this aspect of the reform. However, it should be noted that in Sweden at least there was an ongoing debate about the legitimacy of including environmental and social aspects in tenders.[321]

Conversely, several of the newer accession states had made their opposition to the inclusion of social, and in particular wage requirements, in public contracts clear in the run

[318] For discussion of the effect of the non-transposition of Article 18.2 in the UK, see Semple (2018).
[319] Swedish Committee of Inquiry on Public Procurement (2011), *Response to Green Paper on modernisation of EU public procurement policy*
[320] Swedish Department of Social Affairs (2011), *Svar på Europeiska kommissionens grönbok om en modernisering av EUs politik för offentlig upphandling*
[321] See for example Hettne (2013) on potential conflicts between SPP and the free movement principles.

up to the reform. This can be seen for example in the Green Paper submission of the Romanian Ministry of Justice, which calls for the reform to focus on free competition, transparency and simplification of the rules rather than any 'supplemental' considerations.[322] The Polish government appeared more open to inclusion of environmental and social aspects in procurement, although it did not see the need for changes to the rules on award criteria or technical specifications.[323] Cyprus, which held the Council presidency during the second half of 2012 when the Council's negotiating mandate was being agreed, supported the idea of relaxing the link to the subject-matter requirement for the selection stage only, while maintaining it for technical specifications and award criteria.[324] A common theme in the responses from newer member states is a sense of being overwhelmed by the existing EU procurement *acquis*, and a desire to avoid complex new rules or major changes. In theory most of the older member states shared this desire for a simpler regime, but in practice this was counterbalanced by their wish to achieve specific policies via procurement – whether environmental and social or quasi-industrial such as support for SMEs and public service mutuals. The perception that environmental or social criteria might be used to conceal corrupt practices was also of broader concern in the new accession states, with lowest price awards seen (usually inaccurately) as a bulwark against favouritism or discrimination.

Interest Groups

Over 245 businesses or business associations, and 100 civil society organisations responded to the Green Paper consultation.[325] 92 of these were from transnational business associations or NGOs, with the UK, France and Germany leading the way on single-country submissions. While the majority of business responses opposed new rules on environmental or social elements of procurement, the majority of civil society organisations supported this, and many argued for dropping the link to the subject-matter requirement or developing common mandatory EU standards for green and social procurement.[326] A number of NGOs and local government associations had become actively involved in promoting sustainable procurement – for example ICLEI (Local Governments for Sustainability) and the World Wildlife Foundation – and submitted detailed comments on the Green Paper. Unions were also well represented amongst the respondents, expressing strong support for social aspects of procurement. The GMB union (UK) called for removal of the link to the subject-matter

[322] Romanian Ministry of Justice (2011), *Green Paper on modernization of EU public procurement policy - Romanian Ministry of Justice point of view*
[323] *Urząd Zamówień Publicznych, (2011) Response to Green Paper on modernisation of EU procurement, p17*
[324] Government of Cyprus (2011), *Reply to Green Paper on the modernisation of EU public procurement policy*, p 20-21
[325] European Commission (2011d), p 2-3
[326] Ibid, p 7, 16

requirement based on the following reasoning:

> There needs to be more scope to include social and environmental objectives at various stages of the contracting process and the current Directives and practice interprets [the link] to the subject-matter far too narrowly. To drop this condition will create greater transparency of what the purpose, aims and objectives of the contracting authority are, rather than them having to do this "through the back door" and in less effective ways.
>
> Contracting authorities at every level have a wide range of policy objectives and commitments in the area of social, employment or environmental protection, which are publicly known, and are often generated in response to democratic choices – elections, or community/citizen pressures. It has been wrong for these commitments to be suppressed or restricted in public contracting procedures.[327]

In contrast, the European Automobile Manufacturers' Association (ACEA) opposed any relaxation of the link to the subject-matter rule:

> We are strongly against dropping or loosening this link with the subject matter and believe that no corrective mechanisms exist to correct the loss of competition and creation of discrimination.[328]

The Federation of German Industry (BDI) opposed compliance with the International Labour Organisation conventions becoming mandatory.[329]

Given the importance of public contracts as a source both of employment and of sales, ongoing lobbying at the EU and national levels on these and other aspects of the reform was to be expected. The European Parliament held public hearings on the procurement reform in 2010, 2011 and 2012. Environmental and social interest groups were particularly well-represented at these hearings, and their influence can be seen in the reports adopted by the Parliament. For example, the environmental law firm Client Earth presented detailed positions and even proposed wording in relation to technical specifications, award criteria and other areas – some of which were included in the Parliament's proposed amendments.[330] The Network for sustainable development in public procurement (NSDPP), comprising a number of unions, environmental and fair trade groups, published a joint letter to the Council working party in September 2012[331] which also proposed a number of specific amendments. The influence of these groups upon the Parliament and Council during the legislative process is considered in Chapter six.

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[327] GMB Trade Union, April 2011, *Response to EU Commission Green Paper Consultation*, p 11-12

[328] ACEA (2011) Response to Green Paper on modernisation of public procurement policy, p 19.

[329] Bundesverband der Deutschen Industrie (2011), *Response to Green Paper on modernisation of public procurement*

[330] ClientEarth, Position paper presented at European Parliament public hearing on modernising the EU public procurement rules, 20.3.2012

[331] Network for sustainable development in public procurement, Joint letter to the working party, 10.9.2012

There is less evidence regarding the lobbying efforts and impact of business, environmental or social groups at national level. The preferences for the reform adopted by the United Kingdom and Germany in particular can be seen as pro-business inasmuch as they sought to avoid the introduction of 'red tape' and to simplify procedures, as well as allowing negotiation of contracts. However the benefits of such flexibilities from the point of view of businesses tendering for public contracts depends on whether they are used in a way which is perceived as fair (to them)– which in turn often depends on whether an individual business or its competitors benefit from the discretion available to local or national procuring bodies. In other words, both the benefits and costs of procurement regulation for smaller companies, which tend to be those operating only at local, regional or national level, are both more diffuse and more uncertain than those which operate at transnational level. The latter expect to benefit from procurement rules which are clear and consistently applied across the EU, even if this means that they are more rigid than those which might otherwise apply under national practices. Combined with the greater resources available to larger companies to engage in lobbying, this helps to explain the relative lack of involvement in the reform by smaller businesses. To the extent that the latter did become involved, the objective of facilitating SME participation in procurement, rather than the environmental or social aspects of the reform, provided a natural focal point.

The impact of non-state interests on the reform at EU level is perhaps most clearly seen in the *Right2Water* initiative, led by the European Federation of Public Service Unions (EPSU). This was the first successful European Citizens' Initiative (ECI), a mechanism established under the Treaty of Lisbon which allows citizens to call upon the European Commission to legislate in a particular area. To do this, a minimum of one million signatures is required from at least seven member states, with quotas based on the population of each member state. *Right2Water* was registered as an ECI in April 2012, and by September 2013 had gathered almost 1.9 million signatures and met the required quotas.[332] Its objectives were that:

> (1) The EU institutions and Member States be obliged to ensure that all inhabitants enjoy the right to water and sanitation;
>
> (2) water supply and management of water resources not be subject to 'internal market rules' and that water services are excluded from liberalisation; and
>
> (3) the EU increases its efforts to achieve universal access to water and sanitation.[333]

The ECI reflected concern about the privatisation of water services in Germany and other EU

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[332] The majority of the signatures (1,341,061) were from Germany, however national quotas were ultimately met in 13 countries: Austria, Belgium, Finland, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Slovakia, Slovenia and Spain. Source: www.right2water.eu (accessed on 23 March 2018)
[333] Ibid.

countries, and a growing movement to return these services to the public sector. Grenoble, in France, had re-municipalised its water utility in 2000, followed by Paris in 2010 and Berlin in 2013 (Bieler 2017). EPSU had been active in promoting re-municipalisation in Germany and elsewhere in central and eastern Europe through the Reclaiming Public Water Network. The EU procurement directives, as well as the 2002 Services Directives, were seen as promoting the privatisation of water services. This was based on a misunderstanding of the public procurement rules, which do not require or promote privatisation of any service. Where a public authority decides to outsource a service, the procurement rules do set requirements regarding transparency and competition – but it has always been open to governments to provide water directly or through publicly owned utilities, and many continue to do so. Nonetheless there was concern about the role of the proposed new Concessions Directive on the quality and affordability of water services.

In February 2013, Commissioner Barnier went to Berlin to discuss the Commission's response to the ECI with Chancellor Merkel. *Right2Water* had become a campaign issue in the 2013 German elections, with both the CDU and SPD committing to keep water services public. The possibility of an exemption from certain aspects of the Concessions Directive for Germany was discussed. However ultimately the Commission decided to exclude water services entirely from the Concessions Directive – despite widespread objections and lobbying from water industry companies.[334] This was met with surprise by the BMWi and others involved in the negotiation of the directives.[335] Commissioner Barnier's statement emphasised that there had never been an intention to 'privatise water services through the back door', while accepting that exclusion of water services from the Concessions Directive was the most effective way of providing reassurance.[336] Ironically, this means that where member states do choose to outsource water services, the absence of EU publication requirements means a lower level of transparency and public scrutiny for such contracts. Nevertheless, the success of *Right2Water* demonstrates both the prominence of environmental and social concerns during the reform process and the influence of political actors beyond national governments and the EU institutions.

Conclusions

A close look at German, French and British priorities and preferences for the procurement reform shows a number of commonalities, as well as some divergences. All

[334] See for example AquaFed (2013) *Concessions Directive: European Commissioner renounces transparency and equity in public water services to please German public lobbies*
[335] BMWi (2013g)
[336] Statement of Commissioner Barnier, 21.6.2013, archived at: http://ec.europa.eu/archives/commission_2010-2014/barnier/headlines/speeches/2013/06/20130621_en.html (accessed 23 March 2018)

three member states were committed, at least in theory, to simplification of the rules and to maintaining or enhancing the flexibility available to contracting authorities to choose how to take other policy considerations into account. Although varying levels of commitment to environmental and social objectives existed in Germany, France, and the UK, all were keen to avoid the introduction of any new mandatory requirements at EU level. Importantly for the consideration of where a qualified majority lay within the Council, they were supported in this view by the new accession states. In the terminology of the Green Paper, they were opposed to rules on 'what to buy' as opposed to 'how to buy'. France did express support for removing the link to the subject-matter requirement, but was largely isolated in this position. Other member states, as well as the Commission and business associations, saw this as an important safeguard to avoid discrimination in procedures and to ensure procurement was carried out on commercial principles. Ultimately the link to the subject-matter requirement was strengthened in the 2014 directives, although it remains open to interpretation by the Court of Justice, which may opt for a strict or more flexible approach in cases coming before it. However, the inclusion of Article 18.2 in the final text of the directives does create new mandatory obligations on member states to ensure compliance with environmental, social and labour laws in public contracts – including some, but not all, of the ILO conventions[337] - and collective agreements.

The extent to which the Parliament and Council acted as supranational entrepreneurs on environmental and social matters, or as agents of the member states, will be considered in the next chapter. Does detailed examination of national preferences regarding procurement reform suggest that either the Commission or Court acted as agents of the member states? It is clear from the responses to the Green Paper that the three largest member states broadly welcomed the direction for the reform set by the Commission, but were wary regarding mandatory as opposed to facultative rules and did not seek greater harmonisation of approaches to SPP, although clarity and guidance were called for. The draft text published by the Commission in December 2011 eschewed common mandatory SPP measures, but also proposed relatively complex new rules on eco-labels and life-cycle costing, as well as on production phase considerations. Ultimately these rules will be interpreted by the Court, although member states had the chance to refine them during the negotiation process. This falls short of evidence of the Commission acting against the revealed preferences of the member states, so it remains plausible that it acted as an agent – albeit one with multiple

[337] ILO Convention No. 94 on Labour Clauses in Public Contracts is not included. Convention No. 94 requires that public contracts include clauses to ensure that wages (including allowances), hours of work and other conditions of labour are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried out. This has been ratified by ten EU member states, excluding Germany and the United Kingdom (which denounced Convention No. 94 in 1982).

principals and a mandate to develop the internal market which goes beyond the immediate interests of those principals. The decision to exclude water services from the scope of the Concessions Directive also demonstrates the limits to the Commission's ability to advance an internal market agenda in the face of political opposition.

A striking feature of the Green Paper submissions is the lack of references to CJEU case law on public procurement, including recent and controversial decisions such as *Rüffert*. This could demonstrate acceptance of the Court's jurisprudence and a reluctance to revisit such questions in the reform of the directives. Alternatively, it could reflect a political calculation on the part of the three largest member states that any attempt to override the Court's interpretation of the Posted Workers Directive in procurement legislation would meet with strong opposition from the newer accession states, possibly supported by Spain, Portugal and Greece. Whichever interpretation is correct, it remains difficult to describe the Court as either a supranational entrepreneur or agent of the member states in its procurement jurisprudence. The member states' support for the link to the subject-matter requirement, which the Court had developed in the *Concordia* and *EVN* cases, suggests that it had gained acceptance (except in France) as a means of reconciling the freedom of contracting authorities to include other policy considerations in procurement with the principles of transparency, equal treatment and proportionality. But there is little to suggest that any of the member states anticipated the Court's next major intervention in the effort to reconcile market and non-market objectives, in the *Max Havelaar* case. Rather they were forced to consider how to incorporate this latest development in the thick of negotiations over the new directives.

Chapter 6 – Negotiating the Directives: The European Parliament and Council

This chapter focuses on the role of the European Parliament and Council in the reform of the public procurement directives. Although the main work in negotiating the directives took place during the first half of 2013, the Parliament in particular had invested considerable time and political capital in the topic from 2010 onwards. These early attempts to shape the agenda are analysed here, together with the committee process during 2012 and the trilogues held under the Irish presidency of the Council which lead to a compromise text being agreed in July 2013. This chapter evaluates the hypotheses that the Parliament and Council respectively acted either as supranational policy entrepreneurs (H1) or as agents of the member states (H2) during the reform, and that their actions were either irreversible (H3) or subject to recall by the member states (H4). The approach taken to falsify these hypotheses is the same as in previous chapters – namely looking for evidence that the Parliament and Council, in the form of their respective negotiating parties, acted either only within the bounds of member state preferences or outside of these preferences; and that their actions were subject to reversal by member states or that there was no realistic prospect of member states reversing decisions taken by the negotiating parties. Documentary evidence has been supplemented by interviews with individuals directly involved in the process. Interviews proved particularly useful in helping to trace the origins of individual provisions which appear within the documents, as well as in understanding the informal and formal political and organisational context in which the negotiation took place.

Overview of process

Before turning to the specific roles of the Parliament and Council, a few observations regarding the overall process will provide orientation. The three directives to be negotiated (public sector, utilities and concessions) had many overlapping provisions and were largely negotiated in parallel.[338] Whereas the public and utilities sector directives would replace the 2004 directives, the concessions directive was new – and proved controversial in a number of respects, not least the question of inclusion of water services as discussed in Chapter five. For the purpose of the negotiation, ten thematic clusters were identified by the Council working party and provisions from all three draft directives were grouped within these. The most important for the purpose of this study is Cluster 2 on "Strategic use of public procurement." This covered both environmental and social provisions and included most of

[338] As noted in the introduction, the focus here is on the public sector directive, as it was in the negotiation of this directive that the new environmental and social provisions were agreed.

the areas identified in Table 3.1.[339] Following publication of the Commission's proposal in December 2011, both the Council and Parliament expressed the intention to reach agreement by the end of 2012. However, it took until the end of 2012 for the Council to confirm its general approach, and for the Internal Market and Consumer Affairs Committee (IMCO) to adopt the report put forward by its rapporteur, tabling a large number of amendments to the Commission's proposal. Agreement on the text followed a total of 17 trilogue meetings held between March and June 2013. After a further six months of legal tidying and translation, the three directives were adopted at first reading by the plenary Parliament in January 2014, and by the General Affairs Council in February 2014. A timeline showing the relevant stages and activities by all three bodies is given below, and Appendix B contains an index of the key documents produced during the reform.

[339] In addition, Cluster 3 included subcontracting issues; Cluster 8 abnormally low tenders and Cluster 10 the light touch regime.

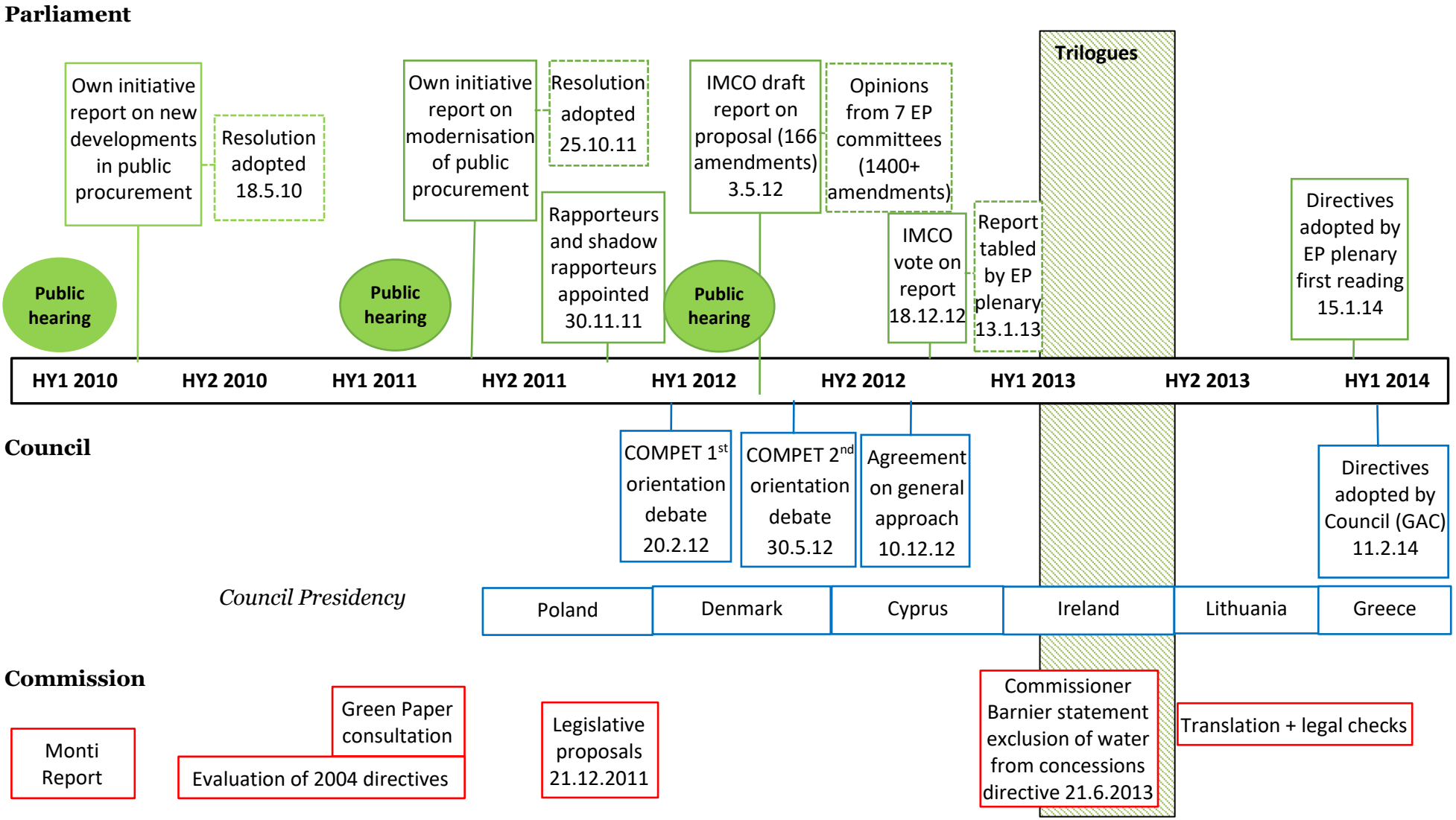

Figure 6.1 Timeline of European Parliament, Council and Commission activities related to public procurement reform, 2010 -2014

Agreement on first reading – theory and practice of trilogues

Relations between the Council and Parliament have often been associated with mutual antagonism and competition – however given the predominance of the ordinary legislative procedure (codecision), effective cooperation between the two institutions has had to be cultivated. In the 2009-14 legislative session, 85% of all codecision procedures were concluded at first reading.[340] The procurement directives followed this trend, although as can be seen from Figure 6.1 this did not mean a rapid process or one which excluded deliberation or public scrutiny. It did mean that closed-door trilogues played a pivotal role in agreeing the final text of the directives, although these came towards the end of the procedure and focused on a relatively short list of amendments compared to the number tabled within Parliament prior to adoption of its report. Trilogues have been the subject of criticism both by academics and by the European Ombudsman due to their perceived lack of transparency. Reh (2014) evaluates democratic critiques of the use of trilogues, finding that the control mechanisms developed under successive changes to the Parliament's rules of procedure only partially address such critiques. She sees trilogues as part of informal politics defined as "restricted and secluded decision-making that is structured by informal institutions and that generates outcomes which require formalization." She identifies the potential benefits of trilogues in terms of flexibility and discretion, but also the challenges they pose in terms of democratic accountability – particularly in the process for selecting rapporteurs/negotiators within EP committees, and for reporting on and monitoring negotiations.

Originally trilogues were thought to empower the Council over the Parliament, in part because it was assumed to have greater diplomatic skills and closed-door meetings were seen as a potential way of sidestepping EP committees (Shackleton and Raunio 2003; Farrell and Héritier 2004). However, there is evidence that this balance may have shifted towards EP negotiating parties since 2009, as explored below. Council negotiating parties for trilogues are usually much smaller than those of the Parliament and even those of the Commission (Roederer-Rynning & Greenwood 2015). While the Council decides when to open trilogues, Parliament effectively controls many other aspects, including hosting them. Negotiating mandates must be approved by Coreper and the relevant EP committee respectively. Bilateral meetings between the country holding the rotating Council presidency and EP representatives may take place before, during or after political and technical trilogues. A typical legislative file might require 10-15 trilogue meetings, the majority of which are technical in nature. These are attended by the EP negotiating party (comprising rapporteur, shadow rapporteurs and chair of the responsible committee), the Council

[340] European Parliament (2014) *Activity Report on Codecision and Conciliation 14 July 2009 – 30 June 2014 (7th Parliamentary Term)* at p 8.

working party (comprising civil servants from the country holding the Council presidency), and Commission representatives.

In recent years, there has been a push for greater transparency in EU decision making, including in the context of trilogues. Reforms to the Parliament's rules of procedure in 2012 aimed to increase accountability, by tightening the mandates given to rapporteurs and formalising the role of shadow rapporteurs within negotiating teams. A majority decision within the responsible committee would henceforth be required to authorise early agreement, set the rapporteur's mandate and to open negotiations.[341] Four-column documents had to be circulated to the negotiating team at least 48 hours before trilogues, or 24 hours in cases of urgency.[342] Negotiating teams had to report back to the committee after each meeting and make copies of negotiated texts available.[343] These amendments were agreed in September 2012 and came into effect in December 2012, meaning they applied during the public procurement trilogues.[344] However, the process leading to agreement on first reading still provides a lower standard of accountability than full public debate in committees of all aspects of legislation. Reh argues that the process lacks narrative accountability because negotiating parties only provide an account of trilogues to the committee and plenary, rather than having to fully explain and justify any compromises made. She also finds that the process of report allocation falls short of good deliberation; neither the committee nor the plenary debate openly which MEP should lead on a dossier, and formal votes or consultations with rank-and-file party members are rare. Report allocation is based on a relatively obscure system in which parties bid for individual reports using points based on the size of their faction within the Parliament. Even prior to the 2012 rules of procedure providing more institutional control over rapporteurs and their mandates, there was an incentive not to deviate too far from the agreed mandate due to the repeated process of report allocation and the need to maintain trust. The possibility to remove an errant rapporteur or to reappoint a diligent one also serves to reinforce accountability. Reappointment of a specialised rapporteur to similar future dossiers is relatively frequent; deselection is less common but does occur.[345]

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[341] European Parliament, Committee on Constitutional Affairs, 25.9.2012, *Report on amendment of Rule 70 of Parliament's Rules of Procedure on interinstitutional negotiations in legislative procedures* (2011/2298(REG)).
[342] *Ibid*, Amendment 5 (Rule 70 paragraph 2b – new). Note however that where four-column documents are very long (650 pages for the public procurement directive) 24 or 48 hours may still be insufficient for detailed review.
[343] *Ibid*, Amendment 6 (Rule 70 paragraph 3)
[344] Further reforms to the EP Rules of Procedure were adopted in January 2017; these extend greater control over trilogues by allowing a vote in plenary on the decision by a committee to authorise such negotiations (rule 69c).
[345] Reh (2014) cites examples from the 2007 Advanced Therapies Regulation and 2009 Social Security Regulation. In 2017, S&D rapporteur Adam Gierek was replaced as the rapporteur on the recast energy efficiency directive due to his proposal of amendments which directly contradicted his party's own position (Euractiv, 5 December 2017 "Controversial MEP replaced as lead on energy savings file" accessed on 17 April 2018)

Following the European Ombudsman's own-initiative inquiry into trilogues in 2015, some additional transparency and control measures are being adopted by the Parliament and Council. The bodies have committed to development of a joint database to provide access to documents and updates on legislative procedures, and the Council intends to publish the name of the Minister, (Deputy) Permanent Representative and Council configuration responsible for each legislative file under negotiation.[346] The EP already publishes its negotiating mandates, and the Council is considering doing so. While the Ombudsman recommended publication of four-column documents and lists of other documents tabled as soon as possible after negotiations conclude, the institutions demurred pending the General Court's ruling in case T-540/15 *De Capitani v Parliament,* which touches upon these points. Judgment in that case was delivered at the end of March 2018, with the Court ruling that access to trilogue documents should be governed by the same rules which apply generally to EU documents, and that they should be disclosed on request unless there is a very clear threat to the decision-making process from doing so. The Court noted that the compromise text set out in the fourth column is usually adopted by the co-legislators without substantial amendment, meaning trilogues constitute 'a decisive stage in the legislative process.'[347] The effect of the ruling is that the four-column documents will be subject to disclosure during procedures, although it remains to be seen whether the Parliament and Council will publish them in the absence of specific requests.

It is likely that the co-legislators will continue to resist full publication of four-column documents while procedures are ongoing, as this could constrain negotiating tactics and interfere with the ability of the negotiating parties to make compromises. The relative secrecy of trilogues can be seen as a factor which enhances the autonomy of negotiating parties – potentially increasing their ability to act as policy entrepreneurs. Where the relevant EP committee or Council configuration has not expressed a definite preference in relation to an aspect of legislation, negotiating parties often identify solutions which they expect will be approved by these bodies as part of a broader package. There are risks associated with this approach, but also potential gains in the form of expedited agreement or avoidance of deadlock. For example, in the course of negotiating the procurement directives the Irish presidency agreed to a number of compromises which were not explicitly mandated in advance.[348] This type of compromise may be less likely if details of trilogues are made public while procedures are still underway, particularly where they are politically sensitive.

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[346] European Ombudsman (2017) *Strategic inquiry on the transparency of trilogues: follow-up and first results*

[347] General Court of the European Union, Press Release No 35/18 of 22.3.2018 *Judgment in Case T-540/15 De Capitani v European Parliament*

[348] Interviews C, D, E. The significant delays in national implementation of the procurement directives may be linked to deviations from member states' express preferences during trilogues.

While a normative argument in favour of greater transparency in trilogues can therefore be made, this must be balanced against the benefits of relative secrecy regarding the details of negotiated compromises. Secrecy has long been the norm in international negotiations, although the Commission has recently adopted an enhanced degree of transparency in trade negotiations, apparently in response to public criticism.[349] In the legislative context, the main arguments made in favour of secrecy are that this enhances efficiency and increases 'negotiating space' (Leino 2017). The CJEU however rejected these arguments in *Council v Access Info Europe*,[350] concerning release of Council documents which contained individual member state positions. The judgment drew upon Article 15 TFEU and Regulation 1049/2001 which both endorse the principle of transparency in legislative procedures, subject to a number of exceptions.

Agency and entrepreneurship in interinstitutional negotiations

The relative secrecy of trilogues presents a challenge in terms of the empirical observation of policy entrepreneurship and agency on the part of Council and Parliament negotiating parties. From an agency perspective, the negotiating party appointed by the Parliament can be seen as a collective agent of the responsible committee. Laloux (2017) looks at the loss of control for principals where they rely upon a collective, rather than individual agent. A collective agent comprises multiple actors with different preferences (e.g., the rapporteur, shadow rapporteurs and committee chair) but which is bound by a single contract to the principal. No member of the negotiating party enjoys veto power. Laloux suggests that the reforms to the EP's rules of procedure have actually increased the discretion of negotiating parties, because the presence of representatives from different political parties means they are perceived as a subset of the committee. Prior to the adoption of the reforms, rapporteurs were seen as a potential threat to the balance of power within committees and so may have been subject to increased scrutiny from political opponents. Both the selection process and monitoring arrangements now serve to ensure that the negotiating party reflects the preferences of the committee as a whole - and to a lesser extent the plenary Parliament (which must approve both the initial report and final legislative text). This has also increased the credibility of EP negotiating parties in the eyes of the other trilogue participants, as they are understood to act with political authority.

The agency relationship is structured differently in the case of Council working

[349] This can be seen in particular in the Commission's publication of details regarding the negotiation of the Transatlantic Trade and Investment Partnership (TTIP), in response to growing public opposition to the agreement in 2014-15. Similar levels of transparency have been adopted by the Commission in subsequent trade negotiations and in relation to the UK's withdrawal from the EU.

[350] Case C-280/11 P *Council of the European Union v Access Info Europe*

parties, due to the preeminent role played by the country holding the rotating presidency at the time that trilogues are held, which chairs these meetings. The presidency country may be seen as a single agent working on behalf of a collective principal, the member states. Coreper acts as an intermediary agent also responsible to the member states, superintending the work of the chair. In contrast to the Parliament's reformed procedures, which in formalising control mechanisms over negotiating parties may actually have given them greater autonomy, the Council and Coreper exercise control over the chair in a more ad hoc, but potentially more constraining manner. The actual levels of scrutiny and control within Coreper and the Council are likely to depend upon the overall levels of trust which other member states have in the presidency country to conduct negotiations responsibly, the political prominence of the file, and the extent of disagreement amongst member states on the draft legislation. Control mechanisms over the chair include the ability of other member states to reject compromises reached during trilogues, and less immediate responses such as the presidency scorecard. Bilateral, confidential feedback is also provided by national delegations to the Council President and Secretariat.

Laloux and Delreux (2018) argue that delegation in the context of trilogues inherently implies deviation by the agents, as concessions must be made to reach agreement. They devise an index to measure this deviation based on the distance between the initial mandates of the Council and Parliament and the final agreement reached. Applying the index to all trilogues held in 2012-2016, they find that the agents frequently deviate more than the amount required to reach an interinstitutional compromise, and that this tendency is more pronounced amongst EP negotiating parties[351] than it is amongst Council presidencies. They also find that the degree of deviation is not linked to the level of support for the initial mandate by the principals or to the size of the agent. Laloux and Delreux acknowledge that deviation is not always undesired by the principals, but that it may nevertheless pose problems in terms of democratic accountability. As a creature of the Treaties, Parliament up to and including its committees may be understood as an agent of the member states who created it. But this link breaks down if negotiating parties deviate from mandates set by committees, and particularly if they serve interests which are outside of the institutional structures prescribed by the Treaties, and which directly conflict with the interests of the member states as expressed via the Council.

From the perspective of the hypotheses I address, deviation in itself does not necessarily falsify the principal-agent relationship; but where such deviation is characterised by risk-taking and brings benefits to the agents as distinct from the principals, I argue that it

[351] Laloux and Delreux examine the behaviour of the EP rapporteur rather than the negotiating party as a whole.

is better characterised as supranational entrepreneurship. The key risks which I look for in the analysis below are the introduction of compromises which explicitly contradict the preferences of the member states (as opposed to merely deviating from them),[352] and the corresponding risk of rejection by the principals. In terms of benefits to the agents, I examine whether such risk-taking might be expected to bring political rewards outside of the principal-agent relationship, for example within the party grouping of the rapporteur or the domestic political order of the country holding the Council presidency. I also consider the potential political rewards for both the Parliament and Council associated with trade-offs between concessions on the public procurement dossier and other legislative files which were under consideration at the same time.

The European Parliament

The responsible committee within the European Parliament was the Internal Market and Consumer Affairs committee (IMCO), chaired by Malcolm Harbour, a British MEP belonging to the European Conservatives and Reformists (ECR) grouping. As shown in Figure 6.1, work on the public procurement directives within IMCO began more than 18 months prior to the publication of the Commission's legislative proposal. In May 2010 an own-initiative report was produced by Heide Rühle, a Green MEP from Baden-Württemberg, calling for a resolution 'on new developments in public procurement'.[353] The report highlights that the proliferation of case law and interpretative communications from the Commission since 2004 had created a very complex set of rules on procurement, which local and regional public bodies in particular were struggling to implement. This legal complexity deterred public authorities from implementing other policies via procurement, resulting in contracts being awarded on the basis of lowest price. The draft resolution calls for greater clarity and enhanced opportunities to apply environmental and social criteria, including those linked to fair trade and payment of standard wages.[354] The report also notes the

[352] Deviation is measured by Laloux and Delreux by comparison of the initial mandates of the Parliament and Council and the final negotiated text. Using a text-mining algorithm, they compare this deviation with the minimum deviation needed to reach an inter-institutional compromise, based on the difference between the two mandates. They validate their method by reference to case studies in selected areas, finding that these corroborate the level of deviation as indicated by the index. A shortcoming of this approach is that the index itself does not identify the substantive weight of textual amendments. For example, the addition of an 'including' or even a comma may radically alter the meaning of a legal text, and the significance of such changes would be missed by most text-mining algorithms. While the index still provides a valuable starting point for large n analyses of legislative negotiations, further and better validation might be achieved by comparing the deviation index to the amount of time taken to reach interinstitutional agreement, with longer negotiations suggesting that the mere degree of textual changes may not fully capture the level of deviation. This could then be cross-referenced with case studies for greater accuracy. For the purposes of this study, I evaluate the individual legal significance of all changes in the draft text related to environmental and social provisions, an approach which gives greater accuracy, but is not well suited to large n analyses.

[353] European Parliament (2010). The report was preceded by a public hearing held by IMCO in January 2010.

[354] *Ibid*, p 12.

comparative lack of Commission support and guidance on socially responsible procurement compared to GPP. Despite this, the explanatory memorandum indicates that the rapporteur considered revision of the procurement directives to be premature at that point.[355] IMCO held public hearings on procurement in 2010, 2011 and 2012 – with strong representation from environmental groups, local and regional government, business associations and unions. The hearings also included a number of legal experts, suggesting that from an early stage the Parliament was not willing to leave the legal detail of the directives to the Commission.

A further resolution relating to public procurement was adopted by the Parliament in October 2011, following the Commission's Green Paper consultation and a second report by Ms. Rühle.[356] This goes further in calling for specific environmental and social measures to form part of any new directives, including life-cycle costing and production-phase criteria. It also expresses concern that the rules should be simplified and made more flexible, whereas the Green Paper suggested the Commission was in favour of the 'micro-regulation' of public procurement.[357] This mantra regarding simplicity and flexibility would come to be repeated many times by all parties involved in the reform process, but *ex post* evaluation of the procurement directives suggests that they have in fact introduced significant additional complexity, due in part to the interinstitutional compromises made on the environmental and social provisions. Ultimately the burden of this complexity is borne at national level. It is one of the reasons for the delays in transposition of the new directives in a majority of member states: 21 missed the deadline for transposition in April 2016 and 15 had still not implemented them by December 2016, leading to reasoned opinions being issued by the Commission. It is notable that while the Parliament made several attempts to engage national interests in its work on procurement, including through an inter-parliamentary forum and the public hearings to which national representatives were invited, there was relatively little interaction with national governments, compared to that with local and regional governments, civil society groups and business associations.[358]

In November 2011 Marc Tarabella, a Belgian member of the Party of European Socialists from Wallonia, was appointed as rapporteur for the forthcoming legislative process. Shadow rapporteurs were assigned from each of the other political groupings within IMCO, who together with the chair Malcolm Harbour brought the size of the negotiating

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[355] *Ibid*, p 19-20
[356] European Parliament (2011). A public hearing was held by IMCO in May 2011.
[357] *Ibid*, p 15.
[358] This is evident from the programmes for the public hearings held in 2010, 2011 and 2012 and was confirmed in interviews C and D.

party to eight. A working document identifying priorities for the negotiation was produced in February 2012 included the following objectives linked to Cluster 2:

- Enhancing respect of social rights and working conditions, health and security at work, compliance with social security protection as defined by European and national legislation as well as by collective agreements;
- Making the exclusion grounds related to non-compliance with social, labour or environmental law mandatory and adding a reference to ILO Convention 94;
- Extending environmental and social sustainability conditions to sub-contractors;
- Further developing labels and certification for social concepts;
- Further developing the light touch regime for social services, including careful assessment of the list of services included.[359]

Work within IMCO on these and other points lead to the publication of its draft report on the Commission's proposal in May 2012, which contained an initial 166 amendments to the text.[360] This was circulated amongst other EP committees, seven of which appointed their own rapporteur and produced an opinion containing further amendments to the text.[361] By September 2012 a total of 1593 amendments had been tabled,[362] and the task fell to the negotiating party to consolidate these into their report. A working document identifies the Cluster 2 issues as highly controversial, with almost half of the tabled amendments relating to this cluster or other areas linked to social and environmental considerations.[363] Amongst the proposed amendments were the removal of lowest price awards and strengthening of the rules on abnormally low tenders, as well as the mandatory exclusion of bidders who had violated environmental, social or labour obligations - including those under collective agreements.

Following a series of meetings between the shadows and committee, the consolidated report was adopted by IMCO on 18th December 2012 in a vote which lasted some 3.5 hours, with 23 members in favour, 8 against and 7 abstentions. The amendments had been whittled down to 253, however several far-reaching social and environmental measures had survived the committee process. Rapporteur Tarabella drew attention to these measures in his final report which was tabled by the plenary Parliament in January 2013:

> The rapporteur considers that the Commission proposal does not go far enough, particularly on social aspects. He therefore wishes to ensure compliance with social

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[359] European Parliament (2012), p 3-4 (paraphrase)
[360] European Parliament (2012a)
[361] The committees providing opinions were International Trade (INTA); Employment and Social Affairs (EMPL); Environment, Public Health and Food Safety (ENVI); Industry, Research and Energy (ITRE); Transport and Tourism (TRAN); Regional Development (REGI); and Legal Affairs (JURI).
[362] The majority of these were tabled by members of the negotiating party or other IMCO members. But ENVI, EMPL and JURI tabled over 50 amendments each while REGI and ITRE tabled over 100 each.
[363] European Parliament (2012f)

> standards at all stages of the public procurement procedure.
>
> …The rapporteur also reinforces the grounds for exclusion by requiring the exclusion from public procurement contracts of any economic operator which has breached its obligations under social, labour and environmental law as defined by national and European legislation and collective agreements which have been concluded in accordance with Union law. Similarly, the contracting authorities may not award the contract to the tenderer making the best bid if the economic operator in question is unable to provide up-to-date information on the payment of his social security contributions.
>
> Finally, at the award criteria stage for public procurement contacts, the rapporteur considers that the notion of the 'lowest price' should finally be scrapped in favour of that of the 'most economically advantageous tender' (MEAT). Given that price is also taken into account in the MEAT, this would allow contracting authorities to make the most appropriate choices in relation to their specific needs, including the consideration of strategic societal aspects, social criteria and environmental criteria and, in particular, fair trade.[364]

Key amendments to the Commission's proposal included the mandatory social clause inserted as Article 15(2) (later becoming Article 18.2) and the exclusion of bidders for violations of ILO Convention 94. The latter was guaranteed to be controversial during the trilogue stage given that not all member states had ratified this Convention, under which public contracts must include clauses ensuring that workers receive the same wages and benefits as apply under local collective agreements. The potential for conflict with the Court's *Rüffert* jurisprudence was also clear.

Green and socialist representatives within the Parliament thus largely succeeded in framing the debate and setting the agenda for the negotiations under Cluster 2. But this took place in an environment characterised by multilateral debate and extensive, detailed review of the tabled report by MEPs of various political orientations, as well as public scrutiny. Going into the trilogues, the negotiating party could be characterised as an agent which had a heavy influence over its own mandate. While rapporteur Tarabella clearly sought to give a social flavour to the directives, he was also obliged to promote amendments which focused on innovation, promotion of small businesses and various other agendas within the Parliament. But the agency model starts to look strained when we consider the final negotiated outcome of the directives, and even the report with its 253 amendments. These clearly *reduce* flexibility and *add* complexity, contrary to the intentions expressed in IMCO's initial reports on public procurement. They also cross a key 'red line' set out in national responses to the Green Paper, by introducing new mandatory measures. This can be seen as the rapporteur and negotiating party taking risks in order to serve an agenda of their own,

[364] European Parliament (2013), p 150-151

which aligns better with the idea of a policy entrepreneur. The negotiating party was the first to recognise and exploit policy windows linked to socially responsible procurement in particular, in the sense described by Kingdon (1984).[365] This second analysis is supported by the lack of consensus within IMCO regarding the report, as evidenced by nearly 40% of the members either voting against it or abstaining.

The negotiating party may have acted as a policy entrepreneur rather than as an agent, but can it be seen as supranational? The idea of supranational entrepreneurship has been developed largely with reference to the Commission and the Court, as explored in Chapter two. It tends to be associated with monolithic, technocratic institutions which are able to exercise power outside of explicit democratic mandates. The Parliament is more often depicted as transnational than supranational, but the distinction is largely moot from the perspective of the competing hypotheses examined here – which test what I have argued are the core incompatibilities of intergovernmental and supranational theory. Either the Parliament is answerable to national interests or it is not; if it is not, and yet it wields considerable power over the nature and extent of EU integration, then this is a problem for intergovernmental theory. It is less of a problem for supranational theory because the Parliament's powers can be explained as part of the EU's distinct polity which has become increasingly independent from purely national interests over time. As contemplated in Chapter two, Parliament may be most influential where its political orientation is distinct to that of the Commission and Council, both of which were dominated by centre-right interests in 2011-14. While the basic elements of policy entrepreneurship appear to be present in the public procurement case, how much power did the Parliament's negotiating party really exercise? Were any of its actions in amending the legislation irreversible or were all subject to recall by member states acting through their agent in the Council? To answer these questions, we must turn to the process within the Council itself.

The Council

The draft procurement directive was discussed at three meetings of the Competitiveness Council held in February, May and December 2012. At the last of these, the Council adopted its general approach, shortly ahead of the European Parliament tabling its report. These meetings provided political direction on issues which had been identified as

[365] As set out in Chapter 2, while principal-agent theory can account for many actions on the part of the agent which appear to be self-motivated or which contradict the immediate interests of the principal, if an EU institution is the first to recognise and exploit a policy window, it is difficult to characterise it as acting as an agent of the member states, or any other body. Essentially the principal-agent relationship loses its power as an interpretative device if it is stretched to cover situations in which an EU institution is acting on its own initiative, for its own benefit and without or prior to the support of the member states.

particularly salient within the reform, including the light touch regime, flexible procedures, e-procurement and governance. During early 2012 the Commission produced several 'non-papers' which were circulated to the working party and which explained various aspects of the proposed legislative text, including the new environmental and social provisions.[366] The working party under the Danish and Cypriot presidencies produced a series of compromise texts amending the Commission's draft throughout 2012, with Cluster 2 issues receiving particular attention. Most of the Council's amendments within Cluster 2 aim to increase the flexibility of the social and environmental provisions, in contrast to the Parliament's amendments which seeking to make these more binding.[367] Following the Court's judgment in *Max Havelaar* in May 2012, the working party incorporated explicit references to fair trade and social award criteria into the compromise text.[368] While the Council repeatedly expressed its intention to adopt the directives within 2012, work was slowed in the second half of 2012 and the first three months of 2013, due in part to the introduction of the draft concessions directive, and the controversy over the inclusion of water services arising from the *Right2Water* campaign.

The first of 17 trilogue meetings eventually took place under the Irish presidency on 6 March 2013. How much independent power does the chair country wield over legislative files? Neither the treaties nor the Council's rules of procedure grant the rotating presidency much in the way of formal powers. Nevertheless, the role is central to the day-to-day workings of the Council and has a large effect on both the volume and content of legislation adopted. Countries are expected to 'leave their mark' on the presidency by achieving progress on topics which reflect their national priorities, as well as those of the EU as a whole. Analysing a dataset of all Council working party meetings from 1995 to 2014, Häge (2017) found that "the [rotating] Presidency has substantial scope for agenda-setting by determining what issues are being discussed, when they are being discussed and how much time is devoted for their discussion." He concludes that the presidency is able to direct the political attention of the Council in line with its own priorities, however this effect varies between policy areas. Previous scholarship had tended to emphasise the constraints placed on the presidency by the Commission's legislative programme and other inherited agendas. Quantitative studies have found that holding the presidency at the time that EU legislation is adopted is associated with an increase in national preferences being realised, although the effect is relatively modest (Thomson 2008; Warntjen 2008). Other studies have analysed

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[366] General Secretariat of the Council, Document ST 5369 2012 INIT of 20.1.2012 and Document ST 5369 2012 REV 1 of 27.1.2012

[367] This can be seen in particular in the replacement of 'shall' with 'may' in a number of the amendments proposed by the Council.

[368] Council of the European Union (2012k)

variations in the effectiveness of presidencies, with Quaglia and Moxon-Browne (2006) finding that expertise in EU affairs, political credibility, and attitudes towards European integration have a greater impact than traditional measures of power such as country size, or economic and political weight.

As Laffan (2014) points out, Ireland's weak economic position at a time of its 2013 Council presidency (it was in receipt of an EU bailout), meant that the budget was half of that allocated in 2004 for the previous Irish presidency. It also meant that the presidency was focused on achieving progress on measures linked to stability, growth and jobs – of which public procurement reform was one, albeit much less prominent than the Multiannual Financial Framework (MFF) for 2014-2020 and legislation related to the ongoing euro crisis. Public procurement was just one of 80 legislative files on which agreement was reached during the Irish presidency, which chaired over 374 trilogues (Laffan 2014). Relations with the Parliament were key to the success of several sensitive and important files, including the MFF, with the Parliament rejecting the version approved by the Heads of State and Government in March 2013. This lead to fraught last-minute negotiations by the Irish presidency in an attempt to salvage agreement on the MFF, which was eventually reached in June. Given this context, a willingness on the part of the presidency to make concessions to the Parliament on less politically prominent dossiers such as procurement, as well as a lack of detailed supervision by Coreper and the Council of Ministers, is understandable. Put simply, the Council was distracted and keen to maintain good relations with the Parliament in order to smooth the passage of more important legislation. Nevertheless, for countries outside of the eurozone or which were not feeling the effects of the crisis as profoundly as Ireland, such as the UK, Germany and France, public procurement remained an important policy area and one in which the outcomes of the negotiations did not match their express preferences as analysed in Chapter five.

There is scope then to question the strength of the principal-agent relationship between the Council as a whole and the working party of the rotating presidency. However, this does not point towards the supranational entrepreneur hypothesis in the same way as the questionable agency of EP negotiating parties does. This is because where working parties deviate from the preferences of the Council as a whole, they are likely to move closer to the domestic policy preferences of the country holding the presidency. Technically as chairs they are expected to be both neutral and impartial, but in the absence of clear political mandates from the Council on specific questions which arise during trilogues, national agendas may intervene. This involves risk-taking which might be characterised as policy entrepreneurship, but not of a kind which undermines intergovernmental theory. On the contrary, it suggests that national preferences can prevail in the gaps between the EU's institutional architecture within the Council. However, there is little evidence in the case

examined here to support the idea that the Irish presidency prioritised national preferences over those of other member states. Unlike the UK, Ireland was one of the countries which was late in its transposition of the directives, and environmental and social measures did not form an important part of national procurement policy either before or after the negotiation. While the various pro-SME measures adopted accord more closely with Irish public procurement policy in this period, these were actually weakened during the negotiation.[369] The relationship between the working party lead by Ireland and the Council as a whole can perhaps best be described as a principal-agent relationship with relatively little deviation, but also relatively little influence on the final text in the areas examined here, compared to the EP negotiating party.

The trilogues involved a gruelling schedule of meetings, which intensified in the final two months of the Irish presidency. A team of just two civil servants was responsible for chairing the meetings, preparing documents before and afterwards, and reporting back to Coreper.[370] Two main sticking points emerged: the inclusion of water services in the Concessions Directive and the Article 18.2 social clause. The former was a particular problem for Germany, the latter for the new accession states – who saw it as a form of social imperialism.[371] The working party and Commission proposed a number of different compromise wordings in order to soften the effect of the mandatory social clause, and several recitals were inserted to clarify that this clause should be interpreted in line with CJEU case law. However the mandatory nature of Article 18.2, and the reference to national laws and collective agreements remain in the final text. The EP negotiating party also succeeded in revising the UK's public service mutuals reservation (Article 77) in a way which ensures organisations benefitting from this clause have an explicitly social purpose and are governed by employees. There was concern within the Council about the complexity of the wording of the provisions on labels and life-cycle costing – these were not eliminated in the final text.[372]

On 21 June and 25 June 2013, four final trilogues took place and provisional agreement was reached on the text for the three Directives. Coreper was debriefed in detail on the outcome of the trilogues on 26 June.[373] Because of the volume and complexity of the proposals, additional technical meetings were held on 27 and 28 June and on 1, 2, 3 and 4

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[369] For example, the requirement to divide contracts into lots (which was intended to benefit SMEs) was abandoned in favour of a weaker provision.
[370] Interview E.
[371] *Ibid*
[372] *Ibid*
[373] Council of the European Union (2013p)

July to complete the texts. Key provisions under Cluster 2 where the Council differed substantially from the Parliament are shown in the below table, with the position of the respective co-legislators going into the trilogues shown as well as the final outcome in the negotiated text. The bracketed (EP) or (C) indicates whether the final outcome is closer to the Parliament or Council position, with (EP/C) used where the outcome amounts to a draw.

Provision	Parliament Position	Council Position	Final Outcome
Mandatory social clause	Proposed Art. 15(2) including compliance with collective agreements	No mandatory social clause	Mandatory social clause including compliance with collective agreements (EP)
Exclusion grounds	Mandatory exclusion for child labour and human trafficking	No mandatory exclusion for child labour and human trafficking	Mandatory exclusion for child labour and human trafficking (EP)
Award criteria	MEAT to be only basis of award	Lowest cost award to be retained	MEAT only basis of award, but cost may be sole criterion (EP/C)
	No definition of link to the subject-matter	Definition of link to the subject-matter	Definition of link to the subject-matter (C)
Life-cycle costing	Limit to costs borne by contracting authority	Include costs borne by other users	Includes costs borne by other users (C)
	No requirement for established method	Requirement for established method	No requirement for established method (EP)
Abnormally low tenders (ALTs)	Mandatory explanation of ALTs	Discretionary explanation of ALTs	Mandatory explanation of ALTs (EP)
	Mandatory rejection of ALTs for non-compliance with collective agreements	No obligation to reject based on non-compliance with collective agreements	Obligation to reject ALTs for non-compliance with collective agreements (EP)
Contract performance clauses	May include innovation and employment-related considerations	No reference to innovation or employment-related considerations	Includes innovation and employment-related considerations (EP)
Subcontracting	Obligation to identify subcontractors in tenders	Option to require identification of subcontractors in tenders	Optional identification of subcontractors (C)
	Liability of subcontractors for breaches of environmental and social obligations	No liability of subcontractors for breaches of environmental and social obligations	Liability of subcontractors, but subject to national rules (EP/C)
Light touch regime	Reference to disadvantaged and vulnerable groups	No reference to disadvantaged and vulnerable groups	Reference to disadvantaged and vulnerable groups (EP)

	Restriction on lowest cost award	No restriction on lowest cost award	Partial restriction on lowest cost award (EP/C)
Public service reservation	Limited to organisations which have explicitly social purpose, reinvest profits and include employees in governance	Not limited to organisations which h have explicitly social purpose, reinvest profits and include employees in governance	Limited to organisations which have explicitly social purpose, reinvest profits and include employees in governance (EP)
Reference to ILO Convention 94 in Annex X	In favour	Against	Not included (C)

Figure 6.2. Parliament and Council negotiating positions and final outcome

Net result: EP 9; Council 4; Draw 3

Of greater significance than the overall tally for each body is the presence of three new mandatory provisions which were proposed by the EP negotiating party and which contradicted the clear preferences of the largest member states. These are: the mandatory social clause (Article 15.2 in the draft, now Article 18.2 of Directive 2014/24/EU); the requirement to exclude bidders convicted of child labour or human trafficking offences (Article 57.1(f) of Directive 2014/24/EU); and the obligation to seek explanation of abnormally low tenders and to reject them where they do not comply with applicable environmental, social or labour laws (Article 69.3 of Directive 2014/24/EU). While these provisions may seem relatively uncontroversial on their face, in practice they pose a considerable challenge for implementation at national level and have the potential to result in national champions being excluded from contracts.[374] While governments may agree with their general intent, both the scope of the social compliance obligations (which extends to collective agreements), and the possibility for other bidders to enforce these provisions directly where contracting authorities fail to apply them, mean they create new administrative burdens and potential liability on the part of states. Germany, France and the UK were all against the creation of any such 'red tape' – both publicly in their Green Paper submissions and privately in the documents and strategies prepared by the departments responsible for overseeing negotiation of the reform. Their presence in the final directives is one of the factors behind the delay in transposition in many member states, as they add to the overall complexity of the legislative package. While the UK adopted a 'short cut' by simply leaving Article 18.2 out of its transposition, this approach is not legally robust and does not deprive the mandatory social clause of effectiveness due to the supremacy of EU

[374] For example, vehicle manufacturer Volkswagen might be excluded for violations of environmental obligations; Veolia for labour law violations or BAE and Rolls-Royce for corruption offences.

law, for at least as long as the UK remains a member.[375]

The UK did achieve one of its clear policy goals by securing the inclusion of the Article 77 reservation for 'public service organisations' – accommodating the then government's desire to award public contracts to employee-led mutuals which had been spun out of public sector bodies. This provision was initially greeted with scepticism by the Commission; the potential for it to lead to numerous demands for special treatment of particular types of social enterprises which varied in form across the member states was clear. The final version of this article is much more explicitly social than the UK had originally envisioned, due to the intervention of the EP negotiating party, making it appropriate for use in other member states as well. The Commission did succeed in including several limitations on the reservation in terms of the number and duration of contracts which could be awarded to public service organisations, as well as a somewhat unusual requirement for its use to be reviewed by the Commission within five years.[376] However in comparison to the provisions inserted by the Parliament, the reservation is relatively insignificant. It is optional for member states to implement, and only applies where it is specifically invoked by contracting authorities – in contrast to the mandatory social clause, exclusion for child labour and human trafficking, and rules on abnormally low tenders which apply to all contracts covered by the directives. It thus represents a small additional measure of flexibility in comparison with far-reaching new social obligations on member states and contracting authorities.

As noted in the introduction, this study focuses on the environmental and social aspects of the 2014 procurement directives. These were focal points of the reform – but they were not the only focal points. For member states, avoiding an overall expansion of the scope of the procurement rules, relaxing access to the negotiated procedure, clarifying the rules on public-public cooperation and encouraging SME participation and innovation were equally if not more important than environmental and social topics. However, in these areas the differences between the positions of the member states, Commission and Parliament were small. In several of these areas, the final provisions adopted by the Council and Parliament were extremely similar to the text originally proposed by the Commission.[377] As the most

[375] At the time of writing, it is unclear what regulatory regime will replace the procurement directives following the UK's withdrawal from the EU. However given the importance attached to access to European public contracts by UK businesses, as well as the market opening obligations which apply under the WTO Government Procurement Agreement and many bilateral trade agreements, it is unlikely that the UK will opt to eliminate or radically reduce procurement regulation, at least in the short term. In terms of environmental and social aspects of procurement regulation, these may come to be seen as important protections against chlorinated chicken and other hazards associated with free trade outside of Europe.

[376] Article 77(2)(d), (3) and (5) of Directive 2014/24/EU

[377] For example, Article 46 of Directive 2014/24/EU on division of contracts into lots (intended to support SMEs)

controversial area of the procurement reform (outside of the debate on inclusion of water services in the Concessions Directive, discussed in Chapter five), the outcome of the negotiation on the environmental and social provisions tells us more about the way power was exercised by the various actors involved in the process than areas which were less controversial. The clearly differentiated views of the Parliament negotiating party and the Council working party on these questions offer an opportunity to meaningfully test the hypotheses relating to supranational entrepreneurship and agency, and strongly suggest that where an outcome matches the preferences of one of these two groups, there is a causal connection with its actions. Tracing the origins of specific provisions allows this to be validated, but it does not in itself allow us to control for the influence of other actors such as the Commission, Court of Justice or interest groups. The role of these actors has been explored in Chapters three, four and five; in the concluding chapter I evaluate their overall impact on the reform in comparison with the Council and Parliament.

Conclusions

In tracing the evolution of the environmental and social provisions of the procurement directives, the broader context of Parliament and Council deliberations needs to be considered. In 2012-13, this was characterised by three developments: the Parliament's adoption of greater formal control over negotiating parties, the Council's preoccupation with the ongoing fallout from the financial crisis, and the need to reach agreement on the Multiannual Financial Framework. I have argued that, paradoxically, the enhanced supervision of negotiating parties under the Parliament's reformed rules of procedure may actually have given them greater room for manoeuvre, due to the formal representation of opposing political factions within the negotiating party in the form of shadow rapporteurs, and the requirement for majority approval within committees to authorise early agreement, set the rapporteur's mandate and open negotiations with the Council. These controls lead to a more labour-intensive process within the Parliament prior to the opening of negotiations, but seem also to have strengthened the hand of negotiating parties once mandates are approved. Support for this analysis comes from the large n study carried out by Laloux and Delreux of the outcome of all interinstitutional negotiations in 2012-2016, which shows extensive deviation from mandates by EP negotiating parties.

Combined with the relative lack of political priority attached to the procurement directives by the Council, and especially its wooing of the Parliament over the MFF in the

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is very similar to the Commission's proposed Article 44. Article 12 on public-public cooperation is also very similar to the Commission's proposal (which aims to codify the Court's case law in this area), despite some tinkering with the percentage of independent business which can be carried out and the nature of permissible private capital participation.

first half of 2013, these contextual factors may explain why the Parliament negotiating party succeeded in achieving a number of reforms which ran counter both to the specific preferences of the largest member states and to the overall political orientation of the Commission and Council at the time. Does this mean the EP negotiating party acted as a supranational policy entrepreneur? It is certainly difficult to falsify this hypothesis based on the account given here, while the agency model appears rather less convincing as an explanation of the actions of the negotiating party. While the EP's amendments could have been reversed by the Council (and indeed this took place in a number of cases), the broader context discussed above meant that the final outcome of the negotiations strongly reflects the Parliament's social and environmental priorities as championed by the negotiating party. These priorities directly conflicted with the 'red lines' identified by the three largest member states by introducing new mandatory provisions and reducing flexibility. To describe the European Parliament as an agent of the member states in such cases stretches the principal-agent concept beyond the point where it has any explanatory power.

Agency implies that the principal is in some way able to realise its preferences through the actions of the agent. This requires an element of control, or sanctions for deviations from these preferences. In the case of negotiating parties and arguably the Parliament as a whole, the control and sanction mechanisms available to member states, as well as the threat of 're-contracting' (through Treaty changes) are too intangible to effectively moderate the behaviour of the 'agent' in any way. Even accepting the long-range theory put forward by Rittberger (2005) that the EP acts as a legitimacy shield to replace that provided by national parliaments, this initial rationale for creating the Parliament does not mean that the preferences of national governments continue to provide a meaningful explanation for its actions. The EP-as-agent-of-the-member-states model is thus of limited value in understanding who exercises power over EU legislation in cases such as the one analysed here. At best, it is no more convincing than the idea of the EP as an agent of the European citizens forming its electorate and the interest groups who lobby it, who have more tangible influence over its members.

The agency model holds up better in the case of the Council working party. Given the arms-length nature of political supervision by Coreper and the Council of Ministers, the compromise texts developed by the working party do contain a number of innovations for which no clear political mandate can be found – based on wording proposed by the Parliament or Commission. But none of the Council's own amendments introduce new mandatory provisions or reduce the flexibility available to member states or contracting authorities, in contrast to the amendments proposed by the Parliament. They thus stay well inside the red lines set by the largest member states, although the same cannot be said of the

final negotiated text. In terms of irreversibility and recall by member states, formally all of the amendments were subject to approval of the Council (and the Parliament) at the end of the process, and to interim approval via Coreper. In practice, these bodies were unlikely to unpick the bargains struck in the course of the trilogues, due to the imperative to reach agreement and the overall positive orientation of the member states towards procurement reform. The delays in implementation of the new directives suggest that member states may not have fully appreciated the scope of the changes, including those under the environmental and social banner. While the agreed directives cannot be reversed in the short-term, future renegotiations are guaranteed, and will be informed by the experience of negotiation during the 2011-14 process. The policy innovations and compromises of the EP negotiating party are thus subject to recall in the longer-term. In my concluding chapter I analyse the significance of recall/reversibility in terms of how legislative power is exercised in the EU, the implications for supranational and intergovernmental theory and democratic legitimacy.

Chapter 7 – Supranational or Intergovernmental Policy-making?

The preceding chapters have traced the process by which environmental and social obligations came to be embedded in the 2014 EU procurement directives. By setting out common rules for SPP, the directives create both vertical linkages between the EU institutions which enforce the rules and the national and sub-national authorities who must apply them, and horizontal linkages between authorities in different member states and businesses tendering on a cross-border basis. This chapter begins by summarising my findings in relation to the four hypotheses developed to test the applicability of intergovernmental and supranational theory to the case of public procurement reform. Based on these results, I evaluate the robustness of the concepts of supranational entrepreneurship and agency as means of understanding the powers exercised by EU institutions. I argue that neither concept provides a sufficient or accurate explanation for the role that the Court of Justice and European Parliament played in the reform. I then turn to the alternative concept of trusteeship as developed by Karen Alter (2008) in relation to international courts and ask whether this might provide a better explanation for the powers exercised not only by the Court, but also by the Parliament. Evaluating the evidence collected on public procurement suggests that these bodies may have acted as trustees of the member states, drawing upon their own sources of legitimacy, making decisions independently, and serving third-party beneficiaries. In order to establish the broader applicability of trusteeship to the study of EU integration, I outline testable hypotheses which distinguish it both from agency and supranational entrepreneurship. The ability of member states to reverse decisions and recall powers from EU institutions means that they should still be considered the principals within the trusteeship model. The chapter concludes with consideration of the implications of my findings for questions of democratic legitimacy and institutional design within the EU, and potential directions for future research informed by the trusteeship model.

Findings

H1 - EU institutions acted as supranational policy entrepreneurs in the reform of environmental and social aspects of public procurement law

The idea that EU institutions – in particular the Commission and Court – act as policy entrepreneurs is a cornerstone of supranational theory. A policy entrepreneur promotes its own agenda, as opposed to the preferences of a principal, usually by marshalling relevant interest groups. It exploits policy windows by being the first to recognise and/or act on a given problem, taking risks in doing do (Kingdon 1984; 1995). Sandholtz and Zysman (1989) characterised the Commission's role leading to the adoption of the 1992 programme in the Treaty of Maastricht as one of policy entrepreneurship, and the

model persists in many analyses of the Commission's activity.[378] In the case of the Court, the idea of 'activism' often stands in for policy entrepreneurship, and has engendered a lively debate in both legal and political science literature.[379] Proponents of supranational theory (Sandholtz and Stone Sweet 1997, 1998, 2012) have emphasised the role of private litigants in empowering the Court, including through the preliminary reference procedure as well as the doctrines of supremacy and direct effect, all of which create a link with national courts and mean the Court is often not dependent on national governments to enforce its judgments. While the notion of the Parliament as a policy entrepreneur is less developed, recent scholarship emphasises the ability of individual MEPs to provide policy leadership in the context of codecision procedures (Wilson, Ringe & van Thomme 2016; Thierse 2017) as well as its vigorous use of powers which member states may not have intended to grant it, exemplified by the *Spitzenkandidat* process in 2014. Some have ascribed supranational activism on environmental and social policy to the Parliament even prior to the first direct elections in 1979 (Meyer 2014; Roos 2017).

Regardless of the exact form which supranational entrepreneurship may take in the various EU institutions, I argue that H1 is falsified if the EU institutions acted only within the preferences of member states, as this precludes the idea that they were the first to exploit a particular policy window and took risks in doing so. It is possible of course that the policy preferences of the member states and EU institutions simply coincide in many areas, in which case supranational entrepreneurship could not be ruled out even if the policies promoted by the Commission, Court, Parliament or Council conformed with member state preferences. For this reason, the preceding empirical chapters have focused on areas where there was a clear and documented conflict between the views of the largest member states and those put forward by one of the EU institutions. A further confounding factor could arise if one of the institutions (for example, the Court) pursued policies at the behest of another EU body (for example, the Commission) which conflicted with national preferences. In this case, it would not itself be acting as a supranational entrepreneur, but rather as an agent of another institution which was engaging in entrepreneurship. While this scenario creates a risk of false positives (finding supranational entrepreneurship when in fact there was none by a particular institution) there is no equivalent risk of false negatives (excluding entrepreneurship when in fact it occurred) – which is why the focus here is on evidence which contradicts the supranational entrepreneur hypothesis rather than confirming it.

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[378] Including in internal security (Kaunert 2011), higher education (Batory and Lindstrom 2011), energy policy (Maltby 2013) and mobile roaming charges (Cini and Šuplata 2017).
[379] For an overview of recent contributions see Howarth and Roos (2017) and others in volume 13(1) of the *Journal of Contemporary European Research*.

Detailed analysis of the Commission's 2011 proposal for the new procurement directives reveals that although it contained a number of novel environmental and social provisions, these did not cross any of the 'red lines' set out by the largest member states in their responses to the Green Paper. In particular, it did not introduce any new mandatory environmental or social obligations or substantially reduce the flexibility available to contracting authorities in this area. As its proposals were aligned with the previously expressed preferences of member states, it is difficult to depict the Commission as acting as a supranational entrepreneur. While the Commission did play a role during the trilogues in developing compromise text, the major changes in the text of the directives during the legislative process can all be traced to initiatives by the Parliament or Council, meaning the Commission did not exploit its role to further its own agenda in this particular area, even when provisions which potentially threatened key internal market principles such as the free movement of labour, and which pose considerable difficulties for enforcement, were proposed by the Parliament and accepted by the Council. The Commission invested its own resources (including credibility) heavily in the procurement reform, and endorsed the inclusion of horizontal policies in the directives from the early stages, but it was neither the first to do so - the Parliament had already made clear its support for this in its own-initiative reports, as had several member states in their national procurement policies - nor did it take any appreciable risks in the environmental and social provisions it put forward. In the one area where the Commission did attempt to impose significant additional obligations on member states during the reform – the creation of national oversight bodies - it was unsuccessful.[380]

The question of whether the Court acted as a supranational entrepreneur is less clear cut. The Court is often cited as the primary force behind public procurement law, driving changes including those related to environmental and social policies. Legal commentators on the procurement directives have emphasised its influence on many of the new provisions, including some in the environmental and social field.[381] The Court's decisions in *Rüffert* and *Max Havelaar* did form crucial reference points during the reform process, as the *Concordia* and *EVN* judgments had for the previous generation of directives. However close examination of the case law and legislative process leading to the 2014 directives reveals that the Court's influence was limited to areas where a qualified majority of member states

[380] The draft directive published by the Commission in December 2011 contained a new requirement for national oversight bodies on public procurement. This was eventually reduced to a mere reporting requirement, following strong objections from the UK and other member states, as discussed in Chapter 5. The Council also inserted a provision in Article 83(3) restricting the frequency of reports to the Commission on national strategic procurement policies to no more than once every three years.

[381] See for example Bovis (2012) and Caranta (2015).

accepted its rulings. A key consideration in this regard is the non-adoption of *Rüffert* in the binding text of the directives; if the Court attempted to act as a supranational entrepreneur in this case it was an unsuccessful one. Despite issuing a prominent judgment which clearly restricted the scope to enforce collective agreements in public contracts, and despite this judgment forming part of a coherent body of case law rather than being an anomaly, there was no attempt to codify *Rüffert* in the binding text of the directives. By the time the Commission was developing its proposal, it had become clear that at least a blocking minority of member states was unhappy with the position in *Rüffert*. On the other hand, a qualified majority had not yet emerged to support an alternative position. The result was non-adoption of *Rüffert*, with only an oblique reference to the Court's case law being included in the recitals.[382] Non-adoption is very different to legislative override – it left this key battleground open for a new judicial or political settlement. In the event, both began to emerge shortly after the directives were adopted, with the Court relaxing its position in *RegioPost* in 2015, and the Commission proposing major revisions to the PWD in 2016.

In contrast, the less controversial judgment in *Max Havelaar* did directly influence the text of the directives. The rules on award criteria effectively codify the Court's finding that fair trade considerations could form part of the evaluation of tenders, while the rules on labels reflect a light modification of the Court's position. Neither the Council nor Parliament attempted to water down the Court's ruling to the effect that social and trading conditions could be addressed in award criteria, opening the door to fair trade procurement. While the Commission opposed this, having brought the case against the Netherlands, it also does not appear to have attempted to limit the impact of the ruling during interinstitutional negotiations.[383] The Court can thus be seen as having a strong influence over this aspect of the reform, with its position endorsing a requirement to pay wage premiums to producers – provided these workers were safely located in third countries and not within the Union. However, it must be recalled that even where the Court acts boldly, it always does so in response to litigation which is brought before it, limiting its ability to set the agenda for such policy changes.[384] The fact that the *Max Havelaar* judgment was readily accepted by the political institutions and member states also suggests that the Court did not take significant risks in adopting its position in support of this particular form of social procurement. The Parliament had signalled its strong support for fair trade, including in public procurement,

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[382] In addition to not being technically binding, the practical impact of the recitals is limited by the fact that they are excluded from many national transpositions. Courts do however refer to them as interpretative aids.
[383] It should be recalled that the Commission was largely successful in its action against the Netherlands, with the Court ruling that the manner in which labels had been referred to infringed the 2004 directives.
[384] Unlike the US Supreme Court, limited docket control by CJEU

in a series of resolutions, reports and cross-party working groups going back to 2004.[385]

In other areas included in the reform - concessions, public-public cooperation, and modification of contracts after award - the Court *had* been the first mover and *did* take more appreciable risks. In these areas a variety of legislative responses are evident, none of which amounts to complete codification of the Court's rulings.[386] It is not possible to falsify H1 based on analysis of the Court's case law prior to and during the reform process. Unlike the Commission, it is clear that the Court acted outside of the preferences of a large bloc of member states in *Rüffert*, and that its decision in *Max Havelaar* was also not clearly linked to member state preferences expressed prior to the judgment. At the same time, there is something implausible about applying the supranational entrepreneur label to the Court based on its influence on the procurement directives. On the question of the enforceability of collective agreements in public contracts, the co-legislators declined to adopt the position endorsed by the Court. On the question of fair trade criteria, the Court's position proved to be uncontroversial amongst member states, and also had considerable prior support from the European Parliament. While the Court may resemble a supranational entrepreneur more than an agent of the member states, both descriptions seem to oversimplify and misconstrue the true nature of the Court's powers – as well as its limitations. I consider the agency model in more detail below, before examining the alternative concept of trusteeship.

The European Parliament displayed many of the classic characteristics of a supranational entrepreneur during the procurement reform, and its role in getting new environmental and social rules adopted exemplifies this. Through own-initiative reports and resolutions prior to the start of the legislative process, IMCO was able to frame the debate relating to these questions, and to marshal support from environmental and social interest groups. These groups remained involved throughout the reform, and in some cases proposed specific amendments to the directives which were ultimately accepted, after being put forward by the Parliament's rapporteur.[387] The rapporteur, shadow rapporteurs and chair of IMCO all engaged assiduously in the internal and interinstitutional process, consolidating over 1400 amendments proposed at committee stage into the 253 which were taken into the trilogues – and succeeding in having many of these key amendments accepted by the Council. While a cynical view of the Parliament's success on this file might attribute it to the

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[385] European Parliament (2012) *Briefing on fair trade in public procurement in the EU*

[386] For example, the definition of concessions in Art. 5 of the Concessions Directive, the minimum percentage of a company's turnover which must be linked to the contracting authority in order to avail of the in-house exemption set out in Art. 12(1) of the Public Sector Directive, and several of the permissible modifications set out in Art. 72 of the Public Sector Directive, all deviate from the Court's case law.

[387] For example, those proposed by Client Earth and the Network for Sustainable Development in Public Procurement.

Council's desire to secure its agreement for the multiannual financial framework, this neither undermines the entrepreneurship thesis nor suggests this is an isolated occurrence. In several areas the Parliament's amendments went against the red lines identified by the largest member states, by introducing new obligations and reducing flexibility at national level in the name of ensuring more robust enforcement of social and environmental rules. It is this ability to act in a way which supersedes national interests which is the hallmark of supranational entrepreneurship. However, it must be noted that many of the Parliament's amendments on SPP were also rejected by the Council, meaning that it was only partially successful as a policy entrepreneur.

Turning to the Council, its strongly intergovernmental nature means that its potential to act as a supranational policy entrepreneur is underdeveloped in EU integration literature. Entrepreneurship on the Council could arise for example where the particular institutional dynamics within a working group lead to deviation from the collective interests of member states, or where the President or rotating presidency is able to pursue an individual agenda. But despite the increasing prominence of the Council President, and occasional departures by working groups from political mandates, it seems clear that member states still firmly hold the reins of power within the Council. In the case of the procurement reform, the trilogues held under the Irish presidency did lead to a number of amendments which contradicted the initial preferences of the three largest member states. However, these were not introduced by the Council working party and all were ultimately subject to approval by Coreper and the General Affairs Council. They thus seem to fall well within the scope of bargaining envisioned by intergovernmental theory, and do not suggest the Council working party itself acted as a supranational policy entrepreneur. H1 can be considered falsified in the case of the Council, because the working group did not itself propose reforms contrary to its principals' collective preferences, as agreed in the Council compromise text produced prior to the trilogues.

(H2) EU institutions acted as agents of the member states in the reform of environmental and social aspects of public procurement law

In order to falsify the agency hypothesis (H2), I look for evidence that EU institutions acted outside of the bounds of member state preferences, understood collectively according to the requirements of a qualified majority on the Council. This is the inverse of the evidence considered in relation to H1, and so can be summarised briefly. The Commission acted within the preferences of (at least) the three largest member states in its proposals relating to environmental and social provisions, and so we cannot reject the idea that it acted as an agent in this capacity. The Commission largely fulfilled its role as appointed champion of the single market, while taking on board clear mandates from the Lisbon Treaty, Europe 2020 agenda and Monti report to include social and environmental protections in its 'relaunch'.

The Court however cannot be seen as an agent of the member states inasmuch as its *Rüffert* judgment did not align with any qualified majority, and lead to a political stalemate regarding social dumping which has not yet been resolved. Plausibly it could have acted as an agent in *Max Havelaar* given the ready acceptance of this judgment by the Council, but this consensus seems only to have arisen *after* the Court's judgment; this is supported by the fact that none of the other member states intervened in the case taken by the Commission against the Netherlands.[388] The Parliament clearly acted in a way which ran contrary to the express preferences of member states, and so cannot be seen as an agent of the member states without a number of logical contortions which fatally undermine the predictive power of this model. In contrast, the agency model holds up well in the case of the Council. The working group only deviated from its initial political mandate after extensive consultation with member states, whose collective preferences appear to have shifted over time in order to accommodate the Parliament as part of a broader interinstitutional game under the Irish presidency. The findings in relation to H1 and H2 are summarised in Figure 7.1.

	H1 – EU institutions act as policy entrepreneurs	**H2 – EU institutions act as agents of member states**
Commission	Falsified	Not falsified – extensive positive evidence
Court	Not falsified – limited positive evidence	Falsified
Council	Falsified	Not falsified – extensive positive evidence
Parliament	Not falsified – extensive positive evidence	Falsified

Figure 7.1 Supranational entrepreneurship and agency

Evaluation of the evidence falsifying and supporting the first two hypotheses indicates that neither policy entrepreneurship nor a principal-agent relationship – the two core mechanisms proposed by supranational and intergovernmental theory respectively to explain the powers exercised by EU institutions – provides a satisfactory explanation of the role played by each of the actors in the public procurement reform. While agency provides a plausible explanation for the actions of the Commission and Council in this case, it does not account for the actions of the Court or Parliament. Supranational entrepreneurship appears to fit the Parliament well here, but the evidence for the Court-as-policy-entrepreneur is more ambiguous. I now turn to the second two hypotheses regarding the irreversibility of actions by the EU institutions and the ability of member states to recall powers exercised by them.

[388] Denmark originally sought leave to intervene, but later withdrew this (Case C-368/10, para 44 of judgment)

(H3) EU institutions acted in a way which was irreversible by member states in the reform of environmental and social aspects of public procurement law

The irreversibility hypothesis (H3) can be falsified by showing either that actions of the EU institutions were actually reversed by member states, or that there was a realistic chance of this based on the applicable decision rule and other relevant structural factors. The focus here is on the decisions made by EU institutions related to environmental and social aspects of procurement: in the Commission's legislative proposal; in the Court's case law; and in the amendments proposed by the Parliament and Council working group as well as the compromises agreed during the trilogue. Technically all actions undertaken by the institutions are reversible within the EU's legal order – if by no other means than by Treaty change. But for the purposes of distinguishing between supranational and intergovernmental dynamics what is of interest is the difficulty associated with reversal. This may be based on structural factors – such as the requirement of a qualified majority on the Council, the rules of the codecision procedure, or the Commission's monopoly over legislative proposals – or arise due to practical considerations such as the limited time and resources which member states have available to influence EU law. Most decisions by EU institutions are irreversible by a member state acting alone, unless they require unanimity in order to be implemented. In some cases, an individual member state can escape from the full impact of EU law by pleading 'essential national interests' or 'mandatory requirements' – however these flexibilities are themselves interpreted by the Court and so do not provide a means of reversal which is fully controlled by member states.

The focus here is on the substantive provisions included in the new directives. These typically come with associated powers which can be exercised either by member states, contracting authorities, the Commission or the Court. As set out in Chapter one, the new environmental and social rules can be divided into four categories depending on their addressee and voluntary or mandatory nature. Each of these rule types is associated with an increase in integration, as measured by the indicators of precision, formality and authority. Even in areas where the directives appear to grant considerable discretion to contracting authorities or member states – for example the light touch regime and most of the rules on subcontracting - they regulate the scope of that discretion and establish principles or limits to be applied by the Court of Justice, as well as by domestic courts. They also empower the Commission to bring actions against member states to enforce the new rules. As noted in Chapter four, the scope of public procurement law has expanded considerably since 2004, with the Court driving much of this expansion through its case law on cross-border interest, concessions, public-public cooperation and modifications to contracts after award. Many member states had indicated their apprehension regarding these developments by supporting Germany's challenge to the *Interpretative Communication* published by the

Commission in 2006. The submissions by Germany, France and the UK in response to the 2011 Green Paper all called for simplification of the rules and additional flexibility. In contrast, both the Court's case law and the European Parliament's ambitions for the reform meant that additional rules and complexity were introduced in the 2014 directives, many of which serve environmental and social aims.

The question is whether the member states had a realistic chance to reverse these developments during the reform process, and if so why they chose not to exercise it. In the case of the Commission's initial proposal, it is clear that member states succeeded in making a number of changes to bring the text closer to their collective preferences. This included removing the requirement to establish national oversight bodies and, in Germany's case, removing water services from the scope of the Concessions Directive. In terms of the environmental and social provisions, the Council did not itself make any major changes to the Commission's draft. This reflects the fact that the Commission's proposals in this domain were relatively conservative and avoided introducing any new mandatory provisions. The eventual acceptance of new environmental and social obligations in the trilogues indicates that member states retained the ability to amend the Commission's proposals. Ultimately if the collective gains under the directives were outweighed by the collective losses from the point of view of member states, they could have rejected the Commission's proposal in its entirety. In terms of the Council working group, although there is some evidence that it deviated from the initial political mandate granted by the Competitiveness Council, this took place within the interinstitutional bargaining environment and can be seen as falling within the behaviour of an agent who is empowered to make compromises. The text negotiated by the working group was subject to approval by Coreper and to formal adoption by the Council, both of which offered opportunities for reversal by member states. H3 is therefore falsified in the case of the Commission and Council.

Did the European Parliament act in a way which was irreversible by member states? I have argued above that it displayed many of the characteristics of a supranational entrepreneur, successfully exploiting a policy window in order to promote a social agenda in the reform of the directives. Again, formally all of its amendments had to be accepted by member states, first via their agents the Council working group and Coreper, and then by the principals themselves. It is possible that the dynamics of an interinstitutional game such as legislative codecision gives rise to a situation where member states are prevented from reversing the Parliament's actions, due to the absence of consensus about a preferable alternative. However, in cases where this occurs, the normal tactic is for the Council to delay legislation or for it to be rejected by Coreper. This did not occur in the public procurement case, with the Council continuing to avow its commitment to finalising the directives even once the scope of the Parliament's amendments had become clear. Acceptance of these

amendments was driven by the perception that the overall gains from the directives outweighed the new burdens, and possibly by the need to secure the Parliament's agreement on other matters. Nevertheless, the Council did reject or attenuate a number of the Parliament's amendments, including some related to SPP as documented in Chapter six. The Parliament's actions remain subject to reversal by member states, even where it successfully exploits a policy window and holds the upper hand in interinstitutional negotiations. This undermines the idea that it exercises power independently of member states in the sense required by supranational theory, and falsifies H3 in respect of the Parliament.

Of all actions and decisions by EU institutions, CJEU judgments perhaps have the greatest potential to be irreversible by member states. As discussed in Chapter four, the occasions on which Court judgments are subject to legislative override are few and far between. There are a number of reasons for this, and I argue below that the Court's own sources of legitimacy within a system based on the rule of law and separation of powers provides a more convincing explanation than the mere absence of a qualified majority on the Council, which may itself be due to the respect accorded to the Court by most member states, most of the time. As in many other areas, the Court's public procurement jurisprudence has often been at odds with national political preferences, and this is clearly illustrated by the *Rüffert* case. While the Court frequently invokes the Treaty principles of non-discrimination, equal treatment, transparency and proportionality in its procurement case law, in *Rüffert* the most controversial aspects of the judgment were based on the wording of the Posted Workers Directive. This lowers the bar for reversal by member states compared to that required for Treaty changes. While member states did not in fact reverse *Rüffert* as part of the 2014 reform, the approach of non-adoption left this door very much open. The reversal of the Court's interpretation of which labour conditions can be imposed in public contracts now looks likely to occur through adoption of the Commission's 2016 proposal on the PWD, with the ground having been softened by the Court itself in *RegioPost*. The existence of a realistic prospect of reversal allows us to falsify H3 in respect of the Court in this case.

(H4) EU institutions acted in a way which was subject to recall by member states in the reform of environmental and social aspects of public procurement law

H4 is the inverse of H3 and so the same evidence is relevant. The recall thesis (H4) can be falsified by showing that there was no realistic prospect of member states reversing decisions or actions of EU institutions in the reform process. Recall may take place either during the legislative process as discussed above, or subsequently via changes to EU law. It may also take place indirectly where member states refuse to implement decisions taken by EU institutions. Given that member states did recall power in several areas where the Commission had originally sought to extend the scope of procurement law, H4 cannot be falsified in relation to the Commission. The volume of changes made to the Commission's

proposal within the Council provides substantial evidence to support the idea that member states retained the power of recall. Likewise, as noted above the actions of the Council working group were clearly subject to approval by the member states, even if they did not withhold this in the circumstances. As far as the Parliament is concerned, the member states accepted some but not all of its amendments, suggesting that they retained the power to reverse its decisions even as it held the upper hand in the negotiations. However, the positive evidence for H4 here is weaker than that for the Commission and Council – suggesting that this may not be a key mechanism in explaining the relationship between Parliament and the member states. Likewise, while the Court's judgments in *Rüffert* and *Max Havelaar* were not subject to legislative override in the 2014 directives themselves, they may yet be. The findings in relation to H3 and H4 are summarised in Figure 7.2.

	H3 – Actions are irreversible by member states	**H4 – Actions subject to recall by member states**
Commission	Falsified	Not falsified – extensive positive evidence
Court	Falsified	Not falsified
Council	Falsified	Not falsified – extensive positive evidence
Parliament	Falsified	Not falsified

Figure 7.2 Irreversibility and recall

Agency and Trusteeship

The agency of international organisations is sometimes treated as an axiom, rather than a theory which needs to be tested. Undoubtedly it provides a useful analytic structure in many international relations scenarios, but it may also serve to obscure the true nature of the power exercised by international organisations. As links between the preferences of states and the actual behaviour of these bodies become more contorted, the value of the P-A structure diminishes as a means of making predictions about this behaviour. The fact that it is possible to make *some* link to the principal's preferences does not serve to establish the parsimony of P-A theory; other analytical structures may provide a better fit and Occam's razor requires us to consider these. To begin with, we can try discarding the assumption that international organisations (in this case, the EU institutions) reduce the transaction costs associated with international decision-making, and that this is a primary reason for states to delegate power to them. What if the reason for delegation is instead the perceived legitimacy which international organisations can bring to decisions, and what if this legitimacy depends upon them *not* being answerable to national preferences or politics? This would lead to a very different set of hypotheses about how EU institutions act than those we can derive from P-A theory. While bargaining between states would still be understood to play a role in the initial establishment of these bodies, the existence or absence of a qualified majority or unanimity amongst member states would no longer be posited as an explanation for

individual decisions made by them. As discussed in Chapter 4, in the case of the Court of Justice large scale studies have failed to establish a convincing or consistent link between its judgments and the preferences of a qualified majority of member states.

Alter (2008) proposes an alternative model for understanding the behaviour of international courts based on the idea of trusteeship. She identifies three characteristics which distinguish trusteeship from agency. The first is the reason for delegation by the principal: trustees are selected because they bring their own source of legitimacy based on professional or other credentials, whereas agents are chosen because they are expected to be faithful to the principal(s) and to reduce transaction costs. Secondly, trustees are delegated the power to make meaningful decisions based on their own judgment, whereas agents are expected to implement decisions made by their principal(s). Finally, trustees make their decisions on behalf of a beneficiary other than the principal, for example private litigants, interest groups, or the general public. Importantly, a trustee cannot place the interests of the principal above those of the designated beneficiary without creating a legitimacy problem. The three characteristics might be summarised as differences of purpose, capacity and constituency between trustees and agents. Alter applies the trusteeship model to international courts, including the CJEU. She identifies the ways in which trusteeship engenders a different politics to that which characterises principal-agent relationships, based primarily on the different role the threat of recontracting by the principal plays. For international courts, the threat of recontracting is small because this would undermine the legitimacy gains which states seek by delegating power to them in the first place. In the international context, collective action problems also reduce the likelihood of recontracting, for example by stripping a court of its jurisdiction, reducing its budget or packing it with judges more sympathetic to the political projects of elected governments (all of which have been known to befall national courts).

These different politics mean that trustees enjoy greater autonomy than agents, and frequently act against the interests of their principal(s). However, they remain subject to various forms of control by the principals, and ultimately may have their powers recalled or judgments subject to reversal through legislative override. Figure 7.3 illustrates the sources of legitimacy, beneficiaries and control mechanisms which apply to the Court and Parliament conceived of as trustees. The following sections explore how well the trustee concept fits the Court and Parliament respectively.

Trustee	Principals	Beneficiaries	Source of Legitimacy	Means of Control by Principals
Court of Justice	Member states	Litigants; European citizens	• Professional judicial standards • Rule of law as protected in EU and national constitutional orders • Separation of powers doctrine	• Legislative override of judgments • Control over appointment of judges • Possibility to amend mandate under Treaties
European Parliament	Member states	Interest groups; European citizens	• Direct election of members • Rules of procedure • Separation of powers doctrine • Perceived democratic deficit within EU	• Non-adoption of legislation by Council • Control of agenda and budget via the Commission • Possibility to amend mandate under Treaties

Figure 7.3 The Court of Justice and European Parliament as trustees

The idea of trusteeship as a form of democratic representation originates with Edmund Burke, and specifically his 1774 *Speech to the Electors of Bristol*. Newly elected to Parliament, Burke was responding to the suggestion that MPs ought to consult their constituents prior to engaging or voting in parliamentary debates. Burke advised his electors that

> Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.[389]

Burke did not consider that a trustee ought to be strictly accountable to his constituents, nor even to the law or constitution – but only to Providence. The idea was further developed in the work of John Stuart Mill, in particular his review of Samuel Bailey's 1835 *Rationale of Political Representation*[390] and 1861 *Considerations on Representative Government*.[391] Mill's views on the legitimacy of 'pledges' to constituents evolved over the period separating these two works, from concern that these would undermine the independence of representatives to acceptance that elections could not be the only means of holding representatives to account. Mill developed the idea of trustees having a moral and political obligation to their principals, which must be balanced against their obligation to exercise independent judgment. Elections ought not to be the only check or control on trustees. The ideal of such 'conscientious trusteeship' can be discerned in the British colonial projects of

[389] Burke, E. (1774) *Speech to the Electors of Bristol*
[390] Collected Works of John Stuart Mill, Volume XVIII, p. 15-46
[391] *Ibid*, Volume XIX, p. 504-519

this era, challenging the view that it is benign. Trusteeship has paternalistic implications, as trustees are less directly accountable than other delegates. Bain (2003) contrasts trusteeship with Mill's ideal of liberty, linking it instead to earlier Enlightenment ideals such as progress and the perfection of humanity. He argues that the paternalistic aspects of trusteeship ultimately render it incompatible with the idea of equality.

The legitimacy of trusteeship in a democratic polity such as the EU depends upon the tripartite relationship between the member states as principals, supranational institutions as trustees, and citizens as beneficiaries. A starting point is to ask whether beneficiaries are voluntary or compulsory recipients of the trust – a question which must be resolved in national constitutional orders and which is an ongoing source of controversy in the EU, exemplified by the French and Dutch referenda rejecting the constitutional treaty, the Irish rejection of the Nice Treaty, and the UK's Brexit referendum. If citizens are able to reject decisions or actions of EU institutions, then this may contribute to the legitimacy of the powers exercised by them as trustees. However as set out above the very reason for states to delegate powers to trustees is that they bring a form of democratic legitimacy which states themselves are not able to supply. Plebiscites which are actually about national politics, or which present false choices to voters, may not be an effective means of controlling EU institutions. Effective controls may be either non-majoritarian as in the case of the Court, or majoritarian as in the case of the Parliament. The powers of a trustee must be appropriate based on the form and strength of democratic or other controls to which it is subject. Are the controls which apply to the Court and Parliament adequate given their powers? Can their mandates be revoked, and if so do EU citizens as beneficiaries play a direct role in this or are they merely passive recipients of the trusts established by member states?[392] These questions are explored in the following sections.

The Court of Justice as Trustee

In the trusteeship model, member states as principals delegate powers to the Court because they expect it to confer legitimacy on EU law by exercising its independent, professional judgment and responding to the needs of its designated beneficiaries, who comprise both litigants in cases and EU citizens as a whole – given the *erga omnes* effect of EU law. This role differs fundamentally from the role ascribed to the Court in intergovernmental theory as an agent enforcing commitments made by member states, because it does not assume that the Court will defer to a qualified majority of member states

[392] In the context of the UK's withdrawal from the EU, an interesting debate has arisen regarding the fate of British MEPs and CJEU judges – should their mandates end on the date of the UK's withdrawal or do they retain a representative/professional obligation to EU citizens after this date? See Fabbrini (2018) on this question.

or that where it fails to do so, member states will threaten to recontract in a way which limits the Court's power. It also differs fundamentally from the supranational concept of the Court as a policy entrepreneur, because it does not assume that the Court has a pro-integration agenda or will act consistently to augment its own powers. I have argued that both of these models fail to capture the Court's role in the public procurement reform, where its judgments neither conformed to member state preferences nor were effective in overriding these preferences. They did however shape the positions taken by the Commission, Parliament and Council in respect of social and environmental aspects of procurement, by drawing attention to the consequences of specific provisions adopted both in the 2004 procurement directives and in the Posted Workers Directive. The Court exercised judicial discretion in interpreting these provisions, adopting an approach which restricted social criteria in *Rüffert* and one which promoted them (subject to transparency and other safeguards) in *Max Havelaar*. The apparent inconsistency between these two cases cannot be explained by changes in member state preferences or the Court's own agenda, but it can be explained by the importance attached by the Court to underlying constitutional principles.

The Court's democratic legitimacy arises from two principles which are embedded in the constitutional order of the EU as well as of all member states[393]: the rule of law and the separation of powers. The rule of law requires that all people and institutions are subject to law, and that no person is above the law.[394] It also requires that the law can be known by those who are subject to it. Some observers of the CJEU would argue that this second requirement is infringed by the Court's tendency to interpret EU law, and in particular the Treaties, in an expansive manner. Oakeshott (1975) developed the idea of international regimes as a form of teleocracy based on common objectives and values agreed by their members. This contrasts with nomocracy, in which law is based on common history or legal tradition. The Court of Justice is often described as operating on teleological principles, giving effect to what it perceives to be the overall objectives of EU law. But this does not necessarily mean the EU as a whole is a teleocracy, due to the operation of the second principle of separation of powers. The separation of powers in a democracy requires that the legislative, executive and judicial branches each have circumscribed competences.[395] Laws or executive actions which are unconstitutional can be invalidated by Courts, but the legislature

[393] These principles are currently under profound threat in Poland and Hungary due to constitutional changes which aim to undermine the independence of the courts. For discussion of this crisis, see Kelemen and Blauberger (2017), Börzel et al (2017) and other contributions in Vol 24(3) *Journal of European Public Policy*
[394] The concept of the *Rechtsstaat* was developed by Rudolph Gneist in the 1830s. Interestingly both this idea and Montesquieu's separation of powers were based on observation of the legal order in Britain.
[395] This tripartite division was set out by French enlightenment philosopher Montesquieu *in The Spirit of the Laws* (1748), and heavily influenced the 1787 constitution of the United States, amongst other democracies.

and executive may in turn invalidate judge-made law via legislation.[396] In the EU context, separation of powers refers both to the distinct roles of each EU institution and to the delineation of competences between the national and supranational levels. Actions at EU level must be justified both by reference to competences conferred by member states in the Treaties and with reference to the subsidiarity principle in areas where the EU does not have exclusive competence. The principle of proportionality acts as a further check on the actions of the EU, as well as on member states.[397]

As Moravscik (2005) put it:

> …the EU's ability to act (even where it enjoys unquestioned legal competence) is constrained by exceptional checks and balances among multi-level institutions. The EU is not a system of parliamentary sovereignty but one of separation of powers, with political authority and discretion divided vertically amongst the Commission, Council, Parliament and Court, and horizontally amongst local, national and transnational levels.[398]

While the Court of Justice plays a key role in interpreting and applying these checks and balances, it can only do so within the boundaries set by member states in the Treaties and in the interests of its beneficiaries: litigants in individual cases and European citizens as a whole. It must exercise professional judicial judgment in order to do so, and is held to standards of independence and consistency by the community of European and international lawyers and judges. This is a very different form of accountability than that which applies to majoritarian institutions, but it is not necessarily a less effective one. The Court periodically fails to uphold the requirements of the rule of law (in particular, the requirement for law to be transparent and knowable to its subjects) and separation of powers (for example, by straying into domains which are more properly the preserve of the political institutions). What follows in these situations is criticism, rather than sanctions from member states. One or several judges on the Court will then adjust their views, and aim to convince their colleagues. This process takes place behind closed doors; it may be immediate or gradual over many years and subsequent cases. The distinct nature of this process, and the potential for it to go wrong, underline why it is important to understand the Court as trustee rather than an agent or supranational entrepreneur. It points to a different set of controls and institutional design principles to ensure the democratic legitimacy of the Court.

In considering the appropriate controls and institutional design, the question arises of whether the Court should be seen as equivalent to national supreme and constitutional

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[396] As discussed below, in the case of constitutional law, ordinary legislation may not suffice to override judicial interpretation.

[397] The principles of subsidiarity and proportionality are set out in Article 5(3) and Protocol (No 2) TEU.

[398] Moravscik (2005) at p. 370

courts or unique. Undoubtedly many of the concerns which apply at national level are equally relevant at EU level: that systems for appointment, remuneration and removal of judges should be insulated from political interference, and yet robust enough to ensure the quality and integrity of the judiciary. Most constitutional orders also provide for the possibility of majoritarian override of judge-made law, with rules for how this is done varying from a simple majority (or even, in some cases, executive order) through to super majority or referendum. Of equal importance to these external controls are the self-imposed controls which courts of final instance must adopt in order to ensure the quality, consistency and legitimacy of their judgments – including decisions about which cases *not* to decide. The latter, embedded in justiciability principles such as rules on standing or political question doctrine, often serve to avert confrontation with the political branches in sensitive areas. The CJEU has been criticised for its restrictive approach to individual applicant standing, and the difficult balance between its role in upholding individual rights and avoiding trespasses into the political domain is often apparent in its case law. The importance of such self-imposed controls in maintaining its legitimacy may be likened to Mill's ideal of conscientious trusteeship.

The European Parliament as Trustee

The Common Assembly was established under the 1951 Treaty of Paris as a check upon the High Authority, meeting only once a year to discuss the latter body's annual report and with the power to dismiss the Authority. It had no legislative role, although an obligation to consult it was introduced in the Treaty of Rome. Member states were free to decide the basis on which national delegations were sent to the Assembly, and used this power to shape delegations according to political preferences.[399] The institution which eventually became the Parliament has always been able to set its own rules of procedure, and has sought to bolster its legitimacy in this way – not least in the changes to the way it conducts interinstitutional negotiations discussed in Chapter 6. It has also successfully increased its own powers vis-à-vis the Council in a process which Roos (2017) traces to the 1950s, when the Common Assembly started offering (unsolicited) opinions on a range of EU initiatives, particularly in the social policy field. The Council then began seeking its opinion, in order to enhance the perceived democratic legitimacy of its own activities. The European Parliament (as it became in 1962) also asserted the power to put questions to Council, even though this was not in the Treaties. Roos argues that by the 1960s the Parliament had effectively become a co-legislator in the social policy field, with the Commission and Council often accepting its amendments

[399] For example, as noted by Roos (2018), Italy and France blocked representation of their national Communist parties in the EP until 1969 and 1973 respectively.

to proposals.

The European Parliament's powers have continued to grow since the first direct elections in 1979, although this progress has been fitful rather than steady. The growth has been driven both by formal Treaty changes and by informal practices adopted by the EP. It cannot be fully explained by the desire of member states to reduce transaction costs and ensure credible commitments. As Pollack (2006) notes:

> In the case of the European Parliament, the member states have delegated supervisory powers to a body whose preferences they cannot control – indeed, since members of the EP are directly elected in second-order elections that tend to take the form of protests against governments in power, the political complexion of the EP often runs counter to those of the governments in the Council of Ministers[400]

Likewise, attributing the EP's burgeoning powers to supranational activism misses the essential role which formal Treaty changes have played in this, not least the extension of codecision in the Treaties of Amsterdam and Lisbon. The empowerment of the EP maps well onto a graph charting the increase in the breadth and depth of EU activities, supporting the idea that it has been used as a means of enhancing democratic legitimacy within the Union. As concerns about an EU democratic deficit came to the fore in the 1990s and early 2000s, member states and the Commission looked to the Parliament to address this problem. This account is supported by comparing the EP with the European Economic and Social Committee (EESC), which has less perceived legitimacy as an unelected body, its members being appointed by the Council. The EESC has not seen any appreciable augmentation of its powers during the 60 years of its existence.[401] The EP has taken on most the role which the EESC was originally intended to fulfil, by providing a forum which civil society actors feel they can influence. As with the Court, assessments of the Parliament's success vary, however unlike the Court the Parliament as a majoritarian institution is subject to the same type of control which member state governments themselves are subject to, in the form of elections. It is also subject to control by its principals via codecision with the Council, as well as the possibility that its mandate or budget will be reduced – although these threats have become less tangible over time. It has slightly more control over its own 'agenda' than the Court, although the Commission's ongoing near-monopoly on initiating legislation continues to limit this.

Does conceiving of the EP as a trustee for member states within the EU's democratic order affect the way we conceive of its relationship with the European citizens it represents?

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[400] Pollack, M. (2006) in Hawkins et al (eds), p 191

[401] Although the list of areas in which the EESC must be consulted has expanded under successive treaties, there is no obligation on the other EU institutions to respond to these opinions.

In the trusteeship model, EU citizens are the co-beneficiaries of the Parliament's trusteeship, alongside interest groups who are able to lobby and influence the EP. But a separate direct relationship exists between European citizens and the Parliament which is not mediated through the member states, based on the election of its members. Clearly these two relationships must interact, and at times will conflict. While detailed consideration of the representative role of the EP falls outside of the scope of this case study, a few observations regarding its impact on the legislative process can be made. First, the public procurement reform was not a prominent issue in the European elections in either 2009 or 2014. To the extent that MEPs acted based on a mandate granted by their electors, this was largely mediated through the broad political orientations of their party groupings. The impact of party orientation upon the committee chair, rapporteur and shadow rapporteurs can all be clearly discerned in the public procurement reform. Secondly, while well-organised civil society groups appear to have exercised a strong influence on the process via the Parliament, the same cannot be said for individual citizens/constituents. In fact, citizens may have been more directly influential on the Commission than the Parliament, due to their participation in the Green Paper consultation and the effect of the *Right2Water* initiative. Outside of the important role of party politics within the EP then, the direct relationship with voters does not appear to offer a more proximate or parsimonious explanation of the Parliament's actions during the reform than the trustee model (which itself incorporates the relationship with European citizens as beneficiaries).

Testing Trusteeship

The above discussion suggests that trusteeship may provide a more plausible framework than agency or supranational entrepreneurship to analyse the behaviour of the Court and Parliament and their relationship to member states and citizens. To test this, we need to develop falsifiable hypotheses which are distinct to those previously generated by intergovernmental and supranational theory. Trusteeship requires i) that the reason for delegation of powers is based on perceived legitimacy gains, rather than on an expectation that the trustee will act in accordance with the preferences of the principal; ii) that the trustee will make decisions in accordance with its own professional judgment and the standards implied by its source(s) of legitimacy; and iii) that the trustee will place the interests of its beneficiaries ahead of the interests of its principals, where these conflict. Determining the reasons for delegation of powers to the Court and Parliament requires analysis of successive historical occasions on which this has taken place, but hypotheses about this can also aim to make predictions about when future delegation will occur. To test this first aspect of trusteeship, the following hypotheses can be made:

> H1(T) Member states have delegated/will delegate powers to the Court and Parliament in areas where these bodies have distinct sources of legitimacy;

and

H2(T) Member states have not/will not delegate powers to the Court and Parliament where these bodies lack distinct sources of legitimacy.

H1(T) can be falsified for example by finding areas in which member states have refused to empower the Court or Parliament despite the existence of a source of judicial or majoritarian legitimacy at EU level which is not replicated at national level. This might be the case if the Court's jurisdiction is excluded in areas where both the rule of law and the separation of powers under the Treaties suggest it is best placed to make decisions. Areas such as the Common Foreign and Security Policy and cooperation in criminal matters would be obvious first testing-grounds for H1(T) in respect of the Court – with particular attention paid to nature of integration in these areas and the corresponding separation of powers between the national and supranational levels. In respect of the Parliament, H1(T) might be tested by evaluating areas where its powers remain relatively weak, such as economic governance. A finding that the EP had been side-lined despite having a clear source of legitimacy in such areas would tend to undermine H1(T). H2(T) is the inverse of H1(T) and so can be falsified if member states delegate powers to either institution despite their lack of distinct sources of legitimacy in the areas concerned – for example by giving the Court the power to make policy or the Parliament powers which duplicate those exercised by national parliaments.[402] As H1(T) and H2(T) are concerned with the *reasons* for states empowering EU institutions, powers which are asserted by the institutions without an explicit basis in the Treaties or another instrument would not in themselves contradict these claims.

In terms of the *way* in which the Court and Parliament exercise power as trustees, the following hypotheses can be identified:

H3(T) Powers delegated to the Court and Parliament will be subject to safeguards intended to ensure the application of the professional standards of behaviour expected from institutions of their type at national and international level;

and

H4(T) Powers will not be delegated to the Court and Parliament without safeguards intended to ensure the application of the professional standards of behaviour expected from institutions of their type at national and international level.

Evaluation of these safeguards should take into account their application in practice, as well as on paper. However, it is important to note that the member states themselves are not the enforcers of these standards. Falsification of H3(T) and H4(T) would involve demonstrating

[402] The duplication of powers between the EP and national parliaments should not be confused with the exercise of a *dual mandate* (where the same member sits in both assemblies, possible up until 2009) or the requirement (for example, in certain trade agreements) for approval by both the EP and national parliaments – where each has a separate role in scrutinising the impact of decisions at the EU and national level respectively.

delegation in the absence of such safeguards, or where it was clear that they had broken down. Finally, to test the tripartite relationship between principals, trustees and beneficiaries contemplated by the trusteeship model:

> H5(T): Sanctions will only be applied to the Court and Parliament where their decisions or actions harm their beneficiaries;
>
> and
>
> H6(T): Sanctions will not be applied to the Court and Parliament where their decisions or actions harm member states, but this is outweighed by benefits to beneficiaries.

Testing these last two hypotheses requires elaboration of what is meant by sanctions and a way to measure harm to member states and beneficiaries. Sanctions by member states may consist of removal of powers, resources or other actions limiting the independence of the Court or Parliament. Harm to beneficiaries may be measured in the Court's case by violations of the rule of law, and in the Parliament's case by failure to respect its own democratic mandate. Harm to member states can be measured by violations of the separation of powers or subsidiarity doctrines to the extent that these protect the primacy of states within the EU's legal and institutional order.

It is worth noting that none of the above hypotheses rely upon the idea that the Court or Parliament are 'good' trustees. Cases where these institutions act outside of the powers delegated to them, violate safeguards or attract sanctions do not fundamentally challenge the trusteeship model, any more than an occasionally disobedient agent challenges the principal-agent model. Trusteeship potentially generates further insight into the 'why', 'why not' and 'how' of delegation within the European Union's constitutional order than the principal-agent model. It also suggests new ways of evaluating and enhancing democratic legitimacy within that order, by theorising the direct relationship between EU institutions and citizens in a way which accounts for the important role of states, but also for the constraints on their ability to control integration. If EU institutions have their own sources of democratic legitimacy and are not obliged to place the preferences of states above their direct responsibilities to citizens, then this implies both an expansive role for them in integration and a need to ensure they are subject to appropriate controls. The next section places this analysis in the context of the debate about democratic legitimacy in the EU, and the question of how institutions should be designed to assure it.

Before proceeding a few words should be said about other alternatives to the principal-agent model which have been advanced in international relations theory. Abbott et al (2016) develop the orchestrator-intermediary model as an alternative to P-A. They define orchestration as "mobilization of an intermediary by an orchestrator on a voluntary basis in pursuit of a joint governance goal." The logic for assignment in the orchestration model is

the same as in P-A theory – states expect to realise efficiency gains and secure credible commitments from other states by empowering intermediaries. Where orchestration differs is in the absence of hard powers of control. Orchestrators look for agreeable third parties to act as intermediaries, and exercise soft power over them by providing material and ideational support. This leads to "a more horizontal relationship of mutual dependence between orchestrator and intermediary" than that posited by P-A theory. Abbott et al argue that when principals find it difficult to credibly threaten to rescind powers, orchestration provides a better tool to understand the resulting dynamics. This model however lacks plausibility as a means of explaining the powers exercised by EU institutions. To begin with, they do not 'voluntarily enlist' themselves as intermediaries but are assigned powers by member states under the Treaties or in secondary legislation. Hard control does exist under the Treaties – even if it is only rarely exercised. Crucially, orchestration does not posit any role for the beneficiaries/targets of the intermediary's powers in determining when powers will be rescinded or sanctions applied, which I have argued make trusteeship a particularly appropriate model for understanding the Court of Justice and European Parliament.

Democratic legitimacy

On 15 March 2018, at an event to commemorate the 170th anniversary of the 1848 Hungarian Revolution which also happened to fall in the middle of an election campaign, Viktor Orbán gave a speech which condemned the European Union in the following terms:

> We, the millions with national feelings, are on one side; the elite 'citizens of the world' are on the other side…On one side, national and democratic forces; and on the other side, supranational and anti-democratic forces.[403]

A few weeks later Orbán's Fidesz party won a convincing victory, with just under 50% of the vote and turnout above 70%. Orbán's denigrated citizens of the world appear to be close cousins of the 'citizens of nowhere' invoked by Theresa May in her speech to the 2016 Conservative Party conference. Beyond inflammatory xenophobic rhetoric, the characterisation of the EU as anti-democratic resonates on either side of Europe. Debates about a democratic deficit within the Union are no longer academic, and have the potential to derail future integration. The analysis put forward in this study has implications for how we understand democracy within the EU, and thus the response to the challenge posed by Orbán, May and others. The question of whether EU institutions act as agents, trustees or supranational entrepreneurs provides a means by which we can explain their powers, judge their democratic legitimacy, and exercise appropriate controls.

Scharpf (1999) drew a distinction between input and output-based legitimacy,

[403] Orbán (2018) "This is our country, and we shall fight for it to the end" speech given on 15 March 2018.

measured respectively by responsiveness to citizens' preferences and effectiveness in solving societal problems. Research by Lijphart (1999) and others has indicated that there is often a trade-off between these two forms of legitimacy, with pluralist democracies scoring better on input legitimacy and majoritarian democracies better on output legitimacy. Dahl (1999) argued that international organisations could not be democratic, inasmuch as they lack popular control and protection for the fundamental rights which ensure this. Dahl saw the long chain of delegation in international organisations, including the EU, as undermining popular control. At the furthest reaches of this chain, Dahl saw delegation as a 'misleading fiction useful only to the rulers.' But what if institutional design effectively closes the loop by providing direct means for citizens to hold EU institutions to account and protection for fundamental rights? As outlined above, the trusteeship model as applied to the Court of Justice and Parliament emphasises their direct responsibility to citizens as beneficiaries, rather than just to member states. Neither of these institutions has been entirely consistent in fulfilling this responsibility, but arguably both have improved markedly in the 20 years since Dahl made his assessment. Are the issues which the EU deals with inherently more complex than national issues and therefore less accessible to citizens? All decisions which involve balancing multiple divergent interests are complex. National decisions about how much to tax and how much to spend require an understanding of many variables and causal relationships, as well as worked out preferences in terms of outcomes. These decisions are no less complex than those made at EU level, but are often more tangible to citizens, and more familiar due to their centrality within domestic party politics.

Determining the general good may also be easier in a more homogenous population, as differences in the impact of collective decisions are smaller than in a highly diverse population. The EU struggles with input-based legitimacy due to distance, diversity and difficulty representing preferences. However, problems in defining the *demos* are not specific to the EU or international polities but are intrinsic to democratic theory (Shapiro and Hacker-Cordón 1999). They are salient in the independence movements of Catalonia and Scotland for example, amongst many others. Smaller units do not necessarily enhance the quality of democracy, partly because what they gain in internal cohesion may be lost in the need to relate to a greater number of powerful external actors. Where the EU operates under a democratic deficit, it must also be considered whether this is because states have jealously guarded the means of generating input and output-based legitimacy. In order for EU institutions to represent a European *demos*, they need to engage with the questions which are central to party politics in most member states, including social policy. De Witte (2017) argues that the EU has entered a 'third wave' of social policy convergence and that this poses particular challenges for the democratic legitimacy of decision making at the supranational level. In this third wave, national social policy divergences are seen as

problematic in light of the fiscal discipline required to secure monetary and economic union.[404] As the scope of powers exercised at EU level has grown, there is a need to continually assess the adequacy of the checks and balances both amongst the EU institutions and between the supranational and national levels.

These questions figure prominently in the German Federal Constitutional Court's (FCC) jurisprudence on the limits of EU integration. Beginning with its decision on the Maastricht Treaty,[405] the FCC has acknowledged that the exercise of democracy differs between the national and supranational levels, but that appropriate standards of judicial review must be applied to each level. It has emphasised the delegated nature of the EU's legal authority, without setting fixed limits on the types of powers which could be delegated to it. Under Maastricht, the FCC noted that non-economic areas of EU integration remained primarily intergovernmental. In its decision on the Lisbon Treaty,[406] the FCC further developed the idea of limits to the competences which could be delegated from national to supranational level – however it did so in a way which leaves ample room for interpretation by governments.[407] In the FCC's view, the irreducible core of national sovereignty is linked to the history, culture and language of a nation, and the political rights and obligations which stem from this under its constitution. Where substantial differences apply between member states on these matters, delegation of powers to the EU would lack democratic legitimacy. The FCC's reasoning implies that as a society becomes less homogenous, the scope of powers which may legitimately be delegated to the supranational level increases. It also implies that as the breadth of the Union increases to include states with highly divergent histories and cultures, the depth of integration will be limited.

The FCC's Lisbon judgment raises the question of whether democratic legitimacy at national level also necessarily decreases as a society becomes less homogenous. It appears to largely ignore the role which the design of representative institutions may play in delivering legitimacy even amongst a diverse *demos*. It also appears to ignore the deep cultural and linguistic divisions which have long characterised many European states. Member state governments do not have a monopoly on democratic legitimacy in the EU context, but face competition from both the subnational and supranational levels. This does not mean they are peripheral to the way power is exercised within the EU, or that they don't have the final right

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[404] This fiscal discipline is exercised in particular via the excessive deficit procedure (EDP), multi-lateral surveillance procedure (MSP) and macro-economic imbalance procedure (MEIP).
[405] *Bundesverfassungsgericht*, Judgment of 12 October 1993, BVerfGE 89
[406] *Bundesverfassungsgericht*, Judgment of 30 June 2009, BVerfG 2, BvE 2/08.
[407] The FCC identified deployment of the army and certain fiscal and social policies as part of the inalienable competence of the state. However, the language used by the court stops short of ringfencing these specific areas in perpetuity, rather using them to illustrate the type of decision which may fall within the essentiality principle.

of recall in relation to EU law. It does mean that intergovernmental theory which conceives of EU institutions purely as agents of the member states is both descriptively and normatively incomplete. Equally, supranational theory which ignores the right of recall which member states have in relation to actions of the EU institutions fails to fully capture the balance between these actors. For either theory to approach descriptive and normative coherence, the role of EU institutions in establishing democratic legitimacy must be further refined. I have argued that instead of characterising the Court and Parliament either as supranational policy entrepreneurs or as agents of the member states, the concept of trusteeship better captures their behaviour in the context of the case study presented here – and identifies a direct link to citizens. I have also outlined how this concept might be operationalised to generate hypotheses which can be tested in future qualitative and quantitative research.

Conclusion

Public procurement is seldom the stuff of high politics. For many, at best it evokes images of government bean counters, and at worst associations with corruption and misuse of public funds. National and subnational governments often blame the EU procurement rules for increasing bureaucracy,[408] while at other times grudgingly accepting their utility. Businesses tend to take a similar view. Although public contracts represent a sizeable chunk of GDP across Europe, this spending is spread across tens of thousands of local, regional and national public and semi-state bodies. Both the costs and benefits of procurement regulation are highly diffuse, meaning that the impact of even a major reform such as the 2014 directives takes some time to become clear. Delays in transposition of the directives in most member states have extended this timetable further. Nevertheless, the 2014 reform marks a significant departure both in tone and content from previous directives, with social and environmental objectives taking on a new prominence. This is not merely cosmetic; the directives set far-reaching new requirements in terms of compliance with environmental, social and labour law and collective agreements, amongst many other changes.

Without providing for complete harmonisation, the new directives require public authorities, national courts, and ultimately the Court of Justice, to apply common rules which balance market and non-market interests. This is a task which speaks to deep conflicts currently playing out in national and international politics, and the way they are resolved in EU law invites scrutiny of the democratic legitimacy of both the process and outcomes. In

[408] A clear example of this can be seen in the 2018 collapse of Carillion, a major operator of outsourced contracts in the UK. Ministers and senior civil servants alike blamed the EU public procurement rules for preventing exclusion of the company from further bids once its financial problems became clear. For discussion of this controversy, see Semple (2018) "Carillion – A canary in the coalmine for overextended government contractors?"

seeking to understand these changes, intergovernmental and supranational theory offer two distinct explanations for how EU institutions, member states and other actors drive integration. Careful analysis of the reform allows us to draw conclusions not only about this specific case, but also to suggest refinements to the way in which integration theory characterises EU institutions as either agents or supranational entrepreneurs. I have argued that neither concept fully captures the influence of the European Parliament and Court of Justice in this case, and have developed the alternative concept of trusteeship as a source of testable hypotheses regarding their roles. Trusteeship may enable a better understanding of the tripartite relationship between member states, EU institutions and citizens – all three of which must be fully present in any democratic theory of integration. By continually refining theory, the goal is to move closer to a descriptive and normative understanding of EU integration which informs the standards by which we judge it, and the majoritarian and non-majoritarian controls which we apply.

Appendix A – Environmental and Social Provisions included in Directive 2014/24/EU

Note: Mandatory provisions are highlighted in **bold**

Article 18 Principles of procurement

…

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Article 20 Reserved contracts

1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

2. The call for competition shall make reference to this Article.

Article 42 Technical specifications

1. The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specification shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

The technical specifications may also specify whether the transfer of intellectual property rights will be required.

For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.

Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

…

Article 43 Labels

1. Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:

(a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

(b) the label requirements are based on objectively verifiable and non-discriminatory criteria;

(c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;

(d) the labels are accessible to all interested parties;

(e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are referred to.

Contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.

2. Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

Article 57 Exclusion grounds

1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

...

(f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council.

...

2. An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

...

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);

...

Article 62 Quality assurance standards and environmental management standards

...

2. Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, they shall refer to the Eco- Management and Audit Scheme (EMAS) of the Union or to other environmental management systems as recognised in accordance with Article 45 of Regulation (EC) No 1221/2009 or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States.

Where an economic operator had demonstrably no access to such certificates, or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall also accept other evidence of environmental management measures, provided that the economic operator proves that these measures are equivalent to those required under the applicable environmental management system or standard.

Article 67 Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

3. Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) the specific process of production, provision or trading of those works, supplies or services; or

(b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

5. The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Article 68 Life-cycle costing

1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works:

(a) costs, borne by the contracting authority or other users, such as:

(i) costs relating to acquisition,

(ii) costs of use, such as consumption of energy and other resources,

(iii) maintenance costs,

(iv) end of life costs, such as collection and recycling costs.

(b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life- cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.

The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:

(a) it is based on objectively verifiable and non-discriminatory criteria. In particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;

(b) it is accessible to all interested parties;

(c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the Union is bound.

3. Whenever a common method for the calculation of life- cycle costs has been made mandatory by a legislative act of the Union, that common method shall be applied for the assessment of life-cycle costs.

A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XIII. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 concerning the update of that list, when an update of the list is

necessary due to the adoption of new legislation making a common method mandatory or the repeal or modification of existing legal acts.

Article 69 Abnormally low tenders

1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

2. The explanations referred to in paragraph 1 may in particular relate to:

(a) the economics of the manufacturing process, of the services provided or of the construction method;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with obligations referred to in Article 18(2);

(e) compliance with obligations referred to in Article 71;

(f) the possibility of the tenderer obtaining State aid.

3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).

...

Article 70 Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

Article 71 Subcontracting

1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

...

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

(a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

Social and Other Specific Services

Article 76 Principles of awarding contracts

1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price- quality ratio, taking into account quality and sustainability criteria for social services.

Article 77 Reserved contracts for certain services

1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

(a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;

(b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

(c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and

(d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

3. The maximum duration of the contract shall not be longer than three years.

4. The call for competition shall make reference to this Article.

5. Notwithstanding Article 92, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by 18 April 2019.

ANNEX X

LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS REFERRED TO IN ARTICLE 18(2)

— ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise;

— ILO Convention 98 on the Right to Organise and Collective Bargaining;

— ILO Convention 29 on Forced Labour;

— ILO Convention 105 on the Abolition of Forced Labour;

— ILO Convention 138 on Minimum Age;

— ILO Convention 111 on Discrimination (Employment and Occupation);

— ILO Convention 100 on Equal Remuneration;

— ILO Convention 182 on Worst Forms of Child Labour;

— Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;

— Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);

— Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);

— Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols.

Appendix B – Index of documents produced by EU institutions during the reform

European Commission

European Commission (2010) *Towards a Single Market Act for a highly competitive social market economy* COM (2010) 608 of 27.10.10

European Commission (2011) *Buying Green! A handbook on environmental public procurement* (2nd edition) Luxembourg: Publications Office of the European Union

European Commission (2011a) *Green Paper on the Modernisation of Public Procurement Policy: Towards a More Efficient European Procurement Market* COM (2011) 15 of 27.1.11

European Commission (2011b) *Single Market Act: Twelve levers to boost growth and strengthen confidence "Working together to create new growth"* COM (2011) 206 of 13.4.11

European Commission (2011c) *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation* SEC (2011) 853 of 27.6.11

European Commission (2011d) *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market - Synthesis of replies*

European Commission (2011e) *Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors* COM (2011) 895 of 20.12.11

European Commission (2011f) *Proposal for a Directive of the European Parliament and of the Council on public procurement* COM (2011) 896 of 20.12.11

European Commission (2011g) *Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts* COM (2011) 897 of 20.12.11

European Commission (2012) 5369/12 *Non-paper on Cluster 2: Strategic use of public procurement* 2011/0438 (COD) Communication via the Council General Secretariat of 23.1.12

European Commission (2014) *Communication on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!"* (COM 2014 177)

European Commission (2014a) *Slide Deck on Social and other specific services: Light regime presented at Meeting of Commission Government Experts Group on Public Procurement*, 19-20 May 2014

European Commission (2014b) *Slide Deck on Grounds for exclusion presented at Meeting of Commission Government Experts Group on Public Procurement*, 3-4 June 2014

European Commission (2014c) *Slide Deck on Award Criteria presented at Meeting of Commission Government Experts Group on Public Procurement*, 11 September 2014

European Commission (2014d) *Slide Deck on Social Aspects presented at Meeting of Commission Government Experts Group on Public Procurement*, 4-5 November 2014

European Commission (2014e) *Slide Deck on Subcontracting presented at Meeting of Commission Government Experts Group on Public Procurement*, 4-5 November 2014

European Parliament

European Parliament (2010), *Report on new developments in public procurement 2009/2175 (INI)* (Rapporteur: Heide Rühle) Committee on the Internal Market and Consumer Protection 10.5.10

European Parliament (2010a), *Resolution of 18 May 2010 on new developments in public procurement 2009/2175 (INI)*

European Parliament (2011), *Report on modernisation of public procurement 2011/2048 (INI)* (Rapporteur: Heide Rühle) Committee on the Internal Market and Consumer Protection 5.10.11

European Parliament (2011a) *Resolution of 25 October 2011 on modernisation of public procurement 2011/2048(INI)*

European Parliament (2012) Committee on the Internal Market and Consumer Protection, *Working document on a proposal for a directive of the European Parliament and of the Council on public procurement* (Rapporteur Marc Tarabella) 23.2.2012

European Parliament (2012a) *Draft Report on the proposal for a directive of the European Parliament and of the Council on public procurement* (Rapporteur: Marc Tarabella) Committee on the Internal Market and Consumer Protection 3.5.12

European Parliament (2012b) *Draft Report on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors* (Rapporteur: Marc Tarabella) Committee on the Internal Market and Consumer Protection, 14.5.12

European Parliament (2012c) *Fair trade in public procurement in the EU* Library briefing of 12.7.12

European Parliament (2012d) *Draft Report on the proposal for a directive of the European Parliament and of the Council on public procurement – Amendments – Volumes I-V* (Rapporteur: Marc Tarabella) Committee on the Internal Market and Consumer Protection 12.7.12

European Parliament (2012e) *Draft Report on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors – Amendments – Volumes I-III* (Rapporteur: Marc Tarabella) Committee on the Internal Market and Consumer Protection 3.9.12

European Parliament (2012f) *Working document on the proposal for a directive of the European Parliament and of the Council on public procurement – Draft list of controversial issues by cluster* (Rapporteur: Marc Tarabella) Committee on the Internal Market and Consumer Protection 19.9.12

European Parliament (2013) *Report on the proposal for a directive of the European Parliament and of the Council on public procurement* (Rapporteur: Marc Tarabella) Committee on the Internal Market and Consumer Protection 11.1.13

European Parliament (2013a) *Report on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts* (Rapporteur: Philippe Juvin) Committee on the Internal Market and Consumer Protection 1.2.13

European Parliament (2013b) *Report on the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors* (Rapporteur: Marc Tarabella) Committee on the Internal Market and Consumer Protection, 7.2.13

Council of the European Union

Council of the European Union (2012) *5326/12 Note from General Secretariat/Presidency to Delegations on Public procurement package – Subject clusters* 13.1.12

Council of the European Union (2012a) *6060/12 Note from General Secretariat/Presidency to Permanent Representative Committee on Proposal for a Directive on public procurement - Cluster 2: Strategic use of public procurement* 3.2.12

Council of the European Union (2012b) *6240/12 Note from General Secretariat to Working Party on Public Procurement - Draft questions for the Competitiveness Council meeting of 20 and 21 February 2012* 7.2.12

Council of the European Union (2012c) *6268/12 Note from General Secretariat/Presidency to Permanent Representative Committee on Public procurement package - Orientation debate* 13.2.12

Council of the European Union (2012d) *6436/12 Note from General Secretariat/Presidency to Permanent Representative Committee on Public procurement package (Legislative deliberation) - Orientation debate* 16.2.12

Council of the European Union (2012e) *6675/12 Press Release: 3147th Council meeting Competitiveness (Internal Market, Industry, Research and Space)* Brussels, 20-21 February 2012

Council of the European Union (2012f) *7457/12 Note from General Secretariat to Working Party on Public Procurement - Articles 4, 74, 75, 76 and Annex XVI: Social services (part of Cluster 2)* 16.3.12

Council of the European Union (2012g) *8765/12 Note from General Secretariat to Working Party on Public Procurement – Cluster 2: Strategic use of public procurement* 18.4.12

Council of the European Union (2012h) *9646/12 Note from General Secretariat to Working Party on Public Procurement – Competitiveness Council meeting of 30 and 31 May 2012* 7.5.12

Council of the European Union (2012i) 9696/12 *Note from Presidency to Coreper/Council on Proposal for a Directive on Public Procurement - (First reading) (Legislative deliberation)- Progress report and Orientation debate* 11.5.12

Council of the European Union (2012j) *10380/12 Press Release: 3169th Council meeting Competitiveness (Internal Market, Industry, Research and Space)* Brussels, 30-31 May 2012

Council of the European Union (2012k) *12878/12 Note from General Secretariat to Working Party on Public Procurement – Presidency compromise text/Consolidated version* 24.7.12

Council of the European Union (2012l) *14481/12 Note from General Secretariat to Working Party on Public Procurement – Presidency compromise text/Consolidated version* 2.10.12

Council of the European Union (2012m) *14971/12 Note from General Secretariat to Working Party on Public Procurement – Presidency compromise text/Consolidated version* 19.10.12

Council of the European Union (2012n) 16189/12 *Note from General Secretariat to Delegations – Proposal for a Directive on Public Procurement – Preparation for a meeting of Permanent Representatives Committee* 14.11.12

Council of the European Union (2012o) 16190/12 *Note from General Secretariat to Permanent Representatives Committee – Proposal for a Directive on Public Procurement – Presidency Compromise Text* 14.11.12

Council of the European Union (2012p) 16191/12 *Note from General Secretariat to Permanent*

Representatives Committee – Proposal for a Directive on Public Procurement –General Approach 19.11.12

Council of the European Union (2012q) 16725/12 *Note from General Secretariat to Council – Proposal for a Directive on Public Procurement –Presidency Compromise Text* 30.11.12

Council of the European Union (2012r) 16726/12 *Note from Permanent Representative Committee to Council – Proposal for a Directive on Public Procurement –General Approach* 5.12.12

Council of the European Union (2012s) 18135/12 *Note from General Secretariat to Delegations – Proposal for a Directive on Public Procurement – Consideration of IMCO Amendments* 21.12.12

Council of the European Union (2013) 5309/13 *Note from General Secretariat to Delegations – Proposal for a Directive on Public Procurement – Consideration of IMCO Amendments* 14.1.13

Council of the European Union (2013a) 6756/13 *Note from the Presidency to Delegations – Proposal for a Directive on Public Procurement, Proposal for a Directive on Utilities Procurement, Proposal for a Directive on the Award of Concession Contracts – Preparation for the informal trilogue* 22.2.13

Council of the European Union (2013b) 7525/13 *Note from General Secretariat to Delegations – Proposal for a Directive on Public Procurement – Debriefing following technical meetings and an informal trilogue covering clusters 1, 3 and 4* 15.3.13

Council of the European Union (2013c) 8024/13 *Note from General Secretariat to Delegations – Proposal for a Directive on Public Procurement – Debriefing following technical meetings and an informal trilogue covering clusters 5 and 2* 27.3.13

Council of the European Union (2013d) 8365/13 *Note from the General Secretariat to the Working Party on Public Procurement – Examination of Compromise Proposals – Part 1* 11.4.13

Council of the European Union (2013e) 8869/13 *Note from General Secretariat to Delegations – Proposal for a Directive on Public Procurement – Debriefing following informal trilogue* 24.4.13

Council of the European Union (2013f) 5927/13 *Note from General Secretariat to Delegations – Proposal for a Directive on Public Procurement – Examination of Compromise Proposals* 24.4.13 [Note partially redacted and numbering indicates it was produced at an earlier date]

Council of the European Union (2013g) 8365/1/13 *Note from the General Secretariat to the Working Party on Public Procurement – Examination of Compromise Proposals – Part 1* (REV 1) 26.4.13

Council of the European Union (2013h) 9278/13 *Note from General Secretariat to Permanent Representative Committee – Proposal for a Directive on Public Procurement – Preparation of informal trilogue* 8.5.13

Council of the European Union (2013i) 9834/13 *Note from General Secretariat to Delegations – Proposal for a Directive on Public Procurement- Preparation of informal trilogue* 22.5.13

Council of the European Union (2013j) 9545/13 *Note from the General Secretariat to the Working Party on Public Procurement – Examination of revised compromise proposals* 28.5.13

Council of the European Union (2013k) 10254/13 *Note from General Secretariat to Permanent*

Representative Committee – Proposal for a Directive on Public Procurement – Preparation of informal trilogue 3.6.13

Council of the European Union (2013l) 10254/13 *Note from General Secretariat to Permanent Representative Committee – Proposal for a Directive on Public Procurement – Preparation of informal trilogue COR 1* 7.6.13

Council of the European Union (2013m) 10600/13 *Note from General Secretariat to Permanent Representative Committee – Proposal for a Directive on Public Procurement – Preparation of informal trilogue* 10.6.13

Council of the European Union (2013n) 10904/1/13 *Note from General Secretariat to Permanent Representative Committee – Proposal for a Directive on Public Procurement – Preparation of informal trilogue REV 1* 13.6.13

Council of the European Union (2013o) 11048/13 *Note from General Secretariat to Permanent Representative Committee – Proposal for a Directive on Public Procurement – Preparation of informal trilogue* 14.6.13

Council of the European Union (2013p) 11664/13 *Note from the General Secretariat to Permanent Representative Committee – Proposal for a Directive on Public Procurement, Proposal for a Directive on Utilities Procurement, Proposal for a Directive on the Award of Concession Contracts – Debriefing following informal trilogue* 26.6.13

Council of the European Union (2013q) 11745/13 *Note from General Secretariat to Permanent Representative Committee – Proposal for a Directive on Public Procurement (Classical Directive) (First reading) – Approval of final compromise text* 12.7.13

Council of the European Union (2013r) 11998/13 *Press Release – Agreement on the reform of public procurement policy* 17.7.13

Council of the European Union (2014) 5218/14 *Note from General Secretariat to Permanent Representative Committee/Council – Proposal for a Directive on Public Procurement*

Council of the European Union (2014a) 5862/14 *Note from General Secretariat to Permanent Representative Committee/Council – Proposal for a Directive on Public Procurement – Outcome of the European Parliament's first reading (Strasbourg, 13 to 16 January 2014)* 22.1.14

Council of the European Union (2014b) 6475/14 *Voting Result – Directive of the European Parliament and the Council on Public Procurement and Repealing Directive 2004/18/EC – Adoption of the legislative act* 13.2.14

Appendix C – Index of national documents

Germany

Document title/description	Date	Reference
Bundesministerium für Wirtschaft und Energie – Informationsvorlage – Grünbuch Modernisierung des EU-Vergaberechts	27.01.2011	BMWi (2011a)
Bundesrat – Stellungnahme zu Grünbuch über die Modernisierung der europäischen Politik im Bereich des öffentlichen Auftragswesens	18.03.2011	Bundesrat (2011)
Bundesministerium für Wirtschaft und Energie – Brief an Präsidentin des Deutschen Bundestages – Antwort auf Kleine Anfrage der Bündnis 90/Die Grünen "Haltung der Bundesregierung zur andegkündigten EU-Rechtssetzungsinitiative zu Dienstleistungskonzessionen und Stand der Vergaberechtsreform"	15.04.2011	BMWi (2011b)
Bundesministerium für Wirtschaft und Energie – Entscheidungsvorlage - Grünbuch Modernisierung des Vergaberechts / Abgabe einer Stellungnahme der Bundesregierung	15.04.2011	BMWi (2011c)
Comments of the German Federal Government on the European Commission green paper on the modernisation of public procurement policy	18.5.2011	Bundesregierung (2011)
North Rhine-Westphalia Government Ministry for Economic Affairs, Energy, Building, Housing and Transport - Response to Green Paper	20.5.2011	North Rhine-Westphalia (2011)
Bundesbeschaffung – Antworten auf Grünbuch über die Modernisierung der europäischen Politik im Bereich des öffentlichen Auftragswesens	9.06.2011	Bundesbeschaffung (2011)
Bundesministerium für Wirtschaft und Energie – Stellungnahme zur Anfrage der FDP-Fraktion vom 08.08.2011	17.08.2011	BMWi (2011d)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage – Neues EU-Legislativpaket zur Modernisierung des Vergaberechts	20.12.2011	BMWi (2011e)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage Herrn Minister - Neues EU-Legislativpaket zur Modernisierung des Vergaberechts und zur Konzessionsvergabe	5.03.2012	BMWi (2012a)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage Herrn St He - Zwischenstand der EU-Verhandlungen zur Modernisierung des Vergaberechts zum Ende der dänischen Präsidentschaft	10.7.2012	BMWi (2012b)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage St He - EU-Richtlinie zur Vergaberechtsmodernisierung - AstV-1 am 21.11.2012	19.11.2012	BMWi (2012c)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage St He - EU-Legislativpaket zum Vergaberecht im EU-Wettbewerbsfähigkeitsrat am 10. Dezember 2012	11.12.2012	BMWI (2012d)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage Herrn Minister	25.01.2013	BMWi (2013a)

Binnenmarktausschuss des EP stimmt Entwurf der Konzessionsrichtline zu — Obergangsregeln für Wasserversorgung vorgesehen		
Bundesministerium für Wirtschaft und Energie – Informationsvorlage PR/KR - Argumentationspapier zur Konzessionsrichtlinie	31.01.2013	BMWi (2013b)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage Herrn Minister - EU-Konzessionsrichtllnie Verfahrensstand und Auswirkungen auf den Wassersektor	19.02.2013	BMWi (2013c)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage Herr Dr. Groß EU-Konzessionsrichtlinie: - Zeitplan und Möglichkeiten der Einflussnahme im weiteren Legislativverfahren - Argumente für die Einbeziehung des Wassersektors in die Konzessions-RL - Gibt es einen Weg den Kritikern entgegen zu kommen, ohne einen Ausnahmebereich für Wasser zu fordern?	22.02.2013	BMWi (2013d)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage PSt B - Ihre Anfrage zur Konzessionsrichtlinie - Wasserversorgung in einem interkommuna-len Gewerbegebiet	25.02.2013	BMWi (2013e)
Bundesministerium für Wirtschaft und Energie – Informationsvorlage St He – Schreiben von StS Dr. Beus (BMF) zu EU-Vergaberechtsmodernisierung – Auftragsvergabe im geheimschutzrelevanten Beriech	25.03.2013	BMWi (2013f)
Bundesministerium für Wirtschaft und Energie – Entscheidungsvorlage Herrn Minister - EU-Kommisslon will Wasserversorgung von Konzessions-Richtlinie ausnehmen	21.06.2013	BMWi (2013g)

France

Document title/description	**Date**	**Reference**
Circulaire interministérielle CAB-TEFP 14/93 du 29 décembre 1994 sur la prise en compte de critères additionnels relatifs à l'emploi dans l'attribution des marchés publics	29.12.1994	CAB-TEFP (1994)
Conseil constitutionnel - Décision No 98-43-DC du 29 juillet 1998 - Loi d'orientation relative à la lutte contre les exclusions	29.07.1998	Conseil constitutionnel (1998)
Loi 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées.	11.02.2005	Loi 2005-102
Code de marchés publics (édition 2006)	1.06.2006	Code de marchés publics 2006
Circulaire du 3 décembre 2008 relative à l'exemplarité de l'Etat au regard du développement durable dans le fonctionnement de ses services et de ses établissements publics	3.12.2008	État exemplaire 2008

loi n° 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement	3.08.2009	Loi 2009-967 (Grenelle I)
Chambre de commerce et d'industrie de Paris - Livre vert sur la modernisation de la politique de l'UE en matière de marchés publics – Rapport de M. Nicolas Gueury	14.04.2011	CCIP (2011)
Mouvement des Enterprises de France - Livre vert sur la modernisation de la politique de l'UE en matière de marchés publics Observations du MEDEF	20.04.2011	MEDEF (2011)
Sénat français - Livre vert sur la modernisation de la politique de l'UE en matière de marchés publics : Vers un marché européen des contrats publics plus performant - Examen dans le cadre de l'article 88-4 de la Constitution	28.04.2011	Sénat (2011)
Secrétariat general des affaires européennes - Contribution française au Livre Vert sur la modernisation de la politique de l'Union européenne en matière de marchés publics	3.05.2011	SGAE (2011)
Loi n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire	31.07.2014	Loi 2014-856
Ordonnance No. 2015-899 du 23 juillet 2015 relative aux marchés publics	23.07.2015	Ordonnance 2015-899
Code de marchés publics 2016 (Décret 2016-360)	31.03.2016	Code de marchés publics 2016

United Kingdom

Document title/description	Date	Reference
Cabinet Office – United Kingdom response to the European Commission Green Paper on the Modernisation of EU Public Procurement Policy	11.04.2011	Cabinet Office (2011)
Procurement Policy Note 05/11– Modernising the EU Public Procurement Rules: Update on UK Influencing Activity	10.08.2011	Cabinet Office (2011a)
Procurement Policy Note 11/11 – Legislative Proposals for the Revised Procurement Directives and new Directive on Concessions	21.12.2011	Cabinet Office (2011b)
House of Commons - Reasoned Opinion Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality concerning a Draft Directive on procurement by entities operating in the water, energy, transport and postal services sectors and a Draft Directive on public procurement	7.03.2012	House of Commons (2012)
Public Services (Social Value) Act 2012	8.03.2012	Social Value Act 2012
Procurement Policy Note 08/12 – Progress Update on the Modernisation of the EU Procurement Rules	24.08.2012	Cabinet Office (2012)
Procurement policy note 10/12 - The Public Services (Social Value) Act 2012	20.12.2012	Cabinet Office (2012a)

Cabinet Office - Procurement Policy Note 05/13 – Further progress update on the Modernisation of the EU Procurement Rules	25.07.2013	Cabinet Office (2013)

Appendix D – List of interviews carried out

Name	Role	Date of interview	Reference
Olivier Moreau	French delegation to the Council	12.1.2018	Interview A
Panayotis Stamatopoulos	European Commission (DG Internal Market)	1.2.2018	Interview B
Marc Tarabella	European Parliament (IMCO - Rapporteur)	1.2.2018	Interview C
Malcolm Harbour	European Parliament (IMCO - Chair)	19.3.2018	Interview D
Ronan O'Reilly	Irish Presidency of Council (Chair of trilogues)	12.6.2018	Interview E

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