

# Cambridge Yearbook of European Legal Studies

2011–2012, Volume 14



Edited by Catherine Barnard and Markus Gehring  
with Iyiola Solanke

The *Cambridge Yearbook of European Legal Studies* provides a forum for the scrutiny of significant issues in EU Law, the law of the European Convention on Human Rights, and Comparative Law with a 'European' dimension, and particularly those issues which have come to the fore during the year preceding publication. The contributions appearing in the collection are commissioned by the Centre for European Legal Studies (CELS) Cambridge, a research centre in the Law Faculty of the University of Cambridge specialising in European legal issues.

The papers presented are at the cutting edge of the fields which they address, and reflect the views of recognised experts drawn from the University world, legal practice, and the institutions of both the EU and its Member States. Inclusion of the comparative dimension brings a fresh perspective to the study of European law, and highlights the effects of globalisation of the law more generally, and the resulting cross fertilisation of norms and ideas that has occurred among previously sovereign and separate legal orders.

The *Cambridge Yearbook of European Legal Studies* is an invaluable resource for those wishing to keep pace with legal developments in the fast moving world of European integration.

CAMBRIDGE YEARBOOK  
OF EUROPEAN LEGAL STUDIES

Vol 14, 2011–2012

The Cambridge Yearbook of European Legal Studies provides a forum for the scrutiny of significant issues in European Union Law, the Law of the Council of Europe, and Comparative Law with a 'European' dimension, and particularly those which have come to the fore during the year preceding publication. The contributions appearing in the collection are commissioned by the Centre for European Legal Studies (CELS), Cambridge, which is the research Centre of Cambridge University Law Faculty specialising in European legal issues.

The papers presented are all at the cutting edge of the fields which they address, and reflect the views of recognised experts drawn from the University world, legal practice, and the civil services of both the EU and its Member States. Inclusion of the comparative dimension brings a fresh perspective to the study of European law, and highlights the effects of globalisation of the law more generally, and the resulting cross fertilisation of norms and ideas that has occurred among previously sovereign and separate legal orders.

The Cambridge Yearbook of European Legal Studies is an invaluable resource for those wishing to keep pace with legal developments in the fast moving world of European integration.

This volume can be cited as (2011–2012) 14 *CYELS*.

#### **Editorial Advisory Board**

Albertina Albors-Llorens  
John Bell  
Alan Dashwood  
Simon Deakin  
David Feldman  
Richard Fentiman  
Angus Johnston  
John Spencer

#### **Founding Editors**

Alan Dashwood  
Angela Ward

# The Cambridge Yearbook of European Legal Studies

VOLUME 14, 2011–2012

EDITED BY  
Catherine Barnard  
and  
Markus Gehring  
with  
Iyiola Solanke



• H A R T •  
PUBLISHING

OXFORD AND PORTLAND, OREGON  
2012

Published in the United Kingdom by Hart Publishing Ltd  
16C Worcester Place, Oxford, OX1 2JW  
Telephone: +44 (0)1865 517530  
Fax: +44 (0)1865 510710  
E-mail: mail@hartpub.co.uk  
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by  
Hart Publishing  
c/o International Specialized Book Services  
920 NE 58th Avenue, Suite 300  
Portland, OR 97213-3786  
USA  
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190  
Fax: +1 503 280 8832  
E-mail: orders@isbs.com  
Website: <http://www.isbs.com>

© The editors and contributors severally, 2012

The editors and contributors have asserted their right under the Copyright,  
Designs and Patents Act 1988, to be identified as the authors of this work.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Hart Publishing, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data  
Data Available

ISBN: 978-1-84946-353-9  
ISSN: 1528-8870

Typeset by Compuscript Ltd, Shannon  
Printed and bound in Great Britain by  
TJ International Ltd, Padstow, Cornwall

# Contents

<i>Preface</i> .....	v
<i>List of Contributors</i> .....	xi
<i>Table of Cases</i> .....	xv
<i>Table of Legislation</i> .....	xlvi

1. The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies. ....	1
<i>Sue Arrowsmith</i>	
2. How Regulatory Networks Shaped Institutional Reform under the EU Telecoms Framework .....	49
<i>Nina Boeger and Joseph Corkin</i>	
3. Perfectionism in European Law.....	75
<i>Jacco Bomhoff</i>	
4. From Fiscal Compact to Fiscal Union? New Rules for the Eurozone .....	101
<i>Christian Calliess</i>	
5. A ‘Minefield of Misreckonings’: Europe’s Constitutional Pluralism .....	119
<i>Emilios Christodoulidis</i>	
6. The Court of Justice as a Labour Court.....	145
<i>ACL Davies</i>	
7. Protection Against Acts Harmful to Human Health and the Environment Adopted by the EU Institutions.....	177
<i>Nicolas de Sadeleer and Charles Poncelet</i>	
8. Paths for Constitutional Thinking ‘Beyond the State’? <i>Alun Gibbs</i> .....	209
9. The Euro Area Crisis and Constitutional Limits to Fiscal Integration .....	243
<i>Alicia Hinarejos</i>	
10. The Fight against Terrorism, Fundamental Rights and the EU Courts: The Unsolved Conundrum.....	269
<i>Eva Nanopoulos</i>	

11. Behavioural Economics and the Autonomous Consumer .....	297
<i>Annette Nordhausen Scholes</i>	
12. The European Union as a Source of Inspiration .....	325
<i>Sir Konrad Schiemann</i>	
13. European Fundamental Rights and the Member States: From 'Selective' to 'Total' Incorporation? .....	337
<i>Robert Schütze</i>	
14. Who's Afraid of the Big, Bad European Public Prosecutor? .....	363
<i>John R Spencer</i>	
15. Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review? .....	381
<i>Dean Spielmann</i>	
16. 'Posting' and 'Posted Workers': The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive .....	419
<i>Aukje van Hoek and Mijke Houwerzijl</i>	
17. An Illusion of Protection and an Assumption of Responsibility: The Possibility of Swedish State Liability after <i>Laval</i> .....	453
<i>Barend van Leeuwen</i>	
18. Up in the Air: Aviation, the EU Emissions Trading Scheme and the Question of Jurisdiction .....	475
<i>Christina Voigt</i>	
<b>The Advocate General: Securing Trust and Democracy in the EU Judicial Order .....</b>	<b>507</b>
<i>Edited by</i> <i>Catherine Barnard, Markus Gehring and Iyiola Solanke</i>	
19. Securing Trust in the Court of Justice of the EU: The Influence of the Advocates General .....	509
<i>Albertina Albors-Llorens</i>	
20. A Fourth in the Court: Why are There Advocates General in the Court of Justice? .....	529
<i>Michal Bobek</i>	
21. The Advocate General: Bringing Clarity to CJEU Decisions? A Case-Study of <i>Mangold</i> and <i>Küçükdeveci</i> .....	563
<i>Tamara Čapeta</i>	



22. The Advocate General: A Key Actor of the Court of Justice of the European Union .....	587
<i>Laure Clément-Wilz</i>	
23. Social Legitimacy and the Court of Justice of the EU: Some Reflections on the Role of the Advocate General.....	615
<i>Alicia Hinarejos</i>	
24. Advocates General and Grand Chamber Cases: Assistance with the Touch of Substitution.....	635
<i>Adam Łazowski</i>	
25. The Notion of Consensus as a Route to Democratic Adjudication? .....	663
<i>Bilyana Petkova</i>	
26. The Advocate General: Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy .....	697
<i>Iyiola Solanke</i>	
27. Advocate Generals' Opinions or Separate Opinions? Judicial Engagement in the CJEU.....	723
<i>Sophie Turenne</i>	
<i>Index</i> .....	745