

Article

## EU Public Procurement Policy During Covid-19: A Turning Point for Legitimate EU Governance?

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Submitted: 22 January 2022 | Accepted: 18 May 2022 | Published: 23 August 2022

### Abstract

Public procurement is a policy area located between two contradictory tendencies. On the one hand, the European Commission strives for greater competition to widen procurement markets. On the other hand, the boosting of competition encounters resistance among the member states. This article investigates how these colliding tendencies played out during the initial stages of the Covid-19 crisis and, more specifically, how changes in the field of procurement affected legitimate governance in the EU. Based on institutionalist and EU governance theories, the study contributes to the literature with three principal findings. First, it demonstrates that the pandemic enabled exogenously driven changes in the field of public procurement with new policies and guidelines, while the EU's overall aims in this field were upheld. Second, the study demonstrates that the Commission was the main driver of change and that it enhanced the harmonisation of procurement rules and supranational integration despite the crisis. Third, while these changes strengthened the role of supranational actors, the study demonstrates that the changes introduced allow member states increased flexibility when it comes to the implementation. In practice, however, this flexibility has the potential to undermine the EU's initial aims, thereby jeopardising the EU's legitimacy.

### Keywords

Covid-19; EU governance; European Commission; European integration; institutionalism; legitimacy; public procurement

### Issue

This article is part of the issue “Legitimacy and Global Economic Ties” edited by Nienke de Deugd (University of Groningen) and Gerda van Roozendaal (University of Groningen).

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### 1. Introduction

Public procurement, the process by which public authorities procure work, goods, or services from companies, is critical to the European economy. It accounts for an astonishing two trillion euros and involves more than 250,000 public authorities per year (European Commission, 2022a). As the public sector is the primary contracting authority—financed through taxpayers' money—all citizens benefit from accurate and transparent procurement outcomes. Ideally, such outcomes serve the common good. However, public procurement is a policy area located between two contradictory tendencies in the European Union. On the one hand, the European Commission strives to widen procurement markets and enhance competition (European Commission, 2010, 2022a). On the other hand, attempts

to boost competition encounter resistance from the member states (Bovis, 2016; Meulenbelt, 2016). While the preferences of supranational bodies and member states have grown increasingly diverse in times of crisis, we know little about how these tendencies affect public procurement in the EU, particularly in the wake of the major policy changes following the current Covid-19 pandemic.

The present study seeks to fill this gap in the research and poses the following question: How did the EU change its policy on public procurement in response to the Covid-19 crisis, and what are the consequences of these policy changes for accurate and transparent procurement outcomes across the EU member states? In answering this question, the study links the crisis management of the EU to the goal-fulfilment and legitimacy of policy implementation in the member states. Based on

institutionalist and EU governance theories, the study examines how swift policy changes are introduced in times of crisis and the extent to which member states have discretion in implementing the policies. In addition, it considers the consequences of these changes for procurement practices in EU countries and for the legitimacy of the EU itself.

Building on the different EU treaties, procurement directives, case law, official EU documents, and newspaper articles, the study makes three contributions to the literature. First, the findings demonstrate that the Covid-19 pandemic put public procurement in Europe to the test and created a turning point in the rules relating to these policies. Due to the pandemic, the EU was confronted with a sudden need to purchase medical supplies, which led to joint procurement and a substantially increased flexibility for public buyers in the member states. Second, the pandemic opened a window of opportunity for the Commission to act as a policy entrepreneur and drive the harmonisation of procurement rules, and hence European integration, forward. Third, while these changes strengthened the decision-making powers of the Commission, the flexibility of the revised procurement rules appears to have undermined the EU's stated goals and led to the differentiated implementation of these policies in the member states. Accordingly, as accurate and transparent public procurement in the EU increasingly depends on member states' willingness and capacity to implement the rules, the policy changes in the wake of the Covid-19 crisis seem likely to jeopardise the legitimacy of EU governance.

The remainder of the article is structured as follows: The next section discusses the EU's overall policy on public procurement to provide a background on the policy. Then, I conceptualise a theoretical framework based on institutionalist and EU governance theories to analyse the changes in the policy area before and during the Covid-19 pandemic. Lastly, I map the different procurement practices to analyse the implementation of these changes and derive implications for the EU's legitimacy.

## 2. EU Policy on Public Procurement

Public procurement is the process by which public authorities procure work, goods, or services from companies. Since it accounts for 14% of EU gross domestic product, harmonised procurement rules aim to create a level playing field for businesses across Europe. Every year, more than 250,000 public authorities in the EU engage in procurement across Europe (European Commission, 2022a). In many sectors, such as energy, transport, health, waste management, social protection, and education, public authorities are the principal buyers. This means that public procurement provides the public sector with significant market power (Schulten et al., 2012) and makes it possible for politicians to exercise political power. For example, the public sector can use procurement as a policy instrument to boost jobs,

economic growth, and investment. Moreover, it can also use procurement strategically to ensure a more resilient economy. This has been possible since 2014, when procurement directives were revised (Directive 2014/24/EU, Directive 2014/23/EU, and Directive 2014/EU/25) to allow procurement contracts to be awarded based on social and environmental criteria (Pircher, 2020b; Semple, 2015). Since procurement involves a high financial volume, efficient and well-managed procurement practices are crucial for the economy as a whole. Ideally, well-functioning procurement practices serve the common good.

Historically, procurement has been subject to increased European integration but has remained largely unaffected by market integration (Weishaar, 2016). This is due to the fact that EU public procurement is a shared competence; competencies in this area lie both at the EU and member state levels. Thus, the principle of subsidiarity applies (Treaty on European Union, 2008, Art. 5). This principle means that the EU regulates member states' procurement policies to ensure the functioning of the internal market, but that member states have discretion in how to implement them. Today, the EU focuses on the following six strategic priorities in procurement: the wider uptake of green and social criteria in procurement, the enhanced professionalization of public buyers, increased access to global procurement markets, improved transparency of procurement procedures to avoid political corruption, the boosting of digital transformation within procurement, and joint procurement (European Commission, 2017). These priorities aim to create efficient procurement markets across Europe. The Commission's objective is to improve the procurement processes in order to save money, and it has stated that a 1% increased efficiency in procurement could save €20 billion per year (European Commission, 2022a).

Due to its financial volume and its crucial political role, public procurement is critical to the European economy and has become a policy instrument for enhancing supranational integration (Pircher, 2020b). This was especially visible in the aftermath of the 2008 economic crisis when the Commission sought to harmonise the procurement regime in the 2014 directives; the stated intention was to overcome domestic constraints and avoid backsliding of national priorities (Arrowsmith, 2011). However, procurement is faced with conflicting tensions. First, the EU has traditionally been committed to the liberalisation and widening of procurement markets (European Commission, 2022a; Schmidt, 2016), while member states often seek to protect national economies (Bovis, 2016; Meulenbelt, 2016). Second, the EU today recommends that national authorities should use procurement for political purposes to counteract economic downturns (Pircher, 2020b). However, member states' capacity and willingness to embark on this path are highly divergent. In short, the EU's policy in the field of procurement provides contradictory economic and political incentives that are likely to lead to varying

implementation outcomes (Treumer & Comba, 2018). Yet, despite the crucial economic and political role of procurement, we know little about how these tendencies have played out during the current Covid-19 crisis.

### 3. Conceptualising Policy Changes and Their Consequences for Legitimate Policy Implementation

In this section, I develop a theoretical framework to analyse changes in the EU’s public procurement policies and how they affect member states’ willingness to implement them correctly. Hence, the framework presented here conceptualises the inherent tension between supranational policymaking and member states’ practices and how this interplay ultimately affects EU legitimacy in times of crisis, such as the current Covid-19 crisis.

#### 3.1. Policy Change

Recent literature on institutional change makes an analytical distinction between the *source of change* (endogenous vs. exogenous) and the *time horizon* of the cause of change (short vs. long), allowing for a more in-depth analysis of how institutions transform (Gerschewski, 2021). Table 1 presents the four different types of change that result from this typology. I argue that cells A and D in Table 1 capture the most frequent sources and causes of change when studying the evolution of EU policymaking. Therefore, I focus primarily on these in the analyses.

Most policy changes during the EU’s existence correspond to cell D in Table 1—that is, to changes that originate from demands within the EU institutions that unfold gradually, over longer time periods. The gradual nature of such processes of change is, for example, captured in the neo-functional concept of “spill-over,” where enhanced integration in one policy area increases the pressure for change in another (Jensen, 2019). Moreover, cell D corresponds to the literature which argues that institutions and policies are “locked into” their own developments and routines (Pierson, 1996) and therefore tend to change incrementally (Mahoney & Thelen, 2010; Streeck & Thelen, 2005a). Mechanisms of these changes include layering—where new policies are added to the already existing ones—or displacement—where dormant resources are reactivated or recovered due to an internal change in logic or prioritisations (Streeck & Thelen, 2005b). In summary, I argue that cell D captures the most common source and cause of change in EU policymaking to date.

However, the EU has also been exposed to exogenous events or shocks, sparking more immediate policy shifts (Table 1, cell A). This means that long periods of path-dependency are interrupted by so-called critical junctures, leading to swift decisions that can open completely new paths in policy development (Baumgartner & Jones, 1993; Capoccia, 2016; Howlett & Cashore, 2009; Saurugger & Terpan, 2015). However, when considering EU policymaking, I argue that swift decisions that occur due to exogenous events rarely—if ever—imply a complete break with previous policy, as suggested in the literature on critical junctures. Thus, while changes occur within a short time due to causes that are exogenous, policy shifts in the EU tend to be incremental and characterised by layering (Falkner, 2017). Examples of exogenous events that profoundly shook the EU include the 2008 financial crisis, the refugee crisis in 2015, and the current Covid-19 crisis. While all these events had exogenous sources and led to swift responses, EU policymaking did not break with the past. Instead, policymaking in the EU often tended to enhance existing policy via integrative spillovers in areas with transnational interdependence and a supranational capacity to solve the problem, even though the issue was previously highly contested between the member states and supranational institutions (Schimmelfennig, 2018). Consequently, exogenous events that occur in short time horizons lead to demands for swift response which, in turn, tend to empower bureaucrats and EU institutions. These bureaucrats and institutions can use this momentum to act as policy entrepreneurs (Karlsson et al., 2019; Pircher, 2020a). In the wake of the multiple crises mentioned above, the Commission has had particular success in shaping certain policies more or less unilaterally and acting as a policy entrepreneur (Copeland & James, 2014).

While the abovementioned tension between the goals of supranational institutions occurred when sources of policy changes were endogenous and causes were long-term (Table 1, cell D), I argue that these problems are significantly exacerbated in times of crisis, when sources of change are exogenous and supranational institutions take swift initiatives to introduce new policies (Table 1, cell A).

#### 3.2. Policy Changes and Consequences for Policy Implementation

In general, I argue that gradual policy changes ensure a higher degree of legitimacy since there is a longer

**Table 1.** Conceptualising policy changes.

Source of Change	Time Horizon of Cause	
	Short	Long
Exogenous to institution	A. Exogenously driven ruptures	B. Exogenous, gradual change
Endogenous to institution	C. Endogenously driven ruptures	D. Endogenous, gradual change

Source: Adapted from Gerschewski (2021, p. 222).

time horizon for shaping EU policymaking, thus enabling the involvement of more actors. Moreover, due to the longer time horizon implementing these policies allows member states a process of policy-learning and gradual adaptation. However, if change occurs more rapidly due to exogenous events such as the economic crisis or the current Covid-19 crisis, decisions are often swift and made unilaterally by supranational actors. Against this background, several scholars have demonstrated that the many crises faced by the EU (Vollaard, 2014, 2018; Webber, 2014) have sparked not only persistent implementation failures (asylum policy, euro crisis) and increased politicisation of the EU (de Wilde & Lord, 2016) but also a general rise in Euroscepticism (Bulmer et al., 2020). Furthermore, member states have often questioned the legitimacy of policy changes that were introduced in times of crisis (Scharpf, 2015; Schmidt, 2021) as these decisions were often taken unilaterally by the Commission. More specifically, the EU's responses to crises often sparked criticism from the member states as these measures tended to bypass crucial steps in the decision-making process. For example, the directly elected European Parliament was side-stepped in critical economic governance decisions during the economic crisis (Fasone, 2013). A range of studies demonstrates that the domestic desire to "take back control" originates from growing discontent with supranational decision-making, which resulted in differentiated integration where some member states commit less to or opt out of common EU policies (Schimmelfennig et al., 2015; Schimmelfennig & Winzen, 2020). The development towards differentiated integration demonstrates that EU governance is increasingly questioned in times of crisis (Lenz & Viola, 2017; Zaum, 2017), with the potential of paradigmatic changes in (at least) some EU policy areas (Schmidt, 2020). Based on the above, I argue that policy changes that are rapidly implemented within a short time horizon should depend more on member states' capacity and willingness and therefore increase the probability of implementation difficulties and differentiated implementation in the member states. In short, when change is exogenously driven and the time horizon for implementing new policies is short, we should see a decline in accurate policy implementation in the member states, which risks the legitimacy of the EU's political system.

Turning to public procurement, I argue that we should generally see tensions emerging from the EU's design of one-size-fits-all policies and member states' varying capacity and willingness to implement them. However, my main expectation is that such tensions are likely to be exacerbated in times of crisis. If such tensions grow, they have the potential to increase differentiated policy implementation among the EU countries, especially if EU provisions also allow for greater flexibility in implementing them. For example, member states may use this flexibility in implementing policies to customise them ("make them fit better") to their preferences and advantages (Thomann, 2015).

#### 4. Taking Stock of Policy Changes in EU Policy on Public Procurement

In this study, I argue that changes in the EU's core field—the internal market—are especially relevant to analyse since these changes afford insights into the functioning of the European integration process. Moreover, in times of crisis, the internal market is the policy area in which most changes are introduced. In addition, since the global pandemic also constitutes an economic crisis, changes in the internal market are highly likely to occur. Public procurement is one main area within the internal market that became a crucial policy instrument for the EU and its member states during the pandemic. This was due to the need to jointly purchase vaccines and the member states' demand for efficient and well-managed procurement practices to purchase medical supplies. Consequently, the field of public procurement is a case where policy changes most likely were introduced during the Covid-19 pandemic.

Based on the theoretical framework, I first seek to identify policy changes in the field of public procurement before and during the Covid-19 crisis from late 2019 onwards. The first unit of analysis is therefore the policy itself. I compare the procurement regulations and provisions in the pre-pandemic period with those that were introduced during the pandemic. To identify and analyse policy changes over time, I draw on EU law—including the treaties and the 2014 Directives—communications by the Commission, and other EU official documents in the policy area, such as fact sheets, reports, and initiated infringement procedures. To classify the source and time horizon of changes, I draw on the classification by Gerschewski (2021, p. 222) in Table 1. Thereafter, I build on EU governance theories and seek to identify the actors behind the changes and their motivations. In other words, I identify whether the drivers of change are supranational or national actors, drawing on relevant documents such as press releases by the Commission, newspaper articles by Agence Europe, and other relevant EU documents and statements by policy-makers. This affords insights into EU governance during the Covid-19 crisis.

Next, I analyse whether the policies introduced during the pandemic led to legitimate outcomes in practice. Therefore, I map the implementation of these policies and analyse whether and to what extent they differ from the EU's goals. For this analysis, I use the *Tenders Electronic Daily* (TED) database and the Single Market Scoreboards in public procurement, both published by the Commission. Based on the TED database, which gathers all procurement contracts within the European Single Market, I provide descriptive statistics on the trends in the procurement practices from 2009 to 2020. In doing so, I focus on two crucial criteria that afford insights into the functioning of procurement markets and whether there are risks of implementation failures. These criteria are the proportion of contracts awarded where there

was only a single bidder and the proportion of procurement procedures that were negotiated with a company without any calls for bids, both analysed in terms of the numbers of offers received for each procurement contract and registered in the TED database (European Commission, 2020). While the Covid-19 crisis was still ongoing in 2021 and 2022, the most recently available data relates to the period up to 2020. One might argue that the fact that data are available only up to 2020 constitutes a clear limitation of this study. By contrast, I argue that this makes it possible to identify the overall trend and the impact of the rapid changes that emerged by the end of 2019 and the beginning of 2020 when the new procurement guidelines were introduced. I further support these data with the Single Market Scoreboards, which measure the countries' performance in procurement. Analysing both data sources affords insights into the actual functioning of the procurement practices in the member states and how they differ. Moreover, such a differentiated policy implementation across member states is visible only when considering longer periods of time, which is possible with the available databases.

## **5. Policy Changes in EU Policy on Public Procurement Before and During the Covid-19 Pandemic**

### *5.1. Pre-Pandemic*

The field of EU public procurement has long been marked by incremental changes towards more regulation and increased harmonisation. Increased harmonisation was achieved through the various treaties and with directives that were increasingly aimed at regulating procurement procedures and their coordination (Arrowsmith, 2005; Gordon et al., 1998; Turpin, 1972). Examples of such directives include the Remedies Directive (89/665), the Utilities Directive (90/531), and the Services Directive (92/50) in the 1980s and 1990s. In 2004, new directives were adopted to simplify procurement procedures and harmonise procurement laws (Arrowsmith, 2011, pp. 55–58). Over time, the overall policy objectives remained the same, namely the free movement of goods and services, the dismantling of trade barriers, and the harmonisation of procurement procedures among member states in order to boost economic growth (European Commission, 2010, 2022a; Meulenbelt, 2016). The policy area has therefore long been characterised by policy continuity (Streeck & Thelen, 2005b) where the source of change is endogenous to institutions and the causes of change unfold over longer periods of time (Table 1, cell D).

Moreover, in line with the typology in Table 1 (cell D), EU public procurement policy faced difficulties that originated from within—that is, the source of change was endogenous. More specifically, the provisions were vague, and the definitions were often unclear. This created immense legal uncertainty in the member states, leading to different interpretations and applications, as

well as more than 400 procurement judgments delivered by the Court of Justice of the EU until 2014 (Semple, 2015, p. XXXIV). Furthermore, applying the procurement rules was challenging, and member states often failed to communicate their national transposition measures. For example, only nine member states communicated these measures timeously in the case of the Public Sector Directive and the Directive 2007/66/EC, while 11 did so for the Utilities Directive and only four for the Defence Procurement Directive (European Commission, 2012, p. 27). Between 2009 and 2011—excluding cases of non-communication—61 infringement procedures were initiated against member states, 53 of which related to incorrect applications. During the same time period, 205 cases were initiated in the EU Pilot, a problem-solving instrument launched by the Commission for solving implementation problems prior to the legal procedure (European Commission, 2012, pp. 28–29). The report on the application of procurement rules for 2013 revealed similar patterns (European Commission, 2013).

Therefore, EU procurement policy has long had an endogenous source of change resulting from policy learning based on the case law and problems in applications. However, the 2008 economic crisis constituted a turning point, or a critical juncture (Table 1, cell A), that created momentum for more extensive changes. As a response to this crisis, the Commission revised the procurement directives in 2014. Three main directives were then adopted: Directive 2014/24/EU on public procurement; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal services sectors; and Directive 2014/23/EU on the award of concession contracts. These comprehensive changes were made possible as the Commission viewed public procurement as a critical policy instrument for boosting competition and ensuring growth in the wake of the economic crisis (European Commission, 2010). However, while the source of change was exogenous, the policy shifts can be classified as layering, with new policy instruments and techniques being introduced on top of the already existing ones (Mahoney & Thelen, 2010; Streeck & Thelen, 2005a). Moreover, the extensive case law gradually positioned the Court of Justice of the EU in the political centre, thus marking a shift where institutions that were previously on the periphery moved to the political centre. Put differently, institutional resources were recovered or reactivated (Streeck & Thelen, 2005b, p. 31), which implies a shift in the salience of different institutional arrangements (Streeck & Thelen, 2005b, p. 22). A common assessment found in the literature is that institutional changes such as these occur if the legitimacy of practices and institutional forms are questioned (DiMaggio & Powell, 1991; Streeck & Thelen, 2005b). This assessment partly applies to EU procurement policy in the aftermath of the economic crisis. Moreover, the introduction of new procurement procedures—and especially the inclusion of common societal, environmental, and innovative aspects as award criteria—marked a

shift in logic since the dominant award criterion in the past was price (Pircher, 2020b). This changed the policy goals more fundamentally and can be classified as a third-order change (Hall, 1993). Interestingly, the EU achieved enhanced harmonisation of the procurement rules despite an increase in protectionism in many EU countries during the economic crisis.

However, the 2014 directives needed to be implemented and applied in the member states until the transposition deadline in August 2016. Since the EU policies were questioned by member states, their implementation was subject to huge domestic debates; for example, on the construction of hospitals (Sweden), airports and stations (Germany), and the question of how to apply the rules in specific areas such as ambulance services (Austria). Overall, the difficulties in implementation led to an average transposition delay of two years (European Parliament, 2020), and the Commission initiated infringement cases against nearly all member states (European Commission, 2016, 2019b). As a result, the EU and its relevant policies became increasingly politicised at the national level, meaning that their saliency and polarisation increased and these issues became more crucial to national political outcomes (de Wilde et al., 2016).

While the economic crisis created momentum for the Commission to introduce substantial policy changes in public procurement (Table 1, cell A), we also observe enhanced tensions between the EU policies and member states trying to adopt more national solutions when applying them (Treumer & Comba, 2018). The same tensions are currently visible in the wake of the initial stages of the Covid-19 pandemic. Thus, public procurement is increasingly characterised by tensions between supranational institutions and member states that were reinforced and put to the test in the current crisis (Arrowsmith et al., 2021).

### *5.2. During the Covid-19 Crisis*

Briefly before the pandemic in 2019, heated discussions in the member states concerned one communication by the Commission that introduced the creation of an international instrument on public procurement (International Public Procurement Initiative [IPPI]) to ensure better reciprocity access to foreign markets (Agence Europe, 2019c). This instrument was to govern the participation of third-country companies in public procurement markets (European Commission, 2019a). The Commission's proposal received strong criticism, especially from the Nordic countries and Germany, as they called for a strengthening of the award criteria (Agence Europe, 2019c). Yet the Commission continued its efforts in the autumn of 2019 to ensure better access to lucrative international markets for European companies in nine central countries, including the US and China (Agence Europe, 2019a). Without the member states having come to an agreement on the IPPI (Agence Europe, 2019b), the global pandemic Covid-19 hit Europe at the

beginning of 2020. However, global procurement with the US (vaccines) and China (face masks and medical equipment) became highly relevant during this time. Therefore, even though the debates at the EU level were controversial and lengthy, the global pandemic enabled further changes in global procurement. The need for joint procurements and the Commission's role in pushing the IPPI instrument forward led to an acceleration of the negotiations and, ultimately, to its adoption in the Council of the EU in June 2021 (Agence Europe, 2021). These changes made in the area of global procurement still adhered to the EU's overall goals in public procurement but were aimed at widening procurement markets.

In the wake of the pandemic, the Commission further released new guidelines for public buyers to purchase medical supplies and personal protective equipment (Communication from the Commission of 1 April 2020, 2020). These new guidelines assist member states in an emergency and apply to goods and services related to Covid-19. These changes in the EU's policy on public procurement included the following: Public buyers can now reduce the deadlines to accelerate open or restricted procedures and—to ensure flexibility—a negotiated procedure without publication can be considered. However, the European Court of Justice requires that the use of such procedures without publication should remain the exception and requires to assess whether the criteria for using them are met or not. These criteria were established by the Commission and include, for example, a daily increase in the number of Covid-19 cases. Moreover, the use of such procedures must be assessed on a case-by-case basis. Another change in the EU's policy on public procurement is that public buyers are encouraged to consider alternative solutions in the market (Communication from the Commission of 1 April 2020, 2020, p. 1). This principle focuses on extreme urgencies, such as the current Covid-19 crisis, where public buyers may need to purchase products within days or even hours. To speed up procurement procedures, public buyers may also consider contacting potential contractors within and outside the EU by phone, e-mail, or in person. Moreover, they can hire agents with better contacts in the markets, send representatives to countries that have the necessary products in stock or contact potential suppliers to agree to an increase in production. As these measures may fail to meet the needs of public buyers in the current situation, they are also encouraged to seek alternatives and innovative solutions (Communication from the Commission of 1 April 2020, 2020, p. 2). In addition, the deadlines in the open and restricted procedures may be shortened in cases of emergency from 35 days to 15 days and from 30 days to 10 days (Communication from the Commission of 1 April 2020, 2020, p. 4). These new guidelines significantly increase member states' flexibility on how to use and implement procurement. Moreover, the EU conducted single central procurement on behalf of all member states when purchasing vaccines against Covid-19.

In summary, the cause of the policy changes in the wake of the Covid-19 pandemic was clearly exogenous, while the time horizon for implementing them was exceptionally short. Although these changes are in line with previous policy goals, the increased flexibility in implementing them represents a transformative character in practice, depending on the application of the rules. This increased flexibility was directly motivated as a response to the emergency brought about by the Covid-19 crisis and would have not been granted otherwise.

In addition, analyses have revealed that the Commission was the main driver for change and unilaterally implemented policies that may backfire in practice. At the beginning of the Covid-19 outbreak, the member states realised that they needed the supranational level to lift the EU countries out of the crisis. Therefore, as in the case of the economic crisis (Karlsson et al., 2019), the pandemic created momentum for increased EU governance. The Commission used this momentum in two ways. First, if public procurement contracts at the national level exceed a certain financial threshold—which was generally the case during the pandemic—competition for those contracts takes place within European or even global markets (Directive 2014/24; World Trade Organization, 2017). As a result, supranational actors decide on the different procurement rules. Therefore, the Commission released new guidelines for public buyers to purchase medical supplies and personal protective equipment to facilitate procurement. Second, the Commission offered to run single central procurement for the first time in history on behalf of all member states when purchasing vaccines against Covid-19. While this pressure came from certain member states that were reluctant to purchase the product and carry the financial risks, it gave the Commission a mandate for joint procurement. This centralised procurement gave increased power to supranational actors, and the Commission assumed a leading role in establishing the rights and obligations of member states in relation to participation in this joint procurement (European Commission, 2020). Therefore, it is also the Commission that decides on the possibility of member states withdrawing from this mechanism. At the time of writing (June 2022), Poland wishes to withdraw from the pooled procurement mechanism, but the Commission argues that countries cannot unilaterally withdraw from the contract (Agence Europe, 2022). This illustrates the pronounced role of supranational actors in procurement. Therefore, the Covid-19 crisis potentially enabled increased supranational integration.

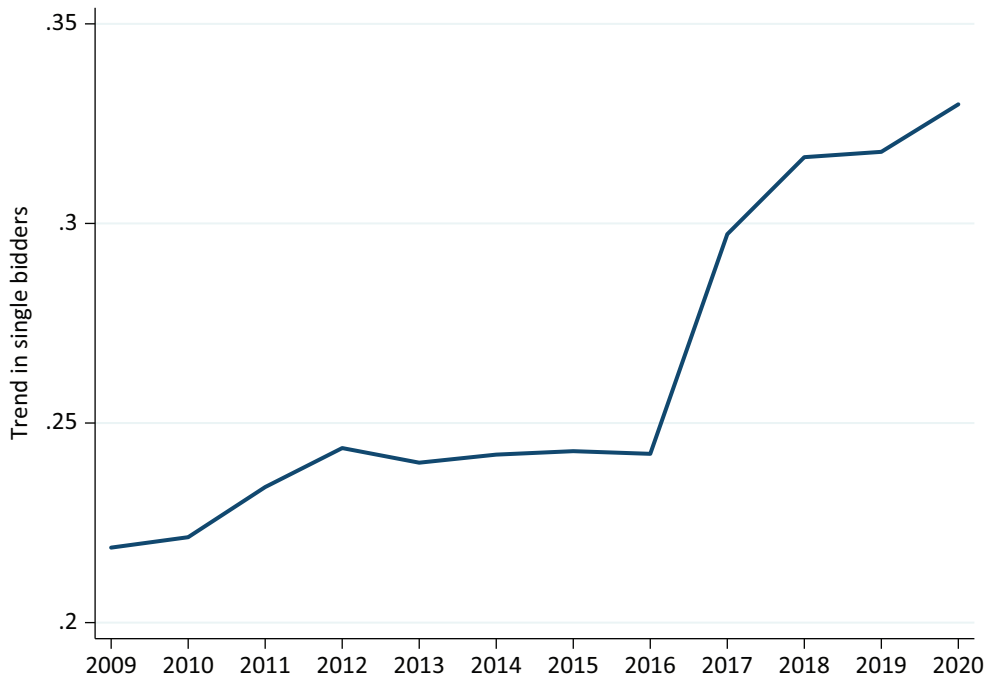
## 6. Policy Changes and Consequences for Policy Implementation

While centralised EU procurement and the new guidelines can be regarded as an indication of further harmonisation of procurement rules, there is evidence that the implementation outcomes do not always serve the com-

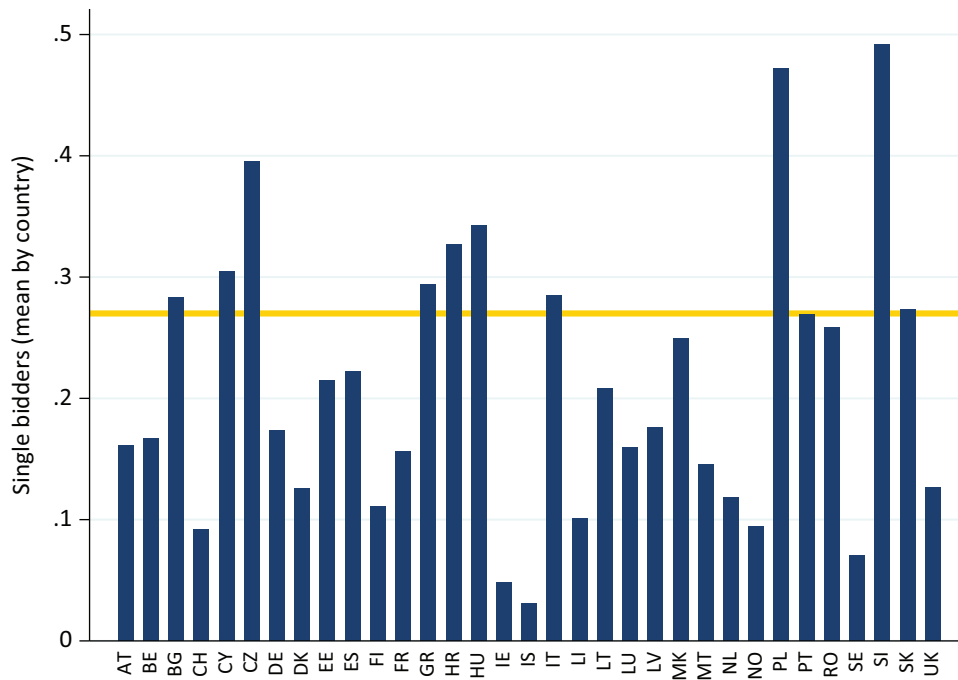
mon good. For example, while the acceleration of procurement procedures is efficient in the current crisis and allows for highly flexible procurement solutions, it also results in unintended consequences in practice. Since the calls for tenders are announced for a shorter time period, they also receive lower numbers of bids. One unintended consequence is that an increasing number of contracts receive only a single bid. Figure 1 demonstrates a stark trend of increased single bidders for all countries within the European Single Market from 2009 to 2020. This sharp increase began in 2016, the year of the transposition deadline of the new procurement directives that aimed to boost competition after the economic downturn (Pircher, 2020b). Moreover, Figure 1 illustrates that the trend reached its peak after the outbreak of the global pandemic at the end of 2019 and in 2020. Since the trend towards single bidders hints at increased protectionism and/or political corruption (Fazekas et al., 2021), the legitimacy of these policies is at stake. It, therefore, appears that the EU policy changes in procurement have the potential to undermine competition in practice, thus failing to achieve the EU's aim of enhancing competition.

Moreover, Figure 2 indicates that the share of procurement contracts with single bidders differs significantly across the various countries. High levels of single bidders can be seen in Eastern and Southern European countries (Bulgaria, Cyprus, the Czech Republic, Greece, Croatia, Hungary, Italy, Poland, and Slovenia) in particular. This is further supported by Figure A1 in the Supplementary File which indicates that the dispersion (standard deviation) in the share of single bidders across the various countries increases over time. For example, recent data relating to 2020 reveal that Sweden had no contracts (0%) awarded with only a single bid in 2020. This stands in contrast to Poland, where more than half of all procurement contracts received only a single bidder (European Commission, 2022b). This discrepancy across the member states is further visible in the use of negotiated procedures without publication, which allows direct awarding to preselected economic operators (Communication from the Commission of 1 April 2020, 2020). While Figure A2 (Supplementary File) indicates that the number of procedures that were negotiated with a company without any calls for bids increased in nearly all EU member states in 2020, it is again the Eastern and Southern countries that show the highest numbers (Bulgaria, Cyprus, Romania, and Slovenia). This demonstrates that the EU's aim of harmonising procurement practices is undermined in practice. Instead, we observe increasingly differentiated policy implementation across the EU countries, which enhances differentiated integration (Schimmelfennig et al., 2015).

Based on these analyses, it appears that the EU's aims and policy changes introduced in procurement in times of crisis may backfire in practice and have the opposite effect, namely undermining the competition and harmonisation of procurement practices. This potentially



**Figure 1.** Trend of single bidders as average of all countries within the European Single Market from 2009 to 2020. Note: The TED database includes North Macedonia. Source: Author’s own compilation based on the Commission’s TED database (TED, 2022).



**Figure 2.** Trend in single bidders by countries within the European Single Market from 2009 to 2020. Source: Author’s own compilation based on the Commission’s TED database (TED, 2022).



creates a turning point for the legitimacy of EU governance in procurement.

## 7. Conclusion

This study investigates the extent to which EU policy on public procurement has changed in the current Covid-19 crisis and how these changes affect the procurement outcomes in the member states. Based on institutionalist and EU governance theories, the study contributes three insights to the literature. The first insight is that the Covid-19 crisis created momentum for policy changes in the field of procurement that can be classified as exogenous and where the cause of change emerged in the short term. The new guidelines for member states to procure medical supplies and the jointly conducted procurement launched by the EU are examples of such changes. While these changes represent new policies and policy instruments in the field, it is nevertheless clear that the EU's overall goals in procurement remained the same. The second insight provided by this study is that the pandemic opened up a window of opportunity for supranational actors to serve as policy entrepreneurs and drive the harmonisation of procurement rules forward. The policy changes in procurement were introduced primarily by the Commission, which was capable of enabling increased harmonisation and thus European integration, despite the crisis. Interestingly, we see the same tendency today as the Commission aims to launch joint procurement of gas due to the war in Ukraine. The third insight is that while the changes in procurement have enhanced European integration, their implementation in practice increases the risk of protectionism and political corruption and may therefore undermine the legitimacy of these policies. This is because the acceleration of procurement procedures and the introduction of new practices led to a sharp increase in the number of contracts awarded on the basis of only a single bidder or via direct contracting without any calls for bids. This development demonstrates that if EU policies are swiftly decided upon at the supranational level and need to be swiftly implemented, member states face major difficulties in applying these policies. Ultimately, this reduces the legitimacy of the policies.

Furthermore, the new policies in the field of procurement introduced during the Covid-19 crisis afford member states greater flexibility in implementing them. However, this greater flexibility leads to increasingly differentiated policy implementation. Moreover, this flexibility can be politically used for specific market policies that deviate from EU policies (e.g., protectionism). This development should be the subject of future research as it might lead to a gradual loss of legitimacy for the EU's political system as a whole. For example, while some member states aim to promote environmental standards as proposed by the EU, others may use the inclusion of environmental criteria to favour certain companies and businesses "through the backdoor." This hidden protec-

tionism has the potential to harm the European Single Market as a whole. This would mean that the EU's aims are subverted in practice, thereby incrementally undermining its legitimacy.

## Acknowledgments

The research undertaken for this article has received funding from the Crafoord Foundation under Grant Agreement No. 20210523. The author thanks the three anonymous reviewers, the editors of the thematic issue, and Karl Loxbo for the valuable comments.

## Conflict of Interests

The author declares no conflict of interests.

## Supplementary Material

Supplementary material for this article is available online in the format provided by the author (unedited).

## References

- Agence Europe. (2019a, November 14). *New Commission initiative to facilitate access for EU companies to international public procurement* (Bulletin No. 12368). Europe Daily Bulletin. <https://agenceurope.eu/en/bulletin/article/12368/17>
- Agence Europe. (2019b, December 10). *No agreement in EU Council on public procurement instrument in 2019* (Bulletin No. 12386). Europe Daily Bulletin. <https://agenceurope.eu/en/bulletin/article/12386/10>
- Agence Europe. (2019c, May 30). *Member states confirm their interest in a public procurement instrument* (Bulletin No. 12266). Europe Daily Bulletin. <https://agenceurope.eu/en/bulletin/article/12266/25>
- Agence Europe. (2021, June 3). *EU member states agree on international procurement instrument* (Bulletin No. 12732). Europe Daily Bulletin. <https://agenceurope.eu/en/bulletin/article/12732/22>
- Agence Europe. (2022, April 20). *Poland wants to withdraw from EU's pooled procurement mechanism for Covid-19 vaccines* (Bulletin No. 12934). Europe Daily Bulletin. <https://agenceurope.eu/en/bulletin/article/12934/13>
- Arrowsmith, S. (2005). *The law of public and utilities procurement* (2nd ed.). Sweet & Maxwell.
- Arrowsmith, S. (Ed.). (2011). *EU public procurement law: An Introduction*. EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation. <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf>
- Arrowsmith, S., Butler, L. R. A., La Chimia, A., & Yukins, C. (2021). *Public procurement regulation in (a) crisis? Global lessons from the Covid-19 pandemic*. Hart Publishing.

- Baumgartner, F. R., & Jones, B. D. (1993). *Agendas and instabilities in American politics*. University of Chicago Press.
- Bovis, C. H. (2016). *Research handbook on EU public procurement law*. Edward Elgar.
- Bulmer, S., Parker, O., Bache, I., George, S., & Burns, C. (2020). *Politics in the European Union* (5th ed.). Oxford University Press.
- Capoccia, G. (2016). Critical junctures. In O. Fioretos, T. G. Falleti, & A. Sheingate (Eds.), *The Oxford handbook of historical institutionalism* (pp. 89–106). Oxford University Press.
- Communication from the Commission of 1 April 2020: Guidance from the European Commission on using the public procurement framework in the emergency situation related to the Covid-19 crisis. (2020). *Official Journal of the European Union*, C 108. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401(05)&from=EN)
- Copeland, P., & James, S. (2014). Policy windows, ambiguity and Commission entrepreneurship: Explaining the relaunch of the European Union's economic reform agenda. *Journal of European Public Policy*, 21(1), 1–19.
- de Wilde, P., Leupold, A., & Schmidtke, H. (2016). Introduction: The differentiated politicisation of European governance. *West European Politics*, 39(1), 3–22.
- de Wilde, P., & Lord, C. (2016). Assessing actually-existing trajectories of EU politicisation. *West European Politics*, 39(1), 145–163.
- DiMaggio, P. J., & Powell, W. W. (1991). Introduction. In P. J. DiMaggio & W. W. Powell (Eds.), *The new institutionalism in organizational analysis* (pp. 1–38). University of Chicago Press.
- European Commission. (2010). *Communication from the Commission: Europe 2020—A strategy for smart, sustainable and inclusive growth* (COM(2010) 2020). <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>
- European Commission. (2012). *Commission staff working document: Annual public procurement implementation review 2012* (SWD(2012) 342). <https://data.consilium.europa.eu/doc/document/ST%2015538%202012%20INIT/EN/pdf>
- European Commission. (2013). *Commission staff working document: Annual public procurement implementation review 2013* (SWD(2014) 262). <https://data.consilium.europa.eu/doc/document/ST%2012642%202014%20INIT/EN/pdf>
- European Commission. (2016, May 26). *May infringements' package: Key decisions* [Press release]. [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_16\\_1823](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1823)
- European Commission. (2017). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making public procurement work in and for Europe* (COM(2017) 572). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A572%3AFIN>
- European Commission. (2019a). *Communication from the Commission: Guidance on the participation of third country bidders and goods in the EU procurement market* (C(2019) 5494). [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2019\)5494&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2019)5494&lang=en)
- European Commission. (2019b, November 27). *November infringements package: Key decisions* [Press release]. [https://ec.europa.eu/commission/presscorner/detail/en/INF\\_19\\_6304](https://ec.europa.eu/commission/presscorner/detail/en/INF_19_6304)
- European Commission. (2020). *Commission decision of 18.6.2020 approving the agreement with member states on procuring Covid-19 vaccines on behalf of the member states and related procedures* (C(2020) 4192). [https://ec.europa.eu/info/sites/default/files/decision\\_approving\\_the\\_agreement\\_with\\_member\\_states\\_on\\_procuring\\_covid-19\\_vaccines\\_on\\_behalf\\_of\\_the\\_member\\_states\\_and\\_related\\_procedures.pdf](https://ec.europa.eu/info/sites/default/files/decision_approving_the_agreement_with_member_states_on_procuring_covid-19_vaccines_on_behalf_of_the_member_states_and_related_procedures.pdf)
- European Commission. (2022a). *Internal market, industry, entrepreneurship and SMEs: Public procurement*. [https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en)
- European Commission. (2022b). *Single market scoreboard: Public procurement*. [https://single-market-scoreboard.ec.europa.eu/policy\\_areas/public-procurement\\_en](https://single-market-scoreboard.ec.europa.eu/policy_areas/public-procurement_en)
- European Parliament. (2020). *Parliamentary questions, 5 March 2020: Answer given by Mr Breton on behalf of the European Commission* (Question P-000287/2020). [https://www.europarl.europa.eu/doceo/document/P-9-2020-000287-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-9-2020-000287-ASW_EN.html)
- Falkner, G. (2017). *EU Policies in times of crisis: Mechanisms of change and varieties of outcomes*. Routledge.
- Fasone, C. (2013). European economic governance and parliamentary representation: What place for the European Parliament? *European Law Journal*, 20(2), 164–185.
- Fazekas, M., Sberna, S., & Vannucci, A. (2021). The extra-legal governance of corruption: Tracing the organization of corruption in public procurement. *Governance*. Advance online publication. <https://doi.org/10.1111/gove.12648>
- Gerschewski, J. (2021). Explanations of institutional change: Reflecting on a “missing diagonal.” *American Political Science Review*, 115(1), 218–233.
- Gordon, H., Rimmer, S., & Arrowsmith, S. (1998). The economic impact of the European Union regime on public procurement: Lessons for the WTO. *The World Economy*, 21(2), 159–187.
- Hall, P. A. (1993). Policy paradigms, social learning, and the state: The case of economic policymaking in Britain. *Comparative Politics*, 25(3), 275–296.
- Howlett, M., & Cashore, B. (2009). The dependent variable problem in the study of policy change: Under-

- standing policy change as a methodological problem. *Journal of Comparative Policy Analysis: Research and Practice*, 11(1), 33–46.
- Jensen, C. S. (2019). Neo-functionalism. In M. Cini & N. P.-S. Borrigan (Eds.), *European Union politics* (pp. 55–68). Oxford University Press.
- Karlsson, C., Silander, D., & Pircher, B. (2019). *Smart, sustainable and inclusive growth: Political entrepreneurship for a prosperous Europe*. Edward Elgar.
- Lenz, T., & Viola, L. A. (2017). Legitimacy and institutional change in international organisations: A cognitive approach. *Review of International Studies*, 43(5), 939–961.
- Mahoney, J., & Thelen, K. (2010). A theory of gradual institutional change. In J. Mahoney & K. Thelen (Eds.), *Explaining institutional change: Ambiguity, agency and power* (pp. 1–27). Cambridge University Press.
- Meulenbelt, M. (2016). Protectionism on the rise? Modernization of EU public procurement rules during the economic crisis. In H. Kalimo & M. S. Jansson (Eds.), *EU economic law in a time of crisis* (pp. 57–75). Edward Elgar.
- Pierson, P. (1996). The path to European integration: A historical institutionalist analysis. *Comparative Political Studies*, 29(2), 123–163.
- Pircher, B. (2020a). The Council of the EU in times of economic crisis: A policy entrepreneur for the internal market. *Journal of Contemporary European Research*, 16(1), 65–81.
- Pircher, B. (2020b). EU public procurement policy: The economic crisis as trigger for enhanced harmonisation. *Journal of European Integration*, 42(4), 509–525.
- Saurugger, S., & Terpan, F. (2015). Do crises lead to policy change? The multiple streams framework and the European Union’s economic governance instruments. *Policy Sciences*, 49(1), 35–53.
- Scharpf, F. W. (2015). After the crash: A perspective on multilevel European democracy. *European Law Journal*, 21(3), 384–405.
- Schimmelfennig, F. (2018). European integration (theory) in times of crisis: A comparison of the euro and Schengen crises. *Journal of European Public Policy*, 25(7), 969–989.
- Schimmelfennig, F., Leuffen, D., & Rittberger, B. (2015). The European Union as a system of differentiated integration: Interdependence, politicization and differentiation. *Journal of European Public Policy*, 22(6), 764–782.
- Schimmelfennig, F., & Winzen, T. (2020). *Ever looser Union? Differentiated European integration*. Oxford University Press.
- Schmidt, V. A. (2016). The roots of neo-liberal resilience: Explaining continuity and change in background ideas in Europe’s political economy. *The British Journal of Politics and International Relations*, 18(2), 318–334.
- Schmidt, V. A. (2020). Theorizing institutional change and governance in European responses to the Covid-19 pandemic. *Journal of European Integration*, 42(8), 1177–1193.
- Schmidt, V. A. (2021). European emergency politics and the question of legitimacy. *Journal of European Public Policy*, 29(6), 979–993. <https://doi.org/10.1080/13501763.2021.1916061>
- Schulten, T., Alsos, K., Burgess, P., & Pedersen, K. (2012). *Pay and other social clauses in European public procurement: An overview on regulation and practices with a focus on Denmark, Germany, Norway, Switzerland and the United Kingdom*. European Federation of Public Service Unions. [https://www.epsu.org/sites/default/files/article/files/EPUSU\\_Report\\_final.pdf](https://www.epsu.org/sites/default/files/article/files/EPUSU_Report_final.pdf)
- Semple, A. (2015). *A practical guide to public procurement*. Oxford University Press.
- Streeck, W., & Thelen, K. (2005a). *Beyond continuity: Institutional change in advanced political economies*. Oxford University Press.
- Streeck, W., & Thelen, K. (2005b). Introduction: Institutional change in advanced political economies. In W. Streeck & K. Thelen (Eds.), *Beyond continuity: Institutional change in advanced political economies* (pp. 1–39). Oxford University Press.
- Tenders Electronic Daily. (2022). *Supplement to the Official Journal of the EU*. <https://ted.europa.eu/TED/misc/aboutTed.do>
- Thomann, E. (2015). Customizing Europe: Transposition as bottom-up implementation. *Journal of European Public Policy*, 22(10), 1368–1387.
- Treaty on European Union, 2008, Consolidated Version, 9.5.2008, C 115/13-45.
- Treumer, S., & Comba, M. (2018). *Modernising public procurement: The approach of EU member states*. Edward Elgar.
- Turpin, C. (1972). *Government contracts*. Penguin.
- Vollaard, H. (2014). Explaining European disintegration. *Journal of Common Market Studies*, 52(5), 1142–1159.
- Vollaard, H. (2018). *European disintegration: A search for explanations*. Palgrave Macmillan.
- Webber, D. (2014). How likely is it that the European Union will disintegrate? A critical analysis of competing theoretical perspectives. *European Journal of International Relations*, 20(2), 341–365.
- Weishaar, S. E. (2016). Striking an uneasy balance between competition and market integration: The case of EU public procurement. In N. Philipsen, S. E. Weishaar, & G. Xu (Eds.), *Market integration: The EU experience and implications for regulatory reform in china* (pp. 97–118). Springer.
- World Trade Organization. (2017). *Agreement on government procurement*. [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)
- Zaum, D. (2017). Legitimacy. In J. K. Cogan, I. Hurd, & I. Johnstone (Eds.), *The Oxford handbook of international organizations* (pp. 1107–1125). Oxford University Press.

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