

The International Diffusion of Regulatory Governance: EU Actorness in Public Procurement

Abstract

This paper attempts to go beyond actor-centred explanations of the European Union's (EU) presence in regulatory politics by examining the role of the Union in the diffusion of regulatory norms and practices. We engage with that question by exploring the international diffusion of public procurement policy, to which multiple organizations and especially the EU and the World Trade Organization (WTO) have made an active contribution. Using the “opportunity-presence-capability” scheme of Bretherton and Vogler (2006), we argue that the EU is actively co-shaping the global agenda on public procurement, mainly due to the “opportunity” and “presence” dimensions of its global actorness and its role in the horizontal diffusion of public procurement regulations between international organisations. It is shown that for the “EU as a global actor” literature to offer valuable explanations, an in-depth analysis of its relationship with other international organisations, such as the WTO, reveals significant interactions and the co-shaping of policy agendas.

Keywords: *European Union; global actor; regulatory politics; diffusion; public procurement; World Trade Organization.*

1. Introduction

Regulatory governance can increasingly be described as a transnational legal order where a number of international organisations interact for the diffusion of regulatory norms and practices. The WTO shapes regulations in more countries than many other international organisations (Shaffer 2015). At the same time, the EU has over time enhanced its international presence and seeks to increase its role as a global actor. Although the EU's role as a global actor is disputed, its role in trade and in the internationalization of public procurement regulation demonstrates that it remains central in the global scene. To shed light to the EU's specific influence at global level, a sizable literature has developed in recent years (e.g. Bretherton & Vogler 2006, Young 2015). EU actorness and the ways in which this is manifested are of particular significance in this regard, yet the literature does not pay enough attention to the international environment and diffusion of norms and practices (see Levi-Faur 2005). Instead, it tends to focus primarily on the Union's policy-making competences and capacities.

In this article we explore the necessary conditions for the EU to act as a global actor. Our starting point is the literature on EU actorness and especially its three dimensions as identified by Bretherton & Vogler (2006): presence, opportunity and capability. We argue that although the EU actorness literature offers valuable tools to detect the EU's specific role in global politics, it nevertheless suffers from a key theoretical and ultimately empirical shortcoming. Although presence and opportunity are acknowledged, the literature mainly focuses on capability. Capability is inadequate,

on its own, to explain broader global trends such as the internationalisation of public procurement regulation. Instead, the EU's formation and development as a regulatory actor should be seen in the broader context of international regulatory governance. Opportunity and presence are key because regulatory policies are often diffused horizontally between international organisations. They cannot therefore be understood merely as the result of the strategic actions of a single global actor. The EU may act as a global actor but other structural factors, as well as diffusion, play an equally important role. Empirical research on EU actorness should therefore take into account the international diffusion of regulatory norms and practices and, within this context, analyse the EU's role.

More concretely, in this article we look at the Union's engagement in the international diffusion of regulatory norms and practices in the area of public procurement. The empirical question that we explore, in light of the theoretical propositions put forward, is whether the EU manifests actorness in shaping public procurement rules **at a global level** and if so, through what means and under what circumstances. Special attention is paid to the interaction with the WTO because of the latter's increased significance in recent years and the fact that it has become, through the Government Procurement Agreement (GPA), a central international actor in the field. Our case study selection **stems**, first, from the growing **importance** of international trade in world politics, and the consolidation of "deep trade" issues (among them procurement policy) as vital to states' and organizations' attempts to promote multiple economic and political objectives through them. Second, changes in public procurement regulation are particularly important for public governance since they cannot be simply

understood as attempts to liberalise one more trade area. Public procurement regulation has a direct impact upon government choices about the delivery of public services.

In what follows, we begin with a theoretical overview on the EU as a global actor, identifying the diverse strands of this literature and locating our own contribution in it. We also outline the reasons behind our selection of trade policy and specifically public procurement, before adding a note on our methodological approach. The next sections analyse the role of the EU in the internationalisation of public procurement regulation by discussing separately all three dimensions of EU actorness: opportunity, presence and capacity. The conclusion summarizes the main theoretical and empirical argument, before discussing possible avenues of further research.

2. The EU as a global actor and regulatory diffusion

The European Union has long been seen as an ascending power in international politics (Galtung 1973, Moravcsik 2002, Reid 2004) and an ongoing discussion on EU actorness has been taking place. This discussion has been limited exactly because of its focus on actorness and its lack of concern for regulatory and policy diffusion. For international law scholars actorness is limited to the EU's legal personality while for realist international relations scholars actorness should be understood in terms of statehood and different versions of power politics. Taking into account behaviouralist, structuralist and constructivist arguments has led to a more rounded understanding of actorness (Bretherton & Vogler 2006). In this article, we argue that a diffusion

perspective should be added in order to have a more comprehensive understanding of EU's role. Bretherton and Vogler (2006) have identified three dimensions to actorness which are central to our model:

- *Opportunity*, which relates to the external environment of ideas and events which can constrain or enable actorness during different times (i.e. what happens in regulatory regimes beyond the borders of the EU, potentially encompassing other organizations as well).
- *Presence*, which refers to the ability of the EU, in an intended or often unintended manner, to exert influence beyond its borders (e.g. the Single Market and the spur it has provided for regulatory reform in other policy areas for the EU and beyond).
- *Capability*, which sheds light to the availability of policy instruments and the ability of the EU to utilise these instruments, in response to opportunity and/or in order to **capitalise on** the benefits of presence.

There is consensus in the literature that all these three dimensions have allowed the EU, depending on the specific case, to act as a global actor or to at least be perceived as one (e.g. Lucarelli & Fioramonti 2010). We argue that the EU's strategy to internationalise public procurement relates to all three dimensions but to understand the reasons behind it more attention should be paid to the first two since they leave space for diffusion and more structural reasons to be taken into account.

Diffusion refers to “the process by which the adoption of innovation by member(s) of a social system is communicated through certain channels and over time and triggers mechanisms that increase the probability of its adoption by other members who have not yet adopted it” (Levi-Faur 2005, p. 23). Diffusion moves beyond structural and

actor-centred explanations of policy change and helps us elaborate the opportunity and presence dimensions of EU actorness. It allows for broader explanations of the reasons why a specific regulation or policy (e.g. public procurement) has been internationalised and helps us explore the role of the EU within the constellation of other international organisations (in this case the WTO, the United Nations (UN) and the Organization of Economic Cooperation and Development (OECD)). Structural explanations tend to focus on phenomena such as globalization, while actor-centred explanations stress the capability of actors such as the EU to export their own models. Levi-Faur (2005) argues that we need to pay more attention to the horizontal patterns of change (country to country). Taking this as a starting point, we move a step further and propose that more attention should be paid to the *horizontal patterns* of change between international organisations in order to map the diffusion of regulatory policies and practices. “Methodological transnationalism”, whereby the interconnectedness of different hierarchical and network structures of both a public and private nature at the transnational, international and/or global level is revealed, is necessary to understand the complexity of diffusion (Stone and Ladi 2015).

The initial conceptualisations of actorness saw Europe as a civilian power which, having renounced the use of military means among its member-states, could legitimately encourage other regions and countries to do the same (Duchene 1972). Moving away from the distinction between civilian and military power, Manners (2002) described the EU as a normative power whose power originates in the rejection of divisive nationalism. “Normative Europe” is based on core values described in the Treaties and has the potential to act as a model, as a promoter of its values and as a

counterweight to the United States (US) (Bretherton & Vogler 2006). Understanding the EU as a value-based actor has influenced policy-makers but has been criticised by scholars for overlooking other material and interest-based factors in EU power projections (e.g. Hyde-Price 2006, Zimmermann 2007 and Meunier & Nicolaidis 2006). In response, a vast literature on the EU as global economic actor, as a global regulator, as a trade power and as a market power has developed (for literature reviews see Young 2015 and Damro 2015). We argue that a more general criticism is that the literature on EU actorness places too much emphasis on the EU itself and understates structural factors such as the international diffusion of norms and practices. In any case, the different understandings and types of EU actorness should not be regarded as opposite to each other but as **complementary**. The internationalisation of EU public procurement regulation, which combines liberalization with environmental and social requirements, is a telling example of the co-existence of normative, market, trade and regulatory attributes in EU actorness.

As mentioned above, the main shortcoming we identify is that the literature on the EU as an economic global actor has been mainly **focused** on the ‘capability’ dimension of EU actorness and specifically on the capacity of the EU to act as a single actor. The “opportunity” and “presence” dimensions which can lead to policy and regulatory diffusion have been neglected (with exceptions, see Bretherton & Vogler 2013). The Union has in the recent past often appeared disunited in the face of external challenges, facing severe criticism over its alleged weakness at the international level. Though this weakness is often assumed to derive from the Union’s low policy coherence (Jørgensen et al 2011), more recent data suggests a more

nuanced relationship between effectiveness and coherence. EU diversity does not necessarily result in low effectiveness at the international level; “depending on the policy areas and the bargaining configuration” under study, high cohesiveness can even result in low effectiveness (Conceição-Heldt & Meunier 2014, p. 975). Similarly, a large part of the literature discusses the economic clout of the EU in multilateral or bilateral trade negotiations from the starting point of the Union’s institutional setup. Focusing on “capability” offers valuable findings on the success and failure of EU external strategies but cannot explain why the agenda shifts to new areas such as public procurement, or why the EU continues to influence the international agenda despite its apparent lack of capacity. We argue that more attention should be paid to the dimensions of “opportunity” and “presence”. Young (2015) claims that in order to understand the EU’s engagement in the world general theories of international political economy should be employed, not least the changing constellation of power in the world system through the rise of emerging market economies and the interconnections between different international organizations who often pursue parallel policy agendas. By focusing on EU’s “opportunity” and “presence” in new policy areas, this is exactly what we are hereby attempting to do.

EU trade policy is one of the most interesting policies to expand the EU actorhood discussion and to combine it with the diffusion literature (see Billiet 2006, Elsig 2007, Damro 2007). Despite the rise of new powers such as Brazil, India and China, the EU remains the world’s largest market and trader. Young and Peterson (2014) argue that we need to analyse EU trade policy in its different sub-systems in order to have a complete picture (e.g. multilateral trade liberalization versus anti-

dumping policies). Interestingly, when focusing on the sub-system of low average tariffs on manufactured goods, the EU can be portrayed as a liberal force, yet when considering the trade restricting effects of EU internal regulations, the EU is best described as a protectionist system. Public procurement combines both.

2.1 Why public procurement policy?

Public procurement is particularly important, not least because it is relatively understudied from a public policy/governance perspective. The global procurement market is valued at \$1.7 trillion, while government procurement accounts for between 15-20% of global GDP. Moreover, public procurement is a lucrative market for the EU, as well as an important contributor to EU GDP. It represents roughly 14% of EU-27 GDP as of 2016 (Directorate General (DG) Growth 2016). It covers the purchase by public organisations of goods and services such as pharmaceuticals, medical equipment, railway, urban transport equipment, and more. All national public procurement above specific thresholds is covered by EU Directives (Young and Peterson 2006). As an EU trade policy, **this sub-system** is particularly interesting, as it simultaneously portrays liberal and protectionist characteristics. This last fact is connected with the increasing **prominence of** public procurement as a core pillar of “deep trade” issues, which have emerged over the last two decades at the international economic scene. It is now increasingly recognised that the contribution of public procurement to trade policy is multi-faceted and not merely restricted to facilitating trade flows. Rather, it is directly linked to broader governance issues including transparency,

value for money and good governance. The dynamics of the Single Market and the application of the non-discrimination principle beyond the EU offer lucrative opportunities to European multi-national corporations (MNCs) whilst strengthening the EU's regulatory role domestically (with stringent enforcement of existing rules) and globally (via the diffusion of EU policy preferences).

The literature on EU public procurement policy, whether in its esoteric, EU dimension and the relevant policies and legislation, or the Union's engagement globally through the WTO tries to answer the same question as the rest of the literature (Blauberger & Krämer 2013, Bovis 2013). The principal focus is the ability of the Commission to engage in regulatory transfer to the WTO in procurement, and the obstacles posed in the process. However, the "opportunity" and "presence" dimensions of this transfer are again omitted.

2.2 A note on methodology

We make use of a qualitative methodological framework, relying on primary sources derived from the EU, WTO, UN and OECD databases, including policy reports and data on public procurement-related policy initiatives, such as the green/sustainable public procurement (GPP/SPP) advisory group launched by the European Commission. The minutes from the network's meetings and bilateral EU-WTO meetings have been incorporated in the analysis. Further, we have conducted 13 face-to-face, semi-structured interviews with senior policy officers of the EU and the WTO in Brussels,

Istanbul and Geneva to verify material already obtained and confirm our hypothesis on the role that diffusion plays regarding public procurement regulation.

3. EU Actorness in public procurement: opportunity, presence and capability

EU actorness in public procurement manifests itself in line with the core dimensions of actorness we identified above, namely opportunity, presence, and capability. Below we investigate each in turn, and identify the mechanisms that lead to their realization. This allows us to contextualize EU actorness by incorporating both diffusion as well as agency-derived variables into our analysis. Public procurement is a particularly ripe field to undertake such an exercise, as the EU is but one of the players that lead to the formulation and revision of procurement rules at global level. At the same time, its role as agent is significant due to the long-lasting experience it has acquired in dealing with deep trade issues for a number of decades.

3.1 Opportunity

EU actorness in public procurement, just as in other policy fields, takes place in context. This is shaped by the diffusion of ideas and actions between international organizations in relation to the role of trade in international political economy (horizontal diffusion). In that sense, empirical data reveals the centrality of the WTO in seeking to coordinate global procurement rules. Its interaction with the EU is of central importance. Ideas (in the form of the “Singapore issues” discussed below) as well as events (the signing and

updating of the GPA) highlight the centrality of opportunity in better understanding EU actorhood. We analyse both below. By examining the interaction of the EU with other states and international organisations (IOs) in formulating, reforming and expanding the regulatory terrain on public procurement, we can better understand the dynamics behind EU actorhood. Below we begin with an investigation of the role played by IOs in pushing for a new regulatory regime and examine their role in turn.

3.1.1 *Horizontal Diffusion and IOs*

The OECD has played a crucial role in rule-setting on public procurement from an early period. **Starting** from the 1960s, the OECD sought to complement non-discriminatory access to procurement markets with the introduction of rules to achieve procedural conformity between its members, not least the US and the (then) European Economic Communities (Trepte 2005: p.1127). Rules agreed **at the** OECD level, with the US playing a key role, have had a direct impact on allowing the EU to develop its own legislative framework on procurement, as will be discussed below. Suffice to say here that the close cooperation between the EU and the OECD on procurement acquired an institutional dimension through the setting up of OECD SIGMA (Support for Improvement in Governance and Management). The latter is an OECD body principally financed by the EU, **which delivers advice, offers** reform recommendations **and seeks to** enhance cooperation between the OECD, the EU and external **actors, including in** public procurement. OECD work on procurement, **containing** initiatives in partnership with other international organizations, is ongoing.

The search for regulatory templates in the field of procurement acquired another dimension in 1994, when the UN, through UNCITRAL (United Nations Commission on International Trade Law) issued its Model Law on Procurement of Goods, Construction and Services, which was subsequently amended in 2011. EU, OECD, WTO and UNCITRAL updates and the modernization of their rules thus follow close on each other's heels, though the content of their respective Codes, Norms (OECD), Directives (EU) and Agreements (WTO) differ in content to varying degrees. Both the 1994 and 2011 versions of UNCITRAL Model law provide a non-binding template for states to follow when procuring for their internal market. While it has been heavily influenced by the GPA, as well as the EU Directives on procurement and remedies, the Model Law seeks to promote international competition in procurement through harmonization instead of imposing a mandatory text (European Bank for Reconstruction and Development (EBRD) 2016). As a consequence, UNCITRAL tends to be more flexible than the latest EU Procurement Directives in allowing for national preferences in procurement as long as this is done in a transparent manner (OECD 2000). On the other hand, the UNCITRAL Model Law includes guidance for states on issues not dealt with in the EU Directives (for instance, on low-value purchases), to entice states to avoid corruption and obtain value for money (Arrowsmith 2009, p. 259).

In the context of EU actorness, the role of the WTO deserves special attention: both ideas and events (the Singapore issues and the GPA respectively) are key examples of opportunity, within which the EU seeks to assert a global role. It is to these core aspects of opportunity we turn next.

3.1.2 *The WTO, the GPA and the global role of the EU in procurement*

For all the crucial work undertaken in procurement by the OECD, the UN or the US, the WTO (starting from its predecessor, the General Agreement on Tariffs and Trade, GATT) has been at the forefront of global regulatory standards on public procurement, shaping the framework within which its members have revised or updated their procurement practices. Public procurement was a policy area excluded from the GATT's most favoured nation and national treatment principles in 1948. This is because of its controversial nature for vote-seeking politicians: "using taxpayers' money to give jobs and contracts to foreign workers and companies is not the best way to win votes" (Woolcock 2012, p.5). Nonetheless, first attempts were made during the Tokyo Round of Multilateral Trade Negotiations in the 1970s, and led to the 1979 Tokyo Round Code on Government Procurement (Reich 2009). The Code owed much to the work undertaken by the OECD in this field, whose 1976 report led the groundwork for the 1979 agreement. Article IX: 6 of the Code foresaw the establishment of the Committee on Government Procurement (CGP) (Trepte 2005, p. 1129). The role of the US in the process was also critical, not least in co-shaping the Code.

By the early 1990s, GATT became the WTO and procurement policy acquired a substantially new dimension. The signing of the GPA and the formation of the WTO had very important consequences for trade policy, changing the opportunity environment within which the EU operated. Until then, trade for powerful blocs such as the EU focused on assurances of mutual market access. This became increasingly unsustainable, as major trade constituencies in the advanced industrialized world

started **pressuring** political authorities to move beyond market access and insert policy regulation on the trade agenda (De Bierre 2006). This is the consequence of the rise in new trade politics (Young and Peterson 2006), which does not limit trade policy to traditional issues around tariff reductions and market access. The new approach is cognizant of the fact that in an era when divergent environmental, labour and social standards are a key feature in investment decisions, exporting domestic regulation practices is a long-term strategy to guarantee increased aggregate trade volumes as well as sustainable market access.

The most important regulatory instrument on procurement for advanced states and organizations is the GPA, first signed in 1994 and modernized twenty years later. Also known as the Marrakesh Agreement on Government Procurement, the GPA aimed at liberalizing procurement markets worldwide. Crucially, the GPA included the procurement of both goods and services. Content-wise, the GPA promoted competition on government procurement as much as possible. It relied on core principles, such as transparency, good governance and non-discrimination (Anderson *et al.* 2012, Anderson *et al.* 2013). These principles were designed to enhance competition for contracts, stimulate an improved “value for money” setup for public contracts and avert a return to protectionism. Nevertheless, the liberal face of the EU can be demonstrated by the fact that companies which originate in countries that are parties to the GPA are treated as EU companies (Young and Peterson 2014). The Agreement entered into force in 1996, and negotiations began swiftly thereafter for its revision. The GPA is a plurilateral agreement and consists of 19 parties and 47 WTO members, with many other states and four international organizations (the IMF, OECD, United Nations

Conference on Trade and Development (UNCTAD) and the International Trade Center) maintaining an observer status. Following a protracted period of renegotiations and ratification by acceding parties, the revised GPA entered into force in April 2014.

Opportunity manifests itself through the GPA but is not merely an external event calling for EU reaction: it is actively co-shaped by the EU given its prominent role in global regulatory politics. The 1994 GPA was itself based on key EU concepts surrounding the appropriate design and execution of procurement contracts since the EU has one of the most developed public procurement regulatory frameworks in the world (Interview 3). This is far from coincidental: at a structural level, the EU has a clear advantage over the majority of other WTO members resulting from the bloc's long experience in handling trade negotiations and pursuing a strategy of multilateralism based on the non-discrimination principle. Yet the relationship is clearly not one way: the adoption of the GPA in 1994 provided the impetus for the Union's new internal market procurement legislation (discussed below) borrowing from concepts developed at WTO level (Interviews 1, 13). To illustrate, the revision of EU internal procurement legislation launched following the 1996 Commission Green Paper took place in light of the then new GPA and the rules this included (European Commission 1996).

When it comes to the revised GPA of 2014, it bears the imprint of the EU in important respects: the Right to Appeal clauses, the Judicial Review Mechanism, and e-procurement were all part of previous EU legislation (Interviews 4, 5, 13). The EU has thus had a substantial impact in setting the framework on which the revised GPA would be based; in fact, the new GPA is "very much in harmony" with the EU Directives on public procurement (Interview 6). In some cases, the EU utilized the GPA agreement in

verbatim when reaching agreements with third parties, such as the EU-Azerbaijan Association Agreement (Interview 6).

The role of the EU in the WTO is thus of crucial significance. The EU (along with the US) has been one of the foremost proponents of the WTO's establishment as part of its commitment to multilateral trade and a new trade agenda in the early 1990s (Blank & Marceau 1996). Further, the WTO has adopted an "increasingly legalistic approach" (Billiet 2006) to dispute settlement through the Dispute Settlement Mechanism (DSM). In relation to public procurement, the WTO "applies key common rules and ensures the predictability necessary for EU traders to rely on those rules vis a vis GPA signatory states" (Casanova 2011, p. 317). This is particularly important for the EU on another level too: the EU's supreme judicial body, the Court of Justice (CJEU) has issued a number of decisions facilitating public procurement regulation according to three core Union principles, namely non-discrimination, transparency and competition (Bovis 2013). Finally, the decision-making structure of the WTO makes it difficult for less powerful states to influence its decisions. WTO Committees and Working Groups require a high amount of administrative expertise, ample resources and functional cooperation (Casanova 2011). These are necessary to create the sort of coalitions of states that will then convince other members to go along with a specific proposal. The EU's *modus operandi* is based on such ability, having to reconcile divergent state interests on a daily basis. Its adequate resources and expertise on trade matters adds to its ability to influence the WTO decision-making process.

The above is true in the specific case of the CGP. Despite its longevity, the CGP remains a negotiating forum among its 45 members (28 of which are the EU member

states). The lack of transparency in CGP proceedings offers a disincentive to developing countries to join, and even the cost of attending the CGP periodic meetings (four such meetings are held every year) can be considered prohibitive for non-western states (Casanova 2011). If the GPA has been a key event in terms of opportunity for the EU, ideas are equally significant. The new context shaped by the GPA has influenced the EU's ideational approach to procurement and led to the tabling of the "Singapore issues", to which we now turn.

Following the signing of the first GPA, EU public procurement bidders started voicing their demands for improved access to public procurement markets outside Europe. Echoing those demands, the EU (along with the US) has been instrumental in tabling the so-called "Singapore Issues" at the first WTO ministerial conference in 1996. Those issues included competition, investment, trade facilitation and transparency in public procurement rules, with the then responsible Commissioner Leon Brittan arguing explicitly for the need to include competition policy, foreign direct investment, environmental and labour standards in the so-called "Millennium Round" (Deutsch 2001). By the same token, new rules on public procurement enhancing transparency and limiting corruption were seen by EU representatives as key to enhance efficiency, facilitate trade and assist in the economic development of the least developed countries (De Bierre 2006, Interviews 3, 4). Importantly, the EU has consistently sought to put this issue at the forefront of multilateral trade negotiations via the WTO, instead of seeking to utilize other international organizations (Interviews 12, 13).

DG Trade took the lead during the Doha Round in calling for enhanced transparency in procurement policy to level the playing field of international competition

(Damro 2007, Interviews 5, 8). The EU regulatory strategy met with limited success, however. Developing countries were particularly vocal in their rejection of pushing forward the Singapore issues. In 2004 and despite last-minute attempts by then Trade Commissioner Lamy to shelve some of the Singapore issues in order to reach an agreement, the WTO decided to exclude negotiations on transparency in public procurement (as well as investment and competition policy) (De Bierre 2006). This came despite the fact that the Doha Ministerial had agreed to set up a working group on Transparency in Government **Procurement**. That group was multilateral and included all WTO members. It carried out a study of 12 issues in total, with the prospect of incorporating some of those in a future agreement. Technical assistance, capacity building and the potential elements of an agreement on transparency in procurement formed the core of the study (WTO, 2016b), yet the 2004 decision by the General Council excluded the Singapore issues from the Doha Round.

3.2 Presence

Explaining the ways in which opportunity manifests itself, not least through the role played by IOs, is the first step in comprehending EU actorness. Yet, if opportunity is manifested through the multiple contact points between international organizations diffusing their practices, rules and norms on procurement, how does the EU establish its presence in procurement rules? In this section, we argue that the Single Market and the development of a dense legislative framework on procurement have offered the EU the ability to actively shape rules that have been incorporated in the GPA.

3.2.1 *The Single Market*

The Single Market is central in understanding the EU's regulatory influence as a result of its "presence", which in turn enhances its "capability" as a global actor. Young and Peterson (2014) argue that this is happening for two reasons. First, because the adoption of common rules means that the EU has something very concrete to export and defend and second, because some EU regulations, such as data privacy and risk regulation, are the strictest in the world and affect foreign firms trying to enter the EU market. The result is that these firms support regulatory cooperation with the EU to improve their access, and block the ability of EU firms to monopolize the European market (Interview 8).

EU public procurement regulations belong to this same category and are pertinent for further internationalisation. The Single Market offers the EU a distinct advantage in formulating non-discrimination trade policies and opening up procurement markets to firms from throughout the Union. It is far from coincidental that the 2011 Single Market Act recognized the strategic importance of public procurement in furthering European integration, which in this instance is directly associated with the operation of the Single Market (Bovis 2013).

The Commission's 2005 Communication "Global Europe: competing in the world" verifies the usefulness of the Single Market in terms of both the promotion of internal competition among EU firms and as a tool to shape global rules and norms governing trade. "The single market...promote[s] predictability and transparency and allow[s]

business to exploit market size and economies of scale...It has fostered the development of high-quality rules and standards *which shape global norms*" (European Commission 2005, p. 3, emphasis added). The same Communication attributes a particularly important role to procurement seeing it as a "new trade area of economic importance to us" (ibid, p.6). Procurement is also an "area of significant untapped potential for EU exporters. EU companies are world leaders in areas such as transport equipment, public works and utilities. But they face discriminatory practices in almost all of our trading partners...*this is probably the biggest trade sector remaining sheltered from multilateral disciplines*" (ibid, p.7, emphasis added)

Moreover, public procurement policy at EU level has allowed the Union to develop the internal market further. Arrowsmith and Kunzik (2009) identify three means by which this process is facilitated. These are, first, anti-discrimination policies, second ensuring transparency and third removing non-discriminatory restrictions on access to the internal market. In addition come CJEU decisions, such as the cases of *Concordia* and *EVN Wiestrom*, which facilitate the work of local authorities when procuring to do so by taking into account social and environmental objectives next to cost considerations (Semple 2012, Interviews 2, 10). Moreover, the Single Market programme facilitated the creation of standard contract award procedures; combined with growing pan-European competition as a result of mergers and investment across the Union which enhanced confidence by firms in their ability to win contracts in the EU. By extending coverage, the Single Market "facilitated the extension of the GPA" (Woolcock 2012, p. 10) and placed the EU at the forefront of procurement regulation. External actorness through

presence went through domestic regulatory reform and the initiation of an ambitious, comprehensive reform project.

Yet the balance between internal regulatory reform and external actorness is always thin. The existence of the Single Market is a potential challenge to EU competitiveness, to the extent that its stringent rules on state aid (part of which is related to public procurement policy) could be an obstacle to MNC's global market expansion (Blauberger & Krämer 2013). The Commission's State Aid Action Plan (SAAP) published in 2005 drew a lot of reaction from important associations, such as the French Business Confederation MEDEF (Mouvement des entreprises de France), for its lack of "global ambition" (Interview 7). The conscious strategy by the Union to export its procurement rules has therefore been also a result of internal (EU) lobbying pressure to harmonize global rules so as not to disadvantage European MNCs (Blauberger & Krämer 2013). "Exporting" EU rules allows firms to save on transaction costs related to different **rules** being applicable in different jurisdictions; it also permits firms knowledgeable of EU rules to retain important administrative advantages in bidding beyond EU territory and when entering foreign markets, given the high degree of similarity in approach between EU and WTO rules on procurement (Interview 6).

3.2.2 EU Public Procurement Directives

EU public procurement legislation has its origins in the Rome Treaty and the prohibition of barriers to trade as well as the establishment of freedom of movement and service provision. Successive Directives related to public works and supplies (as well as

concessions) have been passed since, with every new piece of legislation aiming at a greater degree of legal harmonization and, since the 1990s, the simplification of legislative procedures.

EU know-how on public procurement stretches back to the 1960s, when the first relevant Directives were passed. The first came in 1966 (66/683) and 1970 respectively (70/32), according to which no discrimination between national and foreign products would be allowed in public procurement and public supply contracts (Bovis 2007). These were enacted following extensive cross-fertilisation with the OECD. It is revealing that both 66/683 and 70/32 “essentially took the same approach as that discussed in the OECD” (ibid. p.1129). In 1977 Directive 77/62 added more details in Community legislation by requesting the specification of “objective criteria” in tendering and award procedures as well as the prohibition of discrimination over technical specifications. Nevertheless, procurement remained subject to non-transparent practices, and the Single Market programme identified the diverse rules surrounding member states’ procurement policies as a significant non-technical barrier to trade (Interview 4).

The Commission’s cooperation with private firms goes back to the late 1990s, and industrial firms were particularly active in the revision of the Directives (Interview 4). Directive 89/440 amended previous public works Directives and widened its scope of application to also cover concessions and state-subsidized works. This Directive is most closely linked to the GPA and reveals that the aims were very similar to equivalent work undertaken at the WTO: increase value for money, enhance transparency in the awarding of public contracts and potentially contribute to socio-economic advancement. Moreover, the Directive was influenced by the political context of the time and in

particular the Treaty-specified objectives of social and environmental sustainability (Beuter 2005). Through Directive 89/665, contracting authorities were obliged to certify that their procedures adhered to procurement law and that their decisions would be subject to effective judicial review by national authorities (Bovis 2007). Finally, Directive 93/37 sought to make the legal framework less heterogeneous and included detailed references to due process regarding the award of **concessions**. Given the need to update and harmonize procurement legislation and as a consequence of OECD, WTO and UNCITRAL work in the field, the EU moved to a significant revision in the 2000s (Interviews 3,4). First in 2004, the EU adopted one Directive on procurement in water, transport, energy and postal services (the utilities directive 2004/17/EC); another on public works, supply and service contracts (2004/18/EC) and a third on concessions (2014/23/EU). Since 2009 a different Directive governs defence and security procurement (2009/81/EC). The Commission published in December 2011 its proposals for legislation to replace the existent Directives on procurement. Extensive amendments introduced by the European Parliament (EP) and Council led to a compromise text in 2013. The process was completed in 2014, after the Council adopted the new procurement Directives following the EP's approval.

Directive 2014/25/EU ("the Utilities Directive") replaced 2004/17/EC, while Directive 2014/24/EU ("the Public Services Directive") replaced 2004/18/EC respectively. The new Directives in Article 1 in the Utilities and 1(4) in the Public Services Directive explicitly state that member states are at liberty to decide how to deliver public tasks and services of general economic interest (OECD 2014, p. 4). Compared to the 2004 Directives, the new legislation places more emphasis on

electronic procurement and broadens the possibility of **taking into account** social and environmental **considerations** when specifying technical considerations in line with the development of CJEU case law. Finally, the new Directives seek to further encourage Small and Medium Enterprises' (SMEs) participation in procurement and allow for the possibility of **bearing in mind** life-cycle cost criteria in determining winning bids in tendering, aside from the lowest priced tender (Articles 67 and 82 respectively). However, the exact wording in the two Directives allows for different interpretations, given that the text has resulted from a compromise reached between the Parliament and Council (OECD 2014, p.22).

Be that as it may, the Directives reveal a strong EU presence, accompanied by the acquiring of a certain reputation in the field and expectations of action. The protectionist character of the EU procurement Directives is reflected in discrimination against foreign firms. Any bid whereby more than half of the value of its products originates outside the EU can be rejected (Young and Peterson 2014; **Maughan 2016**). According to the Commission, the motivating factors behind the revision were “economic, social and political developments and current budgetary constraints” (European Commission 2014a), reflecting the Union’s desire to apply the reciprocity principle to those states and markets unwilling to follow its own (at least rhetorical) desire to fully open up their markets to EU firms. As the Commission put it in its 2015 Communication “Trade for All”, “while the EU has progressively integrated and opened its markets, EU companies still encounter discrimination and restrictions abroad” (European Commission 2015, p.10). The new Directives have now been adopted and member states have had a grace period of two years to implement them.

3.3 *Capability*

EU actorness manifests itself in a structural context of policy diffusion and interaction (opportunity), through the Union's strong presence in global regulatory reform by use of the Single Market (presence) as well as its more explicitly agency-related ability through specific advantages in procurement (sustainable procurement practices). Structural and agency-related variables co-exist and together make up EU actorness. According to Bretherton and Vogler (2006), capability links up to policy formulation and the EU's ability to act coherently is crucial in this regard. The distinction between vertical and horizontal coherence is important here: while the former denotes the degree of consistence of EU external policies and their linkage to one another, the latter is about the possible tensions, or synergies, between different policy areas. Furthermore, capability manifests itself through the formulation of policies to incentivize what it deems appropriate behaviour by others through political, economic or military means (Bretherton and Vogler 2013, p.385). Below we outline the concrete manifestations of EU capability in procurement by use of two coherence levels, vertical and horizontal. We also demonstrate its use of specific policies at bilateral (free trade agreements) and global (WTO) level to demonstrate its role as a global actor.

3.3.1 *Vertical Coherence*

In terms of vertical coherence, trade policy is a rather uncontested area in that the EU has developed a high degree of coherence. In public procurement and at the

level of the WTO, all EU member states are parties to the GPA, and the EU counts as one party. In practice, the European Commission negotiates as a representative of the member-states who although present in the room, avoid intervening. It is the Commission which represents the Union as a whole and member states do not take the floor, despite the fact that they have the formal right to do so under WTO rules (Interviews 12, 13). The issue of Commission-member state competences and membership in the WTO has a long history. In fact, disagreements between the member states and the Commission as to the exact competences of each meant that the Commission brought the issue to the CJEU in 1994. The Court's verdict was mixed, in that the EU obtained exclusive competence on cross-border services and trade in goods, whereas this was not the case for other modes of trade in services and trade-related intellectual property rights (Hilf 1995). The WTO charter was thus signed as a "mixed competences" agreement, resulting in the fact that both the EU and member states partake in the organisation. In practice, the Commission's supremacy over member states is manifested in the Committee's seating order, whereby the Commission representatives sit in the front row and member states behind them. An important proviso here is that the Commission interacts constantly with member-states, not least informally, and member states are kept up to date regarding the Commission's negotiating tactics and intentions (Interviews 3, 12).

Nonetheless, the internal division of labour within the Commission is not totally trouble-free (Interviews 1, 3): the Directorate Generals for Market and Trade have separate mandates and "different working cultures" (Interview 4). While DG Markt is responsible for the GPA negotiations, it is DG Trade that looks at international trade

negotiations and as the two issues intersect coordination issues can arise (*ibid.*). DG Markt has been using consultation processes actively for the discussion of the modernization of the procurement directives but not for the GPA revision since this was regarded an international issue, where formal consultation was not considered necessary. **DG Trade**, on the other hand, uses such consultations extensively to involve civil society groups, Non Governmental Organizations (NGOs) and trade unions as well as private interest groups (Crespy 2014: 105). Yet this does not conceal the fact that DG Trade often echoes the views of business more than other groups, and that interest representation can potentially be unequal (Kohler-Koch and Finke 2007).

3.3.2 Horizontal Coherence

Horizontal coherence depends on the extent to which there are tensions or synergies between policy sectors. Procurement being a deep trade issue means that the EU has had to invest quite a bit in developing synergies among DGs **and draw on** outside expertise to raise its capacity and meet its goals. The European Commission has set up two groups on procurement policy, involving firms, employers, employee representatives and specialists. The first group deals with public procurement in **general, and was** set up in 2011 and is tasked with offering expert advice to the Commission “with a view to assisting it in shaping the public procurement policy of the Union” (European Commission 2011). Selected experts represent a number of member states (14 in total) and retain expertise on, *inter alia*, the environmental and social aspects of procurement policy.

The second group was launched in 2005 and deals with Green Public Procurement (GPP). A permanent albeit informal advisory group, it is tasked with the promotion of green public procurement and to assist the Commission in its efforts regarding legislative proposals (European Commission 2014b). Not least through the Group's contributions, the Commission has developed common GPP criteria covering 19 product and service groups, which address the environmental impact of products and services across the entire life-cycle (European Commission 2009, Semple, 2012). By use of a soft approach promoting the contributions and methodological tools followed by pioneering member states (the "Green 7" Member states), the Commission has published numerous studies and reports on sustainable public procurement (European Commission 2007). Pioneering member states are tasked with the development of common GPP criteria; Sweden for instance would develop EU-wide criteria on medical electronic equipment (European Commission 2011). Such developments are directly linked by the EU to its presence in global trade. A 2010 policy statement on "Trade, Growth and World Affairs" called for fairness in public procurement, echoing the Union's grievances on unfair treatment by EU firms abroad. Importantly, it also named sectors where EU firms were competitive and should push for public contracts outside the EU market, including in green technologies (Woolcock 2012, p.10).

Despite varying success across the EU in implementing high GPP/SPP standards, there is little doubt that there is by now "widespread incorporation of both environmental and social considerations in regulated procurement procedures..." (Semple 2012: 4). The contribution of local **stakeholders**, especially local authorities has been very important, and the GPP Advisory Group includes NGOs (such as the European

Environmental Bureau) as well as the ICLEI (International Council for Local Environmental Initiatives) a network of over 1,000 local and metropolitan governments which has assisted the formation of the EU's toolkit on green procurement (Interview 2).

Crucially, the Commission admits the economic case for GPP criteria to be harmonized across the Union: such a policy would be necessary to “avoid a distortion of the single market and a reduction of EU-wide competition” (European Commission 2014c). Further, such criteria are of particular salience to “companies operating in more than one member state, as well as to SMEs” (European Commission 2014c). The pioneering role of the EU in SPP practices has enhanced the EU's “capability” dimension and the advantage the Union possesses *vis a vis* other trading blocs.

3.3.3 *Policy formulation and policy instruments*

By pushing procurement policy onto the WTO agenda, the Union wishes to make good use of further market opportunities and further enhance its expertise to raise EU firms' **competitiveness**. The Work Programme on Sustainable Public Procurement was launched by the WTO in 2012 and aims at specifying the objectives of such procurement, as well as the ways in which sustainable procurement practices can be made compatible with the “value for money” principle as well as the participating states' international trade obligations (WTO 2012). The EU experience on seeking to monitor SPP outcomes and develop life cycle cost techniques provides an immediate point of departure for the WTO Committee's work in this area (Semple, 2012, Interview 13). In fact, the renegotiated version of the GPA entails aspects conducive to the development

of such outcomes. Article X (6) allows for technical specifications that “promote the conservation of the natural resources or protect the environment”, while Article X (9) includes environmental characteristics in the indicative list of tender evaluation criteria (Semple 2012). Finally, launching such a work programme under the auspices of the WTO is essential for the Union in its attempts to achieve its multiple objectives in procurement, namely: a) avoiding protectionism b) creating a level, non-discriminatory playing field at global level and c) spreading its policy principles on sustainability, including life cycle cost techniques and “green” procurement. Although the EU was not the sole actor pushing for the establishment of those Work programmes, it had long advocated and expects its own interest to be played out in this policy field (Interview 10). This is an example of the Union’s issue linkage strategy (De Bievre 2006), through which the EU seeks to reconcile diverse constituencies (exporters as well as domestic producers) and demands (growth and competitiveness in parallel with environmental sustainability). The Works Programmes are ongoing but a senior policy expert involved in the process argues that, given the nature of WTO negotiations and the EU attitude to the Programmes as of now, it is “highly likely” that a sort of “best practice” approach regarding the Programmes will be adopted, and parties will be encouraged to follow best examples of how these types of procurement are conducted across the GPA membership (Interview 12). In international regulatory cooperation language this is called approximation and bears a striking resemblance to the EU’s Open Method of Coordination (OMC) approach.

In addition to the Work Programme, the modernisation of public procurement directives provides the EU with a state of the art regulatory template which can be

further diffused. The EU can inspire or indirectly coerce others, particularly in its periphery, to imitate its approach and take EU arrangements as a model. Other policy tools, such as enlargement, have also been put to use in that regard. To illustrate, Central and East European states were originally following the UNCITRAL Model Law on Procurement, yet had to align with EU regulatory practices and legislative decisions as soon as their EU candidacy became clear. Others may wish to approximate laws and regulations to EU standards as they “shop around” in search for best practices (Börzel & Risse 2012, Schimmelfennig 2010).

Crucially, the EU does not hesitate to make a direct link between its economic clout and explicit policies it wants other states to adopt. This is a tactic used in regional trade agreements and in such instances where the Union seeks to obtain particular concessions. The insertion of a democracy clause in the Preferential Trade Agreement (PTA) with Mexico is a case in point (Conceição-Heldt 2014). To a certain extent, this has also been EU practice in recent years in the WTO context, as the Union has challenged “protectionist” policies in certain policy areas by the United States, as well as countries such as India, Korea, Japan and Australia (Schäffer 2006). Negotiated trade arrangements with other regional blocs are another example of the EU’s regulatory dominance (Maur 2005).

4. Conclusions

In this article the “EU as a global actor” literature is enriched by taking into account the observations made in the analysis of international policy diffusion (e.g. Levi-Faur,

2005). It is argued that Bretherton & Vogler's (2006) three dimensional analysis of EU's global actorness - presence, opportunity and capability – is a good starting point. Nevertheless, although in theory the three dimensions have been described as equally important, the empirical analysis has been mainly focusing on capability. We demonstrate that the EU's advantage stems from the “opportunity” and “presence” dimensions of its global actorness and its role in the horizontal diffusion of public procurement regulations between international organisations. “Capability” stems from the Union's ability to capitalize “opportunity” and “presence”, and is therefore a secondary dimension. It is shown that for the “EU as a global actor” literature to offer valuable explanations, an in-depth analysis of its relationship with other international organisations, such as the WTO, reveals significant interactions and the co-shaping of policy agendas. Applying a qualitative research design based on thorough documentary analysis and in depth elite interviewing allowed us to demonstrate the importance of diffusion mechanisms within “opportunity” and its interlinkages with “presence” and “capability”.

Public procurement has proven to be a ripe policy field for analysing the EU's global actorness. Rule-setting in public procurement has been the result of the international diffusion of norms and regulations between a number of international organisations such as the OECD, UNCITRAL, the EU and WTO. Within this international “opportunity” structure, the EU has played a pivotal role in horizontal diffusion between international organisations. Our findings go a step further and show that the relationship between the EU and the WTO in the field of public procurement is particularly revealing. Their relationship can be best described as *cyclical* meaning that

the relationship of the EU with international organisations is not necessarily a one-way effort by the EU to influence the latter's agenda. It can also be cyclical, in that similar actors negotiate in two different fora, exchange information and know-how and thus shape the international regulatory governance and economic agenda.

This is where the dimension of "presence" becomes important. The EU has developed a strong regulatory capacity in trade issues, including public procurement, through years of technical preparations to enhance competition among its member states and firms. The existence of the Single Market has contributed to the Union's enhancement of procurement rules. The gradual Europeanization of procurement systems **at the** EU level began in the 1970s and has gathered pace in recent years through the modernization of EU procurement directives. Through that process, the EU has acquired substantial administrative and legal expertise on procurement which allows her to play a global role.

Last but not least, this article outlined the concrete manifestations of EU "capability" in procurement by the use of two coherence levels, vertical and horizontal capability. In terms of vertical coherence, trade policy is a rather uncontested area in that the EU has developed a high degree of coherence. For example, all EU member states are parties to the GPA, and the EU counts as one party. As far as horizontal coherence (coherence between policy sectors) is concerned, it was shown that the EU had to invest quite a bit in developing synergies among DGs and set up groups with external stakeholders in order to enhance the environmental and social aspects of its procurement policy. A number of policy instruments have been used by the EU to push its agenda to the WTO and internationally, such as the Work Programme on

Sustainable Public Procurement launched by the WTO in 2012, or the insertion of a democracy clause by the EU in its PTA with Mexico.

To conclude, “opportunity”, “presence” and “capability” are three interrelated dimensions of EU actorness. In this article, it was shown that ‘opportunity’ and “presence” should be the starting point of any empirical research on EU actorness, since they provide the structural and diffusion background that allows the Union to capitalise on its resources and demonstrate actorness. Horizontal diffusion of norms and regulations between international organisations is the prerequisite of any actorness. Finally, although EU global actorness is hereby adequately demonstrated, the cyclical relationship between the EU and WTO in public procurement underlines the evolving nature of the Union’s external economic role and encourages us to further investigate the processes and mechanisms of regulatory capitalism at a time of global economic restructuring.

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Appendix

List of Interviews

1. Attachée Parlementaire, Commission du marché intérieur et de la protection des consommateurs, Bureau Parlementaire de Marc Tarabella, 9 April 2014, Brussels.
2. Member of the European Parliament (MEP), Group of the Greens/European Free Alliance, 10 April 2014, Brussels.
3. Deputy Head of Cabinet, Cabinet of European Commissioner for Trade, Karel De Gucht, 11 April 2014, Brussels.
4. Head of Unit, International Dimension of Public Procurement, DG Internal Market and with Services and Legal Officer, International Dimension of Public Procurement, DG Internal Market and Services, 25 April 2014, Brussels.
5. Cabinet Member, Cabinet of the Commissioner Michel Barnier, Internal Market and Services and with Legal Officer, Public Procurement Legislation II, DG Internal Market and Services, 16 May 2014, Brussels.
6. Senior Adviser, Public Procurement, OECD SIGMA, May 2014, Ankara.

7. Head of Office and Parliamentary Adviser to Malcolm Harbour, Chairman of the Internal Market and Consumer Protection Committee, European Parliament, 17 April 2014, Brussels.
8. Senior Adviser, Internal Market Department, Business Europe and Adviser, International Relations Department, Business Europe, 8 May 2014, Brussels.
9. Legal Adviser, ETUC, Confederation of European Trade Unions, 20 June 2014, Brussels.
10. Director General, FIEC, European Construction Industry Federation and Director Economic & with Legal Affairs, FIEC, European Construction Industry Federation, 9 July 2014, Brussels.
11. Vice President Legal, Anonymous Industry and with Government Affairs Policy Advisor, Anonymous Industry, Representation Office EU, 14 July 2014, Brussels.
12. Head, WTO Secretariat, WTO Committee on Government Procurement, 25 May 2014, Istanbul.
13. Intellectual Property Division WTO, Legal Affairs Officer, WTO Secretariat, 25 May 2014, Istanbul.