GOVERNMENT PURCHASING DURING COVID-19 AND RECESSIONS: HOW EXPANSIONARY LEGAL POLICIES CAN STIMULATE THE ECONOMY

Désirée U. Klingler[*]

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**LL.M. Yale Law School (2020) and Ph.D. Candidate at the University of St. Gallen, Switzerland, funded by the Swiss National Science Foundation. Email: desiree.klingler@aya.yale.edu.* *I want to thank Yair Listokin, Ian Ayres, and Susan Rose-Ackerman from Yale Law School for the insightful discussions and valuable comments. I also want to thank Steven Schooner and Christopher Yukins from George Washington University Law School for their expert view and comments.*

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ABSTRACT

The traditional approaches to "cure" economic recessions are monetary and fiscal policies. Most economic crises are first addressed with monetary instruments, as the Federal Reserve's extensive corporate bond purchasing program of March 24, 2020, has shown.[1] However, when interest rates are zero or close to zero—referred to as the zero-lower bound—and the economic downturn is expected to be significant, governments often launch additional fiscal stimulus programs, such as the U.S. COVID-19 Stimulus Package in the amount of $2.2 trillion passed by Congress on March 27, 2020.[2] But monetary and fiscal policies are not the only means of influencing an economy's business cycle. A third and novel option is expansionary legal policies, also referred to as countercyclical regulation, which is the focus of this article.

Legal instruments have been used only to a limited degree to stimulate the economy. One of the first advocates of law and macroeconomics was Yair Listokin who promotes the use of legal policies and lawyers in macroeconomic policy.[3] In this article, the author explains and applies the idea of expansionary legal policies to the field of public procurement law. Public procurement lends itself particularly well to expansionary legal policies for two reasons. First, public contracts form a large part of the government's expenditure side, amounting to fifteen to twenty percent of global GDP,[4] and can therefore be used to expand the money supply. Second, government contracting is governed by a set of complex administrative rules that can be adjusted to better reflect the business cycles.

This article will discuss the idea, design, application, and potential effects of expansionary legal policies by means of two procurement policies that were adopted in the United States and Switzerland in response to COVID-19 this March and compare them to Germany's relaxation of procurement rules after the financial crisis in 2009. To protect taxpayers' money and mitigate the risk of corruption, this article suggests legal safeguards for expansionary procurement policies. With the necessary measures in place, expansionary procurement

1. *See*, *e.g.*, Jeanna Smialek, *The Fed Goes All in with Unlimited Bond-Buying Plan*, N.Y. Times (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/business/economy/coronavirus-fed-bond-buying.html [https://perma.cc/54H6-YDMJ].

2. *See* Erica Werner et al., *Senate Approves $2.2 Trillion Coronvrius Bill Aimed at Slowing Economic Free Fall*, Wash. Post (Mar. 25, 2020), https://www.washingtonpost.com/business/2020/03/25/trump-senate-coronavirus-economic-stimulus-2-trillion/ [https://perma.cc/J45H-SW8K].

3. *See* Yair Listokin, Law and Macroeconomics: Legal Remedies to Recessions 3 (2019) [hereinafter Legal Remedies to Recessions].

4. Robert Anderson et al., *Assessing the Value of Future Accession to the WTO Agreement on Government Procurement (GPA)* 9 (WTO Econ. Research & Statistics Div., Working Paper No. ERSD-2011-15, 2011).

policies will help procurement regulations to reflect economic realities more accurately and stimulate the economy by increasing and expediting spending through public projects in infrastructure, healthcare, and other sectors.

I. THE IDEA OF EXPANSIONARY LEGAL POLICIES

The COVID-19 pandemic has had drastic impacts on the global economic landscape and exemplified the importance of government procurement. Before delving into the midst of public procurement policies, this article will first explain the novel idea of expansionary legal policies and contrast it to traditional macroeconomic tools (Part I). It will then introduce three examples of expansionary procurement policies from the United States, Switzerland, and Germany that have been applied to address the economic consequences of COVID-19 and the financial crisis, respectively (Part II). By means of these three examples, the article discusses the design of expansionary legal policies, including relaxed regulation versus relaxed enforcement, coordinated action, and the optimal sector to target (Part III). In the latter section, the author discusses questions related to public infrastructure, green public procurement, and crisis-specific policies. Lastly, the article explores potential conflicts between macroeconomic stability and traditional procurement goals, such as cost-efficiency, open competition, and transparency, suggesting legal safeguards to prevent against corruption. To conclude, the article outlines two key features of expansionary procurement policies to shield them from discretionary power: automatic stabilization and economic triggers (Part IV).

A. The Traditional Macroeconomic Tools and Their Limitations

To better understand the origin of expansionary legal polices, this article looks at the existing macroeconomic instruments—expansionary monetary and fiscal policies—and their limitations. When an economy is facing an economic downturn or is sliding into a recession, most jurisdictions have two tools in their toolkit to mitigate the negative economic consequences: monetary policies and fiscal stimuli. The first instrument is by far the most popular remedy to stimulate an economy. In charge of monetary policies are central banks, such as the U.S. Federal Reserve Bank (the Fed) or the European Central Bank (ECB). As the recent health and subsequent economic crisis have shown, the first reaction to address the potential economic consequences of COVID-19 was to increase the money supply in the economy. This technique is known as expansionary monetary policy. The idea behind monetary policies is to give businesses and households more money to spend during an economic downturn, which in turn helps mitigate the contraction and liquidity trap in the economy.[5] The central banks can achieve this goal by either lowering interest

5. A liquidity trap is when monetary policy becomes ineffective due to very low interest rates combined with consumers who prefer to save rather than invest. It was first described by economist John Maynard Keynes. *See* Maria A. Arias & Yi Wen, *The Liquidity Trap: An Alternative Explanation for Today's Low Inflation*, Fed. Res. Bank of St. Louis (Apr. 1, 2014), https://www

rates and making it more attractive to borrow and less attractive to save, or other more sophisticated measures, such as corporate bond purchasing programs. In March of 2020, the Fed extended its corporate bond purchasing program, buying debts from large employers to increase market liquidity.[6]

The second tool in the toolkit of governments is fiscal stimulus programs, such as subsidies or tax cuts that are given to businesses and households. Expansionary fiscal policy is a policy where a government agency, for example the Small Business Administration (SBA) or the Internal Revenue Service (IRS), expands the money supply by using budgetary tools. A recent example is the loans to small businesses approved by Congress in April 2020,[7] or the stimulus checks paid to Americans.[8] In most jurisdictions, fiscal policies are often the secondary choice to monetary policies. They come into play for political reasons or when the economy is facing a serious downturn that can no longer be handled by monetary policies alone.

But a hammer and a saw cannot fix every hole in the wall. Most policies are short-term only and limited at the zero-lower bound (ZLB). The ZLB is a macroeconomic problem where the short-term nominal interest rate[9] is at or near zero and can no longer be lowered. This causes a liquidity trap and limits the central bank's capacity to increase money supply in the markets. The ZLB problem resurfaced after the financial crisis in 2008 with interest rates close to zero. Amongst others, economist Paul Krugman has criticized the view that monetary policy under the ZLB is effective in promoting economic growth.[10] "Helicopter money,"[11] as first suggested by Milton Friedman and supported by the former Chair of the Federal Reserve Ben Bernanke, as well as bond buying programs that are part of central banks' quantitative easing (QE)[12] programs, can cause other serious problems, such as hyperinflation or, in the

.stlouisfed.org/publications/regional-economist/april-2014/the-liquidity-trap-an-alternative-explanation-for-todays-low-inflation [https://perma.cc/X6T5-YDFC].

6. Press Release, Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Board Announces Updates to Secondary Market Corporate Credit Facility (SMCCF) (June 15, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200615a.htm [https://perma.cc/U9VW-KLZU].

7. *See* Jim Tankersley et al., *Small-Business Aid Funds Run Dry as Program Fails to Reach Hardest Hit*, N.Y. Times (Apr. 21, 2020), https://www.nytimes.com/2020/04/15/us/politics/coronavirus-small-business-program.html [https://perma.cc/MQ9T-JSFQ].

8. *See* Richard Rubin, *Coronavirus Stimulus Payments: When Will They Be Sent and Who Is Eligible?*, Wall St. J. (May 11, 2020), https://www.wsj.com/articles/everything-you-need-to-know-about-the-payments-from-the-government-11585229988 [https://perma.cc/E79G-EKTA].

9. The short-term nominal interest rate is the interest rate before taking into account inflation and is set by the central banks. It forms the basis for other interest rates charged by banks and financial institutions.

10. Paul Krugman, *Stay the Course*, N.Y. Times (June 14, 2009), https://www.nytimes.com/2009/06/15/opinion/15krugman.html [https://perma.cc/4M5J-X4S2].

11. "Helicopter money" was a parable of dropping money from a helicopter used by Milton Friedman to illustrate how central banks make direct payments to individuals. *See ET Explains: What Is Helicopter Money and Why Is It in News?*, Econ. Times (Apr. 12, 2020), https://economictimes.indiatimes.com/news/et-explains/what-is-helicopter-money-and-why-is-it-in-news/articleshow/75106564.cms [https://perma.cc/3854-N6R9].

12. Quantitative easing is a monetary policy where a central bank buys government bonds or other financial assets to inject money into the economy to expand economic activity.

case of the Fed's corporate bonds purchasing program, extensive involvement of the government in private business.

Expansionary fiscal policies suffer from different limitations. One of them is the long reaction time of the government to invest money. Spending bills and tax cuts, as initiated by the American Recovery and Reinvestment Act of 2009, need approval from Congress.[13] Another major impediment to a more active fiscal policy is the government's inertia and reluctance to spend money. The reluctance often originates from the fear of increasing government debt.[14]

As a repose to the limitations of expansionary monetary and fiscal policies, this article suggests the application of expansionary legal polices.

B. Expansionary Legal Policy Is More Than Deregulation

The idea of expansionary legal policies was outlined by Yair Listokin in 2016,[15] followed by an article on countercyclical regulation by Jonathan Masur and Eric Posner.[16] Expansionary legal policies stimulate aggregate demand through law and regulation.[17] In other words, expansionary legal polices intend to adapt the laws to the business cycle and increase spending in times of economic crises. Different than monetary policies, legal means and regulations are not limited at the ZLB. On the contrary, they are most effective when monetary policies have reached their limits and interest rates cannot be lowered any further. Also, expansionary legal policies can help multiply the effects of fiscal stimulus programs by circumventing the spending inertia many governments face.[18] Pre–approved countercyclical regulation that is triggered in an economic downturn can release new funds into the economy without the lengthy legal or budgetary approval process. Two examples illustrate the idea of expansionary legal policies.

The first example, suggested by Listokin, is business cycle-sensitive utility-rate regulation.[19] Today, most utilities are natural monopolies. To avoid monopoly pricing, most governments regulate utility rates. In the United States, utility-rate regulation shows an interesting pattern: when demand goes down, as in recessions, utilities often raise their prices to cover their costs. Listokin suggests countercyclical utility regulation where prices stay the

13. *See* Kimberly Amadeo, *Expansionary Fiscal Policy and How It Affects You*, Balance (Jan. 31, 2020), https://www.thebalance.com/expansionary-fiscal-policy-purpose-examples-how-it-works-3305792 [https://perma.cc/QYP3-QRX5].

14. *See* Ángel Ubide, *Fiscal Policy at the Zero Lower Bound*, 5 Intereconomics 279, 279–80 (2019).

15. *See* Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 Yale J. on Reg. 791, 793 (2017) [hereinafter *Law and Economics of Recessions*]; *see also* Yair Listokin, *A Theoretical Framework for Law and Macroeconomics*, 21 Am. L. & Econ. Rev. 46, 46 (2019) [hereinafter *Theoretical Framework for Law and Macroeconomics*].

16. Jonathan Masur & Eric A. Posner, *Should Regulation Be Countercyclical?* (Univ. Chi. Law School Coase-Sandor Working Paper Series in Law & Econ., Working Paper No. 782, 2016).

17. *See Theoretical Framework for Law and Macroeconomics*, *supra* note 15, at 53–54.

18. *See* Ubide, *supra* note 14, at 285.

19. *See Law and Economics of Recessions*, *supra* note 15, at 852 n.185.

same at the ZLB and should be lowered during a liquidity trap.[20] The second example, suggested by Masur and Posner, is suspension of regulation, such as environmental regulation. They understand regulation as a corporate tax, and the suspension of regulation as a tax cut.[21] For example, the U.S. Environmental Protection Agency (EPA) has suspended the emission requirements during the COVID-19 crisis with the intention to reduce compliance costs on companies.[22] However, expansionary legal policies are more than just deregulation. Listokin points out that regulation is not in all cases equivalent to a tax: "[i]nstead, a considerable amount of regulation imposes spending mandates."[23] He describes the mandate as a hybrid between taxation and spending. For example, if the building standards for the Keystone pipeline between the United States and Canada were heightened (taxation), the State Department could have reduced environmental risks while at the same time increasing employment (spending).[24]

This article analyzes expansionary legal policies in the context of public procurement regulation. The macroeconomic analysis of public procurement is particularly interesting for several reasons. First, other than the two previous examples, government contracting directly regulates the government's expenditure side and has great potential to influence government spending. Public procurement makes up a significant part of total government spending—in the United States up to twenty-seven percent.[25] As a boundary case between fiscal and legal policies, public procurement combines two important macroeconomic instruments into one. Second, public procurement forms part of economic regulation, same as taxation, antitrust, or utility-rate regulation. Other than fields of law that are only loosely related to economic considerations, there is a stronger argument to be made for economic regulation to reflect the business cycle. Lastly, similar to utility and environmental regulation, public procurement forms part of administrative law, an often very dense and complex web of rules. Bringing such regulations closer to market reality and the business cycle may profit businesses, the government, and ultimately the society at large.

C. Different Economic Times Call for Different Regulations

Often regulations and laws are rather static in nature. Of course, statutes can be amended, or case law reversed, but this is often a lengthy process that

20. *Id.* at 833.

21. Masur & Posner, *supra* note 16, at 9.

22. *See* Lisa Friedman, *E.P.A., Citing Coronavirus, Drastically Relaxes Rules for Polluters*, N.Y. Times (Mar. 26, 2020), https://www.nytimes.com/2020/03/26/climate/epa-coronavirus-pollution-rules.html [https://perma.cc/K59U-QF6X].

23. Legal Remedies to Recessions, *supra* note 3, at 137.

24. *See Law and Economics of Recessions*, *supra* note 15, at 798.

25. *See Government at a Glance 2015*, Organisation for Econ. Cooperation & Dev. 139 (2015), https://www.oecd-ilibrary.org/docserver/gov_glance-2015-en.pdf?expires=1598217078&id=id&accname=guest&checksum=3D3C2871A21D5D8B4ED228E11B845359 [https://perma.cc/2TLA-Y84Z].

takes years.[26] Many changes in law happen independently from the overall macroeconomic situation and are often a reaction to specific events, such as the financial meltdown in 2008, rather than the overall macroeconomic situation.[27] While the political situation can change and influence the law to a large extent, macroeconomic effects and business cycles have played a less prominent role in lawmaking. This rigidity of the law is often a good thing because it creates legal certainty and trust in the legal system.[28] But sometimes the law's rigidity can exacerbate economic problems. Consider the current economic contraction caused by COVID-19. Many could not go into work or were laid off; however, the Coronavirus Aid, Relief, and Economic Security (CARES) Act only temporarily paused evictions for renters in buildings with government backed loans, which was insufficient relief for those covered and left many without any protection.[29] The only intervention, if any, came from the Executive, from state governors, or from private landlords that showed leniency towards financially distressed renters.

Some laws, such as contract law, have clauses that liberate parties from their obligations in extraordinary circumstances—a concept known as "force majeure" or hardship.[30] This concept usually applies to natural hazards like floods or earthquakes, and in some limited circumstances extends to events caused by human intervention, such as strikes.[31] Administrative laws and regulations do not know such clauses. They can be amended by way of the ordinary lawmaking process; in the United States this means going either through the approval of Congress (for statutes) or notice and comments procedures (for regulations).[32] The last resort, the *ultima ratio* to change the law, is the President's emergency powers. These are originally designed to apply to war situations.[33]

26. *See generally* Symposium, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471 (2011) (describing the lengthy process of agency rulemaking).

27. *See* Jay B. Sykes, Cong. Research Serv., R45162, Regulatory Reform 10 Years After the Financial Crisis: Systemic Risk Regulation of Non–Bank Financial Institutions 8–9 (2018).

28. *See* Nat'l Mining Ass'n v. Sec'y U.S. Dept. of Labor, 812 F.3d 843, 862 (11 Cir. 2016).

29. *See* Dan Keating & Lauren Tierney, *Which States Are Doing a Better Job Protecting Renters from Being Evicted During the Coronavirus Pandemic*, Wash. Post (Apr. 29, 2020), https://www.washingtonpost.com/nation/2020/04/29/which-states-are-doing-better-job-protecting-renters-being-evicted-during-coronavirus-pandemic/?arc404=true [https://perma.cc/NQ5G-5KST].

30. *See* Janice M. Ryan, *Understanding Force Majeure Clauses*, Venable (Feb. 2011), https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses [https://perma.cc/6TJN-AM8V].

31. Damian McNair, *Force Majeure Clauses—Revisited*, DLA Piper (June 2012), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjV4dO4x-rrrAhWkT98KHZG5C7QQFjAAegQIBRAB&url=https%3A%2F%2Fwww.dlapiper.com%2F~%2Fmedia%2Ffiles%2Finsights%2Fpublications%2F2012%2F06%2Fiforce-majeurei-clauses--revisited%2Ffiles%2Fforcemajeureclausesrevisited%2Ffileattachment%2Fforcemajeureclausesrevisited.pdf&usg=AOvVaw1iis37_0BHTZu0gUqB5KB7 [https://perma.cc/QCA9-SGRM].

32. *See How Laws Are Made and How to Research Them*, USA.gov (Mar. 16, 2020), https://www.usa.gov/how-laws-are-made [https://perma.cc/6CRL-74V9].

33. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385, 1390–91 (1989).

Since emergency powers are invoked without congressional involvement and on short notice, executive emergency powers often enjoy less democratic legitimacy and have less checks and balances in place to protect against abuse of power.[34]

Another way the law can be changed is by the judiciary. Studies have analyzed how courts and judges have changed the law.[35] Most of these studies are focused on political forces and partisan preferences of the highest courts (the political model).[36] Only a few recent studies have analyzed how courts, in particular the U.S. Supreme Court, changed its decision-making on macroeconomic grounds.[37] This observation may seem unusual, since fiscal and monetary policies are either the responsibility of the President or Congress. The U.S. Supreme Court, however, often decides cases that impact the national economy.[38] Studies conducted by law professors at Northwestern University found that the U.S. Supreme Court did not increase, but rather decreased, deference to the executive branch during recessions.[39] One explanation is that the Court attributes recessions to the incompetency of the government and tries to take power away from the executive.[40]

When the executive and the judiciary are changing the law based on different business cycles, why should the law itself not be able to reflect the macroeconomic situation? This idea is especially relevant for economic regulation, which is closely related to the business cycle. This article argues that certain economic regulations, especially the ones concerned with the expenditure side of the government, such as public procurement, should have expansionary legal policies in place that may be triggered when the economy is heading towards a recession. The specific design and application of such policies will be discussed in Parts III and IV.

II. THREE RECENT EXAMPLES OF EXPANSIONARY LEGAL POLICIES IN PUBLIC PROCUREMENT

The current health crisis has produced—for better or worse—new cases of expansionary legal policies. Governments have adopted legal policies in public procurement to respond to the negative economic consequences triggered by COVID-19. On March 20, 2020, the U.S. Office of Management and Budget

34. *See* Eric Boehm, *Senators Rand Paul and Ron Wyden Pitch New Limitations on Presidential Emergency Powers*, Reason (June 12, 2019), https://reason.com/2019/06/12/senators-rand-paul-and-ron-wyden-pitch-new-limitations-on-presidential-emergency-powers/ [https://perma.cc/3TNN-LDWA].

35. Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. Pitt. L. Rev. 545, 565–66 (2004).

36. *See*, *e.g.*, Thomas Brennan et al., *The Political Economy of Judging*, 93 Minn. L. Rev. 1503, 1506 (2009) [hereinafter Brennan I].

37. *See*, *e.g.*, Thomas Brennan et al., *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 Duke L.J. 1191, 1194 (2010) [hereinafter Brennan II].

38. *See* Brennan I, *supra* note 36, at 1505.

39. *See id*. at 1508; *see also* Brennan II, *supra* note 37, at 1191–92.

40. Brennan I, *supra* note 36, at 1508.

(OMB) announced "emergency procurement flexibilities" for federal agencies as a response to COVID-19.[41] On March 27, 2020, Switzerland, a European country strongly affected by COVID-19, adopted recommendations to mitigate the negative consequences of the crisis through government procurement.[42] Yet, these two instances are not the first examples of expansionary policies adopted in public procurement. A prominent and early example is Germany's relaxed procurement rules that were launched after the financial crisis in 2009.[43] The analysis of the three policy examples allows for a twofold comparison: first, a comparison of COVID-19 measures between the United States and a European country; and second, a comparison of measures as a reaction to a health crisis versus a financial crisis.

Before critically analyzing the design, application, and effects of these policies, this article will briefly describe the different policies, using the following framework: authority and power to issue the policy; timing and duration of the policy; targeted sectors; stated goals of the policy; suggested measures, both in regulation and enforcement; and quantitative and qualitative effects of the policy (where available).

A. U.S. Emergency Procurement Flexibilities Against COVID-19

In March 2020, the OMB issued a memorandum to federal agencies on Managing Federal Contract Performance Issues Associated with COVID-19 (OMB Memorandum).[44] The emergency procurement flexibilities contained in the OMB Memorandum are based on President Trump's emergency declaration under section 501(b) of the Stafford Disaster Relief and Emergency Assistance Act.[45] While the duration of the measures is not clearly specified in the OMB Memorandum, contractors can track and report COVID-19-related tasks in the procurement system until July 2020.[46]

The OMB Memorandum was issued to all federal agencies and is not limited to a certain sector. But the OMB Memorandum suggests that contracts, which address impending requirements, such as security or logistics, may be "retooled for pandemic response."[47] The OMB Memorandum aims to achieve

41. Memorandum from the Office of Mgmt. & Budget, Exec. Office of the President to the Heads of Exec. Dep'ts & Agencies on Managing Federal Contract Performance Issues Assoicated with the Novel Coronavrius (COVID-19) 5 (2020) [hereinafter OMB Memorandum].

42. *See generally* Beschaffungskonferenz des Bundes (BKB), Coronavirus: Handlungsspielraum zur Milderung der Auswirkungen auf die schweizerische Volkswirtschaft aus Sicht des öffentlichen Beschaffungswesens [Coronavirus: Scope of the Mitigation of the Effects on the Swiss Economy from a Public Procurement Perspective] (2020) [hereinafter BKB Recommendations] (containing recommendations from the Swiss Federal Procurement Conference in collaboration with the Coordination Group for Construction and Property ServicesDo).

43. *See generally* Gesetz zur Sicherung von Beschäftigung und Stabilität in Deutschland, [Law to Secure Employment and Stability in Germany], Mar. 2, 2009, Bundesgesetzblatt, Teil I [BGBl I] (Ger.) [hereinafter German Economic Stimulus Package II].

44. OMB Memorandum, *supra* note 41, at 1.

45. *Id.* at 2.

46. *Id.* at 7.

47. *Id.* at 1.

two goals: first, protection of the health and safety of all Americans, and second, continued contract performance by the effective leveraging of flexibilities, and minimizing work disruption. It states that the flexibilities should enable more rapid responses to pressing demands while agencies should exercise sound fiscal prudence to maximize value for taxpayers' money.[48] To achieve these goals, the OMB Memorandum lists the following measures:

i. Application of emergency procurement flexibilities in line with the Federal Acquisition Regulation (FAR) §18.202 "Defense or recovery form certain attacks,"[49] including
   a. Increase of micro-purchase threshold from $10,000 to $20,000;
   b Increase of simplified acquisition threshold from $250,000 to $750,000; and
   c. Increase of commercial items acquisition threshold to $13 million;[50]
ii. Retooling of existing contracts for pandemic response;[51] and
iii. Extension to performance dates.[52]

The enforcement of these measures is voluntary for all federal agencies. However, the OMB Memorandum stresses that "the acquisition workforce should feel fully empowered to use the acquisition flexibilities, as needed."[53] The OMB Memorandum further clarifies that contracting officers are typically expected to give preferences to local firms during emergencies, but that this requirement does not apply during a nationwide pandemic.[54]

B. Swiss Public Procurement Response to COVID-19

On March 27, 2020, the two strategic procurement committees—the Swiss Coordination Group for Construction and Property Services (KBOB) and the Federal Procurement Conference (BKB)—issued formal Recommendations for "the mitigation of the effects [of COVID-19] on the Swiss economy from a public procurement perspective."[55] The Recommendations are based on the Federal Council's emergency powers,[56] and are in force for six months

48. *Id.*
49. FAR 18.202; *see also* OMB Memorandum, *supra* note 41, at 6.
50. OMB Memorandum, *supra* note 41, at 5–6.
51. *Id.* at 1.
52. *Id.*
53. *Id.* at 2.
54. *Id.* at 6–7.
55. Koordinationskonferenz der Bau- und Liegenschaftsorgane der öffentlichen Bauherren (KBOB), Coronavirus: Handlungsspielraum zur Milderung der Auswirkungen auf die schweizerische Volkswirtschaft aus Sicht des öffentlichen Beschaffungswesens [Coronavirus: Scope to Mitigate the Effects on the Swiss Economy from a Public Procurement Perspective] 1 (2020) [hereinafter KBOB Recommendations] (containing recommendations from the Coordination Group for Construction and Property Services in collaboration with the Federal Procurement Conference); BKB Recommendations, *supra* note 42, at 1.
56. Verordnung 2 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19) [Ordinance 2 on Measures to Combat the Coronavirus (COVID-19)], Mar. 13, 2020, SR 818.101.24, art. 7 (Switz.).

after the emergency ends.[57] While the KBOB Recommendations target public sector construction,[58] the BKB Recommendations target the procurement of supplies and services, with a focus on medical equipment, drugs, and IT services.[59] The Recommendations follow two goals: first, slowing down the spread of the virus, and second, limiting the negative economic consequences, including the risk of unemployment.[60] These goals shall be achieved through coordinated agency action and by simplifying the procurement process.[61] To that end, the Recommendations suggest the following measures:

i. Exhaustion of existing procurement thresholds;
ii. Use of direct awards for unforeseeable and urgent events (urgency exemption in art. 13(1)(d) Public Procurement Ordinance);[62]
iii. Expedited contract awards through faster offer evaluation (health exemption in art. 3(2) Public Procurement Act);[63]
iv. Extension of contract duration and increase of quantities (public health exemption in art. 3(2) Public Procurement Act);
v. Extension of offer deadlines; and
vi. Grant of additional funds for delays caused by COVID-19.[64]

The Swiss government also relaxed the enforcement of procurement contracts during the COVID-19 crisis. It asked contracting agencies to refrain from enforcing fines for non–compliance, and it introduced instant payment of contractors and electronic invoicing.[65]

C. Germany's Relaxed Procurement Rules After the Financial Crisis

As part of the Economic Stimulus Package II, the German government decided to relax public procurement rules (Vergaberechtserleichterungen) for works[66] and for supplies and services[67] from January 2009 until December 2010. The

57. *See* KBOB Recommendations, *supra* note 55, at 2.
58. *See id.* at 3.
59. BKB Recommendations, *supra* note 42, at 4.
60. KBOB Recommendations, *supra* note 55, at 6.
61. *Id.*
62. Verordnung über das öffentliche Beschaffungswesen [VöB] [Public Procurement Ordinanace] Dec. 11, 1995, SR 172.056.11, art. 13, para. 1 (Switz.) [hereinafter Public Procurement Ordinance].
63. Bundesgesetz über das öffentliche Beschaffungswesen [BöB] [Public Procurement Act] Dec. 16, 1994, SR 172.056.1, art. 3, para. 2 (Switz.) [hereinafter Public Procurement Act].
64. *See* KBOB Recommendations, *supra* note 55, at 2–4.
65. *See id*. at 2.
66. Bundesrechnungshof, Bericht über die Auswirkungen der Vergabeerleichterungen des Konjunkturpakets II auf die Beschaffung von Bauleistungen und freiberuflichen Leistungen bei den Bauvorhaben des Bundes [Report on the Effects of the Relaxed Procurement Rules of the Economic Stimulus Package II on Federal Construction Procurements] 9, 24 (2012) [hereinafter Audit Report on Relaxed Construction Procurement].
67. *See* Bundesrechnungshof, Bericht über die Auswirkungen der Vergaberechtslockerungen im Rahmen des Konjunkturpakets II auf die Beschaffung von Lieferungen und Leistungen durch die Bundesverwaltung [Report on the Effects of the Relaxed

government's goal was to bring public investments more quickly into the economy.[68] The relaxed procurement rules were designed to fulfill three goals: (1) accelerating procurement and construction processes; (2) ensuring transparency and competition; and (3) procuring at economic prices.[69] The government provided the procurement authorities with the following measures:

i. Increased thresholds allowing agencies to use limited auctions (up to €1 million) and direct awards (up to €100,000) instead of public tenders;[70]

ii. Use of pre–qualified company lists to select contractors;

iii. Publication of contract data after the award (*ex post* transparency);[71] and

iv. Shortened procurement deadlines for EU-wide tenders.[72]

Other than the U.S. and Swiss policies, the German procurement policies have been evaluated for their effectiveness by the German Federal Audit Office in 2012 (the Audit Report). For that purpose, the Audit Office analyzed 16,000 public construction contracts awarded by four regional construction authorities and the Federal Office for Building and Regional Planning (BBR)[73] and around 100 supplies contracts.[74] In the Audit Report, the German Audit Office found that while regional and federal *building* authorities made extensive use of the relaxed procurement rules, road and other authorities did not rely on the relaxed rules.[75] With the relaxed procurement rules, the non–public tenders increased from forty-nine to seventy-eight percent.[76] However, the construction authorities only made use of the flexibilities in half of the cases.[77] The two largest building authorities reported that the relaxed procurement rules have expedited the procurement and construction process by two and eight percent respectively.[78] For supplies and services, the Audit Office reported time savings of two weeks.[79] The Audit Office also found that the shift from public tenders to limited auctions led to increased government spending in building construction by thirteen percent or €50–70 million.[80] Due to the shift from open tenders to limited auctions, the number of offers decreased by twelve percent in building construction.[81] The Audit Office fur-

Procurement Rules of the Economic Stimulus Package II on Federal Supplies and Services Procurements] 5 (2012) [hereinafter Audit Report on Relaxed Supply Procurement].

68. Audit Report on Relaxed Construction Procurement, *supra* note 66, at 3.

69. *Id.*

70. *Id.* at 9.

71. *Id.* at 3; *see also Ausschreibungen*, Bund.de: Verwaltung Online, https://www.service.bund.de/Content/DE/Ausschreibungen/Suche/Formular.html?nn=4641514 [https://perma.cc/TT9Z-2P5B] (last visited Aug. 16, 2020) (Germany's public tender database).

72. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 10.

73. *Id.* at 8.

74. *See* Audit Report on Relaxed Supply Procurement, *supra* note 67.

75. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 10–11.

76. *Id.* at 11.

77. *Id.*

78. *Id.* at 12.

79. Audit Report on Relaxed Supply Procurement, *supra* note 67, at 7.

80. Audit Report on Relaxed Construction Procurement, *supra* note 66, at 6.

81. *Id.* at 5.

ther observed that procuring agencies limited competition to regional suppliers.[82] One construction authority reported that the distance of companies to the construction sites decreased by twenty-seven percent between 2009–2010 (i.e. projects became more local).[83] In terms of *ex post* transparency, building authorities did not publish all contracts as required. As a consequence, the Audit Office feared that corruption risks increased, however, without providing quantitative data.[84] Overall, the Audit Office concluded that the goals of the relaxed procurement rules were not met fully and therefore recommended not extending the policies beyond 2010.[85]

III. DIFFERENT DESIGNS OF EXPANSIONARY LEGAL POLICIES ILLUSTRATED BY PUBLIC PROCUREMENT LAW

Expansionary legal polices come in many different shapes and forms. This Part discusses three important design choices: (1) whether "one policy fits all crises;" (2) whether suspension of regulation or enforcement is more effective; and (3) whether and to what extent policies should be coordinated. Following the questions of "how to buy," this article will delve into the question of "what to buy," highlighting the link between fiscal and legal policies and the importance of the different procurement sectors for macroeconomic purposes.

A. Same Remedy for Different Crises?

The procurement policies in the United States, Switzerland, and Germany were triggered by different crises: the U.S. and Swiss policies are responses to the COVID-19 crisis, and the German policies were a reaction to the financial crisis in 2008, and the distinct nature of the crises is reflected in the measures the governments chose. The U.S. and Swiss policies provide measures that address health effects, such as telework, and measures that address the economic consequences of the crisis, such as expediting and increasing government spending. The German procurement policies, on the other hand, were mostly focused on mitigating the economic effects of the financial crisis.

While it is sensible to issue *different crisis-specific measures*, for example health-related measures to address the specific needs of a crisis, the economic consequences that flow from different crises are often the same and ask for *similar economic measures*. Whether a crisis is triggered by the bursting of a mortgage bubble (financial crisis) or a pandemic (COVID-19 crisis), crises slow down economic growth, decrease liquidity, and eventually lead to higher unemployment. For example, during the financial crisis, the real GDP in the United States fell nearly $630 billion (4.3%), and the unemployment rate

82. *Id.*
83. *See id.* at 17.
84. *See id.* at 8.
85. *Id.* at 4.

climbed to 10% in 2009.[86] During the COVID-19 crisis, the real GDP of the United States was forecast to fall at 38% in the second quarter, and the unemployment rate skyrocketed to 14.7% in April 2020.[87]

Because economic consequences of a crisis are often the same (albeit different in their magnitude), expansionary legal policies can and should be similar in their design.

B. Relaxed Regulation or Relaxed Enforcement?

Countercyclical regulation, as referred to by Masur and Posner, can take different forms: the agency can (1) relax the regulation during a downturn; (2) maintain the regulation but suspend enforcement; or (3) refrain from issuing new regulations during the downturn.[88]

The three expansionary procurement policies discussed above are focused on the first category: the relaxation of existing regulation. With the exception of one measure—the extension of the offer deadline (in the U.S. and Switzerland policies)—all measures were targeted towards expediting spending. The higher tender thresholds in all three policies give agencies more flexibility to expedite and increase spending. The same holds true for the extension of contracts and quantities, the shortened tender deadlines, and the fast payment requirements, as adopted in the Swiss policies. As mentioned above, the EPA chose a similar approach and relaxed the emissions requirements for companies in March 2020 to increase companies' spending power during COVID-19.[89] The relaxation of existing rules is within the bounds of the agency's standard rulemaking powers.[90] However, because rulemaking takes time—in the U.S., up to four years[91]—a new regulation will often come too late to stimulate the economy. One way to avoid this dilemma is to preventively adopt "automatic stabilizing provisions" that will be discussed in Part IV.B.

An alternative approach to the relaxation of rules is the suspension of enforcement, also known as regulatory forbearance.[92] For the suspension of enforcement, no formal rulemaking is required and agencies can act within

86. *Real Gross Domestic Product*, Fed. Res. Bank of St. Louis (last updated July 30, 2020), https://fred.stlouisfed.org/series/A191RL1Q225SBEA [https://perma.cc/A4JU-L7LN]; *Households and Nonprofit Organizations; Net Worth, Level*, Fed. Res. Bank of St. Louis (last updated June 11, 2020), https://fred.stlouisfed.org/series/TNWBSHNO [https://perma.cc/FU8U-YDQT]; Evan Cunningham, U.S. Bureau of Labor Stat., *Great Recession, Great Recovery? Trends from the Current Population Survey*, Monthly Labor Rev., Apr. 2018, at 1–3, https://www.bls.gov/opub/mlr/2018/article/great-recession-great-recovery.htm [https://perma.cc/4BMA-FP5A].

87. Cong. Budget Office, Interim Economic Projections for 2020 and 2021 (2020), https://www.cbo.gov/publication/56368 [https://perma.cc/UTB6-V5QK] (follow "Download Document" link).

88. *See* Masur & Posner, *supra* note 16, at 19–21.

89. Friedman, *supra* note 22.

90. Masur & Posner, *supra* note 16, at 19.

91. U.S. Gov't Accountability Office, GAO-09-205, Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as well as to the Transparency of OMB Regulatory Reviews 2 (2009).

92. Masur & Posner, *supra* note 16, at 20.

their ordinary authority.[93] The Swiss procurement policies were the only ones among the three examples that have relaxed enforcement. The KBOB Recommendations allowed federal agencies to suspend the enforcement of fines for contractors' non–compliance with regard to time, quantity, or quality.[94] Similarly, the EPA decided not to issue fines for violations of emission standards during the COVID-19 crisis.[95]

Relaxing enforcement is often the faster and more flexible way to impact the business cycle. Agencies do not need to go through a lengthy lawmaking process. However, suspending the enforcement of fines will only marginally increase spending. Since nothing speaks against combining the two measures, the author suggests that future expansionary procurement policies should make greater use of suspending enforcement but limit the suspension in time to avoid abuse.

C. Coordinated Action and Centralized Authority

The expansionary procurement policies in the United States, Switzerland, and Germany apply to all federal agencies and covered all sectors. To give agencies some guidance and ensure that the policies achieve their full potential, two elements are key: first, coordination among agencies; and second, macroeconomic expertise of the agency.

Coordination among agencies is key to ensure the effectiveness of expansionary legal policies. But coordination does not equal uniform application. For instance, in Germany only the building authorities made use of the relaxed rules, while the road authorities and other agencies made little to no use of the exceptions.[96] This article argues that it should be left to the discretion of each agency whether to apply the expansionary legal policy. For example, while promoting the production of medical supplies is a sensible measure to deal with COVID-19, the relaxation of services procurement, such as consulting or legal services, will not help address health-related needs.

With freedom comes responsibility. When applying expansionary legal polices, the agencies must respect some boundaries. First, when an agency decides to make use of the expansionary legal policy, the agency must treat all suppliers fairly and equally—equal treatment of suppliers is one of the core principles of public procurement law.[97] While differential treatment of suppliers *between* agencies may be justified due to different mandates, suppliers of the same agency should be treated equally. Second, when an agency decides not to apply the expansionary policy, it needs to give reasons. Making the agency's decision transparent does not only inform the public about the use

93. *Id.*
94. *See* KBOB Recommendations, *supra* note 55, at 2.
95. Friedman, *supra* note 22.
96. Audit Report on Relaxed Construction Procurement, *supra* note 66, at 10–11.
97. *See*, *e.g.*, FAR 1.102(b)(3); Directive 2014/24, of the European Parliament and of the Council of 26 February 2014 on the Public Procurement and Repealing Directive 2004/18/EC, art. 67, 2014 O.J. (L 94) 4.

of public resources, but also reduces the risk of corruption. For instance, in Germany the road authorities stated that they did not make use of the relaxed rules because open tenders would secure better prices and protection against corruption.[98] Third, even though agencies enjoy wide discretion, this does not exclude coordination among agencies. On the contrary, agency coordination is crucial.

The Swiss COVID-19 Redocumentations understand coordinated actions among federal agencies as a core goal and encourage the two strategic committees—KBOB and BKB—to coordinate their actions.[99] In Germany, different ministries were responsible for the implementation of the procurement relaxations. While the Federal Ministry for the Interior, Building and Community (BMI) was responsible for implementing the procurement relaxations in the public construction sector, the Federal Ministry for Economic Affairs and Energy (BMWi) was responsible for implementing the relaxed rules for the procurement of supplies and services.[100] The Audit Report revealed that the two ministries were not equally strict with the implementation of the relaxed rules. While the BMWi has properly evaluated and submitted an evaluation report at the end of the term,[101] the BMI has failed to conduct the necessary analyses pre– (performance audit) and post– (evaluation report) introduction of the relaxed rules.[102] Had the agencies coordinated their efforts, shared their experiences, and communicated with each other, results could have been improved.

Expertise in macroeconomic policy is another crucial element of the expansionary legal policies' success. While most agencies have vast sector-related and procurement-related expertise, most agency officials are lawyers who have not been trained in economics. For that reason, Listokin has suggested the establishment of a centralized Office for Fiscal and Regulatory Affairs (OFRA) in the United States.[103] The new Office should be staffed not only with lawyers and regulators, but also with economists. The Office would fulfill a similar oversight function as the Office of Information and Regulatory Affairs (OIRA). Instead of overseeing the costs and benefits of prospective regulations, OFRA would review the effects of regulations on macroeconomic stability. This effort would not be the first attempt in the United States. In 1974, President Ford required that major proposals for regulations must be accompanied by a statement certifying the inflationary impact of the proposal, so called "inflation impact statement."[104]

Similar offices could be established in other jurisdictions. For instance, in Switzerland an office of fiscal and macroeconomic policy could either be

98. Audit Report on Relaxed Construction Procurement, *supra* note 66, at 11.
99. *See* KBOB Recommendations, *supra* note 55, at 6.
100. Audit Report on Relaxed Supply Procurement, *supra* note 67, at 5.
101. *Id.*
102. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 4.
103. Legal Remedies to Recessions, *supra* note 3, at 110.
104. *See* Legal Remedies to Recessions, *supra* note 3, at 110; Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 29, 1974).

established within the Swiss State Secretariat for Economic Affairs (SECO), which is responsible for reviewing regulatory impact assessment, or within the Federal Chancellery. At the EU level, the office could be integrated into the European Commission either as a new Directorate-General, or as part of the Regulatory Scrutiny Board, an independent supervisory body that reviews regulatory impact assessments of EU regulations.[105] The EU Impact Assessment Guidelines of 2009 already allow agencies to consider the impact of regulations on macroeconomic stability and employment.[106]

Hence, a centralized office for fiscal and regulatory affairs will not only gather and share macroeconomic knowledge with all agencies and therewith improve enforcement and performance of expansionary legal and fiscal policies. It will also help coordinate agency actions to achieve a harmonized answer to a recession.

D. Which Sector to Target?

The previous sections and the expansionary procurement policies examples are mostly concerned with the issue of *how* to buy, focusing on the relaxation of procurement procedures. Other important questions are *what* to buy and *how much* to buy. These questions are closely related to fiscal policies and highlight the hybrid nature of expansionary procurement policies that include both legal and fiscal aspects. This section will elaborate on beneficial sectors for expansionary procurement policies, including the public infrastructure sector, the potential for green public procurement, and the healthcare sector.

1. The Connex Between Legal Policies and Fiscal Stimuli

Expansionary legal policies are often coupled with fiscal policies that address structural or immediate needs. For example, the German Economic Stimulus Package II not only relaxed procurement rules, but also approved a fiscal stimulus package of €16.9 billion to be spent on education and public infrastructure.[107] This spending mandate provided guidance to procuring agencies on what to purchase, and explained why building authorities have made use of the relaxed rules, while other agencies were more reluctant. The procurement relaxations led to an increase in construction spending of thirteen percent or €50–70 million on average.[108] The Audit Office estimated that the spending increase would have been double (€100–140 million) if road and other authorities made use of the relaxed rules as well.[109]

Similar to Germany's position, the Swiss COVID-19 Recommendations recognize the importance of the public construction sector and encourage

105. *See Regulatory Scrutiny Board*, European Commission, https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en [https://perma.cc/Y539-4S9J] (last visited Aug. 24, 2020).

106. European Comm'n, Impact Assessment Guidelines 34 (2009).

107. German Economic Stimulus Package II, Mar. 2, 2009, BGBl I at 417, art. 6, § 2 (Ger.).

108. German Report on Relaxed Construction Procurement, *supra* note 66, at 6.

109. *Id.*

federal agencies to apply procurement flexibilities in the construction sector. The Recommendations stress that the construction sector is of unique importance to the Swiss economy.[110] It amounts to fifteen percent of the national GDP,[111] and federal agencies procure construction projects in the amount of CHF 20 billion every year.[112] To ensure the continuance of existing construction projects, the KBOB Recommendations endorse that construction sites should not be closed during the crisis, respecting the necessary health precautions.[113] The BKB Recommendations on procurement flexibilities for supplies and services on the other hand, focus more on health-related needs. The recommendations encourage agencies to make use of the procurement flexibilities in sectors that help mitigate the consequences of the pandemic, such as medical supplies and drugs, and the continuance of the public administration, such as telework.[114]

The U.S. procurement policies follow a similar approach. The OMB Memorandum recommends federal agencies assess "whether contracts that possess capabilities for addressing impending requirements such as security, logistics, or other function, may be retooled for pandemic response consistent with the scope of the contract."[115] This recommendation goes in line with a fiscal stimulus package issued to hospitals in the amount of $100 billion,[116] and is followed by large purchases of medical supplies like face masks, ventilators, and drugs by the Department of Health and Human Services (HHS).[117]

Hence, to increase the effectiveness of expansionary legal policies, they should be coupled with fiscal stimuli that target sectors of structural importance, such as public infrastructure, or sectors that are directly affected by the crisis, such as the healthcare sector.

2. Why Invest in Public Infrastructure?

It is a common response for economies in distress to invest into public infrastructure. For example, during the New Deal era the Works Progress Administration financed a variety of projects, such as hospitals, school and roads,

110. KBOB Recommendations, *supra* note 55, at 5.
111. *Id.*
112. *Id.*
113. *Id.* at 3.
114. BKB Recommendations, *supra* note 42, at 4.
115. OMB Memorandum, *supra* note 41, at 1.
116. *See* Emily Cochrane & Sheryl Gal Stolberg, *$2 Trillion Coronavirus Stimulus Bill Is Signed into Law*, N.Y. Times (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/coronavirus-house-voting.html [https://perma.cc/Y82G-CH8R].
117. *See* Mark Maremont et al., *U.S. Pays High Prices for Masks from Unproven Vendors in Coronavirus Fight*, Wall St. J. (Apr. 18, 2020), https://www.wsj.com/articles/u-s-pays-high-prices-for-masks-from-unproven-vendors-in-coronavirus-fight-11587218400 [https://perma.cc/4ZA8-9GRR]; *see also* Peter Loftus, *U.S. Buying More Than $2.5 Billion in Ventilators for Coronavirus Patients*, Wall St. J. (Apr. 14, 2020), https://www.wsj.com/articles/u-s-buying-more-than-2-5-billion-in-ventilators-for-coronavirus-patients-11586901754 [https://perma.cc/ZX95-B76X].

including 650,000 miles of highways and 125,000 public buildings.[118] A more recent example is the shovel-ready projects of the American Recovery and Reinvestment Act of 2009,[119] a cornerstone of which was a $48.1 billion funding allowance for transportation infrastructure.[120]

Why are public infrastructure projects so popular to stimulate the economy? First, public construction is pro–cyclical, which means that public construction is cheapest when the economy is weak.[121] Second, most countries are in need of renewing or building public infrastructure, like school buildings, bridges, or highways. For example, for years the United States has been in an infrastructure crisis and in urgent need of investments into public transportation, roads, and highways.[122] Third, public construction makes up a large part of government spending and can exert a significant impact on the economy. Aside from its sheer size and importance, input-output tables of the U.S. Bureau of Economic Analysis show that the construction sector is a central sector in the U.S. economy and highly interconnected with other sectors.[123] The consequence is that stimuli to the construction sector also reach connected sectors, such as cement or wood, and exacerbate the fiscal stimulus effect. Researchers at the Massachusetts Institute of Technology found that important and highly interconnected sectors, such as the construction sector, have possible "'cascade effects' whereby productivity shocks to a sector propagate not only to its immediate downstream customers, but also the rest of the economy."[124]

But investments into public infrastructure also faced criticism. For instance, the shovel-ready projects under the American Recovery Act often failed.[125]

118. *See* Matt Blitz, When America's Infrastructure Saved Democracy, Popular Mechanics (Jan. 23, 2017), https://www.popularmechanics.com/technology/infrastructure/a24692/fdr-new-deal-wpa-infrastructure/ [https://perma.cc/3X2D-JHEM].

119. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3(a)(4), 123 Stat. 115, 116.

120. Shoshana Lew & John Porcari, *Eight Years Later: What the Recovery Act Taught Us about Investing in Transportation*, Brookings (Feb. 22, 2017), https://www.brookings.edu/blog/the-avenue/2017/02/22/eight-years-later-what-the-recovery-act-taught-us/ [https://perma.cc/87XR-EPYZ].

121. *See* Leland S. Burns & Leo Grebler, *Is Public Construction Countercyclical?*, 60 Land Econ. 367, 375 (1984).

122. *See* Karl Russell & Conor Dogherty, *America's Infrastructure Is Getting Worse*, N.Y. Times (Sept. 18, 2016), https://www.nytimes.com/interactive/2016/09/16/business/economy/infrastructure-gdp-age-traffic.html [https://perma.cc/ASK8-YL6V]; *see also* Emily Cochrane, *'Infrastructure Week' Returns as Trump and Democrats Eye Post–Virus Jobs Plan*, N.Y. Times (Apr. 1, 2020), https://www.nytimes.com/2020/04/01/us/politics/infrastructure-week-coronavirus.html [https://perma.cc/R392-KZXH].

123. *See* Andrew Foerster & Jason Choi, *The Changing Input-Output Network Structure of the U.S. Economy*, Fed. Res. Bank of Kan. City (July 5, 2017), https://www.kansascityfed.org/publications/research/er/articles/2017/2q17foersterchoi-changing-input-output-network-structure [https://perma.cc/3ADQ-3SRA] (follow "Dowload Article" link) (showing construction sector centrality and network interconnectivity).

124. Daron Acemoglu et al., *The Network Origins of Aggregate Fluctuations*, 80 Econometrica 1977, 1977 (2012) (internal quotation marks omitted).

125. *See* Tim Worstall, *The Reason That Shovel Ready Stimulus Didn't Work Is That There Wasn't Any Stimulus*, Forbes (Nov. 1, 2013), https://www.forbes.com/sites/timworstall/2013/11/01/the

One issue was that the projects were often not shovel-ready and launched with a delay.[126] Under the Recovery Act, most shovel-ready projects were ready to start anywhere between six months to one year.[127] Another issue was unspent money—an example is the road project of Northern Virginia outside Washington, D.C.[128] The reasons for these delays or missed investments are that large infrastructure projects are very complex, involve different levels of government, and need a lot of preparation work and funding.[129]

As one solution to these problems, the author proposes investing in repair and maintenance projects instead of new infrastructure projects. In contrast to new construction projects, repair projects can be implemented more rapidly, without the same planning effort.[130] For that same reason, the KBOB Recommendations suggest giving priority to maintenance projects over new construction projects.[131] The OMB Memorandum specifically mentions repair works and recommends that they can be continued on a case-by-case basis even during a lockdown.[132] Another advantage of maintenance projects is that tender thresholds for works, including repair works, are higher than for supplies and services.[133] This allows procuring agencies to use more flexible and expedited procurement procedures for maintenance projects.

Investing into public infrastructure is an investment into a core sector of most economies. Due to unique properties, such as size and centrality, expansionary legal policies that address the construction sector, especially repair and maintenance projects, will have a large effect on stimulating the economy.

3. The Case for Green Public Procurement

Increasingly more public infrastructure projects and stimulus programs are concerned with the reduction of emissions and the increase of energy-efficiency. The focus on sustainable infrastructure has wide-ranging environmental consequences because buildings make up a considerable share of energy

-reason-that-shovel-ready-stimulus-didnt-work-is-that-there-wasnt-any-stimulus/#7e812b12dc5e [https://perma.cc/8WRC-LEVF].

126. *See* William J. Mallett, Cong. Research Serv., R46343, Transportation Infrastructure Investment as Economic Stimulus: Lessons from the American Recovery and Reinvestment Act of 2009 4, 10 (2020).

127. Danielle Kurtzleben, *Fact Check: Trump's Claim That the 2009 Stimulus Built Nothing*, NPR (Apr. 5, 2017), https://www.npr.org/2017/04/05/522629542/fact-check-trumps-claim-2009-stimulus-measure-built-nothing [https://perma.cc/9NQM-6C3S].

128. *See* Worstall, *supra* note 125.

129. *See* Charles Euchner, *Lots of Stimulus Money—and Concerns about Where to Put It to Work*, N.Y. Times (Oct. 22, 2009), https://www.nytimes.com/2009/10/23/business/global/23rglobalus.html [https://perma.cc/S5S3-N2JA].

130. Lew & Porcari, *supra* note 120.

131. KBOB Recommendations, *supra* note 55, at 4.

132. OMB Memorandum, *supra* note 41, at 4.

133. *See Internal Market, Industry, Entrepreneurship and SMEs: Thresholds*, European Commission, https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en [https://perma.cc/3CJP-NDKG] (last visited Aug. 17, 2020).

consumption—in the EU about forty percent.[134] For example, the European Recovery Plan of 2008, which was launched to help European countries recover from the negative economic consequences of the financial crisis, initiated a European energy-efficient buildings initiative. The initiative funds research to promote green technologies and energy-efficient systems and materials in new and renovated buildings to reduce their energy consumption and CO_2 emissions.[135] Similarly, the German Economic Stimulus Package II funds construction projects that reduce CO_2 emissions and improve energy-efficiency.[136]

In the context of government purchasing, the procurement of more sustainable products and works is known as "Green Public Procurement." Countries around the world have integrated the sustainability goal in their procurement laws. For instance, one of the FAR's socioeconomic programs is the "Sustainable Acquisition Policy," which encourages federal agencies to advance sustainable acquisition by ensuring that ninety–five percent of new contract actions for the supply of products, services, and construction are energy-efficient and environmentally preferable.[137] Similarly, the EU Public Procurement Directive of 2014 promotes that the most economically advantageous tender should also include environmental and social aspects.[138]

However, none of the earlier discussed expansionary policies has promoted the procurement of sustainable projects. This article argues that expansionary procurement policies should enable increased spending into sustainable construction projects and technologies. Sustainable projects often are disfavored in public procurement because their costs usually are higher than for traditional construction projects. For that reason, the EPA has relaxed emission standards and enforcement of fines during the COVID-19 pandemic.[139] But, in the context of public procurement, increased environmental standards are not a cost borne by the companies, but by the government. In fact, the increase of spending is a major goal of expansionary legal policies. Therefore, investing public resources in green projects is a sensible use of taxpayers' money and supports macroeconomic stability. For the same reasons, Listokin suggested that the Keystone pipeline project could have heightened environmental building standards and therewith increased jobs and reduced environmental risks at the same time.[140]

134. *Communication from the Commission to the European Council: A European Economic Recovery Plan*, at 16 n.5, COM (2008), 800 final (Nov. 26, 2008) [hereinafter *A European Economic Recovery Plan*].

135. *See id.* at 16.

136. German Economic Stimulus Package II, Mar. 2, 2009, BGBl I at 423 (Ger.).

137. FAR 23.103(a).

138. Directive 2014/24, of the European Parliament and of the Council of 26 February 2014 on the Public Procurement and Repealing Directive 2004/18/EC, *supra* note 97.

139. Friedman, *supra* note 22.

140. *Law and Economics of Recessions*, *supra* note 15, at 798.

Hence, expansionary procurement policies should allow agencies to give preference to environment-friendly projects during recessions, instead of relaxing environmental regulation.

4. Room for Crisis-Specific Policies: The Healthcare Sector

Despite the strong emphasis on public infrastructure, expansionary procurement policies should not be limited to one sector. For instance, the current health crisis triggers different needs than a financial crisis. In its recommendations on mitigating the economic effects of COVID-19 on supplies and services procurement, the Swiss BKB recommends to procure medical supplies through expedited procurement procedures.[141] In the United States, the federal government has awarded dozens of government contracts for millions of dollars to procure medical supplies during the past months.[142] A search on the U.S. government's spending database with the keyword "Coronavirus" reveals that HHS awarded contracts of $800 million in value as of June 2020.[143]

Different crises require different stimuli. Limiting the expansionary procurement policies to specific sectors is not advisable. Depending on the type of crisis, government agencies should be free to decide from which sector to procure. While neither of the three policies has limited the scope of application, the U.S. and Swiss policies have encouraged agencies to either increase spending in the construction sector or the healthcare sector. For example, the Swiss procurement policies recommend using flexible procurement measures for both construction and medical supplies as a response to COVID-19.[144] Similarly, the OMB Memorandum stresses the option of federal agencies to retool contracts that concern logistics and security and encourages construction work to continue.[145]

To guarantee some flexibility to government agencies in addressing the specific needs of each crisis, expansionary legal policies should not be limited to the construction sector. But to give agencies some guidance, expansionary legal policies can encourage investment into certain sectors that are in distress, such as the healthcare sector.

141. BKB Recommendations, *supra* note 42, at 4.

142. Emma Loop, *The US Government Is Spending Millions of Dollars to Respond to the Coronavirus Crisis*, BuzzFeed News (Mar. 17, 2020), https://www.buzzfeednews.com/article/emmaloop/trump-federal-contracts-coronavirus-respirators-labs [https://perma.cc/2SSW-QQ3D].

143. *Spending by Prime Award*, USASpending.gov, https://www.usaspending.gov/#/search/7e599b8fca9d0e155f31a3e9adadcf66 [https://perma.cc/22ND-4F89] (last visited Aug. 6, 2020).

144. *See generally* KBOB Recommendations, *supra* note 55, at 4–5; *see also* BKB Recommendations, *supra* note 42, at 4.

145. OMB Memorandum, *supra* note 41, at 1.

IV. CHALLENGES OF EXPANSIONARY PROCUREMENT POLICIES, AND POSSIBLE SOLUTIONS

Expansionary legal policies in public procurement bring many advantages, but they also face challenges. This Part addresses the most pressing counterarguments. First, it will address potential conflicts between the goal of macroeconomic stability and traditional procurement goals, such as cost efficiency, free competition, and prevention of corruption, and suggest possible safeguards to reduce those risks. Then it will address two distinctive features of expansionary legal policies that give them the unique advantage over traditional macroeconomic instruments: automatic stabilization provisions and economic triggers.

A. Conflicts and Reconciliation Between Macroeconomic Stability and Procurement Goals

Most public procurement laws around the world have similar procurement goals, including efficient use of public resources, fair and open competition, and transparency. Over the years, many procurement laws have created socioeconomic exceptions to these goals, including the promotion of small businesses, green procurement and national acquisitions. In this section, the article will address (1) the tension between macroeconomic stability and microeconomic efficiency; (2) the issue of limited competition; (3) the safeguards to increase transparency and prevent corruption; and (4) the mutually beneficial relationship between macroeconomic stability and socioeconomic programs.

1. Macroeconomic Stability Versus Microeconomic Efficiency

All three expansionary procurement policies have one goal in common: expediting and simplifying procurement processes to increase public spending. This goal is in line with the idea of fiscal policy, which aims at increasing government spending during economic downturns. The different procurement examples discussed here have implemented this goal by means of shortened procurement deadlines and increased tender thresholds. Increased thresholds allow procuring agencies to use more flexible and faster procurement methods, such as auctions with a limited number of participants (limited auctions), direct awards without call for competition, and other simplified acquisitions.

The U.S. and German procurement policies also mention procurement goals of fiscal prudence and procurement at economic prices to maximize taxpayers' money.[146] This goal of cost-efficiency can conflict with the goal of macroeconomic stability. While the goal of cost-efficiency aims at reducing transaction costs and keeping prices low to save taxpayers' money, the goal of macroeconomic stability is increasing and expediting public spending to

146. *Id.* at 2; Audit Report on Relaxed Construction Procurement, *supra* note 66, at 3.

stimulate the economy.[147] The German Audit Office has struggled to balance these competing goals. Ultimately, the Audit Office has given priority to the microeconomic goal of efficiency over the goal of macroeconomic stability and has recommended the discontinuance of the relaxed procurement rules.[148] This outcome is both comprehensible and surprising. It is comprehensible because the Audit Office's mandate is to review government spending with a view to reduce spending and save taxpayers' money. It is surprising from a macroeconomic perspective because the very idea of relaxing procurement rules was to expedite and increase spending through public purchases.

The question of which goal should prevail is a difficult one and falls ultimately under the discretion of the respective government agency. The author argues that this decision should be time dependent. In normal economic times, efficiency (and other goals) should continue to prevail. But during times of economic downturn and recession, agencies should be allowed to give preference to macroeconomic stability and compromise on cost-efficiency. Agencies should be able to increase spending for expansionary legal policies to employ their desired effects. However, following the goal of macroeconomic stability does not always mean an efficiency loss. While expedited procurement procedures may increase tender prices and lead to lost savings, they also shorten the tender process and thereby reduce transaction costs.[149] To be clear: the government should not increase spending by paying higher prices to contractors, but by purchasing more and faster. However, some efficiency losses along the way of increased and expedited spending can be justified with the goal of preventing the economy from sliding into a recession, leading to millions of unemployed people.

For that reason, this article argues that a balancing test should be applied, and, when increased spending outweighs efficiency losses, priority should be given to the goal of macroeconomic stability. The German Audit Office reported that the relaxed procurement rules have led to increased construction spending of thirteen percent, mostly due to increased prices and reduced competition.[150] This efficiency loss would need to be weighed against the acceleration of and increase in public procurement spending due to the relaxed procurement rules, and the jobs gained through these flexibilities. Only when a net benefit results, preference should be given to macroeconomic stability over microeconomic efficiency. This calculation can either be performed

147. *See* Robert Dolamore, *The Tools of Macroeconomic Policy—a Short Primer*, Parliament of Austl., https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/MacroeconomicPolicy [https://perma.cc/4HR2-NMAF] (last visited Aug. 6, 2020).

148. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 27.

149. *See* Organisation for Econ. Cooperation & Development, Progress Made in Implementing the OECD Recommendation on Enhancing Integrity in Public Procurement 16 (2012).

150. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 6.

based on past data (*ex post*), as the German example, or be done prospectively (*ex ante*), similar to regulatory cost-benefit analyses performed by the OIRA.

2. Limited Competition: An Exception During Recessions

Another conflict between macroeconomic stability and traditional procurement goals is reduced competition. Less competition is often the result of more flexible procurement procedures such as limited auctions or direct awards. In Germany, the Audit Office found that, due to the relaxed procurement rules, the number of offers in construction decreased by twelve percent.[151] For the procurement of supplies and services, the Audit Report found a marginal decrease of invited bidders from four and a half to four companies.[152] To increase competition, German building authorities have increased the required minimum number of bidders for limited auctions.[153] The German Audit Office has recognized this measure, but still, the number of offers in limited auctions will remain lower than in public tenders. But does less competition necessarily result in worse prices for the government?

McAfee and McMillan found that the presence of many bidders can increase transaction costs and have a negative effect on price. Also, data has shown that the lowest offer price often ends up being a higher final price than the second or third lowest offer price because low bids are often unrealistic and need many *ex post* adaptations.[154] Hence, more competition does not necessarily lead to better prices.

Even apart from these limitations, the benefits of free competition need to be balanced against the benefits of macroeconomic stability, increased growth, and lower unemployment. The cost of an increased tender price needs to be weighed against the benefit of prevented job losses. In the case of economic emergencies, when governments have to act fast and push money into the markets, some sacrifices, such as decreased competition, are often a better alternative than facing the long-term economic consequences of a recession.

3. Safeguards to Increase Transparency and Prevent Corruption

Expansionary legal policies can lead to less transparency and an increased risk of corruption and collusion. The German Audit Office has identified limited competition and prequalified bidder lists as a potential source of increased corruption and collusion risks.[155] For limited auctions and direct awards, there is no call for competition—the agency invites suppliers directly. This eliminates *ex ante* transparency. Prequalified bidder lists are lists of prospective bidders who are prequalified by the procuring agency as to material, equipment,

151. *Id.* at 5.

152. Audit Report on Relaxed Supply Procurement, *supra* note 67, at 6.

153. *See id.* at 17.

154. *See, e.g.*, Patrick Bajari et al., *Bidding for Incomplete Contracts: An Empirical Analysis of Adaptation Costs*, 104 Am. Econ. Rev. 1288, 1300–01 (2014).

155. Audit Report on Relaxed Construction Procurement, *supra* note 66, at 20.

or services and from which the agency can choose when applying negotiated procurement procedures.[156] The value of these lists is recognized and they are often applied in the United States.[157] Prequalified bidder lists not only expedite the process and save administrative costs; they also guarantee high-quality bidders. However, the German Audit Office saw an increased risk of corruption and collusion associated with these lists.[158] The procuring officer selecting the companies for the list could favor some companies for private gain, or the publication of the list could motivate competitors to collude with listed companies.

To increase transparency and limit the risk of corruption, different precautionary measures exist. One is *ex post* transparency. Even though non–public tenders limit transparency before tendering, transparency after the contract award is still available. Under the German procurement relaxations, procurement agencies were required to publish the awarded contracts, disclosing the winning bidder and price in the public procurement data base.[159] This *ex post* transparency brings two advantages. First, it creates pressure on the winning bidder to offer a similar price as when in a competitive setting.[160] Second, *ex post* transparency allows the public and competitors to scrutinize and challenge a potentially corrupt outcome.

Other measures to limit the risk of corruption are internal controls. The first one is risk analysis. According to the German Directive on Corruption Prevention in the Federal Administration, agencies must perform a systematic analysis, assessing increased risks and weaknesses whenever administrative procedures change.[161] The BMI was supposed to conduct a risk analysis before applying the relaxed procurement rules, but failed to do so.[162] To avoid such failures, this article suggests a second layer of protection: external controls. The administrative measures should be regularly monitored and reviewed by an independent supervisory authority, such as the German Audit Office, or an institutionalized Office for Fiscal and Regulatory Affairs, as discussed in Part III.C.

Another internal control measure is double verification. The German Public Procurement Handbook requires that one procuring officer must select qualified firms, and a second officer must review and amend this selection.[163]

156. U.S. Dep't of Justice, Guide to Procurements under DOJ Grants and Cooperative Agreements 11 (2018).

157. *See*, *e.g.*, FAR 9.201.

158. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 19.

159. *See id.* at 3.

160. *See id.* at 18.

161. Richtlinie der Bundesregierung zur Korruptionsprävention in der Bundesverwaltung [Federal Government Directive on Corruption Prevention in the Federal Administration], Die Bundesrregierung (July 30, 2004), http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_30072004_O4634140151.htm [https://perma.cc/GQ3K-GJR8].

162. Audit Report on Relaxed Construction Procurement, *supra* note 66, at 4.

163. Bundesministerium des Innern, für Bau und Heimat, Bundesministerium der Verteidigung, Vergabe- und Vertragshandbuch für die Baumassnahmen des Bundes 111 (2019).

During the period of relaxed procurement rules, the German Audit Office found that agencies changed the list of selected companies in approximately thirty percent of the cases, and found this number to be insufficient.[164] The author disagrees with the evaluation of the Audit Office: first, changing one third of the companies on the list seems like a decent effort, and second, it is not the percentage change of the list that prevents against corruption, but the verification through a second official. For that matter, this article recommends adopting the double verification system for expansionary procurement policies to safeguard against corruption during economic crises.

Lastly, to avoid collusion among companies, the prequalified bidder list could be for internal use only and not made public. To avoid opportunism, the list of companies could be regularly reported and reviewed by an oversight agency. For example, the BMI has asked federal construction authorities to present it with a list of selected companies every six months.[165]

The combination of *ex post* transparency and internal and external controls should provide sufficient safeguards to reduce the risk of corruption and make up for the reduction of *ex ante* transparency in exchange for increased macroeconomic stability during recessions.

4. Macroeconomic Stability and Socioeconomic Programs

To reflect socioeconomic needs, most public procurement laws have created exceptions to the standard procurement rules. Well known socioeconomic programs include small business programs, labor and safety standards, green procurement, and national acquisitions (in the United States known as "Buy American"). Labor and safety standards should not be compromised, not even during economic downturns. The discussed procurement policies in the United States and Switzerland have urged that work during COVID-19 should only be continued if health and safety of the workers can be ensured.[166] In the previous section, this article discussed the potential for expansionary legal policies to foster sustainable projects. This section delves into the relationship between macroeconomic stability and the promotion of local and national businesses.

In most countries, small businesses play an important role in the economy. Small businesses employ about half of America's non–government workers, and a wave of reductions or closures would quickly cascade through the national economy.[167] To avoid the closure of small businesses, governments around the world have supported them with fiscal relief programs during the COVID-19 crisis. In March 2020, as part of the $2.2 trillion stimulus package,

164. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 20.

165. *Id*.

166. *See* OMB Memorandum, *supra* note 41, at 4; *see also* KBOB Recommendations, *supra* note 55, at 3.

167. Stacy Cowley, *$130 Billion Left at Paycheck Program Deadline, but Senate Acts to Extend It*, N.Y. Times (June 30, 2020), https://www.nytimes.com/2020/06/30/business/paycheck-protection-program-coronavirus.htm [https://perma.cc/S9ZK-QHA3].

the U.S. Senate approved loans to small businesses in the amount of $504 billion.[168] In April 2020, the Senate passed another $500 billion relief package for small businesses after the first package quickly ran out of funding,[169] and extended it until early August 2020.[170]

In addition to these fiscal reliefs, public procurement laws include set-asides for small businesses. For example, the Federal Acquisition Regulation (FAR) has set-asides for small businesses "to award certain acquisitions exclusively to small business concerns."[171] Similarly, the EU Public Procurement Directive of 2014 increased access for small businesses to the public procurement market by dividing contracts into lots and decreasing documentation requirements.[172] These exceptions apply during normal economic times. For emergency acquisitions, procurement laws often increase the support of small businesses. For example, the FAR allows the U.S. government to award contracts to small businesses on a single-source basis.[173] When the President declares an emergency under the Stafford Act, the FAR also requires preference of local firms, either in the form of local area set-asides or an evaluation preference.[174] The OMB Memorandum specifically addresses the preference and set-aside of local firms.[175] However, because the COVID-19 crisis is nationwide, meaning there is no particularly affected area, the OMB requires no preferences for local firms.[176] In the German Audit Report, one construction agency reported that they were taking into consideration mostly local companies during the financial crisis, while another agency limited direct awards to companies within a radius of fifty kilometers.[177] As a result, the average distance from the company to the construction site decreased by twenty-seven percent.[178] The German Audit Office has criticized the increase of local acquisitions because it limits free competition.[179]

But during economic downturns, fostering small businesses, even at the expense of limiting competition, can be justified. To avoid losing a large, productive part of the economy, agencies should be able to purchase from local

168. Jeff Stein, *What's in the $2.2 Trillion Coronavirus Senate Stimulus Package*, Wash. Post (Mar. 26, 2020), https://www.washingtonpost.com/business/2020/03/26/senate-stimulus-bill-coronavirus-2-trillion-list-what-is-in-it/ [https://perma.cc/X985-E6X3].

169. Tankersley et al., *supra* note 7.

170. *See* Emily Cochrane, *Congress Extends Small-Business Loan Program for 5 Weeks*, N.Y. Times (July 1, 2020), https://www.nytimes.com/2020/07/01/us/politics/small-business-loans-extended.html [https://perma.cc/Q887-MHQE].

171. FAR 19.501(a)(1); FAR 19.1401(b); FAR 19.1500(b); Small Business Act, 15 U.S.C. § 637(d) (2018).

172. *New EU Public Procurement Rules: Less Bureaucracy, Higher Efficiency*, European Comm'n (Nov. 11, 2015), https://ec.europa.eu/growth/content/new-eu-public-procurement-rules-less-bureaucracy-higher-efficiency-0_en [https://perma.cc/E75C-CT7H].

173. FAR 18.114.

174. FAR 18.203.

175. OMB Memorandum, *supra* note 41, at 6–7.

176. *Id.*

177. Audit Report on Relaxed Construction Procurement, *supra* note 66, at 17.

178. *Id.*

179. *Id.*

firms more extensively during recessions. But when the crisis is nationwide or even global, local set-asides are less justified. In a national crisis, agencies should not limit their acquisitions to local firms. As a comparison, the small-business loan program was also issued on a nationwide basis and was not limited to certain local areas.

National acquisitions limit acquisitions to domestic firms and exclude foreign suppliers from competition.[180] This regulation goes against the international WTO-Government Procurement Agreement, signed in 1994 by the United States and EU member states. The WTO Agreement promotes free competition and non–discrimination of foreign suppliers.[181] While the exclusion of foreign suppliers is concerning during normal economic times, there is a case to be made for national acquisitions during recessions and economic downturns. Expansionary monetary and fiscal policies are focused on stimulating the national economy. While the Fed is buying corporate bonds from American firms,[182] the ECB is adjusting interest rates in the EU zone.[183] To overcome the economic sequences of COVID-19, Congress approved a fiscal stimulus program of $2 trillion to support U.S. businesses and households,[184] while the German government was providing fiscal stimuli to support the German education system and construction sector after the financial crisis.[185]

Because fiscal policies are limited to the national economy, expansionary legal policies—which are a hybrid between fiscal and legal policies—follow a similar logic. While international competition should not be limited during normal economic times, the focus of expansionary procurement policies to national acquisitions and national interests is more justified during economic downturns.

B. Automatic Stabilization Instead of Emergency Powers

The three procurement policies discussed are discretionary. In macroeconomics, discretionary policy is an economic policy that is based on the *ad hoc* judgement of policymakers, as compared to a policy that is set by predetermined rules.[186]

180. FAR 25.101(a); 41 U.S.C. § 8302(a)(1) (2018).

181. Revised Agreement on Government Procurement, Preamble, Mar. 30, 2012, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf [https://perma.cc/332F-UCG9].

182. *See* Press Release, Board of Governors of the Federal Reserve System, Federal Reserve Announces Extensive New Measures to Support the Economy (Mar. 23, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm [https://perma.cc/MS4S-JGPP].

183. Tess Eyrich, *How Is Europe Responding to the Coronavirus Pandemic?*, U. Cal. Riverside News (Apr. 21, 2020), https://news.ucr.edu/articles/2020/04/21/how-europe-responding-coronavirus-pandemic [https://perma.cc/9WJT-U4KC].

184. Emily Cochrane & Nicholas Fandos, *Senate Approves $2 Trillion Stimulus after Bipartisan Deal*, N.Y. Times (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/us/politics/coronavirus-senate-deal.html [https://perma.cc/S3MC-LEAG].

185. German Economic Stimulus Package, Mar. 2, 2009, BGBl I at art. 6, § 2 (Ger.).

186. *See* Sebastian Dullien & Daniela Schwarzer, *Bringing Macroeconomics into the EU Budget Debate: Why and How?*, 47 J. Common Mkt. Stud. 153, 154 (2009).

The U.S. and Swiss procurement policies both rely on emergency powers. The emergency procurement flexibilities of the OMB Memorandum rely on the President's emergency declaration under the Stafford Act.[187] Similarly, the Swiss procurement policies rely on the COVID-19 Ordinance,[188] which was issued by the Federal Council based on its emergency powers under the Epidemics Act.[189] These emergency powers trigger exceptions from the regular rules. For example, under "Emergency Acquisition Flexibilities," the FAR allows for an increase in the simple acquisition threshold, similar as suggested in the OMB Memorandum.[190] The Swiss Public Procurement Act allows for an exemption of the public procurement rules to protect human health and life,[191] and for direct awards in case of unforeseeable and urgent events.[192]

An alternative to give procuring agencies more discretion to react to economic crises is to include macroprudential stability into the procurement goals. One way to achieve this, is to extend the meaning of efficiency to include macroeconomic efficiency. Efficiency in the context of public procurement is traditionally understood as microeconomic or cost-efficiency to save taxpayers' money. This extension could either be done by the judiciary by interpreting the law or by the legislator. Another, cleaner approach would be to include macroprudential stability as a new procurement goal. This would allow procuring agencies to more flexibly react to economic crises by increasing and expediting spending, without the use of emergency powers. This addition would mean a change of law through the ordinary lawmaking process.

Because expansionary legal policies based on emergency powers and the goal of macroeconomic stability allow for much agency discretion, they can lead to increased risks of corruption. A response to limit government intervention is regulation that is automatically triggered by economic emergencies—hereinafter referred to as "automatic stabilization provisions." Automatic stabilization provisions are a regulatory version of automatic stabilizers.[193] In macroeconomic policy, automatic stabilizers are mechanisms that are triggered without government intervention. The most prominent examples of automatic stabilizers are income taxes and unemployment benefits, which increase or decrease automatically depending on the economic situation.[194]

187. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5192(a)(1) (2018).

188. Verordnung 2 über Massnahmen zur Bekämpfung des Coronavirus (COVID-19) [Ordinance 2 on Measures to Combat the Coronavirus (COVID-19)], Mar. 13, 2020, SR 818.101.24, art. 7 (Switz.).

189. Epidemiengesetz [Epidemics Act] Sept. 28, 2012, SR 818.101, art. 7 (Switz.).

190. FAR 18.201.

191. Public Procurement Act, Dec. 16, 1994, SR 172.056.1, art. 3, para. 2 (Switz.).

192. Public Procurement Ordinance Dec. 11, 1995, SR 172.056, art. 13, para. 1 (Switz.).

193. Masur & Posner, *supra* note 16, at 21.

194. *Id.* at 7–8.

For automatic stabilization provisions, the author sees two potential uses in public procurement law: first, provisions that automatically double procurement thresholds, and second, provisions that cut procurement deadlines in half during economic crises. These two provisions are inspired by the procurement policies of the United States, Germany, and Switzerland, but exclude the discretionary element by adding an automatic trigger. Both the U.S. and German exceptions increased tender thresholds. The idea to cut procurement deadlines is borrowed from the German approach, which shortened procurement deadlines by a third.[195]

Such automatic stabilization provisions have two major advantages: first, they are adopted through the agencies' standard rulemaking process before the emergency situation occurs, respecting the democratic process, and second, they generate greater independence from government intervention, and are therefore less prone to corruption. For these reasons, the author recommends the adoption of such automatic stabilization provisions into regular procurement laws, rather than including a new procurement goal.

C. Economic Triggers to Limit Agency Discretion

Timing is one of the most critical and difficult aspects of discretionary macroeconomic policies. If the regulator relaxes procurement rules too early, the government may face political pushback. If regulation is suspended too late when the economy has already recovered, the stimulus effect vanishes. Even central banks struggle with the timing of expansionary monetary policies.[196] In Germany, the government decided to relax its procurement rules in January 2009. It acted shortly after the financial crisis started and when the Great Recession began. During the COVID-19 crisis, governments acted even faster, adopting policies in the midst of the crisis. The fast reaction of governments may render the COVID-19 policies even more effective than Germany's policies. Only the coming months will tell whether governments acted fast enough to prevent a viral recession.[197]

Another important aspect of expansionary legal policies is duration. In Germany, the relaxed procurement rules were in force for a period of two years until December 2010. The German Finance Ministry decided not to extend the rules beyond 2010 because it found that the rules did not achieve the set goals.[198] The Swiss government decided to relax its rules for six months after the emergency situation ended.[199] In the United States,

195. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 10.

196. *See* Masur & Posner, *supra* note 16, at 27.

197. *See* Editorial Board, *Europe's Viral Recession*, Wall St. J. (Mar. 12, 2020), https://www.wsj.com/articles/europes-viral-recessioneuropes-viral-recession-11584044116 [https://perma.cc/9PN4-H6YB].

198. Audit Report on Relaxed Construction Procurement, *supra* note 66, at 27.

199. KBOB Recommendations, *supra* note 55, at 6.

the emergency procurement flexibilities were in force from March until July 2020.[200] The trade-off lies between limiting corruption and giving agencies enough time to implement the policies. According to the German Audit Office, the relaxation of the procurement rules for two years might have increased risks of corruption and collusion.[201] At the other end of the spectrum are OMB's emergency procurement flexibilities, which were only in force for approximately three months.[202] A period of three months seems rather short, especially in government procurement where rigid rules apply and often large-scale projects are being procured. Most public projects, even when using expedited procedures, will take at least two to three months until work can begin.[203] Relying on past examples, this article argues that expansionary procurement policies should be in force between six months (the Swiss example) and one year (not exceeding the two-year period applied in Germany).

To create more independence from government action, expansionary legal policies should rely on "economic triggers." The dependence of public procurement rules from economic values is not foreign. In many national procurement laws, different tender thresholds trigger different procurement procedures. Masur and Posner mention three economic triggers for use of countercyclical regulation: (1) unemployment rate, (2) inflation rate, and (3) interest rate.[204]

Relying on interest rates brings different advantages and drawbacks. First, interest rates are relatively easy to determine. Central banks publish them on a daily basis. In a world with continuously low interest rates, the attachment of regulation to a zero-interest rate would give procurement agencies a lot of leeway and time to apply expansionary legal policies. The risk is that this freedom may be abused by making use of these procurement flexibilities even during normal economic times. Another disadvantage is that interest rates are set by the government (i.e., central banks), which does not eliminate the discretionary element.

Relying on inflation rates would not be of much help either. While inflation rates were a good and solid indicator for the stability of an economy, this has changed over the past few years. Historically, low inflation rates often went along with high unemployment.[205] This no longer holds true. The current economic situation after the financial crisis is characterized by deflation and high unemployment.

200. OMB Memorandum, *supra* note 41, at 7.

201. *See* Audit Report on Relaxed Construction Procurement, *supra* note 66, at 19.

202. OMB Memorandum, *supra* note 41, at 7.

203. Estimations based on interviews with Swiss procurement officers: specification of government needs (two weeks); tendering of contract (two weeks); contract negotiations and specifications (two weeks); contract conclusion and project preparation (two weeks); start of project.

204. Masur & Posner, *supra* note 16, at 27.

205. *See* Pierpaolo Benigno & Luca Antonio Ricci, *The Inflation-Unemployment Trade-Off at Low Inflation* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 13986, 2008).

Relying on unemployment rates proves to be the best option. Other than the interest rate, the unemployment rate is not set by policymakers, but is the result of the employment market. When unemployment is high, the economy is in a downturn or recession—depending on the level of unemployment. Because the unemployment rate has a wide spectrum, the regulator can decide whether expansionary legal policies should be already triggered when the economy is in a downturn, or only when the economy is in a recession. To make sure that the trigger neither reacts too early nor too late, the author suggests the regulation to trigger when the average quarterly unemployment rate is a multiple (e.g., three times) or specific percentage points (e.g., three percent) over the past twelve-month average.[206]

The unemployment trigger can be illustrated by means of the recent COVID-19 crisis:[207]

1. The January to March 2020 average unemployment rate was at 3.8%. Compared to the previous 12-month average of 3.6%, the rate is not three times higher or over three percentage points. Hence, the exception would not be triggered.
2. The April to June 2020 average unemployment rate was at 13.0%. Compared to the previous 12-month average of 3.9%, the rate is more than three times higher and exceeds three percentage points. In this case, the relaxed procurement rules—such as increased tender thresholds or shortened tender deadlines—would be automatically triggered.

A similar economic trigger can also be applied to end the relaxed procurement rules. For example, the procurement flexibilities can be terminated whenever the quarterly average of the unemployment rate is less than three percentage points of the trigger level.

V. CONCLUSION

Expansionary legal policies are an effective complement to the two traditional macroeconomic instruments of monetary and fiscal policy. Expansionary legal policies are particularly valuable during liquidity traps where interest rates are close to zero and monetary policy is less effective. Stimulating the economy by means of regulation is particularly sensible in fields that are highly regulated and have a considerable economic impact. Public procurement is one of these fields.

In this article, the author discussed three examples of expansionary procurement policies—two recent examples from the United States and Switzerland in response to COVID-19 and one example from Germany as a response to the financial crisis in 2008. While the three procurement policies helped

206. A similar idea has been promoted by Claudia Sahm (Sahm rule), https://www.reuters.com/article/us-usa-fed-sahm/sahm-rule-enters-fed-lexicon-as-fast-real-time-recession-flag-id USKBN1WJ12J.

207. For the unemployment rates, see https://www.ncsl.org/research/labor-and-employment/national-employment-monthly-update.aspx.

specify and mark the contours of expansionary legal policies in the context of public procurement, none of them were perfect and all can learn from each other. The author has critically analyzed the design, application and, where possible, the effects of these policies and came to the following conclusions.

While the origins of economic crises differ—COVID-19 or the mortgage bubble—the expansionary legal response to "cure" recession can be applied universally, to any future economic crisis. The reason is that, independent from the origin, the economic consequences are often very similar. To target the policies to specific sectors, procurement agencies can expedite certain purchases, like medical supplies or public infrastructure, depending on the specific needs of the current crisis. But rather than limiting the policies to one sector, it should be left to the discretion of procuring agencies to determine in which sector to apply expansionary legal policies. An impactful sector that is often worth investing in is public infrastructure. This sector is not only in urgent need for improvements, but also has two unique features. First, public infrastructure is highly interconnected to other sectors, which allows stimuli to propagate across the economy; second, public infrastructure allows the integration of environmental requirements. However, to the vast discretion of agencies two important limitations apply: agency coordination and macroeconomic expertise. To achieve more tuned and macroeconomically informed decisions, Listokin has suggested a centralized Office for Fiscal and Regulatory Affairs in the United States. Establishing such hubs of macroeconomic and legal experts who can transfer knowledge to different agencies would be equally beneficial in other jurisdictions that adopt countercyclical regulation.

To allow procurement agencies to better react to economic crises, this article discussed including the goal of macroeconomic stability into procurement laws. But this goal conflicts with traditional procurement goals, such as cost-efficiency, free competition, and transparency. To decide which goal to preference during economic downturns, agencies should apply a balancing test, evaluating the costs and benefits of traditional procurement goals versus macroeconomic stability. In addition to this test, different measures can be put into place to limit the risk of corruption during economic downturns. Legal safeguards include the publication of awarded contracts in the public procurement data base (*ex post* transparency), double verification of prequalified bidder lists, internal risk analyses of procurement flexibilities, and external controls through an independent supervisory authority. Yet, not all procurement goals are in conflict with macroeconomic stability. Many socioeconomic programs are compatible with macroeconomic policies. In times of economic crisis, there are set-asides for small businesses and rules that allow procuring agencies to concentrate on national purchases and relax rules for local and national businesses in distress—along with fiscal stimulus programs.

Aside from agency discretion, another difficult element of expansionary legal policies is timing. When and for how long expansionary policies should be in force is a prognostic and challenging task, even for central banks. Because governments often struggle with the optimal timing and face the risk

of corruption, this article suggests the use of two features: automatic stabilization provisions and economic triggers. Examples of such automatic stabilization provisions are the automatic increase of tender thresholds or the cut of tender deadlines, depending on the economic situation. The major advantage of such provisions is that they are triggered independently from government intervention and rely solely on the economic situation. For countercyclical regulation, the author suggests relying on the unemployment rate as the economic trigger. The unemployment rate is not set by policymakers, but reflects the employment market. To eliminate the discretionary element of expansionary procurement policies, the author suggests that the procurement flexibilities should be triggered when the quarterly average of the unemployment rate is some multiple of percentage points (e.g., three percent) over the past year's average.