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This is an International Double-Blind Peer Review Journal.
Indexed by the INTERNATIONAL SCIENTIFIC INDEXING.

This journal is published by APMEP – Portuguese Society of Public Markets(www.apmep.pt) and is co-supported by COMEGI (Research center on organizations, markets, and industrial management) of Universidade Lusíada, and FCT (Foundation of Science and Technology), Portugal

Title:

European Journal of Public Procurement Markets - 3rd Issue (July 2021)

Publisher:

APMEP – Portuguese Society of Public Markets

Chief-Editors:

Luís Valadares Tavares and Gustavo Piga

ISSN:

2184-3813

Date:

07.2021

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ON THE THIRD ISSUE OF THE EUROPEAN JOURNAL Of PUBLIC PROCUREMENT MARKETS

By failing to prepare, you are preparing to fail

Benjamin Franklin

This issue is published in a period of dramatic societal changes due to the pandemic COVID 19 and when such changes are having wide and deep impacts in public procurement around the world.

Health and social new needs are disturbing the markets equilibria and the stability of supply changes disturbing the traditional equilibria and reducing the usual complete or partial monopsonic power of public buyers.

This explains why public procurement cannot follow the paradigm of " business as usual" and why the main question is: how can public procurement be changed to cope with the new challenges?

However, any process of change concerning States, Governments or public institutions tend to be painful, hard and subject to long delays, but the case of public procurement is even harder because besides having public contracting authorities as major actors, it has to keep using Public Law as main legal framework which in latin or german cultures is based on Administrative Law more oriented to avoid changes rather than to facilitate them.

This explains why in a context of urgency, frequent cases illustrate lack of coordination , lack of planning and lack of ability to use more innovative and sustainable procedures but , unfortunately, their outcomes include low value for money, lack of competition and insufficient level of transparency as it is confirmed by the evidence collected and published by auditing institutions as it is the case of the Tribunal de Contas (National Court of Auditors) of Portugal.

Nevertheless, there also plenty of examples of public procurers exploring new digital, planned and sustainable approaches avoiding myopic options and challenging the markets through more competitive, negotiated and innovative procedures already considered by frameworks like the European Public Procurement Directives (Directives 2014/23/EU; 2014/24/EU and 2014/25/EU) obtaining much better results and inducing important changes in public administration procedures and models of organization.

Therefore, the diversity of the landscape of public procurement has never been so wide and the disparity of achieved key performance indicators has never been so impressive reflecting the way how public procurers cope with the new needs and the new markets.

Such diversity is quite well illustrated by the accepted papers included in this issue covering an wide range of regions, from USA to Portugal, Italy and Germany and focusing key topics such as the changes introduced in the public law, the adopted economics and organizational models , the selected procedures to form public contracts and the way to cope with the execution of contracts subject to unforeseen and exogeneous changes.

I remember that a basic and essential inspiration that led me to propose and to name this journal was giving a renewed and additional attention to the interaction between public procurers and markets as most of the existing journals either focus more on the objectives and conditions ruling the public procurers (public procurement journals) or on markets behavior (economics and management journals) explaining its title: European Journal of Public Procurement Markets.

The challenges due to COVID 19 could not be a better illustration for the need of this new focus !

I am sure that the readers will find in this issue innovative ideas and significant contributions to improve public procurement in emergency times as it is the case of the new conditions due to COVID 19 which are lasting for several years in most countries .

I am in debt to all the authors contributing to this special issue and special thanks are due to the President of the Portuguese Tribunal de Contas, the Honorable Judge Dr José Tavares, who was kind enough to send us a message of appraisal and motivation.

Luís Valadares Tavares

Chief- Editor of this Special Issue

FOREWORD
Public procurement in emergency situations

"Men at some time are masters of their fates. The fault, dear Brutus, is not in our stars, but in ourselves, that we are underlings."

William Shakespeare (1599), *Julius Caesar*.

Public procurement is undoubtedly one relevant issue, including in emergency situations, like this one we are living in the critical context of SARS-COV-2 and Covid-19 pandemic.

Being a fundamental instrument for meeting social needs, namely in health area, it allows the choice of best options, simultaneously ensuring equality and competitiveness of economic agents in a desirable plane field. In short, a rational State's procurement satisfies the public interest in a sound market economy.

Within emergency situations, naturally, public procurement must have some adjustments with the aim of meet public needs in a more quick, efficient and effective way. But readiness, agility and flexibility are one thing, and other thing, very different, is to ruin its fundamental principles. That is why, in our opinion, the reasoning of today decisions gains importance in view to their tomorrow assessment.

Public procurement has an extraordinary economic and financial impact in State, as well as Civil Society and markets. It corresponds to around 25-30% of all public expenditure in the 27 European Union Member States. Now, look the wider picture of present health crisis. Commutate and consider the zero numbers of, for example, current massive vaccination programs around the World.

Administrative procedures for choice of contracting parties represent the central issue to which we all have to pay attention, which include both award criteria and evaluation models. Here values are preserved and legitimate interests are safeguarded.

With globalization ever-increasing and deepening of European integration, the matter under consideration takes on the corresponding dimensions, added and multiplied by the colossal volume of financial resources involved.

The Tribunal de Contas of Portugal has made an invaluable contribution to existence of a sound procurement system, in particular through its prior oversight to public contracts and the preventive and pedagogical effects that this function represents. As a supreme Court with extra judicial powers, the Institution with the mission of auditing public financial administration has always stressed that State and its services need to be prepared for crises, emergencies and catastrophes. And as early as June 2020 it produced the first of several analytical reports on risks and controls around the SARS-COV-2 and Covid-19 pandemic.

There are lessons to learn how we, institutions and citizens, are dealing with the pandemic. We must pay greater focus, not only at legislative level, but also at level of administration and management, to a special combination of globality with integration, multiannuality, sustainability, intergenerational equity and... responsibility. Other way, and we will put everything to lose sooner or later.

All of these dimensions – and much more that it is not possible to develop in a few lines – are highlighted in the excellent texts that follow, which are very revealing of the experience and theoretical and theoretical-practical knowledge of its Authors.

A priori, plenty of reasons to thank them!

April 26, 2021

José F.F. Tavares

President of Tribunal de Contas of Portugal

RESEARCH and POLICY PAPERS

Public Policies for Procurement under COVID19

Luís Valadares Tavares Pedro Arruda

Abstract

Public procurement is a main issue in the frontline of Governments fighting COVID 19 pandemic as the need for additional and urgent acquisitions as well as the need to consolidate the supply chains and to promote sustainable and innovative procurement have been a source of deep changes and main challenges disturbing public markets and invalidating several assumptions of the traditional public contracting.

In this paper, the development of appropriate public policies to cope with these challenges is studied following the approach suggested by several authors and including four stages: a Stage on Facts and Issues where the main challenges and conditions are studied, the Options Stage to describe which polices and procedures can be adopted, a Values Stage stating the main values to be pursued and, finally, a Policies Stage including the selection of the recommended policies.

The analysis of the challenges and facts includes the study of a taxonomy of short and longer term needs and the available options are based on the comparative study of procedures ruled by the European Directives on Public Procurement approved on 2014. The major values to be respected include the principle of competition which is a major institutional principle of the European Treaty and of the Directives as well as the goal of promoting sustainable and innovative public procurement.

Several indicators are suggested to describe the application of the public procurement policies adopted across EU and their comparative analysis is presented using the TED data for contracts concerning COVID 19.

The case of Portugal is discussed and final remarks about the recommended public policies are also included herein.

Keywords

COVID19; public policies; procurement; European Directives; urgency; sustainability; innovation.

1. COVID 19 : Public Procurement Challenges

Since the pandemic started early 2020, health public authorities are having to acquire a wide spectrum of diversified goods, services and works with a world value of about 1 trillion of dollars per month (Gaspar et al., 2020) justifying multiple procurement decisions and legal changes in most European States.

Most of these acquisitions fall under the class of commercial public markets according to the taxonomy proposed by (Sanchez Graells, 2015) but their nature and required calendar are quite heterogeneous as they include four different classes:

a) additional hospital beds to avoid hospital congestion;

b) specialized equipment for acute hospital treatment such as ventilators for intensive care units;

c) consumer goods and services for COVID19 disinfection;

d) standard products like COVID 19 tests or Individual Protection Equipment (IPE)including masks, examination gloves, goggles, etc.

Therefore, it is widely recognized that "the impacts of chosen procurement strategies have an immediate effect on the effectiveness of policies for dealing with the pandemic and its social and economic consequences."(OECD, 2020a) but the procurement challenges are quite different for these four classes because:

a) The increase of the hospital capacity may imply the acquisition of campaign installations through quick awarding of integrated contracts including design, equipment, materials, works, finishings, etc.. The number of these contracts tends to be very small in each State and so special rules to cope with them can be approved and used.

b) These equipments should be subject to very detailed specifications and a stage of qualification of candidates is very convenient. It should be noted that most of them are not just useful for this pandemic as their needs will last for long periods and so a longer term perspective is required as it happens with the equipments of intensive care units.

c) However, if capacity is short and there is the risk of being exceeded at short term, an urgent acquisition may be justified but, if so, adequate and coordinated procurement is vital to avoid an unbalanced game giving speculative power to the suppliers.

d) These acquisitions have a basic or standardized nature and should be repeatedly executed during many months. Actually, the world monthly consumptions of medical masks, examination gloves and goggles due to COVID 19 were estimated by WHO equal to 89 M€,76 M€ and 1.6 M€, respectively (World Health Organization, 2020).

Therefore, the nature of policy options and legal measures which should be adopted have to respect this diversity and avoiding the typical mistake of wrapping up all these acquisitions as a homogeneous package. Such mistake stems also from the common tradition of classifying the contract object just in terms of goods, services and works which was quite appropriate during the fifties but hardly applicable presently due to the ubiquitous trend of increasing technological complexity and market diversity. Who ignores that buying tonnes of apples requires a very different approach than buying highly performing ventilators?

The acquisitions of type A are quite rare and so special attention is given in this paper to the other 3 classes.

Therefore, and under this "war scenario", a major policy issue concerns the selection of the most appropriate public policies to be adopted by Governments to cope with these new procurement needs justifying the formulation of the research question presented in the next section and studied in this paper.

2. Research Question and Methodology

An unexpected global event with dramatic health, social and economic impacts, as it happens with COVID19, is always a major challenge for Governments as they are tempted to cope with such challenges through unplanned, non-sustainable and myopic decisions with the single purpose of acting fast and therefore the research question addressed by this paper is:

Can the public contracting authorities cope with the needs of procurement due to COVID 19 respecting the principles as well as the rules of the 2014 EU Directives of Public Procurement (European Parliament and the Council of the European Union, 2014a) and pursuing sustainable and innovative public policies avoiding fragmented and myopic options?

The adopted methodology in this paper follows the principles of public policy research already proposed by key authors since the fifties (see, namely, (Lasswell, 1951)) and respecting its interdisciplinary nature (DeLeon and Vogenbeck, 2007) to integrate the contributions of Economics, Public Management, Law and Digital Technologies (Tavares, 2013). The adopted approach follows the "problem oriented" and systemic methodology proposed and studied by (Ackoff, 1974) (Simeon, 1976) (Tavares et al., 1997) as well as (Dunn, 2015) and it is applied in this paper through a four stage process (Fischer et al., 2017) taking into consideration the special impacts of adversity (Dror, 2017):

a) Formulation of the needs, conditions and challenges to be addressed: **Facts and Issues Stage.**

b) Scenarios and options design to enlarge the space of alternatives: **Options Stage.**

c) Values and goals to be pursued: **Values Stage.**

d) Evaluation and policies recommendations: **Policies Stage.**

The study of the procurement needs is presented in the next section (Facts Stage) identifying the short and long term needs and the available options according to the EU Directives of Public Procurement are studied in Sections 3 and 4 concerning the urgent and the long term needs (Options Stage). The Values Stage and the Policies Stage are studied for the two major goals to be addressed - competitive as well as sustainable and innovative public markets - in Sections 5 and 6. A cross-State comparative analysis of the application of the selected policies using the proposed indicators (Sections 5 and 6) is presented in Section 7 and the case-study of Portugal is discussed in the Section 8. Final remarks are included in the last section.

3. Short and Long Term Needs, Conditions and Challenges

The short term needs are quite well known as they include most of the items of types B, C and D to cope with the sudden increase of health services due to COVID19. However, in a period of drastic changes of needs and increased demand for items of classes B, C and D, the supply chains tend to be disturbed or even collapsed creating opportunistic sales, lack of compliance and shortage restrictions. This is clearly diagnosed by (Lalliot and Yukins, 2020) concluding that:

"the crush of the pandemic also transformed a buyers' public procurement market into a sellers' market and forced those government buyers to compete bitterly with one another—disruptions which shook fundamental assumptions that traditionally shaped the norms and rules of public procurement".

Many public markets are often considered as a total or partial monopsony but now the power is being transferred for the sellers due to scarcity of supplies and to doubts about compliance with quality standards. This is clearly shown by the unjustified increase of prices in international markets as it is well documented by the case presented by one of the most important public hospital groups in Portugal, the CHOC ("Centro Hospitalar de Lisboa Ocidental ", CHLO) with an annual budget of 200 M euros , 5000 staff members and 300 beds for COVID 19 comparing the unit price (euros) offered in international markets for the acquisition of the same critical goods in 2019 and 2020 (Peres, 2021).

Table 1- Critical goods prices

	Price (per unit) € 2019	Price (per unit) € 2020	Price 2020/2019
Masks	0.03	0.13	4.33
Gloves	0.10	0.32	3.20
Gowns	0.36	2.10	5.83

Therefore, the price speculation or scarcity of supplies can also increase the risk of lack of integrity as it is noted by (Schultz and Søreide, 2008) and (OECD, 2020b) including the following remark:

"Given market dominance, many transactions are taking place off-book, and price volatility is extreme, with often significant advance payments required by vendors. This could contribute to a paradigm shift in corrupt schemes, as buyers could now corrupt sellers in order to receive essential goods and services --the reverse of what normally happen"

This context of scarcity can also imply changing of contract terms meaning that public procurement has also to cope with market uncertainty. Such uncertainty is not compatible with the most traditional approach of Administrative Law assuming that there is full reliable information and supply availability to buy goods or services "from the shelf" (Tavares, 2017) (Tavares, 2018).

This lack of understanding about these new challenges can explain many quoted examples of failures such as masks without proper certification or ventilators that could not be used as it happened in Portugal (for instance, 30 ventilators were bought by 1,3 Million euros and they have never been used due to the lack of functionalities (Público, 2020)).

Therefore, a major need is the proactive search for better knowledge about markets features, contacting the economic operators to be better informed about their options and inventories as well as inquiring about their potential interest to be engaged into longer term sustainable and innovative initiatives.

This means that this pandemic is also an opportunity to promote sustainable and innovative procurement (Tavares, 2019) (European Commission, 2020a) according to the paradigm of demand driven innovation (Edquist et al., 2000) which has been extensively studied by OECD (OECD, 2011) :

"This interest in demand-side innovation policy has emerged as part of a greater awareness of the importance of feed-back linkages between supply and demand in the innovation process" (OECD, 2011)

and then each Government can become "market shaper—not only market fixer"(Mazzucato, 2016).

Thus, the procurement needs due to COVID 19 go much further than the widely publicized objective of "buying fast" implying the approval of the so called "fast law" (Tavares, 2020).

Conversely, maximal priority should be also given to the adoption of proactive policies promoting longer term sustainable and innovative procurement as well as the consolidation of supply chains

of critical goods and services which will have to be procured for months or years helping to fight COVID19 and to revamp the social and economic recovery.

A typical example concerns the procurement of computers for the students so that they can be served by e-learning due to the confinement rules as this vast need can be used to develop long term procurement strategies including the promotion of sustainable products, namely using a higher percentage of recycled materials or consuming less energy, as well as the development of innovative features, for instance adapting the features to the specific requirements of e-learning. Alternatively, this acquisition can be formulated as an urgent shopping from the shelf, without any advanced planning and then the results are quite obvious: lower value for money and collapse of the supply chains without timely deliver. Unfortunately, this failure is happening in Portugal where the acquisition of computers to be used by about 1 million students was promised by the Prime Minister on 11 April 2020, but the procurement was just started in the last quarter of 2020, without any planning, and so most of the computers were not yet delivered on February 2021 (Expresso, 2021) although all students should be now attending classes and being served by e-learning.

The European Commission has approved an important communication (European Commission, 2020a) concerning public procurement due to COVID 19 and this policy line promoting innovative and sustainable procurement is clearly recommended:

"(…)Interaction with the market may offer good opportunities to take into account also strategic public procurement aspects, where environmental, ***innovative*** *and social requirements, including accessibility to any services procured, are integrated in the procurement process." (bolded by the author)*

Furthermore, other special measures can be adopted helping contractors to execute contracts through advanced payments or other financial measures and they can have significant benefits not just for the economic and social conditions but also to increase the rate of success of contracts awarded by contracting authorities and their value for money. Another important need for public procurement under COVID 19 concerns the financial assistance to economic operators to help them executing the contracts through advanced payments or other financial measures .

Some authors (Gaspar et al., 2020) estimate that world nations have allocated about US$2.6 trillion/month to relief packages with fiscal support or credit and equity injections and the European Commission approved a Framework (European Commission, 2020b) allowing a set of financial measures, grants and loans, to help economic operators to overcome COVID 19 challenges and this policy line should be integrated with the policy lines concerning public procurement.

Summing up, public procurement should play a central role in public policies to fight COVID19 and the needs concerning the items of types B,C and D include two types:

Type I: Emergency, occasional and non-repetitive acquisitions to be accomplished quickly and executed in very short periods of time.

Type II: Long term acquisitions lasting for months or even years requiring a stable and coordinated strategy to improve sourcing through innovation and sustainable policies in order that quality, innovation and efficiency of markets will be increased.

Understanding these two types of needs require information and knowledge about public markets and public management so that the most appropriate procurement options will be adopted respecting the principles and rules of the European Directives of Public Procurement (European Parliament and the Council of the European Union, 2014a). Thus, and according to the presented methodology, the major options for type I and type II needs will be studied in the following two sections

4. Public Procurement Options for Type I Needs

The needs of Type I case may justify the adoption of urgent deadlines for procedures with prior publication of a notice as it is pointed out by (European Commission, 2020a) :

"Using an 'accelerated' open or restricted procedure complies with the principles of equal treatment and transparency and ensures competition even in cases of urgency"

The urgency deadlines are presented in Table 2:

Table 2 – Deadlines for Urgent Procedures

Procedure	Minimal Regular deadlines	Minimal Shortened deadlines
Open procedure	35 days (14)	15 days
Restricted procedure (step 1: Request for participation)	30 days (15)	15 days (16)
Restricted procedure (step 2: Submission of the tender)	30 days (17)	10 days (18)

However, in other urgent situations, these deadlines may be too long and so the negotiated procedure without prior publication of notice (NPWN) (see Article 32 of (European Parliament and the Council of the European Union, 2014a)) may be adopted but the quoted conditions should be respected (European Commission, 2020a):

"(…)In the individual assessment of each case the following cumulative criteria will have to be fulfilled:

2.3.1. 'Events unforeseeable by the contracting authority in question'(…)

2.3.2. Extreme urgency making compliance with general deadlines impossible (…)

2.3.3. Causal link between the unforeseen event and the extreme urgency (…)

2.3.4. Only used in order to cover the gap until more stable solutions can be found."

Therefore, it is clear that NPWN should be not used during long or indefinite periods to cope with repetitive and similar procurement needs.

Quite often, the application of this exceptional procedure can justify doubts and criticisms as it is exemplified by the interesting discussion between Pedro Telles and Sanchez-Graells (Sanchez-Graells, 2020) about the legality of its application to the purchase by the British Government of 10 000 ventilators as the former has doubts based on the previous British decision of not

participating in a EU joint procurement agreement with same object and the doubts of the latter are based on the inadequate selection of the supplier.

These exceptional procedures can only be applied if competitive procedures with urgent deadlines are not acceptable and so, if at the time of award, the contractor is not capable to cope with the contract, as it seems to be the case, how can the adoption of NPWN can be justified?

The absence of appropriate justification for the adoption of NPWN can also increase the risk of lack of integrity which happens often in any emergency context as it is noted by (OECD, 2020b):

"While risks of fraud and corruption are always present in public procurement,1they are elevated in emergency procurement processes. Past health and humanitarian crises, such as Hurricane Katrina in 2005 or the Ebola outbreak in 2014-16, have shown how these processes can be abused at the expense of those most in need of said goods and services"

Therefore, the most appropriate selection of a procedure to cope with urgent needs should compromise urgency with competition, transparency and sustainability .Such challenging decision is studied in Section 6.

5. Public Procurement Options for Type II Needs

Fortunately, there also quite appropriate solutions to cope with type II needs based on the instruments for electronic and aggregated procurement included in (European Parliament and the Council of the European Union, 2014a), namely, Framework Agreements (FA) or Dynamic Purchasing Systems (DPS) including Electronic Catalogues (EDC), as they can provide quite efficient solutions as it is pointed out in 2.3.4 by (European Commission, 2020a) to promote sustainable and innovative procurement.

These techniques and instruments for electronic and aggregated procurement are ruled by the Directives on Public Procurement on 2014 (European Parliament and the Council of the European Union, 2014a) and require the adoption of electronic procurement which is mandatory since 2018 across EU.

These instruments imply an initial stage of qualification of economic operators and then an evaluation of submitted tenders by the qualified candidates to evaluate their tenders and to contract those with better tenders. Thus, the contracted economic operators become a "confined" market with a duration of up to 4 years (or 8 years in the case of the special sectors, (European Parliament and the Council of the European Union, 2014b)) which can be used every time a contracting authority included in the procedure has a specific need. This type of market is quite important in Public Management and it is called Quasi-Market (Le Grand and Bartlett, 1993) having been also treated by key legal authors such as (Vincent-Jones, 2006).

Such Quasi-Market is fixed for the Framework Agreements (FA) but newcomers can be qualified in DPS increasing competition and transparency.

It should be noted that the minimal times to receive applications and tenders either for FA or DPS follow the rules of the restricted procedure (Article 28º) and so in the case of urgency they can be reduced to 15 days (applications) or 10 days (electronic tenders), which means that these durations are similar to the usual periods adopted to invitation procedures.

Furthermore, the Article 36º-4 about Electronic Catalogues is quite clear about the possibility of awarding a contract in terms of the Electronic Catalogue obtained as an outcome of a FA (or of a

DPS) which means that even the duration of 10 days can be avoided if no updated tender is required by the contracting authority:

"4. Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting authorities may: (…)

(b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question; provided that the use of that method has been announced in the procurement documents for the framework agreement."

Therefore, FA and DPS with an EC are particularly well adapted to the needs of Type II for items B, C and D along months and years suffering the effects of pandemic because:

a) They permit setting up appropriate Quasi-Markets, respecting full competition and transparency and improving the value for money of each acquisition.

b) After being set up, they allow a very expeditious calendar including 15 days for the period of qualification and 10 or 0 (with an electronic catalogue) days to receive tenders.

c) They contribute to the coordination between contracting authorities and the aggregation of demand reducing the risk of suffering from speculative and opportunistic strategies developed by suppliers due to the increase of demand.

The Directives also include other procedures promoting innovation, namely the Partnership for Innovation (Article 31º) stating that:

"1-…In the procurement documents, the contracting authority shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure. The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.(…)

7-The contracting authority shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market "

Thus, this procedure (Gomes, 2021) can be particularly useful to achieve better solutions for products or services with a higher level of technological complexity such as ventilators, vaccines, or other drugs. Using this procedure is much more transparent and efficient to support the development of new products and services than the more traditional approach of allocating subsidies and grants through casual options and under debatable equity and transparency conditions.

Obviously, these options are even more useful if these long term procedures are opened before the occurrence of natural disasters ("preventive procurement ") as it has been suggested by several authors, namely after well known disasters as the KATRINA hurricane in USA (Yukins and Schwartz, 2005) (Schultz and Søreide, 2008) (Raimundo, 2012) but most Governments tend to

ignore preventive public policies against unknown dangers because they may believe that such unfortunate challenges will not happen again.

6. How to promote competition , sustainability and innovation using procurement options ?

According to the presented methodology, the presented options should be now discussed in terms of the values to be pursued - Competition as well as Sustainability and Innovation - in order that the most appropriate options will be selected by the contracting authorities.

A) Competitive public markets

The European Union is based on the principles of Market Economy which have been revised to accommodate social policies by the Lisbon Treaty (European Union, 2012) as it is pointed out by (Gerbrandy et al., 2019) labeling the European economy as "Social Market Economy" considering the Article 3-3 of (European Union, 2012)

"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. …"

These social objectives should respect the general principles of equality, transparency, proportionality and competition and so public procurement should also respect the principle of competition so much as possible as it is clear from the first recital of (European Parliament and the Council of the European Union, 2014a):

"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), … so as to ensure that those principles are given practical effect and public procurement is opened up to competition ".

and ruled by the Article 18º of (European Parliament and the Council of the European Union, 2014a)

"1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.".

An interesting interdisciplinary interpretation of this article is presented in (Sanchez Graells, 2015).

Respecting this principle is also important because competitive procurement plays a key role to shape competitive markets and to form prices as it was studied by several authors such as (Caldwell et al., 2005) (Townsend, 1980). This is why disrespect this principle may be not just a violation of one of the EU institutional principles but it may be also a reason for intervention by authorities in charge of regulating competittion (Sanchez-Graells, 2018).

Furthermore, the lack of competitive public procurement is often correlated with bad practices of corruption and patronage even in countries with a general low level of corruption as it is shown for the case of Sweden (Broms et al., 2019).

The basic concept of competition has an economic nature (Hunt, 2000) and the concept of competitive interaction between consumers and vendors is the key generator of value for money for the buyers as it is noted by (Prahalad and Ramaswamy, 2004):

"The new value creation space is a competitive space (…) developed through purposeful interactions between the consumer and a network of companies (…)".

This is why , according to the classical principles of the Theory of the Consumer in Market Economy (Allen, 1936), the expected consumer value of an acquisition is increased if the buyer carries out searching and comparative evaluations between alternative bids before buying and this is why competitive procedures should be adopted in public procurement, not just for increasing transparency and equity (ClientEarth, 2011) but also to increase the value for money for the buyer (Piga and Treumer, 2013). Furthermore:

"Majoritarian views advocate for an interventionist approach and instrumental utilization of procurement for the promotion of horizontal policies seen as deeply embedded in the Europe 2020 strategy. Conversely, public procurement can only make such a contribution by promoting the maximum degree of competition and being open to market-led innovation"

as it is pointed out by (Sanchez Graells, 2016) which means that competition is a key attribute of public procurement if development horizontal public policies should be pursued.

In public procurement, the level of competition (C) (Tavares, 2011) (Tavares, 2015) can be mathematically defined by a simple formula:

$$C = N - 1$$

where N is the number of economic operators that can present a relevant tender.

There are several ways of reducing N in competitive procedures with a prior publication of notice such as including too hard conditions for selection, qualification or even too narrow specifications to be fulfilled by the tender disrespecting the competition principle as it has been stated by the European Court of Justice in many cases (see, for instance (Jema Energy v Entreprise, 2017)).

NPWN reduces N through the number of invited tenderers but the assumption that the degree of competition is always higher for competitive procedures with prior notice than for NPWN or that inviting 1 or more tenderers has the same degree of competition as it has been expressed by juridical authors[1] (Amaral e Almeida and Sánchez, 2016) just shows not understanding the economic concept of competition.

Furthermore, it should be noted that NPWN includes the case of direct award (N=1) but it also includes invitations to N>1 economic operators as it is clear from the Article 32 of (European Parliament and the Council of the European Union, 2014a) where the case of N= 1 is just mentioned in Article 32º -2 b).

The quoted communication (European Commission, 2020a) also explains that N should be higher than 1, if possible:

[1]"the contribution of the duty to invite more than one entity to the promotion of competition is utopic" (translation by the author)

"Eventually, even a direct award to a preselected economic operator could be allowed, provided the latter is the only one able to deliver the required supplies within the technical and time constraints imposed by the extreme urgency "

and

"Concretely, the negotiated procedure without publication allows public buyers to acquire supplies and services within the shortest possible timeframe. Under this procedure, as set out in Art. 32 of Directive 2014/24/EU (the 'Directive') (2), public buyers may negotiate directly with potential contractor(s) and there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements"

These two paragraphs are quite important and consistent as they are both restating the well-known principle of the Directives: NPWN just can be used in urgent situations already discussed and N should be higher than 1 whenever such option is compatible with the level of urgency but N=1 can be accepted if just direct award to a pre-selected economic operator will cope with the existing conditions of extreme urgency .

This means that NPWN is available for urgent conditions in an emergency context due to COVID 19 and N>1 should be adopted whenever is possible, but NPWN should be just be:

"used in order to cover the gap until more stable solutions can be found" such as framework contracts for supplies and services, awarded through regular procedures (including accelerated procedures)."

as it is clear in 2.3.4 of (European Commission, 2020a).

Nevertheless, after almost one year of pandemic context it can be concluded that (Lalliot and Yukins, 2020):

"The COVID-19 emergency lasted relatively briefly, allowing time only for surprise and quick reactions. As countries learn to manage in a new post-COVID era, they must also rethink emergency purchasing procedures which are no longer justified in the face of a situation which is admittedly difficult to control but which is no longer unpredictable"

and so it is recommended that (Lalliot and Yukins, 2020):

"new approaches are needed—though ones grounded in traditional norms of transparence, competition and integrity. Public policy should rest on digital tools that allow governments to respond to the exigencies of a crisis and the immediate needs of users, while ensuring transparency and reliability of purchases, and the publicity of operations"

Summing up, the presented guidelines should be considered by the contracting authorities to use the procurement options of type I without disregarding the major value and policy objective of European public policies: setting up competitive public markets.

Thus, the percentage of procurement procedures opened to competition through a contract notice can be a preliminary proxy to quantify the fulfillment of this policy goal and this indicator will be used for the cross State comparative analysis in Section 7.

B) Electronic Public Procurement

A key instrument to cope with the new challenges of public procurement policies concerns e-public procurement as it helps to form contracts, to support the sustainable development of supply chains, to accelerate procedures and to promote integrity.

Actually, electronic instruments and e-procurement is mandatory in EU since 2018 (Article 90º of (European Parliament and the Council of the European Union, 2014a)) and can play a very important role to promote fast acquisitions as well as sustainability and innovation because it may reduce the bureaucratic load (Arantes et al., 2013) (Aguiar Costa et al., 2013), it may facilitate the dissemination of competitions or the request for innovative bids and it allows the implementation of new and innovative procedures (Tavares et al., 2014).

Such positive impacts were estimated for Portugal (Arantes et al., 2013) (Aguiar Costa et al., 2013) which was the first member State to adopt mandatory e-public procurement since 1 November of 2009, and the results were quite positive and relevant to support the deadline of 2018 established by the European Directives on Public Procurement (European Parliament and the Council of the European Union, 2014a).

Furthermore, e-procurement can help to reduce the risks of lack of integrity as it is suggested by (OECD, 2020, page 5) as recommended initiatives :

"Using or expanding existing e-procurement platforms to record transactional information on the procurement of emergency items. A database could be created to analyse bidding patterns and identify potential red flags, signalling risks posed to integrity" and

"Creating digital and easily accessible tools to allow the public to track all emergency purchases undertaken in line with emergency procurement measures".

Also, e-public procurement is an essencial condition to apply the proposed procedures explained in C) of this section.

Finally, a special mention about the importance of "digital tools" is also made in the quoted communication:

"(…)In addition: Public buyers may use innovative digital tools (4) to trigger a wide interest among economic actors able to propose alternative solutions(…)Public buyers may also work more closely with innovation ecosystems or entrepreneurs' networks, which could propose solutions"

C) Sustainable and innovative public markets

During the last decades, the contribution of public procurement to accelerate public policies (Arrowsmith, 2010) (Tavares et al., 2014) has been receiving growing priority as it is clearly expressed by the Recitals nº 2 and 47 of (European Parliament and the Council of the European Union, 2014a):

"(2)- Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds…."

(47) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth "

The study of sustainable and innovative procurement has been treated by Manuals of the European Commission (European Commission, 2016) (European Commission, 2019a) of OECD (OECD, 2015) (OECD, 2017) and by other authors (see, namely (Tavares et al., 2014) (Tavares, 2019)). The application of green public procurement using the life cycle cost as award criterion has been even studied for goods particularly important to cope with COVID19, namely, imaging equipment and computers or monitors (European Commission, 2019b) (European Commission, 2019c).

The procedures already presented in the previous section can be quite useful to "shape markets" as it is recommended by (Mazzucato, 2016) as they set up a stable and adaptive framework for public contracting and also to achieve the public policy goal of promoting sustainable and innovative procurement if:

a) The procedure documents leave significant degrees of freedom to the bidders and introduce incentives to pursue the goals of innovate and to improve sustainability.

b) The award criterion is the Most Economically Advantageous Tender (MEAT) clearly explained and recommended by (European Parliament and the Council of the European Union, 2014a) (Article 67º) including the appropriate value functions to model such goals rather than the minimal price under full specification of the contract object which prevents the introduction of such incentives. The Article 68º (Life-cycle costing) explains the application of MEAT to the life cycle cost criterion which can be also quite important to promote sustainable procurement.

The adoption of the MEAT criterion is not sufficient to promote sustainable and innovative procurement but it is a key necessary condition and therefore the percentage of contracts awarded by this criterion can be a preliminary proxy of the importance given to the achievement of this public policy goal.

This explains why this indicator is used for the cross-State comparative analysis presented in Section7.

Several EU States (OECD, 2020c) are making full use of aggregated and electronic instruments to pursue sustainable procurement strategies based on Central Purchasing Bodies or Central Procurement Agencies as it is the case of Estonia (State Shared Service), Finland (Central Purchasing Body using FAs and DPSs),France (Central Purchasing Body UGAP), Greece (Hellenic Single Public Procurement Authority), Ireland (Office of Governmental Procurement), Italy (Central Purchasing Body, CONSIP),The Netherlands (PIANOo), Poland (Public Procurement Office) and Sweden (Swedish Agency for Public Procurement). The European Commission promoted 3 Joint Procurement Agreements about gloves and surgical gowns (28 February 2020), PPE, ventilators and respiratory equipment (17 March 2020) and laboratory equipment including test kits (19 March 2020).

The development and an innovative application of FA with an electronic catalogue to contract Home Health Respiratory Care services in Portugal implementing the public management concept of Quasi-Market (Vincent-Jones, 2006) and embracing all the main qualified providers is described and discussed by (Tavares and Arruda, 2020). The presented results show how impressive are the advantages achieved in terms of cost reduction, quality of services innovation and sustainability if compared with the traditional approach a series of open or restricted procedures.

Unfortunately, the number of applications of the Partnership for Innovation is far behind the expected level.

Summing up, the presented options allow a positive answer to the research question addressed by this paper.

7. A Comparative Analyses across EU

Health expenditure has been deeply affected by this pandemic through a twofold impact:

a) High reduction of the normal services such as surgeries, urgencies or first appointments as it happened in Portugal where the percentages of reduction were -58%, -44% and -40%, respectively during 2020.

b) Urgent and vast need of procurement for items related to COVID19 corresponding the CPV codes 33157400, 33670000, 33631600, 33195110, 35113400, 18424300, 33141420, 33192120, 39330000, 33191000, 18143000, 45215142, 33157110, 33157000, 33694000 according to (Tenders Electronic Daily, 2021).

The number of contract award notices published by TED, between 1/2/2020 and 31/12/2020 and considering the relevant codes related to COVID 19, include more than 4000 contract award notices distributed by different types of procedures and States as it is shown in Table 2:

Table 3– Contract Award Notices [Type of Procedure]

	Negotiated procedure without a call for competition	Open procedure	Competitive procedure with negotiation	Restricted procedure	Accelerated restricted procedure	Negotiated procedure	Innovation partnership	Contract award without prior publication	Total
Austria	112	22	4					2	140
Belgium	3	31	5						39
Bulgaria	2	98		3		3			106
Croatia	13	25		1					39
Cyprus	2	1							3
Czechia	11	220		43		4		4	282
Denmark	24	11	2	2		1			40
Estonia	4	17							21
Finland	1	21	2	2				3	29
France	104	168	1	1		11		17	302
Germany	129	117	4			1		4	255
Greece	2	20							22
Hungary	5	49							54
Ireland	5	8				1		1	15
Italy	10	57		3				4	74
Latvia	4	17				1			22
Lithuania	53	155		1				1	210
Luxembourg	10							2	12
Malta	1	3							4
Netherlands	8	16		1					25

Poland	9	552	1	4	1				567
Portugal	1	3							4
Romania	146	912		1				1	1060
Slovakia	10	40		6					56
Slovenia	6	83		3					92
Spain	55	110	2			2		7	176
Sweden		72				2			74
United Kingdom	357	33		2			1	17	410
Total	1087	2861	21	73	1	26	1	63	4133

The total number of the contracts is denoted by CT and the sum of the first and last columns correspond to contracts without prior notices (CWN). Thus, CT = CWN + CC, where CC is the number of contracts with prior notice.

The most common procedure is the open procedure as it could be expected, including a significant percentage of competitions opened within a framework agreement.

The distribution of contract award notices per State and award criterion can also be studied considering the minimal price criterion (NP) and MEAT (Most economically advantageous tender) criterion (NQ) (Table 3)

Table 4– Contract Award Notices [Award Criterion]

Country	Minimal Price	MEAT
Austria	109	31
Belgium	6	33
Bulgaria	99	7
Croatia	4	35
Cyprus	3	0
Czechia	218	64
Denmark	25	15
Estonia	12	9
Finland	12	17
France	128	174
Germany	146	109
Greece	17	5
Hungary	19	35
Ireland	8	7
Italy	45	29
Latvia	20	2
Lithuania	208	2
Luxembourg	1	11
Malta	4	0
Netherlands	13	12

Poland	155	412
Portugal	4	0
Romania	862	198
Slovakia	56	0
Slovenia	84	8
Spain	77	99
Sweden	62	12
United Kingdom	342	68
Total	2739	1394

The presented results allows the estimation of the two proxy indicators already presented to describe competitiveness and necessary conditions for sustainability and innovation: the Competition Index (CI) and the Price Quality Index (PCI).

Also, these data allows the estimation of how frequent is the adoption of procurement procedures for contracts with a value equal or higher than the EU thresholds which will be denoted by Contracting Intensity Index (CII).

A- COVID19 Contracting Intensity Index (CII)

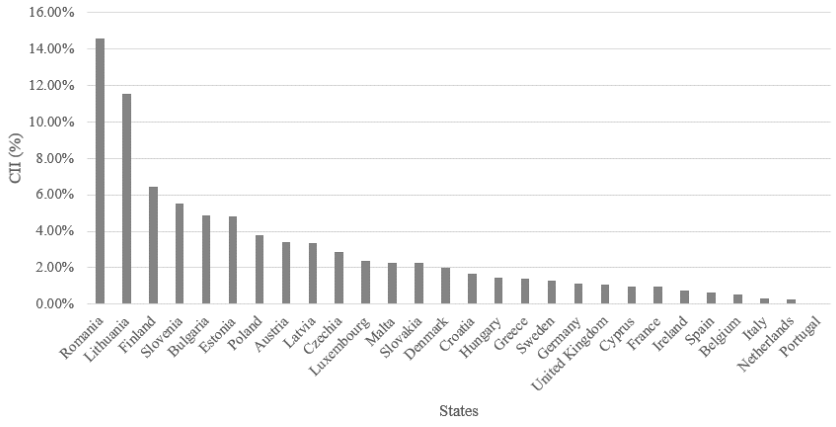
This indicator is defined by the percentage ratio between CT and the total number of citizens that were infected by COVID19 (total cases/100) expressing the preference by each State to award contracts with a value higher than the EU thresholds. This indicator expresses the combined effect of two different factors.

a) the need to buy because some States may be more or less equipped to cope with the pandemic;

b) the organization of public procurement more or less based on contracts with a value equal or higher than the EU thresholds. Obviously, those States preferring procurement based on contracts with a value lower than the thresholds are contributing less to the single market than those with alternative policies.

The results are presented in Figure 1:

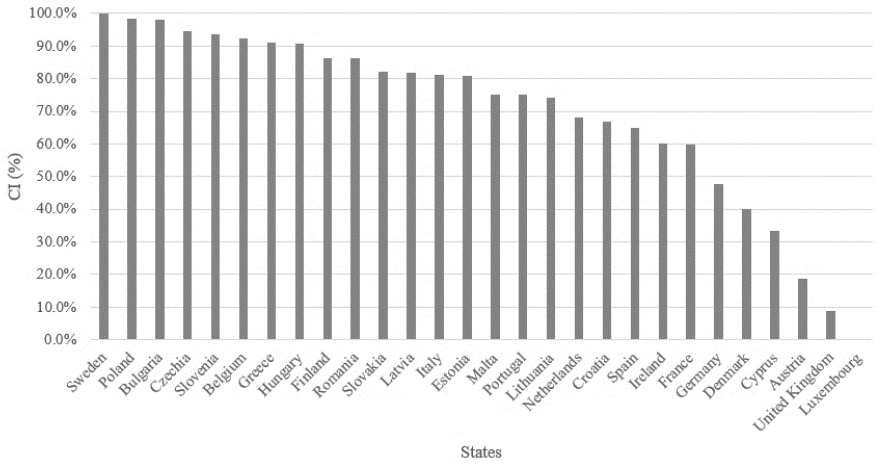
Figure 1 - Contracting Intensity Index



B- The Competition Index (CI)

This indicator can be considered as a proxy of how the goal of contributing to competitive public markets is considered by each State and it may be defined by the ratio CC/(CWN + CC) representing the percentage of contracts opened to competition through TED and its presented in Figure 2:

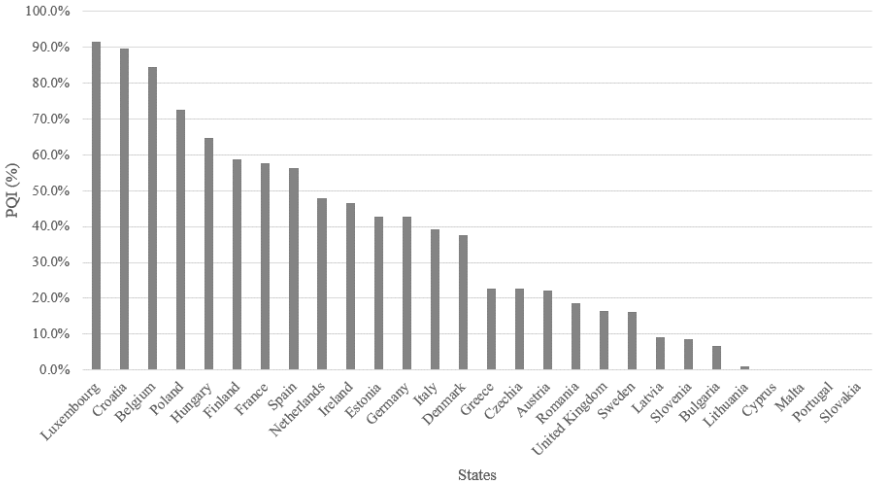
Figure 2- Competition Index



C- Price Quality Index (PQI)

As it was explained in the Section, the promotion of sustainability and innovation requires that the procurement procedure will allow degrees of freedom to the bidder so that he can develop innovative solutions and can adopt stable strategies to supply demand during long periods. Thus, a proxy of a necessary condition to pursue such goal may be expressed by an indicator defined by the ratio NQ/(NP+NQ) representing the percentage of contracts adopting the MEAT ("Most Advantageous Economically Tender ") criterion and presented in Figure 3

Figure 3 - Price Quality Index



Several comments can be made:

a) 14 States award more than 30% of contracts using MEAT award criterion :Luxembourg, Croatia, Belgium, Poland, Hungary, Finland, France, Spain, Netherlands, Ireland, Estonia, Germany, Italy and Denmark.

b) All but six States (Luxembourg, UK, Austria, Cyprus, Denmark, Germany) award more than 50% of the contracts with a value equal or higher than the thresholds and publishing a contract notice.

c) All these indicators express quite a high diversity of procurement options and patterns made by the member States to procure goods and services to fight COVID 19 which is confirmed by their estimated coefficient of variation (standard deviation over mean) which is particularly high for CII and PQI: CV(CII) = 1.11; CV (CI) = 0.39: CV (PQI) = 0.81

d) PQI can be described by a linear function with equation $PQI(^{n}) = 0{\cdot}85 - 0{\cdot}0345n$ (with R^2 = 0.9599) being n the index ordering the States (n= 1 for Luxembourg and n= 28 for Slovakia) but the other indicators have a non-linear behavior.

Furthermore, a few more specialized comments can be made:

a) The evident diversity of openness to competition and to assess quality as an award criterion shows that this substantial increase of public acquisitions may not have the optimal impacts in these public markets in terms of quality improvement and prices stabilization.

b) COVID 19 has also justified public procurement besides the CPV codes selected by TED such as the acquisition of information systems and computers or the installation and management of call centers to guide citizens in terms of their symptoms.

c) Central Purchasing Bodies could be expected to correspond to a large share of notices concerning the CPV codes selected by TED and related to competitive procedures but that is not the case. There is even the notorious absence of central purchasing bodies such as CONSIP in Italy or SPMS (Health Central Purchasing Body) in Portugal as they have not sent a single notice.

d) An unusual DPS was opened for public works concerning the development and renewal of housing for a Scottish region during 5 years and with a value of 40 M GBP.

e) A competitive dialogue concerning medical and surgical materials was opened by an important hospital in Dublin.

f) In the case of Portugal (Tribunal de Contas, 2020) from March,16,2020 until March, 31, 2020, 55 public contracts were awarded using the COVID19 TED codes and each one with a value higher than 1M euros. The total awarded value was 158 M euros and 56% of procedures adopted either NPWN or Direct Award meaning quite a low value for TI. Furthermore ,and unfortunately, most of these award contract notices were not sent to TED but, quite surprisingly, it seems that no sanctions will be applied.

8. The Case of Portugal

8.1 Approach

Most Governments are aware that they have approved an web of cumbersome and complex legal rules for public procurement and so they tend to believe that the magic solution to fight pandemics is relaxing some of these complexities facilitating the use of NPWN (or even just the use of direct

award as it happens in Portugal). This "mystic" believe shows deep ignorance about the disruptive and turbulent changes in public markets due to war conditions as it happens with COVID 19 and so the major needs concerning supply chains monitoring and their longer term consolidation , promoting the innovation and optimization of sourcing through aggregation and electronic instruments are forgotten.

Portugal is an example of such policy, as since the outbreak of COVID 19, the Portuguese Government approved 12 major legal acts (Tavares, 2020) from 24 March until 29 May 2020 corresponding to an average of 1.5 legal act per week just oriented to accelerate procedures. According to the comprehensive analysis by (Raimundo, 2020) the main decree-law (Presidência do Conselho de Ministros, 2020a) was already amended 15 times which means that the emergency regime concerning contracts directly related to fight the pandemic COIVD19 introduces additional doubts and complexity.

Unfortunately the Portuguese tradition of preparation of the legal framework does not follow the recommendations of OCDE (OECD, 2020d) and no background interdisciplinary studies are known to have been used to support the adopted juridical options explaining why no analysis of the diversity of procurement needs was carried out and why the multiple and complex legal measures had the major objective of making procedures more expeditious

Unfortunately, the published acts, namely (Presidência do Conselho de Ministros, 2020a), do not express any concern with the Type II needs and just includes measures to accelerate procedures based on urgency due to COVID 19 for contracts concerning meaning that no analysis of the sourcing challenges including innovation and rationalization were considered. Therefore, the paragraphs quoted in Sections 3 and 5 from (European Commission, 2020a) as well as important contributions focusing the need to cope with the needs of Type II, were ignored by the approved legal act.

Other several interesting papers about public contracting under COVID19 were published by Portuguese legal experts but they just tend to discuss the new regime and so no study is included about the type II needs or the electronic instruments for aggregated procurement (Pereira, 2020) (Azevedo, 2020) (Brito, 2020) (Raimundo, 2020) (Sánchez, 2020).

8.2 Formation of contracts

The approved act (Presidência do Conselho de Ministros, 2020a) concerns the COVID19 contracts and includes the Article 2º-1 confirming the possibility of using NPWN for high value contracts based on urgency already stated by the normal public contracts law (Planeamento e das Infraestruturas, 2017) but the Article 27º-A of (Planeamento e das Infraestruturas, 2017) is revoked by the Article nº2º-3. The Article 27º-A is very important because it states that invitation should adopt $N \geq 3$ economic operators whenever it is feasible ("consulta prévia"). Therefore, public contracting authorities can now, under the new regime, award contracts with a value higher than the Directives thresholds by direct award to a preselected economic operator due to urgency related to COVID 19 even if invitation to more than one economic operator is compatible with the urgency conditions . The authors have no doubts that this new rule:

a) Does not promote the respect the Directives principles ruling the adoption of NPWN for N=1 only if N>1 is not feasible as it was shown before.

b) Will reduce the value for money of acquired goods and services according to the principles of Market Economy.

Furthermore, this legal act has no time limit for its application (months, years?) and allows the disrespect of existing framework agreements (Article 2º -7) contributing to the fragmentation of public procurement.

Additional legislation (namely (Assembleia da República, 2020)) has contributed to a more expeditious implementation of award decisions (Raimundo, 2020) exempting the contracts formed under the act (Presidência do Conselho de Ministros, 2020a) from the need to get an ex-ante compliance declaration ("visto prévio") by Tribunal de Contas (equivalent to the English National Audit Office).

The communication between contracting authorities and economic operators should be based on electronic platforms according to the existing Code of Public Contracts (Planeamento e das Infraestruturas, 2017) to fulfill the requirements of integrity and confidentiality set up by the Article 21º-3 of (European Parliament and the Council of the European Union, 2014a):

"In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved."

However, invitation procedures are exempting from this rule because the Artº 115-1 g) allows the use of other "electronic transmission means" which means that common e-mail can be used.

Probably, this exemption was justified in terms of the lower value of contracts formed by NPWN but its generalization to high value contracts should justify the mandatory use of an electronic platform. Unfortunately, such new rule is not included and so doubts about the compliance with the principles of integrity and confidentiality for contracts under the Directives regime can be raised if common email is adopted.

As it could be expected, the execution results justify serious concerns as it is already shown by the thorough report of Tribunal de Contas showing that more than 300 M euros of goods and services were contracted by direct award since March to September (Tribunal de Contas, 2020). Such acquisitions include the same items with high fluctuations of the unit price (from 1 to 2.6) and equipment that cannot be used as it was mentioned before.

Also, more than 96% of COVID 19 contracts awarded by Portuguese municipalities until September 2020 have adopted the direct award procedure (TC, 2020a).

In the Health sector, since March 2020, it should be noted that no competitive procedures with prior notice were published by Health Central or Regional Contracting authorities in TED, including SPMS, confirming the previous doubts and the potential of the instruments of the aggregated and electronic procurement is ignored. Actually, common goods as masks or gowns were not acquired through centralized procedures increasing inefficiency and disparities (Martins, 2021).

8.3 Contract Execution

The challenges of COVID19 are also quite relevant for the regime of execution of public contracts, namely about the possibility of introducing modifications during their execution (see the interesting paper by (Almeida, 2019)) but the published legislation does not introduce additional

flexibility or additional mechanisms for mediation and arbitration in COVID 19 contracts. Such changes are particularly important because the Portuguese law is more restrictive about the introduction of such modifications than the Directives(Tavares, 2017) (Tavares, 2019). However, the quoted legal act includes positive changes about the possibility of contracting authorities making advanced payments (Article 2º-6) avoiding the assumptions ruled by the normal law (Article 292º of (Planeamento e das Infraestruturas, 2017))[2].

Another legal act (Presidência do Conselho de Ministros, 2020b) was approved about the reposition of the financial balance of the long term contracts due to COVID19, namely concessions and public private partnerships, with the objective of allowing the extension of contracts but excluding financial compensations by the State.

8.4 Additional developments and comments

In the end of 2020, a new law was approved and will probably be promulgated by the President of Republic in coming weeks defining new simplified and diversified regimes for public procurement for several domains:

a) related to contracts funded by European Funds (A).

b) related to contracts concerning the social and economic recovery defined by (Presidência do Conselho de Ministros, 2020c) (B).

c) related to the digital transition defined by (Presidência do Conselho de Ministros, 2020d) (C).

These two Resolutions include long lists of topics some of them with unclear definitions and even some of them with overlapping domains.

Therefore, on 2021 the public procurement framework will include 3 different regimes:

a) normal law (Planeamento e das Infraestruturas, 2017) ,N .

b) Urgency due to COVID19 (Presidência do Conselho de Ministros, 2020a) and other acts ,U.

c) Without time limit and according to new legal act devoted to the cases A, B and C.

Therefore, in many cases, the contract object may fulfill the conditions concerning U and (A or B or C) as it happens in the example of acquiring a new medical information system using EU funds to monitor COVID 19: it fulfills the COVID19 urgency, it is supported by EU funds, it is included in the list of B and, finally, it is an instrument of Digital Transition (C). In such cases, the public contracting authorities have a "buffet" of regimes of Public Contracts Law and they can select one of them.

The author has no doubts that this amazing proliferation of regimes with fuzzy borders will be treated through quite interesting legal analyses by excellent Portuguese experts but also that it

[2] *This article sets several assumptions (in Portuguese, "pressupostos") and the restriction of such advanced payments not exceeding 30% of the contract price but the new legal act exempts the contracting authority of respecting such assumptions. Thus, doubts may be raised about the duty of respecting or not the limit of 30% because the concepts of restriction and assumption are different. However, a more liberal interpretation of this Article allows exceeding such limit (Raimundo, 2020).

will contribute to complexify the Portuguese legal framework for public procurement rather than contributing for its simplification and therefore increased litigation can be expected.

Summing up, the authors have shown in this paper that the Portuguese legal framework for COVID 19 procurement:

a) has just considered urgent needs;

b) do not promote the full compliance with the principles of competition and transparency of the Directives;

c) introduces a web of complexities through different overlapping exceptional regimes with fuzzy boundaries, instead of simplifying the normal regime;

d) facilitates the rejection of aggregated instruments as framework agreements;

e) keeps allowing the use of common email as mean of communication between contracting authorities and economic operators to form public contracts with a value above the Directive thresholds and so the compliance with the principles of integrity and confidentiality may not be guaranteed.

Furthermore, the emergency regime legally approved has no time limit for its application contradicting the wise recommendations based on multiple evidences (Lalliot and Yukins, 2020):

"As countries learn to manage in a new post-COVID era, they must also rethink emergency purchasing procedures which are no longer justified in the face of a situation which is admittedly difficult to control but which is no longer unpredictable. The return to normal purchasing procedures is also now becoming an issue: while many countries have enacted exceptional time-bound legislation, others have not set any terminal dates for their "emergency" contracting rules which avoid traditional procurement norms."

9. Final Remarks

Governments have plans, institutions and budgets to cope with emergent and unexpected events but they tend to be designed to protect citizens and communities from sudden and tragic disruptions such as an earthquake, a tsunamis or an wild fire, rather than from a tragic but long lasting threat as it happens with pandemic COVID19.

The previous equivalent pandemic often called "pneumonic" or "Spanish flu" lasted for 2 years (1918-1920) and killed more than 3% of the population in several countries (Nunes et al., 2018) but the new scientific and technologic advances are supporting hopes that through massive vaccination, this pandemic will fade away sooner but its real duration is still a very uncertain parameter.

Unfortunately, this uncertain long term duration of COVID19 is not being well coped by the public policies adopted by many Governments on public procurement not just because they have not promoted preventive procurement but also because they tend to adopt myopic options following the paradigm of " buying fast". Unfortunately, such options based on the lack of coordinated and centralized procurement and on the repetitive use of NPWN to buy " fast" do not help to improve the supply chains and reduce sustainability and innovation as well as the value for money besides increasing the risk of lack of integrity.

Conversely to such myopic approach, the adoption of strategic policy lines supporting innovative and sustainable public procurement and respecting the principles of transparency and competition

has been shown to be the most appropriate approach stemming from the evidences already available from different public markets.

In this paper it is also shown that the EU legal framework includes the appropriate instruments to implement these policy lines giving a positive answer to the research question addressed herein and therefore the rules of the European legal framework cannot be used as an excuse for Governments adopting myopic decisions rather than strategic policies.

The TED data about COVID19 is analyzed and three indices are proposed to have a comparative perspective across EU: contracting intensity, competitiveness and price-quality evaluation as useful proxy indicators of how far are the States pursuing the goals of achieving competitive public markets and necessary conditions for sustainability and innovation. These results confirm the high diversity of policies between States and also that, quite unfortunately, the duty of publishing the award contract notice is not always respected.

The case of Portugal is also studied showing that it is an illustration of the discussed shortcomings and explaining why it fails to be the best example of compliance with the institutional principles governing public procurement in EU.

Finally, a word should be added about this tragic pandemic as an opportunity to reform Governments. In a context of disruptive events as it is the case of COVID19, the Governmental ability to change following the paradigm of adaptive governance (Eshuis and Gerrits, 2021) is quite critical to make use of such opportunity and the reshaping of public procurement can be a very important element to redesign Governmental structures, policies and processes as it has been recommended by many authors (see, e.g. (Ramalingam and Prabhu, 2020) (Phillips et al., 2007).

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Striking a Balance Between EU Competition Law and Public Procurement Law: Analysing the CJEU attempt in the *Vossloh Laeis* case

Vittoria Moccia

Abstract

The present *Insight* offers an analysis of the judgment of the Court of Justice in the *Vossloh Laeis* case (judgement of 24 October 2018, case c-124/17, *Vossloh Laeis GmbH v Stadwerke München GmbH*), which seeks answers to the extent of cooperation required from an economic operator wishing to demonstrate its reliability towards both the investigating and the contracting authorities. Taking into consideration the AG's opinion and the CJEU findings, this *Insight* exposes some of the legal obstacles that follow from the interplay between EU competition and public procurement law and the CJEU attempt at harmonizing two otherwise often conflicting policy areas.

Keywords

Vossloh Laeis; Directive 2014/24; self-cleaning programs; leniency agreements; public procurement; competition law.

1. Introduction and Factual Background

The EU is guided by its competences: areas where the EU is able to legislate, with or without the member states. Amongst these are, *inter alia*, public procurement and competition law. The former relates to substantive EU Directives that govern the process by which authorities purchase work, goods, or services from companies.[1] While, the latter governs rules on cartels, market dominance, mergers, state aid, and the reporting of anti-competitive behaviour.[2] In the pursuit of an ever-more integrated internal market and harmonized *acquis communautaire* these two EU competence areas often come into conflict. This mainly happens in two ways: (1) in tackling anti-competitive behaviours in the form of public tenders and (2) in curtailing distortion of competition as a consequence of public action and/or regulation.[3] The extensive line of case law of the CJEU

[1] European Commission, *Public Procurement - Internal Market, Industry, Entrepreneurship and Smes - European Commission*, in *European Commission*, 2020, https://ec.europa.eu/growth/single-market/public-procurement_en#:~:text=Under%20EU%20public%20procurement%20rules,purchasing%20works%2C%20goods%20or%20services.&text=To%20support%20the%20further%20uptake,innovative%2C%20green%20and%20social%20criteria.

[2] European Commission, *Competition Rules*, in *European Commission*, 2020, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/competition-rules_en.

[3] R. Paukste, *Competition Law and Public Procurement – An Easy Catch for Competition Enforcers?*, in *Lexxion*, 17 October 2019, https://www.lexxion.eu/en/coreblogpost/competition-law-and-public-procurement-an-easy-catch-for-competition-enforcers/.

has continuously exposed this clash and has attempted to give its interpretation in order to harmonize the EU rules.

One of the most relevant cases in this ambit is the judgment C-124/17 *Vossloh Laeis GmbH v Stadwerke München GmbH* (*Vossloh Laeis*) delivered on 25 October 2018.[4] In this case, the German company *Vossloh Laeis* was accused and found guilty of taking part in agreements as part of a cartel.[5] This led to the establishment of a civil action against the German company from the contracting authority, *Stadwerke München,* for the harm caused upon them as a result of the participation in the cartel.[6] Notwithstanding this pending action, *Vossloh Laeis* wished to participate in a new tendering procedure by *Stadwerke München*, bringing forth the self-cleaning defence in regards to certain measures it had adopted to prevent it from distorting competition once again.[7] Doubtful of this, *Stadwerke München* asked *Vossloh Laeis* to provide the leniency decision of the Federal Cartel Office – the relevant competition authority – imposing the fine upon the German company, so as to examine the decision and the gravity of the infringement incurred.[8] However, the German company refused to provide such document, arguing that it had already fully cooperated with the relevant competition authority, and that providing the leniency decision went beyond the scope of the requirements of the Procurement Directive 2014/24.[9] Following this, *Stadwerke München* decided to prohibit the participation of the German company in the new tendering procedure and actions were brought against this exclusion by *Vossloh Laeis* before the national public procurement board.[10] The national board decided to bring the case to the CJEU in the form of a preliminary ruling procedure to ask the extent of cooperation that is required from a tendered wishing to demonstrate its reliability towards both the investigating authority and the contracting authority.[11]

2. The Opinion of the Advocate General

The judgment in itself brought forward several questions including, *inter alia*, what should be interpreted as 'investigating authorities' under Article 57(6) of the Procurement Directive 2014/24.[12] The AG opinion focuses on this issue, especially in regard to whether the 'investigating

[4] Court of Justice, judgement of 24 October 2018, case C-124/17, *Vossloh Laeis GmbH v Stadwerke München GmbH*.

[5] *Vossloh Laeis GmbH v Stadwerke München GmbH*, cit; P.A. Giosa, *Enhancing Leniency Programme In Public Markets,* in *Journal of Antitrust Enforcement*, 2020, p. 14.

[6] P.A. Giosa, *Enhancing Leniency Programme In Public Markets*, cit., p.14.

[7] Ibid.

[8] Ibid.

[9] Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance; P.A. Giosa, *Enhancing Leniency Programme In Public Markets*, cit., p.14.

[10] P.A. Giosa, Enhancing Leniency Programme In Public Markets, cit., p.14.

[11] P.A. Giosa, Enhancing Leniency Programme In Public Markets, cit., p. 14.

[12] Art. 57(6) of Directive 2014/24/EU, cit.

authorities' must be interpreted as to include the contracting authorities and other entities.[13] Firstly, in the paragraphs 40 and 41, the AG Campos focuses on the requirements listed under Article 57(6) and concludes that they are mandatory and, therefore, the contracting authorities and other entities cannot accept self-cleaning defences which do not satisfy them.[14] Secondly, regarding the interpretation of the term 'investigating authorities', the AG claims that Article 57 only imposes some investigative powers upon contracting authorities and other entities, however does not consider them 'investigating authorities' *per se*.[15] In this respect, however, AG Campos advocates that it does not go beyond the requirements of Article 57(6) of the Directive to demand that the tenderer, seeking to absolve itself through self-cleaning procedures, cooperates with investigating authorities and contracting authorities and other entities.[16] Although the opinion brings attention to many relevant arguments for the interpretation of Article 57(6) of the Directive, it is still filled with a plethora of legal implications, beginning from the fact that it makes an effort to protect leniency programs without explicitly mentioning them.[17] The rest of the case note will be dedicated to analysing the findings of the CJEU in the *Vossloh Laeis* judgment.

3. Findings of the CJEU

Amongst the most important findings of the CJEU is that the contracting authority can ask a tenderer to actively cooperate as to prove its reliability to the extent that the cooperation is strictly necessary for that examination.[18] In this regard, the Court specified that the procurement entity can demand the company to provide the leniency decision even if the procurement of such may lead to the establishment of a civil claim.[19] The disposition of such decision is sufficient to allow the contracting authority to prove the tenderer's reliability.[20] The Court further clarified that the

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[13] Opinion of AG Campos delivered on 16 May 2018, case C-124/17, Vossloh Laeis GmbH v Stadwerke München GmbH; A. Sanchez-Graells, Bid Rigging, Self-Cleaning, Leniency And Claims For Damages: A Beautiful Procurement Mess? (C-124/17), in How to Crack a Nut, 22 May 2018, https://www.howtocrackanut.com/blog/2018/5/22/bid-rigging-self-cleaning-and-leniency-a-beautiful-procurement-mess-c-12417.

[14] Opinion of AG Campos, Vossloh Laeis GmbH v Stadwerke München GmbH, cit.; A. Sanchez-Graells, Bid Rigging, Self-Cleaning, Leniency And Claims For Damages: A Beautiful Procurement Mess? (C-124/17), cit.

[15] A. Sanchez-Graells, Bid Rigging, Self-Cleaning, Leniency And Claims For Damages: A Beautiful Procurement Mess? (C-124/17), cit.

[16] Opinion of AG Campos, Vossloh Laeis GmbH v Stadwerke München GmbH, cit., paras 55-61; A. Sanchez-Graells, Bid Rigging, Self-Cleaning, Leniency And Claims For Damages: A Beautiful Procurement Mess? (C-124/17), cit.

[17] A. Sanchez-Graells, Bid Rigging, Self-Cleaning, Leniency And Claims For Damages: A Beautiful Procurement Mess? (C-124/17), cit.

[18] J. Bracker, ECJ On Reinstatement of Former Cartelists as Trusted Procurement Tenderers, in Ashurst.com, 26 November 2018, https://www.ashurst.com/en/news-and-insights/legal-updates/ecj-on-reinstatement-of-former-cartelists-as-trusted-procurement-tenderers/.

[19] J. Bracker, ECJ On Reinstatement of Former Cartelists as Trusted Procurement Tenderers, cit.

[20] P.A. Giosa, Enhancing Leniency Programme In Public Markets, cit., p. 15.

contracting authorities have the right to ask for further information and clarification where the need to evaluate the self-cleaning measures is concerned.[21] In order to establish the extent of collaboration, the Court has emphasized the role of the principle of proportionality in order to establish what is necessary to satisfy the goal at stance.[22] In addition to this, the CJEU also gave its own interpretation to the term 'investigating authorities' under Article 57(6) of Directive 2014/24/EU. The Court concluded that the 'investigating authorities' are to include both the competition and the contracting authority.[23] Thus, the undertaking is required to actively cooperate with both authorities.

4. Legal Assessment

Although the Court embarks on an extensive discussion on the extent of cooperation required on a tenderer wishing to re-establish its reliability, it still leaves plenty of doubt on the specific standard of care to employ in self-cleaning procedures and civil claims.[24] For example, the Court fails to address which version of the leniency decision of the competition authority – whether the non-confidential or confidential one – is required from the contracting authority.[25] In addition, the Court also fails to mentions guidelines as to which technical, organizational and personal measures must be carried out to ascertain an efficient self-cleaning process.[26] Nonetheless this focus on the importance of re-establishing trustworthiness is an expression of a wide European consensus towards self-cleaning programs as mitigating factors for competition law breaches.[27] This in itself brings plenty of legal implications as to how these programs should work in light of competition law, and more generally, which area of law – be it public procurement or competition law – should be offered more protection.

In this regard, it is important to highlight the links and clashes between EU competition law and public procurement law. Unlike for the policy area of competition law, the TFEU contains no explicit duties nor requirements for the policy area of public procurement law.[28] The rules governing public procurement are only inferred from the TFEU four freedoms, in particular the free movement of goods, the freedom to provide services and the freedom of establishment.[29] Despite this difference, the need for competitive practices in public procurement is an ever more present requirement in order to preserve these very Treaty principles, in particular the free

[21] Ibid.

[22] Ibid., p. 16.

[23] Ibid.

[24] J. Bracker, ECJ On Reinstatement of Former Cartelists as Trusted Procurement Tenderers, cit.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, Title VII; M. Werner, *Recent CJEU Case Law: Core Notions And Principles & Exceptions*, Germany, 2019.

[29] Arts 34, 56 and 59 of TFEU, cit.

movement of goods and services, the right to establishment as well as the prohibition of discrimination.[30]

One of the ways in which the two policy areas clash is in the enforcement of Article 57 of Directive 2014/24. This provision offers both mandatory and discretionary grounds of exclusion under which contracting authorities ought or may disqualify economic operators.[31] The protection of this provision has led to a system called 'self-cleaning' programs whereby economic undertakings that wish to absolve themselves through an exclusion ground can prove their reliability and may thus be allowed to participate in future procurement processes.[32] However, the discretion left to contracting authorities *per se* conflicts with well-established EU principles of equal treatment, transparency and proportionality. As stressed by the CJEU in the field of public procurement law, a transparent procedure is one which is outlined by clear and accessible procedural rules.[33] Specifically in regards to contracting authorities, the Court has stated in the *Costa and Cifone* case that the discretionary rules applied by contracting authorities ought to be "drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenders exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion."[34]

In addition, the lack of clear discretionary rules for contracting authorities also leads to potential breaches of equal treatment as it is challenging to prove that they are treating similar undertakings who trigger similar exclusion grounds in an equal fashion if there are no transparent, strict nor accessible procedural rules to testify such treatment.[35] Consequently, this places a wide duty on contracting authorities to respect Treaty principles under, otherwise, vague and untouched rules on exclusion of economic operators from public procurement practices. Therefore, the competition rules on transparency end up limiting the discretionary powers offered to contracting authorities under Article 57 of Directive 2014/24.

In the specific case at stance, the clash between the two EU policy areas is evident in the way self-cleaning programs offer leeway for undertakings to escape exclusion under Article 57(6) of Directive 2014/24 which leads to ineffectiveness and inefficacy of this provision.[36] In fact, eroding

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[30] G Skovgaard Ølykke and A Sanchez-Graells, *Book Review: Reformation or Deformation of the EU Public Procurement Rules*, Edward Elgar Publishing, 2016, p. 705.

[31] Art. 57 of Directive 2014/24, cit.

[32] S. de Mars, *Exclusion And Self-Cleaning In Article 57: Discretion At The Expense Of Clarity And Trade?*, in *Reformation or Deformation of the EU Public Procurement Rules*, Edward Elgar Publishing, 2016, p. 253.

[33] Court of Justice, judgement of 7 December 2000, case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG*; Court of Justice, judgment of 21 July 2005, case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*.

[34] Court of Justice, judgement of 16 February 2012, case C-72/10, *Criminal proceedings against Marcello Costa and Ugo Cifone*, para. 73.

[35] S. de Mars, Exclusion And Self-Cleaning In Article 57: Discretion At The Expense Of Clarity And Trade?, cit., p. 268.

[36] A. Sanchez-Graells, Competition and Public Procurement, in Journal of European Competition Law & Practice, 2018, p. 557.

such provision leads to the overall inadequacy of the objective of leniency agreements in themselves. Undertakings wishing to apply for leniency agreements will carefully consider their choice as that may lead to detrimental effects upon their position in public procurement procedures.[37] In particular, leniency agreements allow for the competition authorities to gather sensitive information about the undertaking's activities in cartel cases and may lead to threats of exposition in civil damage cases.[38]

Some further weaknesses of the judgement can be outlined by the tension it creates between two public authorities. In allowing the contracting authorities to demand the leniency decision from the competition authority and review it in the effort to ascertain the reliability of the barred undertaking, the Court gives the contracting authority the power to have a say on the legitimacy of the works of the competition authorities, leading to an ambience of mistrust between the two bodies.[39] The danger of discouraging companies from participating in leniency programs just because in waiving their confidentiality they risk being further exposed in civil liability cases has been a debate amongst various legal scholars and public enforcers.[40]

Nevertheless, a balance must be struck between the rights of the undertaking in question and the contracting authorities. The wide power awarded to the contracting authorities in the assimilation of information is necessary for the effective exercise of their right to compensation and to judge whether or not the application for the self-cleaning program is legitimate.[41] In this regard, the protection of leniency programs is in the general interest, and the rights of contracting authorities are not absolute, especially when they need to be balanced against rights in the public interest.[42] In fact, a trend in Europe has emerged following the Damages Directive 2014/104 giving prevalence to the protection for leniency agreements instead of measures that could hinder their effectiveness.[43] The European Commission has emphasized this view in its policy and the CJEU has retaliated it in its jurisprudence, specifically in its decision *EnBW*.[44] However, this predominance may be challenged by invoking the public interest also found in protecting the rights of contracting authorities; namely the right to compensation of contracting authorities allows public money that has been illegally appropriated for rigged good and/or services to be returned.[45] It is in the public interest for the contracting authorities to exercise wide discretionary and investigative power in order to ascertain that the self-cleaning process is appropriate in preventing

[37] P.A. Giosa, Enhancing Leniency Programme In Public Markets, cit., p. 17.

[38] Ibid.

[39] Ibid., p. 16.

[40] Ibid., p. 17.

[41] Ibid., p. 18.

[42] Ibid.

[43] Ibid., p. 19.

[44] Court of Justice, judgement of 27 February 2014, case C-365/12, *European Commission v EnBW Energie Baden-Württemberg AG*; P.A. Giosa, *Enhancing Leniency Programme In Public Markets*, cit., p. 19.

[45] P.A. Giosa, *Enhancing Leniency Programme In Public Markets*, cit., p. 19.

the competition law breach incurred in the past from occurring again in the future and, thus, deterring future outlawed competitive behaviour.[46]

Therefore, the balancing between the rights of undertakings and contracting authorities needs to be judged on a case-by-case basis in order to establish the most pressing need in light to the circumstances at stance. Inevitably, in seeking to protect, on the one hand, the interests of an undertaking wishing to participate in public procurement procedures and, on the other hand, the right to compensation of the contracting authority following a competition law infringement, tensions will arise.

5. Policy Implications

In reviewing the relevance of the *Vossloh Laies* case, it is important to note, not only what the Court established, but also the potential implications of such conclusions. Such as, for instance, the interpretation of the Procurement Directive and in specific its rules on debarment, self-cleaning and leniency programmes. The case outlines how engaging with contracting authorities and applying for self-cleaning allows an economic operator to re-establish its reliability in the market, which in turn also gives grounds for denying self-cleaning procedures in other nations.[47]

However, there are some implications which unfolded with the opinion by AG Campos. For instance, AG Campos claims that firms do not have duties towards contracting authorities, as the AG does not consider them to fall under the term 'investigating authorities'.[48] This follows from the rationale that imposing such duties on contracting authorities would create tensions between the investigating authorities and the contracting ones, whom have different nature and functions.[49] However, this would imply that the victims of a cartel would not be able to bar a self-cleaning programme of an economic operator, which would act as a shield from administrative fines and civil action, as well as from exclusion in procurement procedures. [50]

Furthermore, the case allows for two options for the economic operator: (a) abide by the secrecy of the leniency agreement and accept the exclusion from procurement procedures; or (b) renounce this secrecy and allow the contracting authority to judge the self-cleaning procedure.[51] However, following AG Campos' arguments, this choice can be circumvented by the economic operator by delegating limited functions to the contracting authorities to investigate under Article 57(6) of Directive 2014/24.[52] This circumvention of the economic operator in itself casts further doubt upon

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[46] A. Sanchez-Graells, *Bid Rigging, Self-Cleaning, Leniency and Claims For Damages: A Beautiful Procurement Mess? (C-124/17),* cit.

[47] W. Kalk, 'Debarment Legislation: Its Potential As An Anti-Cartel Enforcement Tool' (Master, Vrije Universiteit Amsterdam 2019), 8.

[48] Opinion of AG Campos, *Vossloh Laeis GmbH v Stadwerke München GmbH*, cit., para 60.

[49] Ibid.

[50] A. Sanchez-Graells, Competition and Public Procurement, in Journal of European Competition Law & Practice, cit., p. 559.

[51] Ibid.

[52] Ibid.

the reliance of the firm and causes further trouble for the contracting authorities to ascertain he tenderer's self-cleaning procedure.[53]

Nevertheless, the European Commission itself gives guidance on how to apply the *Vossloh Laeis* case to fight collusion in public procurement in the March 2021 edition of the Official Journal of the European Union. Firstly, the Commission clearly argues for the contracting authorities' wide margin of appreciation in the choice of whether or not to deny the accessibility of a tenderer in a procurement procedure.[54] In fact, it is up to the contracting authorities to judge on a case-by-case basis whether the conditions of the case render the exclusion of an economic operator from a procurement procedure legitimate, thus, allowing the tenderer to participate even where there are enough grounds to render its exclusion.[55] This follows from the rationale that the contracting authorities ought to be the one to assess the integrity and reliability of the firm, precisely because it is where the authority's trust lies. [56]

Secondly, the Commission further stresses the importance of the independency of the contracting authorities in their margin of discretion. It does so by stating that the Procurement Directive does not allow Member States to oblige contracting authorities to accept tenderers' requests to participate in procurement procedures. [57] This would renderer ineffective the very object of self-cleaning programs under Article 57(6), as the tenderer would have undisputed access to future procurement procedures and would not need to show any effort to re-establish its reliability *vis-à-vis* the contracting authority.[58]

Another important consideration of the *Vossloh Laies* case is the argument brought forward in paragraph 42 of the judgment. The Court concluded that when a tenderer is excluded from procurement procedures under Article 57(4)(d) of the Procurement Directive by the competent authority, "the maximum period of exclusion is calculated from the date of the decision of that authority."[59] However, this raises significant implications in cases where that decision has not been rendered final, and only interim measures have been taken. This was the case in a Spanish decision by the Spanish National Commission on Markets and Competition ('CNMC') regarding a railroad electrification cartel.60 In this decision, the CNMC clearly prohibited the competition

[53] Ibid.

[54] European Commission Notice of 18 March 2021 on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground [2021] OJ C91/1, p. 13.

[55] Vossloh Laeis GmbH v Stadwerke München GmbH, cit., para 23; Ibid.

[56] Case C-267/18 Delta Antrepriză de Construcții și Montaj 93 SA v Compania Națională de Administrare a Infrastructurii Rutiere SA [2019] ECR II-826, para 26.

[57] European Commission Notice of 18 March 2021 on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, cit., p. 17.

[58] Case C-552/18 Indaco Service Soc. coop. sociale and Coop. sociale il Melograno v Ufficio Territoriale del Governo Taranto [2019] ECR II-997, para 27.

[59] Vossloh Laeis GmbH v Stadwerke München GmbH, cit., para 42.

[60] Spanish National Commission on Markets and Competition Resolution S/DC/0598/2016 of 14 March 2019 on Electrification and Railroads Electrification.

infringers to enter into procurement procedures but failed to state the scope and duration of this period and created further legal uncertainty by referring the case to the State Consultative Board on Public Procurement.61 However, the Court in the Vossloh Laeis case – which is to be considered directly applicable Union law – specified that de facto the maximum period of exclusion is three years.62 Therefore, by only establishing unclear interim measures, the CNMC created a legal loophole allowing the infringers more time and a much shorter time period of exclusion.63 This decision clearly highlights the very loopholes that muddle the Vossloh Laeis judgments, as it is clear that where interim measures are established, the maximum period of exclusion needs to run also taking those decisions into account. If not, the mere litigation in competition infringement cases gives extra time to the infringers from the exclusions under the Procurement Directive.64

Inevitably, in cases of competition infringements, double interests of the European Union arise. On the one hand, the competition law objective to protect the proper functioning of the internal market, and – on the other hand – the interests of the tenderers in the financial market.[65] A tension which ultimately lies in the interplay of two different EU competence areas – public procurement law and competition law – which the European bodies, and in specific the CJEU, have yet failed to appropriately balance.

[61] Ibid., pp. 317-320.

[62] Vossloh Laeis GmbH v Stadwerke München GmbH, cit., para 7.

[63] A. Sanchez-Graells, 'Bid Rigging Conspiracy In Railroad Electrification Works: A Very Spanish 'Sainete' <https://www.howtocrackanut.com/blog/2019/8/16/bid-rigging-in-railroad-electrification-works-a-very-spanish-sainete> accessed 4 April 2021.

[64] A. Sanchez-Graells, 'Litigation in Spanish Railroad Electrification Cartel Highlights Further Inadequacies of Regulation of Bid Rigger Exclusion' <https://www.howtocrackanut.com/blog/tag/vossloh+laeis> accessed 4 April 2021.

[65] O. Blažo, 'Proper, Transparent And Just Prioritization Policy As A Challenge For National Competition Authorities And Prioritization Of The Slovak NCA' (2020) 13 Yearbook of Antitrust and Regulatory Studies, p. 127.

Covid-19 – the impetus for public service innovation. Advancing the shift towards social procurement.

Natalia Spataru Lorenzo Cioni

Abstract

With the present and future being shaped by the Coronavirus disease and worldwide responses to it, critical insights are essential. The Covid-19 pandemic has profoundly influenced the lives of most people on the plane as well as the global market, some experts believing it has caused the worst economic decline since the Great Depression. The pandemic found States unprepared to face the challenges brought by it, it has exposed the vulnerabilities of individuals, societies and economies. A few months after the sparking of the first wave of Covid-19 it was possible to assess the earliest public intervention and to foresee how the virus is going to impact economic and social systems. Given the significant increase in public expenditure since the beginning of the pandemic, this Article will articulate and explore the role of public procurement in anticipating the risk of market failure, despite the complicated environment. Likewise, focus will be drawn upon the EU soft law instruments designed to respond to economic and public health issues, through the prism of solidarity. The Article will then focus on the analysis of the Italian response to the pandemic through public purchasing techniques.

Keywords

Public procurement; Covid-19 pandemic; Italy, European Union Commission; service innovation.

1. Introduction

With the present and future being shaped by the Coronavirus disease 2019 (Covid-19) pandemic and worldwide responses to it, critical insights are essential. The Covid-19 pandemic has profoundly influenced the lives of most people on the plane as well as the global market.

Millions of workers all over the world have been put on government-supported job retention schemes as parts of the economy, such as tourism or hospitality, came to a standstill under lockdown. Researchers predicted a 13.1% reduction in the EU gross domestic product (GDP) in 2020 and a fall in consumption and investment of 14.9% and 16.7%, respectively.[1]

In August 2020, the International Monetary Fund (IMF) estimated that the global economy shrunk by 3%, describing this decline as the worst since the Great Depression of the 1930s.[2] Initial assessments indicate that as many as 40 million people may fall into extreme poverty, reversing a declining trend that lasted over two decades. Some 1.6 billion working in the informal sector could see their livelihoods at risk, and many lack access to any form of social protection. Numbers such as these are indicative of the immense risks of not acting swiftly, coherently, and in a

* The authors would like to thank Professor Roberto Caranta for his valuable expertise.

[1] Commission, 'The Territorial Economic Impact of Covid-19 In the EU. A Rhomolo Analysis' <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc121261.pdf> accessed 15 October 2020.

[2] IMF, 'The Economic Effects of COVID-19 Containment Measures', WP/20/158

coordinated manner. At the same time, they indicate the imperative to "*build back better*," in order to forestall similar risks to our future.[3][4]

The pandemic has exposed the vulnerabilities of individuals, societies and economies and has brought unparalleled challenges for governments to ensure not only the health of their citizens but also public service continuity, calling for a rethink of how economic and social activities are organised. It calls for strong responses based on solidarity, co-operation and responsibility and for a re-balancing of efficiency and resilience throughout the economy.

This study seeks to articulate and explore the role of procurement in anticipating the risk of market failure, despite the complicated business environment, and finding alternative solutions with relevant technical or demanding functions to the current economic situation. There will be analysed public procurement instruments of the European Commission (EC) and Italy - the first European nation to suffer heavily from the pandemic, at a stage of great uncertainty. Likewise, focus will be drawn upon service innovation during COVID-19 pandemic, as a novel phenomenon that contrasts with the common idea of service innovation as a primarily discretionary activity.

2. European Union prospective

The immediate reaction to COVID-19 in Europe was not exemplary. Critical medical health supplies were held in national warehouses while borders were closed, with a "my nation first" reaction, EC President Ursula von der Leyen described it.[5] However, soon afterward, the European Union (EU) has reacted fast in time, by allocating the necessary resources and fund to mitigate the effects of the pandemic.

First, the European Central Bank launched a monetary package, worth €750 billion and later upgraded to €1.35 trillion, to counter the risks to liquidity and the outlook for the euro area.[6] A massive pan-European crisis response package followed. The European Investment Bank and European Stability Mechanism (ESM) agreed to finance up to €540 billion to help people,

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[3] UN Department of Economic and Social Affairs, Recovering better: economic and social challenges and opportunities, 11 <https://www.un.org/development/desa/en/wp-content/uploads/2020/07/RECOVER_BETTER_0722-1.pdf accessed 15 October 2020.

[4] Building Back Better (BBB) is a program that was first officially used in the United Nations' Sendai Framework for Disaster Risk Reduction, adopted on 3 June 2015 buy the UNGA. "The principle of 'Build Back Better' is generally understood to use the disaster as a trigger to create more resilient nations and societies than before. This was through the implementation of well-balanced disaster risk reduction measures, including physical restoration of infrastructure, revitalization of livelihood and economy/industry, and the restoration of local culture and environment".

[5] Speech by President von der Leyen at the European Parliament Plenary on the European coordinated response to the COVID-19 outbreak, 26 March 2020, <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_532> accessed October 2020.

[6] European Central Bank announces ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP), 18 March 2020. <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html> accessed 15 October 2020.

businesses and countries throughout Europe, including liquidity support to companies, funding for development of treatments and vaccines, and financing for employment as well as direct and indirect healthcare costs related to the pandemic.

Public procurement is a sensitive field in terms of the internal market's integrity. This is particularly so, when goods and services are swiftly needed to face the magnitude of a pandemic crisis as the one Europe is facing. The EC's soft law choice to address public procurement in emergency situations provides an interesting example to study. The soft law tools used by the EC show its commitment to provide support to the Member States in the public purchasing of protective equipment, medical goods and services, at a time when supply networks experience serious disruption, as in fact they did at the very outset of the pandemic outburst. The EC's intervention evolved along two different routes.

First, it has stepped up efforts by launching instruments under the Civil Protection Mechanism and joint procurement actions for various medical and similar goods. Since there are more than 250000 contracting authorities in the EU, the EC has declared its will to mobilize all available resources to provide further advice and assistance to Member States and public buyers.[7]

Second, in such harsh emergency situation, it was essential to prevent undesired delays for national authorities engaged in ensuring basic objectives, while following the EU legal framework. In this scenario, the EC has adopted a Guidance[8] on the smart use of public procurement law during the COVID-19 crisis. Being aware of the imperative need of swift solutions to deal with an abrupt increase of demand for protective and other medical goods and services, the EC highlighted all the available possible options under the EU procurement framework.[9] Thus, it has offered the national public authorities the possibility of substantially reducing the deadlines to accelerate open and restricted procedures, or even choose a negotiated procedure without publication – a solution that in fact entails a straight award, so as that a public authority is empowered to engage directly with the market.

2.1 EU Civil Protection Mechanism (rescEU) and Joint Procurement Agreements

In 2019, the EU reinforced and strengthened components of its disaster risk management by upgrading the EU Civil Protection Mechanism. The latest element introduced - rescEU stockpile[10] - has the objective of enhancing both the protection of citizens from disasters and the management of emerging risks.

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[7] R Baratta, 'EU Soft Law Instruments as a Tool to Tackle the COVID-19 Crisis: Looking at the "Guidance" on Public Procurement Through the Prism of Solidarity' (2020) 5 European Papers 365.

[8] Commission, 'Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis' (Communication) COM (2020) C108/01.

[9] Ibid.

[10] The European Civil Protection Mechanism aims to strengthen cooperation between the EU Member States and participating States in the field of civil protection, with a view to improving the prevention, preparedness and response to disasters. See Commission, 'Strengthening EU Disaster Management: rescEU Solidarity with Responsibility' COM (2017) 773 final; Press Release (EC), 'COVID-19: Commission creates first ever rescEU stockpile of medical equipment' (19 March 2020)

Under rescEU, the EC is planning a European stockpiling of medical countermeasures aimed at combatting serious cross-border threats to health. It will include: vaccines or therapeutics, intensive care medical equipment, personal protective equipment, laboratory supplies. The instrument receives 100% financing from the EC.[11] The rescEU stockpile supplies for now include over 65 million medical masks and 15 million FFP2 and FFP3 mask; over 280 million pairs of medical gloves; almost 20 million medical gowns and aprons; several thousand oxygen concentrators and ventilators. The hosting States are responsible for procuring the equipment with the support of the EC. In early April 2020, European Medical Teams composed of doctors and nurses from Romania and Norway were deployed to Italy via the EU Civil Protection Mechanism and coordinated by the EU Emergency Response Coordination Centre.[12] The Emergency Response Coordination Centre also managed the distribution of the equipment to ensure assistance to Italy - the first EU Member States hit by Covid-19. So far, 142,000 FFP2 and FFP3 protective facemasks from the rescEU medical reserve were delivered to Italy.

Within the framework of a coordinated EU health response, along with the rescEU, the Joint Procurement Agreement (JPA) has emerged as a core instrument to support a pan-European purchasing of personal protective equipment (PPE), ventilators and devices necessary for coronavirus testing.

One of the main characteristics of the JPA is its transparent nature:[13] calls for competition notices are freely and openly advertised on the Official Journal; interested economic operators are provided with sufficient information in the call for competition notices to assess whether it is appropriate to tender for the contract;[14] selection, evaluation criteria and the award procedure are made fully available to interested companies;[15] and, at the end of the competitive process, a contract award notice is published in the Official Journal.[16] Additional information on the type of contract, costs is published on the EC's official website.

Under the JPA, Member States have the possibility of purchasing personal protective equipment, respiratory ventilators and items necessary for coronavirus testing. The co-ordination role belongs to the EC, while Member States purchase the goods. Since February 2020, the EC launched six procurement competitions to purchase medical supplies and equipment. Two procurement competitions related to PPE were conducted in February and March. The first one did not lead to

[11] European Commission, Q&A on the activation of the Emergency Support Instrument in the context of COVID-19 Pandemic – DG ECHO (December 2020), 3.

[12] Commission, 'Crisis management and solidarity' <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/crisis-management-and-solidarity_en> accessed 21 January 2021.

[13] The Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65 (2014 Procurement Directive) similarly requires contracting authorities to comply with the TFEU principles of transparency, equal treatment, non-discrimination and proportionality.

[14] Joint Procurement Agreement to Procure Common Auction Platforms [9 November 2011] (JPA), Article 19.

[15] JPA, Article 18.

[16] Ibid.

the awarding of a contract.[17] The second tendering attempt was, by contrast, successful, and a framework agreement was awarded in March with an estimated budget ceiling of €97 million.[18]

The EC launched four different calls for tender for medical equipment and supplies: gloves and coveralls; personal protective equipment for eye and respiratory protection; ventilators; laboratory equipment. The national budget of Member States takes part in the JPA procedure, being provided €3.3 billion.[19] This coordinated approach gave Italy - one of the first states which benefited from the medical-equipment purchased through a JPA - a strong position when negotiating with the industry on availability and price of medical products.[20] As to the Covid-19 vaccines, Italy is relying entirely on JPA, which is, by now, using the vaccine developed by Pfizer and BioNTech as the bloc waits for other vaccines to be approved by the European Medicines Agency.[21]

It has been essential for Italy to benefit from these EU instruments in the health sector in order to address the shortage of personal protective equipment, ventilators, and medicines and to implement emergency cross-border health cooperation. Increased cross-border voluntary collaboration in the procurement of health technologies enables sharing experience and strengthens bargaining power, mitigating overly high transaction costs by pooling skills and capacities and through joint negotiations.[22] The COVID-19 pandemic has shown that those strengths have been appreciated by Italy, and there is a growing acceptance and use of centralised cross-border procurement in the health sector.

2.2 EC's guidance

The EC's Guidance intendment is not meant only to guide national authorities as to how to take advantage of the inherent flexibilities of EU public procurement law in emergency times. Throughout the Guidance the EC has also assumed, along with national authorities, its own share of responsibility to respond properly to the serious public health issues related to the COVID-19 crisis. In this respect, the importance of the Guidance is material and deserves a short contextualization.

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[17] Tenders Electronic Daily, contract award notice 2020/S 051-119976 (2020).

[18] Commission, 'Covid-19 Response – Public Health' <https://ec.europa.e/nf/ive-work-travel-e/ealt/oronavirus-respons/ublic-health_en> accessed 21 January 2021.

[19] European Commission, Q&A on the activation of the Emergency Support Instrument in the context of COVID-19 Pandemic – DG ECHO (December 2020).

[20] Commission, 'COVID-19: Commission creates first ever rescEU stockpile of medical equipment' press release '19 March 2020 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476> accessed 21 January 2021.

[21] Reuters, 'Italy to invest in biotech ReiThera to support COVID-19 vaccine development' <https://www.reuters.com/article/us-health-coronavirus-italy-reithera/italy-to-enter-capital-of-reithera-to-support-covid-vaccine-development-idUSKBN29A17V?edition-redirect=in> accessed 21 January 2021.

[22] WHO Regional Office for Europe, 'How can voluntary cross-border collaboration in public procurement improve access to health technologies in Europe?' (2016) <https://www.euro.who.in/_dat/sset/df_fil/00/3199/B21.pdf> accessed 21 January 2021.

According to the Guidance's wording,[23] public buyers have several options they can consider:

- In cases of urgency they can avail themselves of possibilities to substantially reduce the deadlines to accelerate open or restricted procedures.
- Should those flexibilities not be sufficient, a negotiated procedure without publication can be envisaged. Eventually, even a direct award to a preselected economic operator could be allowed, provided the latter is the only one able to deliver the required supplies within the technical and time constraints imposed by the extreme urgency.
- Public buyers should also consider looking at alternative solutions and engaging with the market.

These provisions accord public authorities a "safe harbour" in times of a state urgency. Had such authorities decided to shorten an open procedure or to resort to the accelerated restricted one, it is guaranteed that the EC would not challenge their actions and will refrain from launching infringement procedures for violation of the urgency test as set forth in Articles 27(3) and 28 (6) of the 2014 Procurement Directive.[24]

Moreover, as noted above, the Guidance has also suggested an extra simplified approach for public procurement in times of pandemic crises, by enabling national authorities to directly award public contracts through a procurement procedure without prior publication. Indeed, the EC has accepted that COVID-19 embraces the standards of "state of extreme urgency".

The EC's Guidance provides the possibility to change the procurement process by supporting simplified and accelerated procurements and thus speeding the effectiveness of the national response to COVID-19. When this speed and flexibility is achieved by removing red-tape and encouraging collaborative co-design without sacrificing accountability or transparency, the end result is lower costs, greater flexibility, and greater freedom to focus on outcomes.[25]

The Guidance also provides for the possibility to contact potential contractors by phone, e-mail or in person to agree to an increase in production or the start or renewal of production. The emphasis on dialogue between supplier and client proved to be crucial and many partnerships have embraced this new way of communicating into business as usual. Stakeholders often suggest that more flexibility in procurement procedures is needed, and that in particular, contracting authorities should be allowed to negotiate the terms of the contract with potential bidders.[26] Such a possibility could hence be implemented in the general EU public procurement legislation, on condition of compliance with the principles of non-discrimination and fair procedure.

The global Covid-19 pandemic proved to be the catalyst for accelerated digital transformation in procurement and can make valuable contributions in the following areas:

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[23] Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis, above fn 8.

[24] 2014 Procurement Directive.

[25] Baratta, above fn 7.

[26] Commission, 'Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market' COM (2011) 15 final.

- Harmonized experience and simpler change management with a consistent user interface across all solutions, including guided tours, embedded learning and a digital assistant
- Faster, more informed decision-making through instant access to embedded intelligence, including proactive alerts to support smart and secure buying
- Improved visibility and real-time reporting with end-to-end analytics
- Lower total cost of ownership and rapid return on investment through unified integration that eliminates the need for costly services and support.[27]

3. The Italian perspective

On 6 April 2020, a letter, signed by the German Ministers of Foreign Affairs and Finance, was published in different languages in the national newspapers of some Member States. It stated « *We need a clear expression of European solidarity in the corona pandemic […]* »[28]. The hoped-for expression of European solidarity came right after. Following tough negotiations between the Member States, the European institutions set the target of relaunching European economy. In order to reach this goal, they did not limit themselves to deploying new economic means and upgrading the existing ones, such as European Stability Mechanism (ESM)[29] and Recovery Fund[30], but they clarified the will to 'set the Union firmly on the path to a sustainable and resilient recovery'[31].

By delivering this statement EU institutions renewed their commitment for a social oriented development[32]. The adoption of a political strategy towards a fairer allocation of resources is relied to the importance of public spending. Even before the spread of the coronavirus pandemic the amount of money spent by the Member States on the purchase of works, services, and supplies[33] is enormous, suffice it to say that around 14% of their GDP is normally used to finance such acquisition. In 2019, Italian contracting authorities awarded public contracts for a total value of

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[27] Supply Chain, 'Gartner Reveals the Results of the 2020 Supply Chain Top 25' <https://www.supplychaindigital.com/supply-chain-2/gartner-reveals-results-2020-supply-chain-top-25> accessed 20 October 2020.

[28] 'A response to the corona crisis in Europe based on solidarity' <www.auswaertiges-amt.de> accessed 7 October 2020.

[29] 'Eurogroup Statement on the Pandemic Crisis Support' <www.consilium.europa.eu> accessed 9 October 2020.

[30] 'Special European Council, 17-21 July 2020' <www.consilium.europa.eu> accessed 9 October 2020.

[31] European Council, 'Special meeting of the European Council – Conclusions' (2020) 10, 2.

[32] The will to achieve a sustainable growth may be deduced also by European Commission, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system' <https://eur-lex.europa.eu/resource.html?uri=cellar:ea0f9f73-9ab2-11ea-9d2d-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 9 October 2020.

[33] According to the data set out in *ec.europa.eu* (accessed 24 September 2020), every year public authorities in the EU spend around € 2 trillion per year on the purchase of services, works and supplies.

€169,9 billion. The Region which spent the most was Lombardia (almost €31 billion), whereas Valle d'Aosta was the one that spent less (around €374 million)[34].

This data is probably going to increase due to the countercyclical policies implemented by the EU institutions. In fact, as a response to the disease, the EU earmarked additional resources[35]. These projections, and the fact that public spending can be a huge lever for stimulating innovation, demonstrate that the coronavirus pandemic represents a unique opportunity for the Member States to accelerate social development. The easiest way for accelerating development is making smart purchases. The expression 'smart purchases' is used to define such acquisitions that can help reducing disparities and implementing environment-oriented policies. This part of the paper aims to review the latter public procurement reforms to identify, if possible, a trend line that may help to understand how the incoming resources are going to be used and how can they contribute to advancing social innovation.

Up until the end of last century, the social and environmental facet in public purchasing was not considered a priority. In fact, in 1998 the Communication entitled «*Public procurement in the European Union*» contained claims such as "*the Commission reiterates that the object of public procurement remains essentially economic*"[36]. However, in Italy, the third-generation directives[37] generated the enactment of the National plan on Green Public Procurement and minimum environmental criteria were made fully mandatory[38]. In other words, nowadays contracting authorities cannot award public contracts to companies that do not fit environmental and social benchmarks. Moreover, growing attention has been reserved to improving the efficiency of resource use and to reducing the generation of waste. Italy did not limit itself to transpose EU Directives, such as Directive 2008/98/CE, but broadly implemented more socially oriented policies.

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[34] Autorità Nazionale AntiCorruzione, 'Relazione annuale 2019' <https://beta.anticorruzione.it/documents/67828/84752/Relazione+Annuale+2019.pdf/79d48a36-f393-a61c-1882-0730d2c110ad?t=1593680773263> accessed 3 November 2020.

[35] European Council, 'Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions' (EUCO 10/2020).

[36] Commission, 'Public procurement in the European Union' COM (1998) 143 final, 27.

[37] Recital 1 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114 set the tone stating that 'This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2'. In fact, only few years later EU role was considered a pattern cf. S Oberthur and C Roche Kelly, 'EU Leadership in International Climate Policy: Achievements and Challenges', The International Spectator (2008) 43.

[38] S Colombari, 'Le considerazioni ambientali nell'aggiudicazione delle concessioni e degli appalti pubblici', Urbanistica e Appalti, (2019) 5.

Unfortunately, whilst during the last decades, the overall policy climate became more and more oriented towards the creation of a circular economy[39], Italy's approach towards public contracting has been characterized by a lack of long time planning. An emblematic case is the one concerning the implementing regulation of the Public procurement code. As the fourth-generation directives were transposed in the new Public procurement code[40] (d. lgs. 50/2016), the lawmaker repealed the former implementing regulation. From that moment on the implementing rules were to be set by National Anti-Corruption Authority guidelines. After only three years from the approval of the new Code, law decree n. 32/2019 introduced a novelty which led to a partial return to the past. As a result, nowadays some issues are covered by the guidelines and some issues should be disciplined by the new implementing regulation, which has not been approved yet[41].

3.1 Emergency regulation

The regulatory framework became even more complex during the peak of emergency. In fact, even though the Public procurement code provides for specific arrangements to shorten the purchasing procedure, further rules were added to speed up the purchase of medical devices[42]. Analyzing some instances demonstrates the assumption that derogating from the rules concerning procedures may have accelerated the purchasing process, but, in order to set Italy '*on the path to a sustainable and resilient*' growth, lawmakers should pursue digitalization and socially oriented policies instead of encouraging the contracting authorities to resort to shortened procedures.

Before the spread of the disease, art 3 of an ordinance of the Head of Civil Protection Department (*Ordinanza del Capo Della Protezione Civile* Ocdpc n. 630 3 February 2020) introduced a series of derogations to the Public Procurement Code. According to the first studies on this case[43], the circumstance that those derogations were not sanctioned by a law, which is the proper mean to waive conditions having force of law, discouraged the contracting authorities from using the shortened procedures provided for in Ocdpc n. 630. It is empirically proven that contracting authorities kept awarding contracts by means of the traditional procedures[44].

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[39] An emblematic case is the one regarding energy communities cf. E Ferrero, 'Le comunità energetiche: ritorno a un futuro sostenibile', Ambiente e sviluppo, 2020 677.

[40] L Pardi, 'The New Italian Public Procurement and Concessions Code', (2017) EPPPL 57-59; Id., 'Implementation of the New Directives on Procurements and Concessions in Italy: a Chance for Domestic Regulation Improvement', (2015) EPPPL 316-319; see also R De Nictolis, 'Il nuovo codice dei contratti pubblici', (2016) Urbanistica e appalti 503.

[41] I Cavallini M Orsetti, 'I reali effetti del c.d. "Sblocca cantieri" sulle Linee Guida ANAC: un'occasione mancata per il tramonto del sistema di soft-law', Azienditalia (2020) 496.

[42] I Gobbato, COVID-19 and derogations from the procurement code in Italy, in www.jdsupra.com (accessed 10 October 2020).

[43] A Ruffini 'Le procedure di gara ai tempi del coronavirus tra rallentamenti ed accelerazioni' Urbanistica e appalti (2020) 460.

[44] A Ruffini '*Le procedure di gara ai tempi del coronavirus tra rallentamenti ed accelerazioni*' Urbanistica e appalti (2020) 463.

In early March 2020, Article 34 law decree n. 9/2020 allowed the 'implementing bodies' to acquire personal protective equipment and medical devices without applying the public procurement code until the end of the emergency.

Subsequently, another ordinance of the Head of Civil Protection Department (Ocdpc n. 655 25 March 2020) enabled the local authorities to purchase services and supplies without following the dispositions regarding open procedures, restricted procedures and the publicity of calls for competition. The sole condition required was that such acquisitions had to be useful '*to ensure the management of situations linked to the pandemic*'[45]. This clause is clearly undetermined.

Different provisions were approved to safeguard enterprises. The legislator allowed public authorities to carry out advanced payments under strict conditions. According to the latest version of Article 35 d. lgs. 50/2016, the amount of the advance payments should be equal to 20 % of the price and must be paid within 15 days from the beginning of the execution. However, Article 207 law n. 77/2020 enabled public administrations to increase this amount up to 30% of the price; this opportunity will be available for all the procedures whose call for competition will be published before 30 June 2021. This novelty was significant because it has made it possible to ensure to many social economy actors the access to cash flow. Indeed, most social economy actors did not have large cash reserves due to the structure of their financial model[46].

3.2 Insights for the future

As explained above, the first phase has been characterized by several interventions of administrative institutions aimed at accelerating the public procurement process and safeguarding enterprises. In Italy, the outcome of these interventions resulted in the creation of simplified procedures[47]. It is already possible to foresee which will be the pros and the cons in the event that these procedures will be applied even after the Covid-19 pandemic is over. Whereas the greatest part of the rules introduced in the first phase intended to waive the application of the Public procurement code, in order to harmonise the different regulations, a process of rationalisation would be necessary. Indeed, once that the simplified procedures will be in force, the access to public contracts would be easier, especially for actors such as SMEs and Women Owned Enterprises[48] which would benefit in particular from the rules concerning advanced payments.

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[45] A Varlaro Sinisi 'L'impatto dell'emergenza Covid-19 sulle procedure e sull'esecuzione dei contratti pubblici' Urbanistica e appalti (2020) 317.

[46] 'Social economy and the COVID-19 crisis: current and future roles' in www.oecd.org/coronavirus/policy-responses/social-economy-and-the-covid-19-crisis-current-and-future-roles-f904b89f/#endnotea0z2

[47] Still the emergency has brought with itself questionable legislative measures, such as the one regarding the possibility to award public contracts on the sole basis of a provisional anti-mafia policy until 31 December 2021 (see Article 3 law decree n. 76/2020). The contracts stipulated by applying this novelty contain a cancellation clause in the event that the anti-mafia definitive checks result in a formal prohibition to conclude agreements with public administrations. This rule may accelerate slightly the administrative procedure, but it will surely result in uncertainty and litigation.

[48] Cf. B Hoekman B K O Taş 'Procurement policy and SME participation in public purchasing' Small Business Economics (2020) https://doi.org/10.1007/s11187-020-00414-z and K Heinonen T Strandvik 'Reframing service

After the first phase, additional arrangements were introduced. Among these is the Article 75 of the decree n. 18/2020 (converted into law 27/2020), which provides a change in the tone of the framework demonstrating the will to pursuit short term objectives. In order to facilitate smart working, this provision features the opportunity for contracting authorities to purchase electronic goods and services through negotiated procedures without prior publication. This opportunity will be available until 31 December 2020.

Given that the EC has clarified that negotiated procedure without prior publication is a tool to use in cases of extreme urgency[49], it is impossible to foresee whether Article 75 d.l. 18/2020 is going to have a great impact on the way public employees work. Still, it is important to point out that, after many uncoordinated interventions, a clear disposition tried to pave the way for a targeted use of resources.

Article 120 d.l. 18/2020 is in line with the same criterion. It allocates around €80 million to acquire digital devices destined to facilitate remote learning in educational institutions. The largest part of these funds is earmarked to facilitate underprivileged students' fruition of online classes.

Those rules aim to achieve the objective of digitalisation[50] in an innovative way; they encourage contracting authorities to use simplified procedures and bind the same authorities to use funds in order to reach specific goals. However future provisions could use the same approach to reach more ambitious targets[51], such as implementing circular economy[52] and reducing social disparities, in compliance with the SDGs. This kind of regulation would be in line with the path undertaken with the approval of the National Plan on Green Public Procurement. Some regions already implemented local plans in order to confirm the institutional commitment for a greener economy[53]. Targeted interventions by the contracting authorities (which are bond to respect minimum environmental criteria[54]) could trigger an upturn of the economic cycle.

In conclusion, a conscious use of public spending could be more effective than structural reforms, although both are needed in Italy. Using the words of German Ministers of Foreign Affairs and

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innovation: COVID-19 as a catalyst for imposed service innovation' Journal of Service Management <https://www.emerald.com/insight/1757-5818.htm> accessed 7 October 2020.

[49] Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis, above fn 8.

[50] For an analysis of the steps towards digitalisation in Italy cf. F Notari, 'Il percorso della digitalizzazione nelle amministrazioni pubbliche: ambiti normativi mobili e nuovi modelli di governance', (2020) Giornale di diritto amministrativo 21.

[51] Autorità Nazionale AntiCorruzione, 'Strategie e azioni per l'effettiva semplificazione e trasparenza nei contratti pubblici attraverso la completa digitalizzazione: le proposte dell'Autorità', in www.anticorruzione.it.

[52] Cf. www.acquistinretepa.it/opencms/opencms/programma_acquistiverdi.html

[53] Cf. Regione Lombardia, 'Piano di azione per gli appalti verdi' <www.ariaspa.it/wps/wcm/connect/e9dd2953-d0fa-41d6-b733-f16b9b5c349b/Piano+di+Azione+-+GPP+-maggio+2020.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-e9dd2953-d0fa-41d6-b733-f16b9b5c349b-nal6p5.> accessed 7 October 2020.

[54] L Cioni, 'I criteri ambientali minimi sono una causa di esclusione?' Giurisprudenza Italiana (2020) 2237.

Finance, Europe needs '*quick and targeted relief*'[55]. Those are the reasons why, even though nowadays in Italy most political debates concern whether to use or not the ESM fund, it appears evident that '*the key question is not whether but how the state should put its balance sheet to good use*'[56].

Conclusions

COVID-19 is an international health crisis that requires quick and intelligent solutions and cleverness in dealing with an expansion of demand for goods and services while certain supply chains are disrupted. Public buyers are at the cutting edge for most of these goods and services, as it is their responsibility to ensure the availability of personal protective equipment such as face masks and protective gloves, medical devices, notably ventilators, other medical supplies, but also hospital and IT infrastructure, to name only a few.

The pandemic has driven numerous changes to economic activities and the way EU and its Member States function, bringing the role of public procurement to the fore. Addressing these challenges has prompted EC to rethink how to better protect EU citizens and use public purchasing as a lever to drive social innovation initiatives. Even though the initial response to the to the pandemic crisis has been slow, at a certain point EC changed attitude and decided to stick to the general principle of solidarity that is a feature of the European integration construct. Considering the EU soft law measures and legislative initiatives adopted during the pandemic crisis, it emerges a principle that is taking on deeper and newer connotations based on the awareness of a common interest, showcasing its positive contributions to reinforcing mutual connection and interdependence of people.

Italy may be regarded as an emblematic case. This State was severely hit by COVID 19, but it is now moving in the right direction. It has simplified the purchasing procedures and has promoted a more socially oriented public spending. In the aftermath of the first wave, it has started a process which will leads to structural reforms. Although the crisis has distraught the lives of million Italians, it seems to have brought a brand-new approach to public procurement. It is evident that such an approach will have to be the basis for a long-time schedule that should have as an objective the simplification of the public contracts matter.

[55] 'A response to the corona crisis in Europe based on solidarity' <www.auswaertiges-amt.de> accessed 7 October 2020.

[56] M Draghi, 'We face a war against coronavirus and must mobilise accordingly', Financial Times, 24 March 2020 <www.ft.com> accessed 10 October 2020.

Public procurement and Covid-19 in Portugal: the particular case of the acquisition of institutional publicity related to the pandemic disease

Marco Caldeira

Abstract

In addition to several other exceptional legal measures adopted in regard to public procurement related to the pandemic of the disease Covid-19, the Government also enforced a specific regime for the acquisition of institutional publicity related or associated to Covid-19. However, this framework (set forth in article 2nd-B of Decree-Law no. 10-A/2020, of March 13, added by Decree-Law no. 20-A/2020, of May 6) is highly problematic and raises several issues, as, under the "cover" of a procurement regime, it is actually a direct public subsidization to the social media market, with a full upfront payment based on grounds of "urgency" that does not seem compatible with the public procurement rules.

Keywords

Covid-19; public procurement; social media; institutional advertising; urgent direct award.

1. Further to its health, social and economic consequences, the pandemic of the disease Covid-19 also had a huge impact in the legal systems throughout the world, including in Portugal. In fact, in order to fight the disease and prevent a larger-scale contamination, while trying to support the economic activities in a lockdown context, several legal measures were adopted, covering virtually all the sectors since labor regulation, data protection, insolvency, tax matters, administrative and judicial proceedings and, of course, public procurement. In this context, a new and exceptional framework was enforced, in order to allow awarding entities to enter into contracts for the execution of public works, the lease or purchase of goods and services related to Covid-19. A special reference shall be made to the regime enforced by Decree-Law no. 10-A/2020, of March 13, amended for several times (*inter alia*, by Law no. 1-A/2020, of March 19, by Decree-Law no. 10-E/2020, of March 24, by Law no. 4-A/2020, of April 6, by Decree-Law no. 18/2020, of April 23, and by Decree-Law no. 20-A/2020, of May 6), related to public procurement in general, and which was also made applicable to specific acquisitions by means of special provisions (for example, related to artistic spectacles and cultural events, *ex vi* article 11th of Decree-Law no. 10-I/2020, of March 26).

In broad terms, the special measures adopted by the Portuguese legislator consisted on the following:

a) The possibility of using direct award procedures on the grounds of "extreme urgency", for the execution of public works, lease or purchase of goods and services contracts related to Covid-19, regardless of the contract's price;

b) The possibility of using a simplified direct award (contracting upon an invoice or similar document) for the execution of public works, goods or services contracts, up to € 20.000 (four times more than what is normally permitted by law);

c) The possibility of using a simplified direct award, to the necessary extent and for duly justified reasons of extreme urgency (which cannot be attributed to the awarding entity), regardless of

the price, for the execution of contracts for the acquisition of the necessary equipment, goods and services for the prevention, containment, mitigation and treatment of Covid-19, or related purposes;

d) The possibility of executing contracts without the awarded bidder being obliged to submit its habilitation documents (*e.g.*, the proof that it has no debts to the tax authorities) or to provide a performance bond to ensure the contract's fulfillment;

e) The dismissal of the Audit Court's prior clearance to the contracts (without prejudice of their submission to a further control);

f) The possibility of purchasing outside the scope of centralized framework agreements (even when acquisitions under said agreements are mandatory); and

g) The reduction of bureaucracy in regard to budgetary provisions and expenditure authorizations[1].

2. However, along with this special regime for the procurement of works, goods and services related to Covid-19, the Government also enforced a specific regime for the acquisition of institutional publicity related or associated to Covid-19.

2.1. More specifically, by means of the abovementioned Decree-Law no. 20-A/2020, the Government allowed the use of the direct award procedures for the execution of contracts for the acquisition of institutional publicity related or associated to Covid-19, in national, regional and local media, through television, radio, printed and/or digital means, up to an overall amount of € 15.000.000, VAT included (as per article 2nd-B of Decree-Law no. 10-A/2020, added by Decree-Law no. 20-A/2020). However, these direct awards can only be adopted to the extent strictly necessary and on duly grounded reasons of extreme urgency.

Pursuant to this regime, a group of contracting entities may, for an 18-month period, and based on duly grounded reasons of extreme urgency, purchase the strictly necessary instructional publicity on:

a) The public health pandemic situation and, among others, advertising on preventive and containment measures for the transmission of the virus, good social and hygiene practices, periodic reports and information on the public services in question;

b) Legislative measures adopted to contain the pandemic, as well as the public or social means available to rescue, monitor, inform or oversee;

c) Legislative measures adopted to balance the economy on a cross-sectoral or sectoral basis, as well as the public or social means available to rescue, monitor, inform or oversee;

[1] For a general overview and further developments on this subject, see, in particular, José Duarte Coimbra, Tiago Serrão and Marco Caldeira, *Direito Administrativo da Emergência – Organização Administrativa, Procedimento Administrativo, Contratação Pública e Processo Administrativo na resposta à COVID-19*, Almedina, 2020, pp. 87-120, as well as Miguel Assis Raimundo, "Covid 19 e contratação pública", in *Revista da Ordem dos Advogados*, I/II, 2020, pp. 165-217, and Pedro Fernández Sánchez, "Medidas excepcionais de contratação pública para resposta à pandemia causada pela COVID-19", in Inês Fernandes Godinho/Miguel Osório de Castro (ed.), *COVID 19 e o Direito*, Edições Universitárias Lusófonas, 2020, pp. 45-89.

d) Legislative measures adopted for the progressive recovery of life and economy in a pandemic and post-pandemic context, as well as the public or social means available to rescue, monitor, inform or oversee;

e) Ancillary measures in the health area, such as the call for vaccination and the use of primary and emergency health services;

f) Measures in the area of education to inform the educational community of their rights and duties, deadlines, timetables, teaching and auxiliary resources as well as the means available to implement them;

g) Raising awareness on the prevention of forest fires in a pandemic year;

h) Social and humanitarian causes, such as domestic violence, violence against the elderly or minors, sharing of domestic and parental responsibilities, fighting discrimination, raising awareness to mental illness, and helplines and services in times of pandemic;

i) The promotion of media literacy and dissemination of cultural activities during and in the aftermath of the pandemic;

j) Other areas and matters serving similar purposes.

2.2. Through Resolution of the Council of Ministers no. 38-B/2020, of May 15, as amended by Declaration of Rectification no. 22/2020, of May 27, the Government *(i)* appointed the Government Shared Services Entity ("eSPap") as the grouping's representative[2] and *(ii)* listed the entities who should benefit from these aids – which basically corresponded to every institution registered as a social media institutions towards the Portuguese Regulatory Authority for the Media ("ERC").

3. This legal framework raises several issues, both from a formal and from a substantial point of view.

3.1. From a formal standpoint, this framework appears, quite unexpectedly, as a provision destined to a "grouping of awarding entities" – when, on the contrary, we seem to be confronted, *prima facie*, with a brand new permission for the use of a direct award procedure to enter into a specific kind of contracts, with pre-determined companies and without prior clearance ("*visto prévio*") from the Audit Court[3].

However, when taking a closer look, this legal framework becomes even more peculiar: in fact, more than a legal permission for launching direct award procedures, article 2nd-B of Decree-Law

[2] Decree-Law no. 20-A/2020 provided that the Council of Ministers should appoint the grouping's representative and also establish the powers of each of the members.

[3] As per article 6th, no. 1, of Law no. 1-A/2020, applicable *ex vi* article 2nd-B, no. 1, paragraph b), of Decree-Law no. 10-A/2020.

The Audit Court shall nevertheless proceed to a further control of the contracts executed under this legal framework.

In addition, the Resolution of the Council of Ministers no. 38-B/2020 foresees that the General Secretariat of the Presidency of the Council of Ministers shall issue a trimestral report regarding the performance of such contracts. However, no report seems to have been issued so far (or, if it has, it is not publicly available).

no. 10-A/2020 constitutes, by itself, the actual decision of opening such a procurement procedure; and the subsequent Resolution of the Council of Ministers no. 38-B/2020 was, for all the relevant purposes, the awarding decision issued in that procedure – with the singularity that, in this case, no formal invitation was sent to any of the chosen entities and no formal bid was submitted by the latter[4].

A deeper analysis of this framework leads us, therefore, to a surprising conclusion: under the "mask" of a specific provision for acquisition of institutional publicity by a grouping of awarding entities or a legal permission for the adoption of direct award procedures, the Government in fact proceeded to a *direct subsidization of the sector of social media*, by means of an anticipated purchase of institutional publicity[5]: which is confirmed by the fact that the amount to be granted to each one of the awarded entities shall be *fully paid in advance*[6] and, as far it is known, it was calculated based on each entity's profits arising from commercial communications and their circulation profits during 2019's second trimester[7].

3.2. Even assuming that such a direct intervention of the Government in a regulated market does not raise any competition issues[8], fact is that, in this particular case, public procurement concepts, mechanisms and framework seem to have been convoked to grant formal legitimacy to what was *ipso facto* a State aid to a specific sector (admittedly, in order to help the companies that operate in such market to survive the economic crisis, as acknowledged in the preamble of Decree-Law no. 20-A/2020)[9].

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[4] According with the information made publicly available, at least two entities – owners of the online journals *Eco* and *Observador* – have even rejected the financial support offered by the Government.

[5] This anticipated purchase, for a whole 18-month period (see below), means that the performance of the service is not instantaneous (but rather continuous), *i.e.*, each entity shall carry out several purchases until their respective "plafond" is sold out.

From this perspective, this becomes close to a framework agreement with several entities and that is performed throughout a typically long period of time by means of successive call-offs.

[6] As per paragraph 4 of Resolution of the Council of Ministers no. 38-B/2020.

[7] Similarly, on an equally revealing note, the amount of the total expenditure involved was previously settled at € 15.000.000, *which already included the applicable VAT*, which also indicates that this was not the price to be paid in exchange of services to be provided in the future, but instead a fixed amount to be granted upfront to the social media institutions.

[8] As Portuguese law provides that no public help granted to private companies may affect the internal market in a significant way (as per article 65th, no. 1, of the competition legal framework, enforced by Law no. 19/2012, of May 8).

However, as far it is known, the Portuguese Competition Authority was not consulted by the Government in this matter.

[9] And it is a particularly sensitive sector, subject to a specific constitutional framework destined to ensure the freedom of press and the independence of social media from the political power [see articles 38th, nos. 4 and 6, and 39th, no. 1, paragraphs a) and c), of the Portuguese Constitution].

Furthermore, even from a strict public procurement perspective, this regime contains highly problematic provisions, which – now from a *substantial* point of view – may hinder the validity of the Government's conduct.

On the one hand, the "extreme urgency" invoked to allow direct award procedures is not compatible with an 18-month term: it is, in fact, quite difficult to argue that the "urgency" in the acquisition of institutional publicity may last for so long, as if during those 1,5 years would not be possible to launch a competitive procedure. As several authors rightly emphasize, pursuant to the proportionality principle, the appeal to the "urgency clause", for this purpose, shall be limited to the extent strictly necessary and cannot be subject to legal "manipulations" in order to cover situations in which no urgency actually exists[10]. And, according with the European Court of Justice, the exception of "extreme urgency" cannot be invoked for the award of contracts that take longer than they would have taken if a transparent, open or restricted, procedure had been used, including accelerated (open or restricted) procedures[11].

On the other hand, the scope of the purchases in question is very broad, given that article 2nd-B of Decree-Law no. 10-A/2020 foresees that the publicity to be acquired may be destined to so many different goals as, for example, raising awareness on the prevention of forest fires in a pandemic year, social and humanitarian causes (*e.g.*, domestic violence, violence against the elderly or minors, sharing of domestic and parental responsibilities, fighting discrimination, raising awareness to mental illness, and helplines and services in times of pandemic), promotion of media literacy and dissemination of cultural activities during and in the aftermath of the pandemic and other areas and matters serving similar purposes. These vague concepts and their remote connection with the pandemic show that the reference to Covid-19 is merely a pretext to simulate the "urgency" that would allow the use of direct procedures.

In view of this, there are solid grounds to sustain that, once the applicable thresholds are exceeded, the contracts executed for the acquisition of institutional publicity shall be deemed invalid, for breach of Directive 2014/24/EU of the European Parliament and of the Council, of February 26, 2014[12].

This direct subsidization of social media entities, consisting on an advanced payment, even before any service was actually rendered, by means of a governmental decree-law, without any intervention whatsoever from the Parliament and the ERC, therefore raises serious doubts from a constitutional point of view, as duly noted by Pedro Fernández Sánchez (ob. cit., pp. 60 and 63).

[10] For this matter in general, see Miguel Assis Raimundo, "Catástrofes naturais e contratação pública", in Carla Amado Gomes (coord.) *Direito(s) das Catástrofes Naturais*, Almedina, 2012, pp. 260-261.

Specifically in regard to article 2nd-B of Decree-Law no. 10-A/2020, see Pedro Fernández Sánchez, ob. cit., pp. 62-64.

[11] As expressly reminded by the European Commission, in its *Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01)*, of April 1st.

[12] See Pedro Fernández Sánchez, ob. cit., pp. 62-64.

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Challenges in public procurement before, during, and after the COVID-19 crisis: Selected theses on a competency-based approach

Michael Eßig Christian von Deimling Andreas Glas

Abstract

This paper develops three theses on a competency-based approach during and after the COVID-19 crisis. These theses are based on the following empirical findings: case insights into the procurement of protective gear in Germany, the supplier shortage, which was a problem even before the crisis, and a quantitative view on the extended supply chain challenges in public procurement, including the decreasing number of bidders and an overly narrow view on supply chain partners. A key finding is that while the COVID-19 crisis has uncovered the problems of public procurement, the root causes lie more deeply in public procurement capabilities. As a result, this paper promotes extended public buyer competencies based on a European Framework, evidence-based decision-making in public procurement and the use of digital technologies to improve the security of supplies.

1. Re-thinking public procurement: Some thoughts made more urgent by the COVID-19 crisis

The need to professionalize public procurement was recognized long before the crisis. In fact, the crisis hit public procurement entities while they were implementing professionalization measures. During the crisis, it has become clear that public procurement plays a strategically important role (e.g., securing the supply of medical equipment). The crisis has also clarified that the public has high expectations for the efficiency of public procurement activities (e.g., in terms of the medial presence of public procurement) that may help to ease or overcome the crisis. However, the crisis has also revealed fragile supply chains that are vulnerable to sudden and unexpected disruptions and deficits in public procurement. The need to professionalize public procurement now extends to a more thorough and resilient supply chain management. Moreover, as a measure of economic recovery, public procurement will certainly gain additional long-term importance to secure markets, drive their development and promote the emergence of new companies. Therefore, the role of public procurement as an instrument of market development and job security is drawing attention. In the future, the contribution of public procurement to a functioning community should be more strongly rewarded to make the service more attractive.

This article will report on three phenomena that have arisen in public procurement practice. First, it starts with the pandemic crisis of COVID-19. Second, data on bidding volumes and, in particular, about the number of bidders is evaluated. Third, the influence of public procurement on suppliers is examined by using a supply chain perspective. All three phenomena indicate that improvements can only be achieved if public procurement addresses more fundamental and underlying problems. As a contribution, this article argues that a competency-based approach has high potential for improving public procurement and proposes theses on how to develop competencies in the profession, the evaluation of evidence and technology. The theses are summarized and provide promising paths for future research. As a first step in the development of the competency-based theses for public procurement, the next sections provide insights into empirical phenomena.

1.1 Empirical findings I: Public procurement of protective gear

During the COVID-19 pandemic, the need for protective equipment has risen enormously, with tenders for billions of protective masks being issued at short notice. At the same time, much of the protective equipment has so far been produced in Southeast Asia. For example, 75% of simple surgical masks come from China. Moreover, in the face of global demand, the prices of what had been considered "cent items" have risen by up to 300%. This is associated with challenges about how the demand can be economically covered by procurement measures. Süddeutsche Zeitung, a renowned German newspaper, has reported on the associated procurement problems in the following two articles:[1]

"So far, the German government has not succeeded in obtaining sufficient protective clothing, especially from China, where masks and other materials are produced in large quantities. Now the government wants to use 'the expertise of large companies' that do business with China, it is said in government circles. Companies like VW are 'familiar with Chinese structures in a very different way, they know the supply chains and the purchasing chains'. [...] 'These companies bring their experience and contacts in foreign markets to organise purchasing and logistics for the government'. [...] The demand for protective clothing is so great that the federal government's purchasers are not yet able to keep up. Purchasing via the procurement offices of the Federal Ministry of Defence and the Federal Ministry of the Interior has started very slowly. This has not worked, according to the environment of Federal Minister of Health […]. Only a fraction of the protective masks previously procured by the federal government had come through the procurement offices."

Subsequently, under the heading "Businesses can do better," another article from the same newspaper states:

"Civil servants and politicians should not phone around the world trying to get face masks or respirators. This will only waste valuable time. They should hand this task over to business. [...] Civil servants and politicians cannot just phone around the world and procure any goods. They lack the experience. [...] Governments and ministries have valuable skills that they are currently demonstrating. But they are not familiar with the world market for medical products. How could they? When politicians try to act as buyers, valuable time is lost in the fight against corona. [...] There are many experts in industrialized countries for the global procurement of all kinds of products. They sit in the companies."

According to these media reports, the perception of public procurement is as follows:

a) Political leadership and professional expertise in the contracting award entities and public authorities or ministries are mixed and evaluated without differentiation.

b) The public sector is denied the ability to procure at all.

c) Public procurement as a profession is negated.

1.2 Empirical findings II: Supplier shortage even *before* the crisis

There are currently only a few data sources available for the study of the awarding behavior of public purchasers. These include data retrieved from the online version of the "Supplement to the Official Journal" of the EU, dedicated to European public procurement (tenders electronic daily, TED). In principle, the ted database contains all notices of contracts to be awarded in the future (so-called "Contract Notices," CN) and contracts that have been awarded already (so-called

[1] See Translated quotes from https://sz.de/1.4866977 and https://sz.de/1.4867005, called up April 8th, 2020.

"Contract Award Notices," CAN) above certain threshold values.[2] Focusing on the available data for contract award notices (CAN), makes it possible to identify approximately 1.7 million CAN for all European member states (including associated member states such as Norway or Switzerland) for the period 2009 to 2018.

Since the enforcement of the European Public Procurement Directives (e.g., 2014/23/EU, 2014/24/EU, 2014/25/EU) in 2014, the number of published notices on awarded contracts (CAN) has been steadily increasing (cf. Figure 1). In 2017 and 2018 in particular, there were major leaps in the number of published CAN. Of the approximately 1.7 million notices on awarded contracts, about 237,000 notices (i.e., just under 14%) were published by public contracting authorities in Germany. The positive trend of the number of published notices (see Figure 1) in Germany is similar to the numbers observed for all member states.

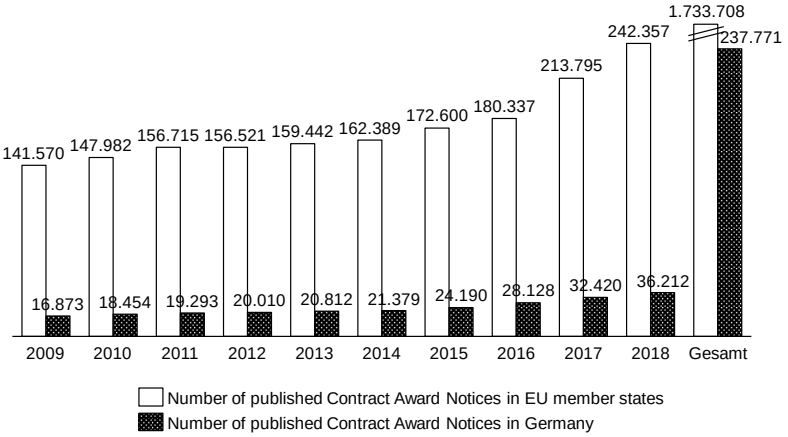

Figure 1: Number of CAN

The clearly positive trend in the number of CAN is also reflected in the procurement volume, although it is more volatile after 2017 (cf. Figure 2). The data demonstrate that currently only a fraction of the annual public procurement volume can be viewed and tracked via the ted data. For example, in Germany, of the estimated annual public procurement volume of approximately €350 billion [Eßig & Schaupp, 2016] in 2017 and 2018, only values between €45 and €48 billion have been reported, which corresponds to a share of about 13% of the annual procurement volume. For the years 2017 and 2018, the average contract value (per contract award notice) would thus be between €1.2 and €1.5 million.[3]

[2] See TED data is published yearly and has an „open access policy". The data is available via https://data.europa.eu/euodp/de/data/dataset/ted-csv and was called up on May 1st 2020.

[3] While there is little doubt, that data quality in the ted-database is in part questionable it is also the only open data platform that provides deeper insights into public procurement behaviour. For a more elaborated view on data quality limitations see Prier et al.(2018).

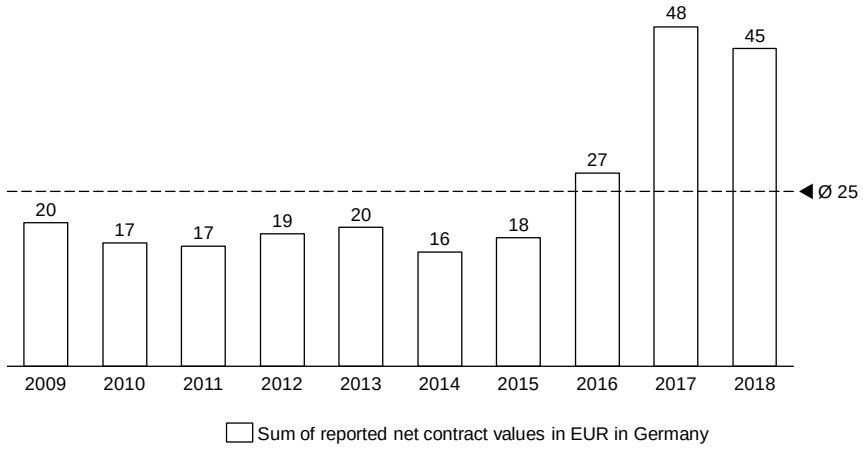

Figure 1: Total net contract value in billions of euros for Germany only

This positive development in the number and volume of public contracts contrasts with the negative trend in the number of bidders, which has been observed for years. In 2009, an average of nine offers were received for a tendered lot, while in 2014 an average of six offers were received. The more recent figures from 2017 and 2018 demonstrate that this trend has continued. The average number of current bids is about four (see Figure 3).

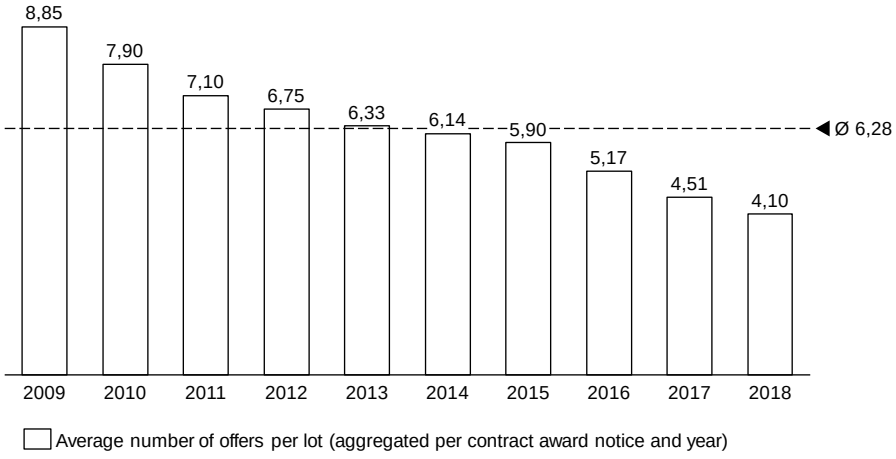

Figure 2: Average number of offers received

The number of lots for which only a single offer was received also increased significantly in the period between 2009 and 2018 (cf. Figure 4). Since 2016, the upward trend has been especially clear. In fact, in 2018, despite the broadest possible tendering behavior across Europe, only one bid was received for more than 20% of all public procurement contracts. Considering the strong economic situation in Germany before the crisis (cf. Figure 4), this initially seems to imply that, from the bidders' point of view, winning public contracts is unattractive.

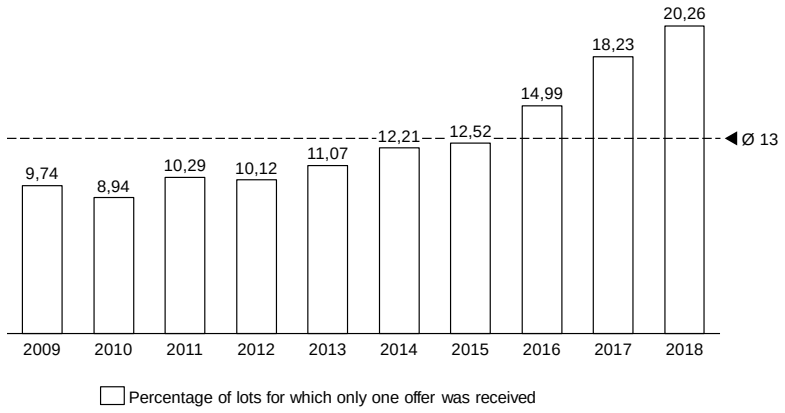

Figure 3: Share of lots with only one offer received in %

The data on the public procurement behavior reveals the following (Findings II from the secondary analysis of the TED:

a) The number of published CAN in the EU increased by 71% over a nine year period (2009 to 2018), and the volume of contracts awarded increased by 125% in the same period, as reflected in the TED database. Even if these data only document the increasing publication activity, it can be assumed that public procurement activity has not decreased.

b) Despite rising volumes and, thus, increasing attractiveness, the number of bidders has fallen by almost 54% over the same period.

c) Apparently, it is no longer attractive for companies to bid for public contracts, and the "Public Customer Attractiveness" is low [Eßig et al., 2014].

d) These problems exist independently of peaks in demand, which typically occur in crisis situations. Despite the increasing number and volume of services put out to tender, the bidding market has becoming increasingly tighter. At the same time, supply to the public sector seems to have declined, which indicates that general signs of supply bottlenecks already existed before the crisis.

1.3 Empirical findings III: Moving public procurement toward a supply chain perspective

The Directive 2014/24/EU only provides limited insights into modern supply chain management. Article 58 (4) specifies that contracting authorities may impose requirements to ensure that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. To prove technical and professional ability, annex VII (d) specifies that it is sufficient to indicate which supply chain management and tracking systems the economic operator will apply when performing the contract. A similar view was adopted in 2016, when the public procurement directives in Germany were overhauled.

German public procurement law designates different participants in a supply chain. These include the contracting authorities (Sections 98, 99, 100 and 101 GWB), the main contractors (before the conclusion of the contract, the term "bidders" or "candidates" is used; after the conclusion of the contract, a distinction is made between "successful bidders" and "unsuccessful bidders," see Section 46 UVgO) and the subcontractors (also referred to as subcontractors or subcontractors, see Section 132 (2) No. 4 (c) GWB, Sections 8 (2) No. 5, 36, 46 (3) No. 10 VgV and Section 26 UVgO)

[Burgi, 2018], [Deutscher Bundestag, 2018]. From the perspective of supply chain management [Eßig et al., 2013], based on the focal organization within a supply chain (in this case the contracting authority, level 0), the direct suppliers (in this case the main contractor, level -1) and the suppliers' suppliers (in this case subcontractors, level -2) are, in principle, subject to public procurement law [Pala et al., 2014]. While the contracting authority has a direct contractual relationship with the main contractor, there is often no contractual relationship between the contracting authority and the subcontractor. Overall, the different stages of the supply chain in the procurement and award activities can be accounted for and made transparent with a proactive supply chain management and supply chain monitoring system. However, the "view" of the supply chain only extends to a maximum of level -2. All other members of the supply chain, such as those at levels -3 and -4, remain unknown, at least from the point of view of procurement law. Moreover, the German public procurement directives allow supply chain management activities to be transferred and conducted by the main contractor. Therefore, these activities can be excluded from the responsibility of public authorities.

A transparent view of the entire supply chain helps clarify how all or selected important components of a contract item are brought together and made available through the various stages of the supply chain to form a comprehensive supply item. If the supply chain is not transparent, it is difficult to identify risks, disruptions or compliance with social or environmental requirements along the value chain [Fraser et al., 2020].

For example, in the automotive industry supply chain, the loss of a feed supplier in South Africa can mean that cattle can no longer be kept. This may cause a shortage of leather for seats and interiors and lead to a production standstill in the German automotive industry. At this point, it is clear that the visibility of first and second tier suppliers is insufficient. A deeper look into the structure of the supplier network is necessary to enable procurement decisions that counteract the risks of failure and supply ("multi-tier" supply chain management) [Chae et al., 2019].

Looking at the few publicly available references from public procurement officers, it can be assumed that the current view of supply chains is more focused on first level suppliers. For example, the procurement office of the Federal Ministry of the Interior, Building and Homeland Affairs (BeschA) reports that the current supplier base (main contractor) comprises a total of 465 suppliers and had an order volume of around €5.3 billion in 2019. About two-thirds of these suppliers have long-term relationships with BeschA, and the remaining one-third are new suppliers [Beschaffungsamt des Bundesministeriums des Inneren, 2020]. No information on the number of subcontractors is provided in the report. The number of main contractors from other countries is also not provided. Here, it can only be assumed on the basis of other studies in the field of cross-border procurement that very few main contractors come directly from abroad [Ramboll & HTW Chur, 2011]. Public procurement law explicitly allows information about the supply chain management and supply chain monitoring system from the main contractor to be requested during the verification of technical and professional performance (§46 Section 3 No.4 VgV). Ultimately, these activities could be outsourced to the main contractor, who then would have to inform the contracting authority about changes in the supply chain, at least in the security and defense sector (§8 Section 2 No.7 VSVgV). The following figure illustrates the above facts by outlining a supply chain, including the supplier levels.

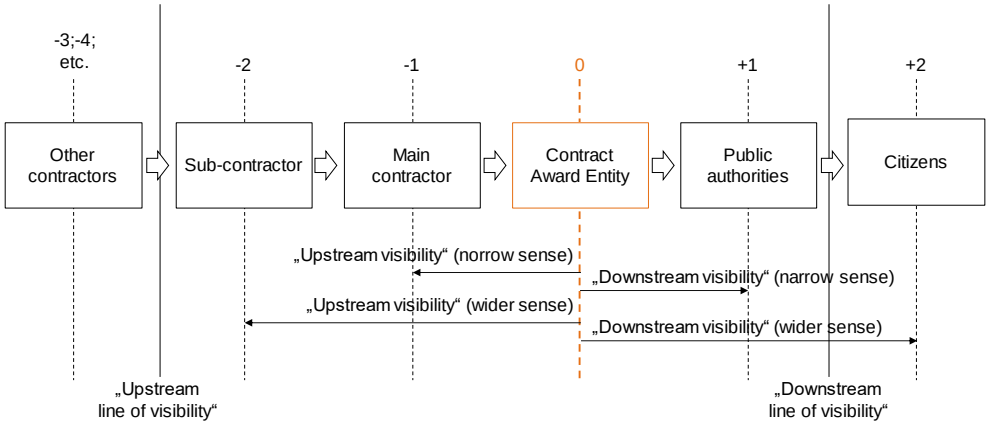

Figure 4: Sketch of a public "supply chain"[4]

Supply chains can be very complex. Even the companies involved may struggle to understand them [Eßig et al., 2013, pp. 33 f.; following Ostertag, 2008, p. 287]. However, all service providers in the economy (i.e., all bidders) are highly dependent on inputs. The share of external procurement by industrial companies is usually well over 50% of turnover; in individual cases, it is considerably higher (e.g., Volkswagen is approximately 75%). The entire supply chain of an organization can take on enormous proportions. For example, in a recent press release, Volkswagen mentions 40,000 suppliers who must be addressed in more than 19 national languages [VW AG, 2020]. In Finland's blood donation supply chain, 210,000 "suppliers" are connected to 100,000 "customers" through three stages, involving more than 100 participating organizations [Eßig et al., 2013, pp. 33 f.; following Spens & Bask, 2002, p. 77].

Findings III from the view of the supply chain:

a) In supply chains with a complex division of labor, procurement and supply risks arise from the supplier's direct source of supply and primarily at upstream stages of the value chain.

b) Currently, the public sector can establish a certain transparency in public procurement law down to the subcontractor (supplier of the supplier, level -02).

c) If public procurement is still limited in its risk assessment to first-tier suppliers when making award decisions, significant parts of the supply chain are ignored and risk management is incomplete.

2. A competency-based approach for public procurement: Three theses

The empirical findings demonstrate that the COVID-19 crisis acts like a burning glass on the status of procurement in the public sector. Although there was an obvious problem with protective gear, security of supply seems to be a general problem. The bidding behavior of suppliers and the supply chain perspective indicate that addressing only the crisis is insufficient. Instead, further development of public procurement needs to address the underlying causes of these problems. Using a competency-based approach, this article formulates three theses that address the development of professional, evidence and technology competencies.

[4] Adopted from Eßig/Batran (2006)

2.1 Thesis (1): Competencies of public buyers: Toward a recognized „profession“

The empirical findings indicate that the skills of public buyers must be better promoted and utilized in the future. The developments in the COVID-19 crisis have revealed that, in addition to the basic principles of procurement law, employees and managers in strategically oriented public purchasing fields require specific competencies in exchange with the procurement markets. For example, they must be able to observe and analyze markets and competitive situations over the long term in order to initiate the search for substitutes or supplementary suppliers with sufficient time (e.g., in the event of bottlenecks or delays). Therefore, the required spectrum of necessary competencies should be identified specifically for the public sector and implemented with the appropriate focus on education, training and continuing education programs. These programs should be of particular interest if successful participation with officially recognized qualifications opens up career prospects in public procurement.

Indeed, in October 2017, before the COVID-19 crisis, the European Commission called for further professionalization of public procurement in the member states [European Commission, 2017a, p. 9]. The demand for the "right people with the right skills and instruments in the right place at the right time" [European Commission, 2017a, p. 11] may have been considered abstract at the time. However, the "European Competency Framework for Public Procurement Professionals" has since developed a more distinct view of the required skills. The EU Commission's proposal released in December 2020 comprises a catalog of 30 capabilities [European Commission, 2020a] that are roughly oriented toward the phases of the procurement process and the tasks specific to each phase. For example, it provides for skills that are considered relevant for public purchasers before (e.g., market analysis) and after the contract award (e.g., conflict management). In addition, there are phase-independent skills (e.g., supplier management or project management) and social/methodological skills (e.g., critical and analytical thinking and acting) that will be required of future public purchasers.

Three essential bundles of skills stand out from the 30 skills listed. Targeted training in these areas could contribute to building up and expanding the skills that have become relevant in the current crisis. These include (1) a better understanding of procurement markets [European Commission, 2020a, p. 44 f.]; (2) a more active supplier management system [European Commission, 2020a, p. 41 f.] and (3) dealing with digital opportunities in public procurement [European Commission, 2020a, p. 35 f.]. An improved understanding of procurement markets is related to the requirement to develop relevant knowledge about particularly critical procurement markets. On the one hand, this requires in-depth market analyses and market forecasts. On the other hand, it involves proactively addressing market participants in legally compliant ways (e.g., in the context of market dialogues, market consultations or organizing open days). A more active supplier management system includes the establishment and development of trusting, open and resilient relationships. Effective risk management can be strengthened as a further necessary competence when combined with the competencies for market analysis and market approaches. The demand for significantly enhanced skills in handling digital technologies that flank the public procurement process is not new. These should go beyond those already initiated for e-tendering or electronic tendering and settlement. For example, technologies for market analysis or in the area of supplier management could be used.

The comparison between the requirements just described and the current training landscape in Germany demonstrates that there are few offers that reflect the required skills adapted for public procurement. So far, the focus has been on questions of public procurement and budgetary laws and the associated financial and auditing laws. For example, the Federal University of Applied Sciences for Public Administration emphasizes these issues in their bachelor's of Public Administration (LL.B) [Hochschule des Bundes für öffentliche Verwaltung, 2018, p. 34 and 59] and master's of Public Administration [Hochschule des Bundes für öffentliche Verwaltung, 2019, p. 49] programs. Courses that consider the above-mentioned business management aspects of public procurement, in addition to public procurement law, have only been available for a short time at the Bundeswehr University Munich's part-time MBA in Public Management program [UniBw M, 2020]. Finally, a survey of public buyers has confirmed the lack of training and further education opportunities for business management aspects of public procurement. Of the 308 participants in the survey, approximately two-thirds said that they had not undergone specific training for their field of activity [von Deimling & Eßig, 2020, pp. 152].

The requirements for professionalization in purchasing should also be reflected in an attractive career path and correspondingly attractive salary ranges. A survey of 638 interviewed buyers in the private sector in Germany revealed a median gross salary of €67,600. A closer examination of the results determined an average gross salary for purchasers with vocational training of €64,200. A buyer with a master's degree would be paid an average of €82,800 [BME, 2019]. In comparison, the salary bands for buyers with training in the public sector as collective agreement employees are in pay categories E6-E8 or pay grades A6-A8. Pay category E8 (TVöD Bund, experience level 4 = 10 years or more in the public sector) or A8 would be around €40,000 to €42,400 (gross). As a result, there is a payment gap between public buyers and private buyers of more than €21,800 and €24,200, but public buyers often act in even more complex governance structures (law, politics, public attention) that require peculiar skills. At the management level, the gap is much smaller. Comparing the private sector payments with corresponding salaries for an E15.4/A15.4 position (just under €80,000 (gross)) result in a gap of only €2,800 yearly. Ultimately, the civil service should be prepared to offer higher pay for more professional and competent purchasers and revise the remuneration models for non-management positions like senior strategic buyers.

The call for an improved and extended use of necessary competencies in public procurement, combined with an improved education, training and continuing education landscape, will be insufficient to equip and transform public procurement with the necessary competencies in a sustainable manner. The "European Competency Framework for Public Buyers" will provide an orientation for the differentiated structuring of the necessary competencies, depending on the role and task of the public buyer. The recruitment, training and development of talents and competencies in public procurement should also be expressed in corresponding career opportunities. As in other countries (e.g., Denmark, Poland, Portugal or the Netherlands), the recognition of "public buyer" as a profession in its own right would be a useful vehicle [OECD, 2013, pp. 78].

2.2 Thesis (2): Evidence-based decision-making

At a European and national level, the requirement for transparency means that government action and economic decisions must be open, public and comprehensible. Transparency can be understood as a quantity of information that must be accessible to the legal entities involved. It

should also comprehensibly and predictably present state action. Transparency aims to make the decision-making processes understandable and legitimate (participation and legitimation), control the decision-making processes and secure subjective rights (control and protection), open the decision-making processes in the award of public contracts to competition and ensure equal treatment of all legal entities involved (competition and equality). Against this background, the awarding of public contracts requires ex-post transparency (i.e., the comprehensibility of the award decision taken) and ex-ante transparency (i.e., the predictability of future award decisions). The publication of future award decisions will inform potential bidders about the procurement intentions of the contracting authorities, who will then independently decide whether to participate in the procedure [Plauth, 2017, pp. 185 ff].

To implement the transparency requirement, information on contract notices (ex-ante), CAN (ex-post) and corresponding changes to the notices are published and archived on different portals and at different levels of granularity. At the European Union level, all relevant notices above defined thresholds concerning future or completed procedures are accessible via the electronic Official Journal of the European Union (Tenders Electronic Daily/TED). For example, since 2006, more than 1.7 million CAN, with more than 72 information fields per individual notice, have been archived [European Commission, 2017b] [European Union, 2019]. This enormous amount of data and the information hidden in it is gradually becoming the focus of political decision makers who want to professionalize public procurement and make decisions based on the information collected [OECD, 2019, pp. 144 f.]. For example, a "Single Market Scoreboard" has been set up to provide key figures on the development of public procurement in Europe and its member states [European Commission, 2020b]. However, these indicators are limited to contracts above the defined thresholds. Contracts below these thresholds are not recorded, and there are numerous exceptions where publicity is not required (e.g., in the security and defense sector). Moreover, the quality of the data is often questioned due to the varying degrees of precision of recording in the member states [Prier et al., 2020, p. 8 f.].

At the national level, there are also efforts to systematically collect information on procurement procedures and use it in decision-making. The aim should be to collect basic data on public contracts and concessions for Germany as comprehensively as possible. To this end, the federal government issued the Ordinance on Public Procurement Statistics (VergStatVO) in April 2016 [BMWi, 2020], which allows contracts below the thresholds, from 25,000 EUR, to be covered. In addition, data on the development of politically set objectives (e.g., on environmental sustainability) will be requested. In March 2020, an automated data collection system was set up, which will be archived and evaluated by the Federal Statistical Office. The collection of reliable data is planned for the beginning of 2021 [OECD, 2019, p. 139]. Ultimately, these notices of intention to award contracts to public authorities will establish procurement statistics for Germany, similar to the key figure reports of the European Union. The developed key figure systems on European and national levels are oriented toward political decision makers [OECD, 2013, p. 86] [OECD, 2019, p. 142]. Currently, these systems are rarely used by the individual contracting authorities for extended decision-making. Comparative analyses with contracting authorities with a comparable portfolio of tasks (e.g., comparative analyses on the procurement of public utilities) may be possible. Market analyses of bidders in a specific product group who have already been awarded contracts by other contracting authorities (e.g., with the aim of expanding bidder lists) are also conceivable. In addition, key award parameters can be compared between

different contracting authorities to identify bundling potential across authorities. Finally, external "data treasures" enable the individual contracting authorities to look beyond their own outfits. Therefore, the transparency requirement has advantages for potential bidders and the contracting authorities.

At the level of individual contracting authorities, data and fact-driven decision-making is also helpful. Ideally, the contracting authorities can use information from their enterprise-resource-planning (ERP) systems. For example, they can view contract release orders by time, quantity and value, develop expenditure analyses and demand forecasts, record demand notifications and identify potential for demand pooling and carry out supplier structure analyses and creditor evaluations. This information can then be used to derive essential decisions on procurement issues and, ideally, data- and fact-based procurement strategies [OECD, 2013, pp. 107 f.]. This information, which often already exists, can be extended by new applications, such as those offered by the start-ups ScoutBee [ScoutBee, 2020] or Riskmethods [Riskmethods, 2020]. ScoutBee helps with the digital search for and evaluation of suppliers, while Riskmethods provides support for the automatic early recognition, evaluation and mitigation of risks along value chains.

The call for evidence-based decisions (i.e., decisions that are systematically based on data, facts and figures) in public procurement at all levels is not new [OECD, 2013, pp. 107 f.] [OECD, 2019, p. 141]. However, so far, efforts seem to have focused on the question of which data to collect for each procurement and award project. Accordingly, it can be observed that large amounts of data are already being recorded and archived [Glas & Eßig, 2018]. Almost reflexively, the quality of these data volumes, or "data treasures," which have been collected at great expense, is often doubted. Moreover, the data has not been adequately interrogated to determine its potential. Although these doubts are justified and data quality must be improved, these concerns should not distract from the central question of what data is actually needed and can be sensibly used for specific decisions at various decision-making levels. For example, at the level of the individual contracting authority, it is necessary to combine different external and internal information and utilize additional information from available applications. The work with the data cannot be carried out as a side job in conjunction with other tasks in public procurement. It requires the development and expansion of its own analytical capacities and competencies (e.g., in the form of data specialists with expert knowledge of purchasing).

2.3 Thesis (3): Using digital technologies to improve security of supply

Even in times of crisis and under adverse circumstances, businesses and citizens rely on the government to perform its tasks reliably. The sometimes short-term changes in a crisis situation pose enormous challenges for public clients. For example, short-term supply bottlenecks, short-term peaks in demand and disruption of entire supply chains must be responded to appropriately and quickly. Against this background, it necessary to establish a reliable risk management system for the early identification of risks and promote an understanding of supply chain considerations (i.e., supply chain management) [Kleindorfer & Saad, 2010]. It is also imperative to question the use of new technologies and production processes in the context of the government's performance of its tasks. Especially in the event of a crisis, it is important to have a high degree of flexibility to be able to react as quickly as possible to uncertainties and guarantee the efficiency of the state. In this context, flexibility can be understood as the efficient and effective adjustment and

reconfiguration of production factors. In this respect, it is conceivable to use additive manufacturing processes to ensure flexibility and responsiveness [Caviezel et al., 2017, pp. 1–27].

Additive manufacturing ("3D printing") uses a digital representation (CAD file) of the object to be manufactured, then the corresponding source materials are positioned and joined together layer by layer until a physical image is created [Ghadge et al., 2018]. Due to "tool-less" manufacturing [Holmström & Partanen, 2010], a 3D printer can handle a wide range of different materials [Rogers et al., 2016] and a variety of designs with different degrees of complexity [Ghadge et al., 2018]. The physical starting materials consist of raw materials like powder and filament. They are highly unspecific and are increasingly becoming a standard commodity [Öberg, 2019]. The fully automated manufacturing process also requires almost no monitoring [De La Torre et al., 2016]. This indicates that the technology has found its way into the so-called maker movement, in which hobbyists independently design and manufacture products [Waller & Fawcett, 2014]. Virtual drawing data are key factors. These can be easily created, modified and exchanged [Oettmeier & Hofmann, 2016] because their standardized format can be read by all 3D printers (STL) [Potter & Eyers, 2015]. Ultimately, 3D printing offers the advantage of being able to produce a wide range of different products on the same system, based on standardized raw materials and quickly available digital blueprints. The construction of specific production facilities at one location, which is time and cost intensive, can be avoided by using decentralized printer capacities. This high flexibility potential is countered by problems that still have to be overcome. For example, the current state of additive manufacturing has a cost advantage over traditional manufacturing methods, such as injection molding for small production quantities. However, additive manufacturing has so far only been used sporadically in medium and large industrial production series [Rylands et al., 2016]. Moreover, how certified drawing data sets and construction plans can be safely realized in the application must be clarified; in principle, anyone can create and distribute them.

Against this background, the state must assess how it intends to make such technological developments useful for its future tasks [Meyer et al., 2020]. Apart from a political-normative objective on the basic scope of the state's tasks and the definition of the extent to which the state is to perform its tasks, it is necessary to determine what proportion of value creation is to be performed by the state. For example, in the context of risk prevention, it is conceivable to establish and operate state-owned printing capacities and storage capacities for the required raw materials. Risk prevention through using the capacities of external third parties is also plausible. In the latter case, the aim must be to secure and make available the capacities of external third parties, especially in the event of a crisis.

The call for improved responsiveness to short-term bottlenecks and peaks in demand requires the ongoing assessment of new technologies and their range of applications. One of these promising technologies is additive manufacturing. It offers high flexibility because a wide range of different products with a variety of designs can be manufactured in the same plant, using the same standardized starting materials. Digital blueprints can be distributed quickly and implemented on available printers at different locations without having to set up special production facilities. Against this backdrop, the question arises of whether entities should set up their own 3D printer capacities and warehouses for the source components as part of government risk provisioning, or whether they should commission external service providers to provide the necessary capacity.

Appropriate competencies for the classification of new technologies in public procurement and their meaningful use for the performance of public tasks would have to be developed more intensively, including appropriate competencies for increasing the acceptance of new technologies.

3. Conclusion and outlook

The COVID-19 crisis has presented new challenges to the field of public procurement. This crisis has clarified that societies rely on a professional and powerful public administration. The perception of how public procurement has managed the crisis is not entirely favorable. Therefore, public procurement improvements should be addressed with a competency-based approach. This paper argues for better collaboration between the public and private sectors, which will improve the supply security and state performance. The interface with the public sector has to be managed professionally, and public procurement has to become strategic. This implies that appropriate management skills must be developed. These skills must go far beyond an oversimplified transfer of private sector management knowledge, but must aim to a peculiar, own strategic management expertise of the public sector. So far, strategic public procurement has been mainly associated with strategic goals like green public procurement, social public procurement or public procurement that promotes innovation ("strategy content"). In the future, this must be combined with strategic processing skills like improved market exploration, supply chain risk management and explicitly formulated strategy content. The EU competency framework could form the basis for a strategy implementation of these competencies. However, further research is required to elaborate on and analyze the proposed competency-based approach. This will also help overcome the major limitation of this research: the normative reasoning and selective sampling of phenomena.

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Competitive Public Procurement during COVID-19: The Unique Political and Policy Experience of the United States

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Abstract

COVID-19 appeared during one of the most turbulent political environments in U.S. history. This research documents how political polarization during a presidential election year coincided with an incoherent national policy and procurement response to the COVID-19 pandemic, and empirically examines the competitive nature of pandemic-related public procurement contracts across the 50 states based on partisan control of state governments.

Keywords

Disaster Spending; Partisan Politics; Public Procurement; Full and Open Competition

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security.

James Madison

Introduction

Responsible for the catastrophic loss of life and substantial impact on the global economy, the SARS-CoV-2, commonly known as COVID-19, drives much of the current political, economic, and social agenda. While the effects of the COVID-19 pandemic vary across nations, its effect on the United States (U.S.) is unique and characterized by a complicated federal system of government and partisan politics (Kettl 2020; Rocco et al. 2020; Xu et al. 2020; Bekker et al. 2020). Adding to the complexity of dealing with the virus, including slowing disease transmission, maintaining an effective healthcare system, and protecting front-line workers, the U.S. suffered economic damage during one of the most divisive presidential elections in U.S. history (see for example, Shockley-Zalabak & Morreale 2020). Moreover, 2020 saw rising social unrest at government's treatment of minorities (Towler, Crawford & Bennett 2020), coupled with increasing distrust of politicians by Americans – all of these developments suggested that there were growing questions about whether the government can effectively combat the virus (Pew 2019, Cooper 2018; Van de Walle et al. 2008).[1]

In this heavily politicized social environment, the federal government addressed the COVID-19 crisis with Congress passing the largest economic stimulus package in U.S. history – the $2.2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, 2020 (see other coronavirus-related Congressional acts in Shearman & Sterling 2020; timeline adopted from AJMC 2020). The CARES Act provided direct economic relief to American families ($300 billion in

[1] The Pew Research Center bears no responsibility for the analyses or interpretations of the data presented here. The opinions expressed herein, including any implications for policy, are those of the author and not of Pew Research Center.

one-time cash payments), aid to businesses through the Paycheck Protection Program ($350 billion in original funding, and later increased to $669 billion), tax incentives and loans to businesses ($500 billion), and assistance to state, local, and tribal governments navigating the impact of the COVID-19 outbreak ($339.8 billion).

Indeed, while the CARES Act helped stabilize the economy, the federal government failed to take the lead in addressing the health and safety needs of the nation, and an intergovernmental nightmare ensued (Kettl 2020). During a press conference on April 10, 2020, President Trump said that he wished to "allow governors to make decisions without overruling them", and this policy declaration resulted in the federal government - along with state and local governments - competing to acquire pandemic-related supplies and services such as personal protection equipment (PPE) and medical equipment (Gerstein 2020). When nearly all governments simultaneously tried to acquire essential goods and services, demand spiked. As a result, prices for supplies like N95 masks rose quickly; corruption and outright supplier fraud increased; and ultimately some indispensable goods and supplies were either not received in time or not received at all (Atkinson et al. 2020; Vecchi et al. 2020). A point was reached where, according to the *Chicago Sun Times* (April 15, 2020), Illinois Governor Pritzker purchased millions of Chinese gloves and masks and chartered a plane to bring them to his state. Things were so dire that Pritzker felt it important to keep the details of the procurement secret because he feared the cargo might be seized by the Trump administration and diverted into the federal stockpile.

These conditions raise fundamental questions, not only about government transparency and accountability, but also about procuring in times of a global pandemic. This research examines the core public procurement norm of full and open competition during the COVID-19 emergency situation. Given the extremely partisan environment in which national policy played out, it is hypothesized that competitive procurement procedures were relaxed in the face of growing pandemic-related chaos. As a result, observers may infer that the U.S. federal government procurement strategy may contribute to American's growing distrust in government institutions, especially in light of the incoherent federal response that ultimately helped fuel the disastrous effects of the deadly virus (Rocco et al. 2020; Grossman et al. 2020; Xu et al. 2020; Bekker et al. 2020; see CDC 2020 for an updated number of virus casualties).

The purpose of this research is to explore the relationship between partisan politics, public trust in government, and how the federal government contracted for COVID-19 supplies and services. To directly measure if COVID-19 competitive contracting practices differed from those procured under normal circumstances, all specified COVID-19 contracts are compared to all contracts for the fiscal year 2020 (October 1, 2019 to September 30 , 2020 - FY2020). To assess if the political climate during this past year may have resulted in differential competitive contracting practices, COVID-19 related contracts are linked to the state in which the federal contracts are performed, and this linkage is then evaluated based on political party control of the state legislature and governor's mansion.

Partisan Politics, Public Trust, and the COVID-19 Pandemic

Public trust in government is employed herein as an evaluative tool and is associated with ideological partisan politics. Analyzing public trust can unveil potential consequences for governance capabilities and, specifically, purchasing during the COVID-19 crisis (Chanley et al. 2000; Rudolph & Evans 2005; Gauchat 2012; see also the GHSI 2019 or WHO 2017 index). While

issues of public trust and perception of government are not unique to the U.S. (see Keele 2005), 2020 was a unique year given the electoral circumstance and the increasingly divisive nature of partisan politics. Moreover, partisanship colors the perceptions of the electorate. For instance, it remains true that confidence in government is relatively higher for Americans belonging to the party that controls the White House, though it is particularly aggravated during Republican rule (see the Miller-Citrin debate on partisan politics and its impact on public trust in government; Miller 1974a; Miller 1974b; Citrin 1974). However an April survey administered by the Pew Charitable Trusts notes that not even a Republican controlled Senate, which helped pass the CARES Act, could boost public trust in the Trump administration's handling of COVID-19 — nor could the stimulus package itself diminish negative perceptions of the economy, which was manifest in high unemployment, small businesses closing, and the middle-class experiencing food insecurity (Pew 2020a).

Applying findings by Nyhan (2020) and Swire et al. (2017) suggests that the leader phenomenon might help describe the clear ideological polarization of the government's handling of the economy during the pandemic, where Republicans proved far more optimistic of their party's decisions regarding the coronavirus relative to Democrats (Nichols 2017; Drezner 2017; Pew 2020a; Pew 2020b). Indeed, when Americans were asked their thoughts on President Trump's assessment of the virus' risk, approximately 73% of respondents belonging to the president's party believed the president had "gotten the risks about right" compared to only 8% of Democrats. In fact, 55% of Democrats believed the president had "not taken the risks seriously at all", whereas only approximately 3% Republicans shared those same beliefs (Pew 2020b).

While public trust in how the U.S. federal government spends tax dollars is at an all-time low (OECD 2020), fluctuations persist in times of administrative shifts, election years, and emergent crises (Nyhan 2020; Klein 2020). In the face of disaster-related events such as hurricanes, Miller (2016) finds that public confidence in public institutions decreased. One exception was a poll taken a month after the September 11, 2001 terrorist attack which showed that for the first time since 1970, a majority of both Democrats and Republicans trusted the federal government to do what is right "just about always" or "most of the time" (Chanley 2002; Pew 2020a). Thus, public trust in governmental institutions is correlated with the type and effect of the disaster, among other variables such as political identity or ideological differences (see, for other examples, Reinhardt 2019; Lang & Hallman 2005; or Poppo & Schepker 2010).

For COVID-19 specifically, geography likely contributed to partisan politics. Consider that the pandemic first flared in urbanized cities dominated by relatively more liberal voters and Democratic party-controlled state offices, while rural states dominated by the Republican political party did not experience the impact of COVID-19 until months later. The combination of heightened politics during a presidential election year; a deadly virus; and the presence of a bias-confirming media ecosystem, further exacerbated the partisan polarization (Hanitzsch et al. 2018; Nyhan 2020; Kiousis 2001). Consequently, and for many reasons, the U.S. exhibits low levels of public trust in the press, especially during the Trump administration's callouts of "fake news" and the evils of science, the embrace of "magical thinking", and propagating media misconceptions and misinformation (Atkinson et al. 2020; Hanitzsch et al. 2018; Nyhan 2020; Kiousis 2001). As a result, a recent survey found that half of Republicans thought news media exaggerated the risks of the virus to some degree or another (Pew 2020a).

In sum, the extreme partisan atmosphere that was intensified during an extraordinary election year, not only shaped public perception of the federal government's capabilities and inadequacies, but also likely shaped its decision-making (see Huntington 1981; Woodard 2012). The following section illustrates how public procurement was conducted within this environment.

Supply-Chain Nightmares and Intergovernmental Ineffectiveness

According to the Organization for Economic Co-operation and Development (OECD 2009), to promote public trust in how public funds are managed, public procurement must "include elements of transparency, good management, prevention of misconduct, as well as accountability and control" including "an overarching obligation to treat potential suppliers and contractors on an equitable basis" (p. 127). If governments follow these fundamental guiding principles, citizens and businesses alike will be more confident that governments are good stewards of public resources. During the COVID-19 crisis, however, it is likely that elements of these norms were undermined to some degree. For example, consider the intergovernmental stockpiling of procured medical goods and supplies, and the supply-chain vulnerabilities that evolved during the pandemic.

COVID-19 exposed substantial weaknesses of just-in-time procurement supply-chain management, and one need look no further than the Strategic National Stockpile (SNS) failure in distributing proper medical supplies to health professionals, particularly N95 face masks and ventilators (Gereffi 2020; Handfield et al. 2020). Historically, the SNS's role was to buffer immediate shortages of critical medical supplies and also supplement state and local supplies during crises — although it's effective function arguably rests on the assumption that states have properly managed their own stockpiles (Esbitt 2003). As states attempted to balance the need for a vigorous economy and a healthy public, administrators began pushing for a greater role for federal policymakers to help overcome state revenue shortfalls, massive cuts to essential policy areas, and the lack of appropriate infrastructural processes to carry out necessary procurement actions (Clemens & Veuger 2020; Bekker et al. 2020; Gordon et al. 2020; Chernik et al. 2020; Clemens 2012; CBPP 2020; see LAO 2020 for the state of California as an example).

Leaving aside issues associated with the individual sovereign states' obligations to protect their own citizens, there is little debate that both the federal government and the states had inadequate stockpiles leading up to the pandemic. The federal government has, for a long time, exhibited its commitment to a just-in-time supply chain strategy that tends to maximize vendor corporate shareholder value (Lazonick & Hopkins 2020). This federal strategy led the Trump administration to falsely claim to have inherited an "empty" stockpile yet fail to modernize expired equipment and procure necessary supplies in the three years leading to the pandemic (Gore 2020; PBS 2020). While this failure may have partly been a consequence of departmental changes, where the Centers for Disease Control and Prevention (CDC) relinquished its management duties to the Department of Health and Human Services in 2018, signs also point to an ineffective and nepotistic administration. Not only did the administration oversee such departmental changes, but the senior advisor and son-in-law of the president conceptualized the SNS as solely a federal stockpile after a long history of shared relations, thus formally downplaying the obligatory federal role in assisting state and local efforts based on previous promises (Weixel 2020; see PHE 2020 for an updated definition).

If one of the major tenets of good procurement practice is managing and coordinating critical supply-chain vulnerabilities at all levels of government (Schapper et al. 2006), when both state and federal institutions refuse to share the burden, rational efforts to respond in a crisis are inefficient. Consequently, increased economic and resource costs rose as authorities attempted to procure essential supplies which require a rigorous and timely federal certification, where high-risk suppliers were granted multimillion-dollar contracts (PBS 2020; WSJ 2020). For example, Philips Respironics has historically been unsuccessful in fulfilling government contracts, yet the federal government continued to funnel millions of dollars to unfilled contracts procuring critical goods and supplies during a health crisis (PBS 2020; see also NYT 2021). Reliance on failed procurement procedures and management processes surely diminishes public trust and increases supply vulnerability risks. Even as the country seeks some relief from the virus at the start of administering highly effective vaccinations across the country, supply-chain and distributional complications abound. These include the lack of intense cooling systems to store the medicine and the over-reliance on military operational help that continually threaten logistical realities that will impact its effective distribution and intended utilization (Locht 2020; Alexander 2020).

While there have been numerous warnings about the threat of infectious disease for a long time (see Garrett 1994; Central Intelligence Agency 2000), prolonged federal emergency mismanagement and reliance on international suppliers whose loyalty would default to their home country was the backdrop for the U.S. shortage of ventilators and other medical supplies during COVID-19 (PBS 2020; CNN 2020; see, for example, GAO 2008). Yet, all levels of government were ill-prepared and relatively ineffective in procuring needed supplies. As a consequence, it is hypothesized that the federal government had to ameliorate this situation by relying on non-traditional procurement procedures.

Full and Open Competition in Pandemic-Related Public Procurement

Transparency and competition are hallmarks of public contracting in both Europe and the U.S. Indeed, the institutionalization of voluntary ex ante transparency notices in Europe attest to the centrality of these notions (see Prier, McCue, & Boykin 2021 forthcoming). Moreover, the European Union directives on full and open competition (see for example, Directive 2014/24/EU) are consistent with what the U.S. federal government requires, with certain limited exceptions (see FAR subpart 6.2 and 6.3). Consider that for all contracts exceeding $250,000.00 (FAR 1.404), federal agencies must use a formal tendering process that requires publishing contracting opportunities at least fifteen (15) days before the issuance of a bid or solicitation and at least thirty (30) days for businesses to respond to those opportunities (Competition in Contracting Act, 41 U.S.C. 253; also see FAR Subpart 6.1″Full and Open Competition”). For purchases below $250,000, federal agencies can use the simplified acquisition procedure (SAP). The SAP allows federal agencies to use informal quotes and shorter competition procedures for purchases below the established threshold (FAR 13.500(c)).

For example, quotes may be submitted orally and quoted prices may be directly compared by contracting officers rather than by conducting formal negotiations. Therefore, vendors may be chosen directly (i.e. non-competitively) by a contracting officer.[2] Although SAP allows federal agencies to directly contract with certain economic operators, federal agencies are not mandated to use the SAP if the agency believes it can acquire the needed goods and services through a formal tendering process.

As noted above, COVID-19 occurred in a polarized political environment, characterized by an uncoordinated policy responses and inefficient supply-chain procurement processes administered by a distrusted federal government. With the understandable yet chaotic economic push for congressional stimulus to cope with perceived governance failures including supply-chain disruptions, it is posited herein that the relaxed federal budgetary atmosphere produced similarly lenient public procurement procedures. Specifically, in disaster-related procurement processes, it is expected that competition between vendors decreases and as a result, the overall proportion of competed contracts relative to non-competed contracts will diminish (see Seshadri 2005; Buor 2019). To examine if this expectation is empirically borne out during the COVID-19 pandemic in the U.S., the first hypothesis assesses if the proportion of competitive contracts for COVID-19 procurement is substantially different from non-COVID-19 contracts.

What follows are two analyses that examine the association between partisan state politics and competitive contracts. According to Noll and Grab, (2017) a major philosophy of Republicans (both as a national party priority and individualized ideological appeal) is government deregulation. A plausible consequence of this proposition, if true, is that Republicans would favor more deregulation in federal contracting to better reflect instantaneous supply-demand circumstances in the Hayekian spirit of informative markets (see Hayek 1945). It is hypothesized that states controlled by Republicans would be more favorable toward market pressures that result in a lower incidence of competitive contracting. To evaluate this hypothesis, statistical analyses are conducted to gauge if there is no difference between Democratic- and Republican-dominated states in the proportion of COVID-19 federal contracts issued noncompetitively. These appraisals are conditioned on both gubernatorial and legislative partisan control across the fifty states. That is, if the governor is a registered Democrat or Republican and the legislative body is primarily controlled by the same party, that state would be considered unified. For those states where there is a difference between governor party and legislative party, it would be considered a divided or split state. Data used in this study come from the U.S. General Services Administration (GSA), specifically beta.SAM.gov (SAM)[3] and USAspending.gov (USA Spend). All FY2020 federal contracting data (N=5,565,306) were downloaded on November 8, 2020, and COVID-19 data

[2] For European audiences, while there is not a U.S. federal equivalent method to a dynamic purchasing agreements, framework agreements are very similar to blanket purchasing agreements (see https://www.fedmarket.com/contractors/Blanket-Purchase-Agreements--and-Basic-Ordering-Agreements-). It is important to note that the ratios of competitive to non-competitive contracts is not affected by purchasing methods.

[3] Since October 2020, all U.S. federal contract awards are to be posted on SAM, which has replaced the function of the Federal Procurement Data System. SAM is similar to the *Official Journal of the European Union's* Tender Electronic Daily (TED) portal.

(N=74,769) reflect published updates as of December 11, 2020. Both SPSS version 27 and R version 4.0.3 were used to analyze the data. While some contracts were modified or cancelled over time, the current analyses reflect only initial contract awards for all federal reported procurements greater than $3,500 USD.[4] Moreover, regardless of the purchasing method used, such as using the Federal Supply Schedule, e-procurement, purchasing cards, or informal processes, all purchasing methods are captured in the datasets used. Partisan control state data were obtained from the National Conference of State of Legislatures and population estimates for 2019 were acquired from the U.S. Census Bureau.

Findings

In order to understand and document the normal policy environment, the most recent FY2020 is baselined in terms of initial competitive contracting. Because this analysis reflects a preference for conservatively uncovering differences in competing contracting levels so as to minimize Type I errors, while the contracting data originally reported nine different categories of competition, contracts were dichotomously categorized according to competition as outlined in Table 1. Note the table also breaks out COVID-19 contracts from all contracts initiated in FY2020.

Table 1. U.S. Federal Contracting for FY 2020 and COVID-19

FY 2020 Not Competitive 15.6% (834,998)	**FY 2020 Competitive 84.5% (4,704,778)**
Not available for competition	Competitive delivery order
Not competed	Competed under SAP
Non-competitive delivery order	Follow on to competed action
Not competed under SAP	Full and open competition after exclusions
	Full and open competition
COVID-19 Not Competitive 24.1% (18,241)	**COVID-19 Competitive 74.6% (56,528)**

Source: author calculations

The four non-competitive categories listed in the first column comprise the proportion of non-competitive contracts, and data conform to expectations: the FY2020 "normal" procurement circumstances exhibit a baseline of 15.6% of non-competitive contracts compared to 24.1% of COVID-19 contracts falling into this category. Similarly, the large majority of all contracts during FY 2020 (which includes COVID-19 procurements comprising 1.3% of all FY2020 contracts) were procured competitively with 84.5% of contracts baselined as competitive compared to 74.6% of COVID-19 contracts. This first analysis finds a ten percentage point higher proportion of non-competitive contracts for COVID-19 procurement relative to baselined (normal) contracts. Given

[4] According to USA Spend, there are some known data limitations for COVID-19 spending. Thus, this analysis takes the data "as is" and as the best available at the time of download. Moreover, there were some apparent duplicate contract awards identified in the dataset that remain in the analyses, but since their number appeared to be minimal, there is little reason to believe that conclusive results would be systematically biased.

the large Ns, this is striking evidence that the norm of competitive contracting for COVID-19 supplies and services has been relaxed.[5] Although not reported in Table 1, separate calculations show proportional differences in solicitation procedures used for COVID-19 contracts compared to those for FY2020. For instance, while only differing slightly in competitive and noncompetitive simplified acquisition procedures (16.5% of COVID-19 contracts vs. 18.1% for FY2020), the proportion of all contracts resulting from negotiated procedures dramatically shrank for COVID-19 contracts (29.7% vs 47%).

Table 2 looks specifically at state legislative and gubernatorial party control and the extent contracts were competed within each state. The data are presented across all COVID disaster data, regardless of competition type. For both tables 2 and 3, the top portions inform about combined partisan control of state legislatures coupled with control over the executive branch. In other words, if both branches are controlled by a single party, then those states are reported in the top rows as either Democrat or Republican. If one party controls one branch and another party the other branch, then the state is labeled Split. The bottom of the two tables (labeled Gubernatorial) details which party holds the respective states' governor's office irrespective of control of the legislature.

Not specified in the tables are population totals across the categories. For the 15 states where Democrats control both branches, there is a total estimated 2019 population of 120,182,161; for the 21 states controlled by Republicans, they are estimated to have about 10% more people with a total population of 132,657,767; and the 13 states experiencing split control of both branches have a total population of 72,759,438. The population for the 24 states with Democratic governors totals 178,019,716 and 149,514,058 reside in the 26 states with Republican governors.

[5] For those interested in treating the data analyses as representing a sample, the Pearson Chi-Square = 4976.317, df=1, p<.001 conditioned on the null hypothesis being true (see Thompson 1988 as to why the Yates' Continuity Correction is not reported). Due to the large Ns and the fact that the data comprise the universe of cases targeted for study, no further statistical significance tests will be run.

Table 2: Demographics of COVID-19 Contracting by State Legislative and Gubernatorial Control

Party (N)	Competed Contracts (N)	Total COVID-19 Spending
State Control		
Democrat (15)	Yes (26,068)	$7,271,016,692.94
	No (9,249)	3,801,596,186.44
Republican (21)	Yes (12,411)	4,836,926,456.00
	No (6,057)	4,669,166,381.03
Split (13)	Yes (19,661)	5,147,017,073.48
	No (2,807)	4,877,354,433.42
Gubernatorial		
Democrat (24)	Yes (34,320)	9,103,236,859.39
	No (11,003)	5,644,307,086.95
Republican (26)	Yes (23,897)	8,211,563,436.77
	No (7,122)	$7,710,020,525.21

Source: author calculations

Data in Table 2 reveal at least three major points for the purposes herein. First, while competitive contracts were more likely procured than non-competitive contracts, there is substantial variation across the states. For example, those states with split party control between the legislative and executive branches had 7 times more competitive than non-competitive contracts performed in their states (19,661/2,807); those states with Democrats in control had almost 3 times as many competitive versus non-competitive contracts performed in their states (26,068/9,249); and Republican states had twice as many competitive over non-competitive contracts performed in their states (12,411/6,057). However, when stratified by gubernatorial control, the ratios are fairly comparable at approximately three competitive to one non-competitive contracts performed in states with Democrat or Republican governors (34,320/11,003=3.12 compared to 23,897/7,122=3.36).

Looking at the data another way, these competitive versus non-competitive contracts can be examined as proportions and they reveal similar findings: states run by Democrats or states with split control were, on average, more likely to have had federal contracts to be the result of competition compared to those contracts performed in states controlled by Republicans. Indeed, 73.8% (26,068/35,317) of all contracts procured for delivery in Democratic-run states were competed compared to 87.5% for states with split control and 67.2% in states where Republicans controlled the two branches. Again, the large Ns confirm rejection of the second null hypothesis.

The data reported in the last column suggest clear partisan differences in total spending amounts across the states as well. For instance, total COVID-19 competitive contract spending in Democrat

controlled states was nearly twice the non-competitive contract spending while for both split and Republican controlled states, there were nearly equal amounts of COVID-19 competitive and non-competitive contract spending performed in these states. When considering which party holds the governor's seat, the competitive/non-competitive spending ratios are 1.61 for Democrats and 1.07 for Republicans.

Table 3: COVID-19 Contracting by State Legislative and Gubernatorial Control

Party	Competed Contracts	Spend/Per Capita	Spend/Per Contract	Contracts/Per Capita[a]
State Control				
Democrat	Yes	$60.49	$278,924.99	21.69
	No	31.63	411,027.80	7.69
Republican	Yes	36.46	389,728.98	9.35
	No	35.19	770,871.12	4.56
Split	Yes	70.74	261,788.16	27.02
	No	$67.03	$1,737,568.37	3.85
Gubernatorial				
Democrat	Yes	$51.14	$265,245.83	19.28
	No	31.71	512,978.92	6.18
Republican	Yes	54.92	343,623.19	15.98
	No	$51.57	$1,082,563.96	4.76

Source: author calculations

[a] This ratio is per 100,000 people

Table 3 stratifies COVID-19 data differently. Looking at the first two rows of the total number of competed contracts procured for states controlled by the Democrat party, the average dollars spent per capita is $60.49 for competed contracts or nearly twice that of the $31.63 average for non-competitive contracts. Further, the average dollars spent per competed contract is $278,925 versus $411,028 for non-competitive contracts; and the number of competed contracts/per capita in Democrat states is 21.69 which is about three times the 7.69 figure for non-competitive contracts. The bottom of the table reports similar results for states with Democrat governors: the average competitive dollars spent/per capita is $51.14 versus a non-competitive average of $31.71; the average spend/per competed contract is $265,246 versus $512,979 for non-competitive contracts; and the number of competed contracts/per capita in Democrat states is 19.28, which again is about 3 times the 6.18 figure for non-competitive contracts.

All of the table data can be transformed into ratios for stratified comparison purposes. For example, transforming data at the top of the table reveals the competitive versus non-competitive Democrat spend/per capita ratio is 1.91 ($60.49/$31.63); a ratio value of 0.68 for spend/per contract ($278,925/$411,028); and a ratio of 2.82 (21.69/7.69) for competitive versus non-competitive contracts/per capita. Consider how these numbers for Democrat states are distinguished from those states controlled by Republicans with a nearly even competitive versus non-competitive spend/per capita ratio of 1.04 ($36.46/$35.19); a ratio of 0.51 for spend/contract; and a ratio of 2.05 contracts/per capita ratio. Results in the lower part of the table reporting gubernatorial control reveal similarly divergent partisan ratios: spend/per capita ratios of 1.61 (for Democrats) and 1.07 (for Republicans); spend/contract ratios of 0.52 (D) and 0.32 (R); and contracts/per capita ratios of 3.12 (D) and 3.36 (R), respectively.

No matter how partisanship is measured (state or gubernatorial control), this exploratory data analysis suggests a partisan component to COVID-19 federal contracting and spending. Indeed, the bottom of Table 3 shows that over three times as much money per non-competitive contract was spent compared to the average amount spent for competitive contracts in states with a Republican governor. This is in contrast to Democrat states where less than twice the average contract amount was non-competitive versus competitive.

Conclusion: What Not to Do in a Pandemic

The federal and state relationship in the United States, and the intergovernmental responses towards the virus, is an entirely unique experience from that of European countries (Cairney & Wellstead 2020). This research illustrates that, in contrast to the experience of many European countries, the lack of a coherent or coordinated policy response at the federal level has asymmetrically affected various states at all levels of government, and will likely have an impact on public trust in government institutions across the U.S. The public perception of this uneven and unique response to COVID-19 challenges demonstrates that in an exceptional election year characterized by hyper-partisanship, public policy will inevitably be interpreted through a web of political narratives that will likely impact how emergency preparedness and supply-chain failures will be viewed. This is also true for the federal procurement decisions detailed herein that were intended to mitigate the virus.

This research focused on how the partisan and political environment provides a backdrop by which COVID-19 contracts procured by the federal government were empirically distributed across the states. Although the analyses do not directly measure if politics drove how the federal government procured goods and services under the Trump administration, there is enough evidence to consider the possibility that partisan politics did at least contribute to differences in the distribution of competitive contracts. By baselining all pandemic-related contracts to the most recent fiscal year, this analysis has confirmed that competition between vendors decreased to potentially prioritize faster decision speeds and fulfill contracts, but the data show that during COVID-19, such effects are felt unevenly across states depending on partisan control.

Taken together, these findings call for further research. In terms of addressing some of the problems associated with the federal response to the COVID-19 pandemic, future investigations could examine ways the federal government can more fully promote full and open competition, consistent with the OECD (2009) conventions, even during a pandemic. For example, given the failures of the Strategic National Stockpile, where supply vulnerabilities added to the poor federal

response, considerations should be given to the SNS moving from the just-in-time approach to a just-in-case approach for inventory management. In addition, while beyond the scope of the current analysis, closer examination of the nine different solicitation procedures available to federal contractors is appropriate. For instance, while strict sealed bidding comprises less than one-half of 1% of federal contracts so is of little overall consequence, the 19.1 percentage point difference in negotiated proposals/quotes cited earlier is surely of interest. Moreover, single source contracts and those subject to multiple award fair opportunities exhibit substantial differences during COVID-19 compared to normal circumstances. Thus, it would also be fruitful to investigate individual federal contracting officer's preferences for promoting competition by determining if they actually received multiple quotes when using the SAP during the COVID-19 pandemic as well as examining the strengths and weaknesses associated with in-shoring essential PPE rather than off-shoring those critical items.

Given the dearth of data analyses in the literature on emergency procurement processes, this article calls for additional studies to determine if non-competitive contracting increases during disasters in general, and how this might compare to the unprecedented COVID-19 experience. For example, a first exploration into other disasters, such as hurricanes, could compare how goods and services were procured during those times and compare the results to COVID-19. Indeed, the authors have already begun to compare federal contracting during four major hurricanes with COVID-19 contracts, and preliminary pooled results suggest that across these four hurricanes, competitive contracting diminished even more than what has been documented here during COVID-19.

Another route for opportunistic research could examine federal contracting during disasters to see if there are patterns based on which agencies are buying and when. Returning to the preliminary pooled analysis of the four hurricanes, the lead agency (in terms of number of contracts with 38.2%) was the Federal Emergency Management Agency while for COVID-19 federal contracts, the lead agency is the Federal Acquisition Service with 34.3% of contracts procured. Given the differing nature of disasters, perhaps this might be expected, but surely there are numerous questions left unanswered concerning this research agenda. Finally, further research might also examine distributional contracting across congressional districts to confirm if at this level, district party affiliation is associated with amounts spent, among other variables. Moreover, the analysis provided here suggests future inclusion of a number of control variables, such as an urban-rural dichotomy, race and ethnicity, and income level.

Above all, this research strongly suggests the need to more fully understand what happens in public procurement during disasters because admittedly at this time, little scientific scholarly effort has focused on this important subject. Given the huge gap in the literature, it is unknown at this time whether the empirical data outlined here are consistent with best practices *during normal circumstances* or not. It is easy to hypothesize that competition is expected to decline during a disaster, and this article documents this happening in the U.S. But for what period of time can this remain reasonable? One month or two; six months or one year? All of this is unknown and supports the calls for research outlined above.

What is known is that there are documented failures in terms of U.S. preparation and procurement policy response to a pandemic for which there had been many warnings issued. Unfortunately, a major takeaway is that a hyper-polarized political environment laid the

foundation in which any procurement difficulties must be understood. Indeed, the COVID-19 crisis of U.S. emergency management has been a slow-moving train wreck that unsurprisingly turned an emergent virus into a U.S. disaster. The rise of something like COVID-19 was entirely predictable (see Garrett 1994), yet this article provides researchers with a framework to ponder how it turned into one of the greatest governance failures in U.S. history. Emergency public procurement practices are typically designed as an *a priori* tool to assist in on-the-ground preparations and that, under extreme circumstances, the federal government would then provide fail-safe operations to help relieve localized burdens and problems. But when an international pandemic arrives on a country's shores, the COVID-19 experience has shown that while public procurement can be a powerful and important tool in a policy response, for good or ill, it is constrained by a nation's political system.

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CASE STUDIES and TECHNICAL NOTES

IT Procurement Case Study of the Japanese Government within the Institutional Theory Context

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Abstract

Japanese government has sought to create and implement an IT[1] procurement system that fosters competitive bidding. This study examines 31 IT procurement case studies surrounding the 2016 launch of Japan's social security and tax number system[2] with which the author was directly involved. It identifies a disjunction between IT procurement as a legal and a social system, wherein the government and vendors acknowledge that some vendors will inevitably be awarded contracts. The Japanese government should thus reconsider its IT procurement system and abandon competitiveness as a goal.

Keywords

IT procurement; Government; My Number; Institutional theory; Shared belief

1. Introduction

Usage of IT in the administration of governmental entities has progressed in Japan, and IT costs reduction has become an important issue. Government Electronic Procurement System is a system common to ministries that electronically conducts procurement procedures for goods and services facilitated by the government and some public works via the Internet. Some ministries and agencies that operated individual electronic procurement systems are supposed to be integrated into this system.

The Japanese government formulated a basic policy on government IT procurement [Resolution of the Council of Government Agency CIOs, 2007] in 2007 for realizing competitive environment and securing transparency and fairness in the governmental procedures, and IT procurement by ministries and agencies is now conducted based on it. Moreover, ministries and agencies upgraded IT systems *en masse* to prepare for the 2016 launch of Japan's social security and tax number system (SSTN system). This study elucidates the real status of the Japanese government's IT procurement based on this procurement case and its features through a theoretical observation to contribute to future improvements.

In this study, Section 2 illustrates a literature review on the background of government procurement. Section 3 presents the method and data of the investigation. Section 4 states the results. Section 5 presents the considerations. Finally, Section 6 concludes the study.

[1] IT means software and hardware that utilize information and communication technology.

[2] In Japan, the social security tax number system started in 2016.

2. Literature Review

Previous research in auction theory [McAfee & McMillan, 1987; Milgrom, 1989; Milgrom & Weber, 1982] has perceived government procurement as a noncooperative game with no prebinding agreements between ministries, agencies, and vendors and as a game with incomplete information [Harsanyi, 1967] with an informational asymmetry between orderers and vendors. Kanemoto [1991] argues that the essence of a procurement system is that the procuring parties can design the procurement system by supplementing their insufficient information through competition based on the system. According to this thought, implementation of a competitive bidding system that secures competitiveness makes the procurement intended by the procuring parties possible. However, while the IT procurement by the government is conducted under the basic policy that aims at securing competitiveness, lack of competitiveness is pinpointed in the Board of Audit of Japan's report [2011]. In previous studies [Masanori, 2012; Tomohiro, 2013; Yukio, 2008], the lack of capacity on the procurement side was pinpointed as a factor. The procurement capacity may be achieved through well coordination, efficiency in deliver, and reducing information asymmetry [Phillips et al., 2008]. This raises a question that previous research may not apply to IT procurement. If the ability of the procurement side is the essence of the problem, the basic guidelines should ensure competitiveness. The auction theory is premised on the information asymmetry and does not assume that the procurement side is required to have the ability to eliminate information asymmetry. This study proposes that there may be a problem with the procurement legal system and its operation.

However, the actual state of IT procurement by the government such as the status of procurement by ministries and agencies or the results of their procurement rarely provide a clear view. Improvements in procurement systems and their operations necessitate addressing the issues based on concrete case studies, but this has not progressed.

Further, we will clarify the characteristics of Japanese government's IT procurement by theoretically reviewing it within the context of previous research. In this research, we will use previous research in institutional theory from the viewpoint of what role procurement plays in the information system field. Institutional theory studies that analyze social systems have been focused on the nature and role of institutions [Scott, 1995; Kohno & Itabashi, 1998]. They are also studying the concept of a system, what is a system [Aoki, 2001; North, 1990; North, 1991]. In this study, we will use the previous research to consider the actual situation of information system procurement in Japan in line with institutional theory research. This study is novel even in light of recent theoretical research on public procurement in recent years [Flynn & Davis, 2014; Martti et al., 2017; Saarela et al., 2018; Shkolnik et al., 2018], as there is no previous research theoretically discussing the actual situation of information system procurement by the Japanese government and local governments.

We can thus conclude the aims of this study answer the following questions:

1. What is the role that procurement plays in the information system field?
2. What is the actual situation of information system procurement in Japan in line with institutional theory research?

3. Data and Methods

To generalize the actual status of IT procurement by the government from the procurement examples, it is necessary to analyze more than one case with the same procumbent subject, object, and environment. As the procurements by ministries and agencies are conducted individually, obtaining cases of such examples are extremely difficult, and no previous studies exist on them. The difficulty may be because some institutions do not publish the information of the procurements. Moreover, the issue comes from the absence of an integrated source for the procurements data.

This study will proceed with case studies. Given the difficulty of obtaining quantitative data for all information system procurement cases in government and local governments, we conduct case studies on one or more cases where accurate information can be obtained. It is reasonable to attempt generalization based on this. "Multiple case analysis" for analyzing procurement results and "specific case analysis" for analyzing procurement processes are performed to clarify the actual situation and issues.

A. Specific Case

Procurement of information collaboration system associated with the Social Security and Tax Number is the core of the network for each administrative organization to exchange information using My Number as a key.

B. Multiple Case Analyses

In this study, the system was classified as a "My Number" system according to the procurement project name and procurement specifications.

The purpose of the renovation is to construct a network for exchanging information with other government agencies using the my number as a key, refurbishing for associating my number with the personal information of the people held in the business system of each ministry.

We analyzed the procurement results of 31 My Number related systems in comparison with the system procurement results of each ministry and agency reported in the 2011 report of the Auditing Institute. The comparative analysis items are as include procurement environment (procurement capability, procurement system, etc.), ratio of general competitive bidding, one-person bid ratio, average successful bid rate, noncompetitive bid ratio, and percentage of orders received by specific companies.

In the specific case analysis, we used data published by the Cabinet Secretariat and data stored and recorded by the author. The example of procurement as it relates to the introduction of SSTN system presented a rare opportunity in which various ministries and agencies procured the same kind of systems simultaneously. Further, as they include an example in which this author was directly involved, verification is possible on the process and operation by way of participant observation method.

The 31 IT procurement cases of the ministries and agencies were analyzed to introduce the SSTN system based on the public data published on the websites of the ministries, agencies, and official gazettes [Kentaro et al., 2018]. The information that has been published in the official gazette includes the procurement items, such as procurement capability, procurement system; the bidding information; successful bid; and the orders received by specific companies.

For information on procurement items of each ministry and agency, we used information published in the official gazette by the information retrieval service and information published by each institution on the homepage. Other information included the Cabinet Office e-bidding and ticket gate system (discontinued on July 31, 2014). Information from the e-bidding system of each ministry and agency before the transition to government electronic procurement (GEPS) [Note] was used. With the exception of some information published in the official gazette, all of them were just before the start of comprehensive operational testing.

Further, we verified the actual status of procurement process and system operation of the procurement example of systems related to SSTN system by the Cabinet Secretariat based on public data and the information that was used by Kentaro [2019]. Based on these, we will then review the actual status along previous research in auction and institutional theories.

4. Results

A. Results of Procurement by Ministries and Agencies

It was found that 80.6% of SSTN-related IT procurement projects were executed under open competitive bidding. However, of those, 48% had only one bidder (excluding 85.7% projects where some bidders other than the successful bidder were unknown), and the ratio of noncompetitive bidding, or negotiating contracts and single-bidder contracts, was as high as 90.0%, if we consider only the projects with known bidders.

It was also found that 96.8% of contracts (99.1% in monetary terms) were awarded to any of the five domestic vendors: NTT Communications, NTT Data, NEC, Hitachi, and Fujitsu. Moreover, consortiums among these five large companies made bids and won 12.9% of contracts awarded. The average successful bid ratio was 89%, even higher for the successful average bid ratio where only one bidder was involved with 95.2%. Hence, this result revealed that sufficient competitiveness was not maintained for the IT procurements by ministries and agencies.

However, no record exists for any SSTN-related IT contract that was not awarded and failed, meaning that all necessary procedures were executed as planned.

B. Actual Status of Procurement Process

The Cabinet Secretariat developed the core system of the new high security network, established with the “My Number” system, in which the author was directly involved. As the author verified the procurement process and procurement results by participant observation method, while the procurement process was carefully conducted by giving utmost priority to the realization of competitive environment in accordance with the basic policy, it ended up with a sole bidder situation by a consortium of the five large companies failing to realize the competitive environment. Moreover, some challenges such as issues of single-year budgeting and inadequate procurement periods, poor dialog with the vendors, and myopic procurement management were found.

5. Considerations

A. Perspective of Our Consideration

Previous research based on auction theory hold that in the governmental procurement, the lack of information on the part of the orderer can be overcome by utilizing competition among the vendors

based on the procurement system [Kanemoto, 1991]. Yet, in reality, although the procurement rules that incorporate mechanisms to assure competitiveness are faithfully followed, competition in fact is not secured. This raises the following question: Does the procurement function in action theory still work when it comes to IT procurement? To answer this question, we will examine the actual practice by applying the concept of institutional theory with a viewpoint of what kind of a role procurement as a social system should play. Notably, the term "institution" as used in the institutional theory means, unlike in the procurement system/institution within a legal framework, the role as a social system that procurement itself plays.

B. Characteristics of Procurement as a System

Scott [1995] categorized systems from a sociological perspective and revealed that three pillars exist in institutions—regulative, normative, and cognitive pillars—and that the emphasized elements differ depending on the institution. Applying this categorization to procurement suggests that the IT procurement that imposes a process intended for securing competitiveness onto both the procuring party and the vendor is a system that emphasizes the regulative pillar. If IT procurement is a regulative system, securing fair process and competitiveness that it aims to achieve should be realized by those involved with enforceability.

However, focusing on the actual practice of IT procurement by the government, the way the procurement process based on basic policy is conducted faithfully by both the procurer and the vendor can be interpreted as a regulative pillar incorporated in the IT procurement. Yet, the actual status where procurement results indicate that competitiveness is not firmly secured can be interpreted that the degree of its regulative pillar has decreased. In other words, we can understand that IT procurement is one in which the degree of regulative pillar that procurement intrinsically possesses has weakened, and while procedural enforceability is in place, enforceability for the realization of competitiveness is nonfunctional.

C. Are Those the "Rules of the Game"?

North [1991] conceptualized institutions from the perspective of game theory, arguing that institutions are "the rules of the game" that constrain the players, where the game players in procurement are the ministries and agencies, procuring parties, or individual vendors. If you apply North's concepts, you can interpret procurement as common rules whereby ministries and agencies, or procuring parties and vendors, with the respective strategies of their own, act to obtain their respective benefits (obtaining procured material at economic prices for the government and obtaining profits based on agreements for the vendors) without having a binding agreement among them.

When this concept of North is applied to the actual practice of IT procurement by the government, although the ministries and agencies abide by the procedural rules in the game called IT procurement, it means that rules that should secure the competitiveness are not observed. This is because the government makes non-binding agreements with the vendors. Yet, there is one more important aspect that should not be overlooked, a fact that, in the IT procurement by the ministries and agencies in respect of SSTN, there has never been a case in which the engaging vendor was eventually left determined and the introduction of the system itself became impossible.

According to North's concepts, this means that in the game of IT procurement, there are rules that are abided by (procurement procedures) and rules that are not (securing competitiveness), but as

far as the results of the game show, the counterparty, which is the final objective of procurement, has been determined. This would mean that the decision on the counterparty of the contract itself is the rule between the procuring parties and the vendors from the beginning but would also mean that the rules of procurement procedure and securing competitiveness are meaningless. In other words, North's concept that regards institution as the "rules of the game" cannot fully explain the roles procurement plays in the field of IT.

D. "Institutions as Shared Beliefs" and Governmental IT Procurement

Unlike North, who sees institutions as rules of the game, Aoki [2001] defines institution as self-binding expectations that are shared by the players, and proposes that players' behaviors are conditioned by a compulsion to achieve an equilibrium, and their jointly-held sense of equilibrium comprises "institutions as shared beliefs." In that regard, players neither cooperate nor agree; they implicitly understand the equilibrium (summary expressions) peculiar to the game and are influenced by shared symbols that lead to it. Aoki called groups of individual economic entities "domains" and argued that domains select symbols that simultaneously calibrate the expectations of individual economic entities. Per this idea of Aoki, current government IT procurement involves two domains: government (the procuring party) and the market (vendors) (Figure 1). It can be interpreted that their guiding symbol is the national consensus to bring effective IT to government, and the summary expression is "a situation where an order is eventually placed with one vendor and the IT system is realized."

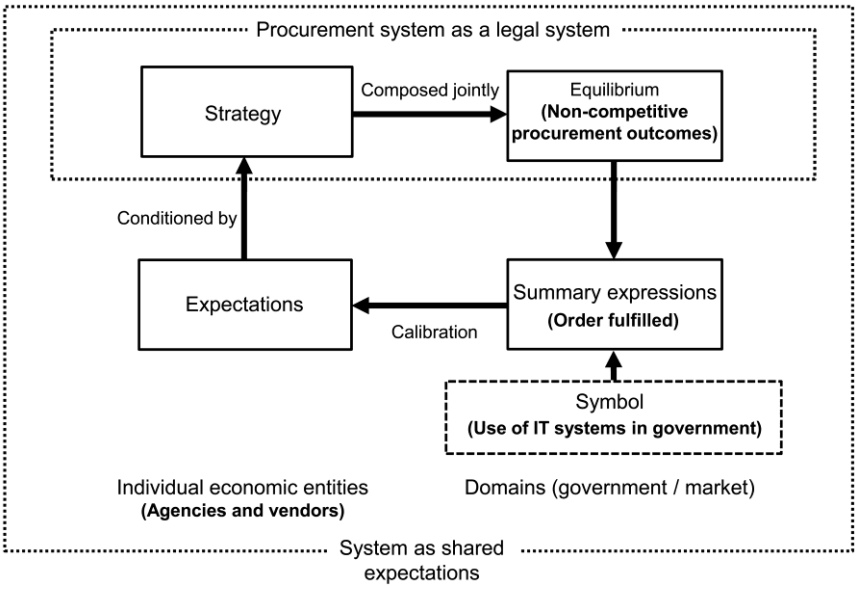

Figure 1 - IT Procurement as an Institution for Sharing (Source: [Aoki, 2001])

Figure 1 demonstrates that the actual situation of IT procurement is not the competitiveness that the procurement system as a legal system aims at, but the establishment of the order itself is shared between the procurement side and the business operator; it shows that the legal system and the institutional system recognized by the procurement side and the operator are different.

Against the background of the fact that the government and the market make the "realization of information system (fulfilling an order)" as their summary expression, each ministry and agency

and each vendor chooses strategy that implicitly makes this assumption. That is, government imposes procedures intended to assure fairness and transparency to meet their accountability, whereas the only bidding vendors are those who can satisfy the contract and bear its risks. If no single vendor can do so, the risk is diversified by forming a consortium permitted by the system. Furthermore, it can be understood that this results in noncompetitive single-bidding or at-will awards.

6. Conclusions

Japan currently has an unobjectionable national consensus to implement effective IT in government administration. In it, IT procurement is motivated, not by a legal system to secure fair procedures and competitiveness, but by the state in which the realization of the systems (fulfilling the order) is shared and recognized by the government and all the vendors comprising the market.

This indicates that a deviation prevails between procurement as a legal system and the system as a social system as perceived by the ministries and agencies who are the procuring entities and the vendors. There is a likelihood that this has caused social diseconomies, impaired understanding, and lack of opacity. Ideally, procurement as a legal system would align with the social system that society perceives it so it can be better trusted and understood by people.

The Japanese government's current procurement system based on competitive bidding seeks to support market mechanisms, but if participants' strategies and behaviors are influenced by "systems as shared beliefs," government needs to rethink IT procurement and aim at procuring necessary information systems at economic prices without regard to competitiveness. For the procurement of large-scale and complex information systems, it is desirable to introduce a dialog-based procurement system, which is used in other countries such as the United Kingdom and the United States, instead of competitive bidding.

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Direct Award, the New Normal in times of Covid-19

Catarina Pinto Correia

Abstract

This article outlines the main exceptional and temporary measures adopted in Portugal to address the Covid-19 pandemic crisis.

Keywords

Public procurement, exceptional and temporary measures, Covid-19 pandemic, direct award.

1. Introduction

The Covid-19 pandemic crisis declared by the World Health Organization in January 2020 triggered the adoption of an extensive and distinct range of exceptional regulations and measures.

Public procurement was no exception. The generalized stoppage caused by the pandemic impacted public procurement procedures, which became more drawn out in terms of their procedural paths and the associated decision-making processes. Governments suddenly had to deal with a huge increase in the global demand for goods and services essential to tackle the pandemic – including its prevention, contention, mitigation, diagnosis and treatment – and the simultaneous constraints on the manufacture and distribution of goods. The exceptional public health emergency was not compatible with existing public acquisition rules. It required special measures that would allow the public entities of the Portuguese National Health System to easily and quickly acquire the works, goods and services necessary to deal with the escalating health crisis.

The essential characteristics of the exceptional temporary measures adopted in Portugal include: the exceptional non-suspension of procurement procedure deadlines; the free adoption of direct award, including the increase in situations where simplified direct award is allowed; the elimination of limitations to contracting the same private entity by repeated direct awards; the simplification of the awardee documentary and guarantee requirements; the easing of publicity, approval and other requirements prior to the effectiveness of contracts; and the easing of public expense approval.

In this paper, we will focus our attention on the new exceptional rules facilitating the use of direct award procedures even in high value or repeated contracts, decreasing the level of transparency, equality and open competition in public acquisitions in order to increase their speed and simplification.

2. Direct Award, the new normal

On 13 March 2020, Decree-Law no. 10-A/2020 was enacted[1] to ensure the swift availability of products and services considered essential in the combat against Covid-19, by simplifying and accelerating public procurement procedures in the context of Covid-19 related contracts the purpose of which was the "*prevention, contention, mitigation and treatment*" of Covid-19 and the "*replacement of normality*" (cf. article 1, no. 2).

This piece of legislation aimed at generalizing the direct award procedure for contracts executed for the purposes mentioned above, justified by the public interest of protecting public health. It is in force since 13 March 2020 and, despite being an *exceptional* and *temporary* regime, there is no indication of its term. It will thus remain in force until revoked by a new legislative act or until the conditions for its application are no longer verified[2]. Given that it applies to contracts relating to the replacement of normality, we assume it will be the new normal for quite some time yet.

Article 2, no. 1 of Decree-Law no. 10-A/2020 set forth the possibility of public awarding entities adopting direct award procedures, under article 24, no. 1, c) of the Portuguese Public Contracts Code ("PCC")[3], regardless of the value of the contract, whenever the contract relates to the execution of public works or the lease or purchase of goods and services and is considered strictly necessary and based on grounds of extreme urgency.

The adoption of simplified direct award procedures was also facilitated (article 2, no. 2), with the maximum threshold of the contractual price of goods and services that may be awarded under said procedure having been increased to €20,000[4]. It is worth noting that, as the law orders the application of article 128, nos. 1 and 3 of the PCC, these procedures will be exempted from any formalities concerning the execution or the publication of contracts, of value up to €20,000.

With the enactment of Decree-Law 18/2020, amending Decree Law 10-A/2020, article 2-A was added to extend the possibility of adoption of the simplified direct award procedure, regardless of the contractual price, (i) up to the budgetary ceiling, (ii) to the extent necessary and based on duly grounded reasons of extreme urgency, (iii) for the execution of contracts for the acquisition of necessary equipment, goods and services, and (iv) for the prevention, containment, mitigation and treatment of Covid-19, or related purposes.

One specific situation was expressly set forth in article 2-B of Decree-Law 10-A/2020, as amended by Decree-Law no. 20-A/2020, of 6 May, which established that, to the extent strictly necessary and on duly grounded reasons of extreme urgency, regardless of the contractual price and up to a total amount of €15,000,000.00, contracts may be directly awarded by a group of awarding entities,

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[1] And subsequently amended. The main amendments of relevance to public procurement procedures were approved by Law no. 1-A/2020, of 19 March, Decree-Law no. 10-E/2020, of 23 March, Decree-Law no. 12-A/2020, of 6 April, Law no. 4-A/2020, of 6 April, Decree-Law no. 18/2020, of 23 April, and Decree-Law no. 20-A/2020, of 6 May.

[2] See also Miguel Assis Raimundo, "Covid-19 e Contratação Pública, O Regime Excecional do Decreto-Lei n.º 10-A/2020, de 13 de Março", Revista da Ordem dos Advogados, ano 80, (I-II), 2020, pp. 173-174.

[3] Approved by Decree-Law no. 18/2008, of 31 August, as subsequently amended.

[4] Instead of €5,000, as set forth in article 128 of the PCC.

under article 39 of the PCC, for the acquisition of space for institutional advertising related to Covid-19 in national, regional and local media, through television, radio, printed and/or digital means[5].

This very concrete ruling is again based on the public interest of raising awareness and informing the population on the specificities of the pandemic, prevention and treatment measures, individual good practice and recommended social behaviour, among other concerns.

The advertising space acquired is that strictly necessary, for reasons of extreme urgency, for institutional advertising, for a period of 18 months, and is densified or limited by a list of concrete measures such as, *inter alia*: the public health pandemic situation; advertising on preventive and containment measures; good social and hygiene practices; legislative measures adopted to contain the pandemic, to balance the economy, or for the recovery of life and the economy; and public or social means available to rescue, monitor, inform or oversee. The scope of this exceptional group of awarding entities regime is also densified by means of the global prices limitation for certain acquisitions.

3-. The subjective scope

Whilst these rules generally apply to all public awarding entities subject to the PCC, as per article 2 thereof (article 1, no. 3) – i.e., the Portuguese State, the Autonomous Regions of the Azores and of Madeira, municipalities, independent agencies, public institutes, public foundations, public associations and "public law bodies" – regardless of whether they are healthcare or related entities, the simplified direct award procedure rules only apply to the health sector acquiring entities specifically listed in the law (article 2-A, no. 2), including centralised purchasing entities: the Directorate General of Health, the Health System Central Administration Public Institute ("ACSS"), the National Health Institute Dr. Ricardo Jorge and the Ministry of Health, Shared Services ("SPMS") regarding acquisitions for entities under the supervision of the Ministry of Health (such as public hospitals).

On the one hand, we understand that the simplified direct award is an even "more exceptional" procedure than the direct award, thus justifying the restriction of entities that may benefit from this even more flexible regime and the limitation of its use to the minimum number of situations possible, where beneficiaries are health entities directly engaged in the fight against Covid-19.

However, we are of the opinion that the same restriction should have been applied to the list of entities benefiting from the exceptional regime applicable to "normal" direct awards also, at least as regards contracts for the acquisition of goods and services, which is – or should be –, in this specific case, restricted to health care entities of the National Health System.

In fact, exceptional rules impose the need for strict measures and interpretations[6], which should only include the entities considered strictly necessary to achieve the intended goal. This would

[5] Resolution of the Council of Ministers no. 38-B/2020, of 15 May, as amended by Declaration of Rectification no. 22/2020, of 27 May, designated the entities acquiring said services.

[6] Concerning the strict interpretation of exceptional rules regarding direct award, see the European Court of Justice ("ECJ") cases no. C-250/07, *Commission vs. Greece*, 04.06.2009, par. 34, 35; C-157/06, *Commission vs. Italy*, 02.10.2008, par. 23; C-385/02, *Commission vs. Italy*, 14.09.2004, par, 19, 37; C-318/94, *Commission vs. Germany*, 28.03.1996, par. 13; C-57/94, *Commission vs. Italy*, 18.5.1995, par. 23; C-199/85, *Commission vs.*

appear to be the intention of the legislator, who mentions, in the Preamble of Decree-Law 10-A/2020, that, "*in the domain of health, it is a priority to guarantee that health care entities of the National Health System have the possibility of acquiring, with maximum speed, the goods and services necessary to evaluate suspected cases and treat the symptoms and complications associated with Covid-19*". Nevertheless, in its rulings, the legislator preferred to limit the applicability of the exceptional measures by only expressly restricting the type of contracts included thereunder.

4. The objective scope. "Covid-19 related contracts"

On the one hand, the exceptional rules apply only to public works, provision of services and acquisition or lease of goods contracts. The exceptional regime for simplified direct award is stricter, applying only to the acquisition or lease of goods and the acquisition of services (article 2, no. 2, and article 2-A, no. 1[7]). And the exceptional regime for acquisition by groups of awarding entities is even stricter, applying only to acquisitions of space for institutional advertising (article 2-B).

Excluded are other types of public contracts, such as public concessions or public-private partnerships. The latter, being long-lasting and transformative contracts, remain subject to the general rules ensuring transparency and open competition, even if their execution is motivated by pandemic related reasons. This may be the case, for instance, of public-private partnerships for hospital management or for the supply of public health services. Even though these may be of extreme importance in the current situation, where all – public, private and social – efforts should be combined, it would not be justified to open the door to the execution of such important – in terms of value, duration and transformative impact – contracts by means of urgent and closed procedures, such as direct awards.

On the other hand, all contracts benefiting from this regime must be "Covid-19 related contracts".

Pursuant to article 1, no. 2 of Decree-Law 10-A/2020, the regime applies to the "*prevention, contention, mitigation and treatment of infection by Covid-19*" and the "*replacement of normality*". Accordingly, it applies to contracts related to these purposes (i.e., "Covid-19 related contracts"). Article 2-A, on the simplified direct award, is more limited in its scope, applying only to contracts for the "*prevention, contention, mitigation and treatment of infection by SARS-CoV-2 and Covid-19 sickness*", "*or others* [illnesses] *related thereto*". On the one hand, this last provision excludes contracts aimed at the replacement of normality, but on the other hand, it seems to include contracts concerning any illness related to Covid-19 infection. Although these contracts are not expressly set forth in article 1, no. 2, we may assume that the legislator's intention was to include in the scope of this regime any other Covid-19 related illness or condition.

Certain cases are clearly included in the scope of the law. These cases include the examples set forth in the law as eligible for the exceptional simplified direct award, and which are unequivocally directly related to Covid-19 infection – namely, the acquisition of personal protective equipment;

Italy, 10.03.1987, par. 14; among others. The list of awarding entities should also only include those strictly necessary to fulfil the objective of the law.

[7] Article 2-A, no. 1 mentions the "*acquisition of equipment, goods and services*", with equipment being included in the category of goods.

goods necessary for Covid-19 testing; equipment and materials for intensive care units; medicines, including medical gases; other medical devices; and logistics and transport services related thereto, or distribution to entities supervised by the Ministry of Health or to other public entities or entities of public interest (article 2-A, no. 2). Other cases, such as contracts for the construction of new hospitals or for expansion and improvement works, will certainly also be allowed to be executed through direct award procedures under article 2, no. 1.

However, other situations may fall on the border line, such as food supply for those sick with Covid-19, support services to the families of sick people, consultancy services or R&D services related with Covid-19 matters, and cleaning services in public service buildings or public transport. Are these contracts related to the "*prevention, contention, mitigation and treatment*" of Covid-19?

And what is the scope of contracts aimed at the "*replacement of normality*"? This latter concept is very ambiguous and may open the door to a number of distinct purpose contracts, probably a higher number than would be allowed by a more cautious and truly exceptional positioning, including in terms of extension in time. In fact, said concept might theoretically include contracts for the acquisition of any kind of services or works for the reopening of closed activities, or even the acquisition of medicines, medical devices and other goods to treat long-lasting lung disease caused by Covid-19 in recovered patients.

In the above mentioned and most other cases, the contracts at stake may be considered to be *related* to the *replacement of normality.* However, their inclusion will extend the applicability of the regime much further than desired, including in terms of extension in time. The replacement of normality will be a long-lasting effort and should be subject to correct and reflected planning that allows for transparency, equality and open competition to prevail in acquisition procedures.

According to the principle set forth by the ECJ case law for procedures without a notice, such as direct awards, the grounds for using such procedures should be strictly interpreted[8], seeing as they are exceptional procedures that do not promote effective transparency and competition.

In addition, in its Technical Orientation[9], the Instituto dos Mercados Públicos do Imobiliário e da Construção ("IMPIC") states that a strict interpretation is to be adopted, by only including contracts *directly* related to Covid-19. Notwithstanding this, the same doubts arise concerning the scope of contracts "*directly related to Covid-19*".

The concept may be interpreted in line with the criteria applicable to public procurement rules, for instance, when entities and activities of the utilities sectors are at stake. In order to determine the legal regime applicable to contracts to be executed by public entities exercising activities in the utilities sectors (as per article 9 of the PCC, and according to the European Utilities Directive[10]),

[8] See Cases mentioned in point 3., footnote 6, above. The Court mentions that "the provisions (…) which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public works contracts, must be interpreted strictly".

[9] Technical Orientation no. 06/CCP/2020, of 17 April, on the exceptional regime under analysis.

[10] Directive 2014/25/EU of the European Parliament and of the Council, of 26 February 2014 ("Utilities Directive").

the criteria rests on whether the contracts are or not intended "*for the pursuit*" of those activities[11]. This should be interpreted as including contracts related to the carrying out a particular activity, i.e., if the works, goods or services in question are being acquired for the carrying out of the activity included in the Utilities Directive or not[12].

The same criteria should be applied in this case. If the acquisitions are necessary for the pursuit of the prevention, contention, mitigation and treatment of Covid-19 (or for the replacement of normality), then the exceptional regime shall apply.

Furthermore, according to European Directives and national rules[13], any contract intended to cover several activities "*shall be subject to the rules applicable to the activity to which it is principally intended*"[14]. For contracts where the main intended activity cannot be objectively determined, the applicable rules shall be established in accordance with the rule that the most demanding regime should prevail[15]. As Swe Arrowsmith mentions[16], "*in accordance with the philosophy (…) that exceptions ad limitations should be strictly applied or interpreted, there is a presumption in favour of regulation in accordance with the stricter of the two regimes*".

It is our opinion that contracts benefiting from the more flexible Covid-19 regime – considering that it is an exceptional temporary regime and that the principles of competition and transparency are being compromised in favour of speed – should not pursue several purposes, i.e., they should not cover several (Covid-19 and non-Covid-19 related) activities and simultaneously benefit from the exceptional regime, even if they are principally intended for Covid-19 related activities. Otherwise, the principles of transparency and competition will be threatened, potentially making way for abusive applications of the law. Accordingly, the general rules resulting from the PCC should apply to contracts covering both Covid-19 and non-Covid-19 related activities, where it is assumed that the Covid-19 related acquisitions are not strictly urgent. Public entities would thus have to set up a separate procedure and contract for any urgent Covid-19 related acquisitions.

It is also worth noting that public entities' duty of reasoning in what concerns justification of the inclusion of contracts within the objective scope of the exceptional regime, i.e., demonstration that acquisitions are directly related to Covid-19 and are directly intended to pursue *prevention, contention, mitigation and treatment* of Covid-19 or the *replacement of normality* activities, should gain special prominence here. If the principle that public awarding entities should bear the burden of proof as regards verification of the circumstances justifying the use of the exceptional

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[11] Article 7 of Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014 ("Public Sector Directive").

[12] See also Swe Arrowsmith, The Law of Public and Utilities Procurement, Thompson – Sweet & Maxwell, 2005, Vol. I, pp. 478, 479; and Mark Kirkby, *A Contratação Pública nos «sectores especiais»"*, *Estudos de Contratação Pública*, Vol. II, pp. 75-78.

[13] Article 12 of the PCC.

[14] Article 6, no. 2 of the Utilities Directive.

[15] This same solution results from article 6, no. 3, of the Public Sector Directive.

[16] *Ob. Cit.,* pp. 481.

procedures[17] is valid for "normal" direct award procedures under the PCC, it is even more valid (and demanding) for "exceptional" direct award procedures carried out under the exceptional regime.

5. Conditions for the adoption of direct award

As mentioned above, article 2, no. 1 of Decree-Law 10-A/2020 sets forth that, for the purposes of the adoption of the direct award procedure, "*article 24, no. 1, c) of the Public Contracts Code applies* (…) *to the extent strictly necessary and based on grounds of extreme urgency*".

Article 24, no. 1, c) of the Public Contracts Code establishes that direct award should only be used: (i) to the extent strictly necessary, (ii) based on grounds of extreme urgency, (iii) as a result of events unforeseen by the public awarding entity, (iv) when the deadlines inherent to other procedures cannot be complied with, and (v) provided that the circumstances invoked to justify its use are not imputable to the public awarding entity[18].

As per the reference made to article 24, no. 1, c) of the Public Contracts Code, the adoption under the exceptional temporary regime of a direct award procedure for Covid-19 related contracts requires that all five conditions listed above be met. Therefore, the novelty introduced by Decree-Law 10-A/2020 and respective amendments is not to exempt awarding entities from the need to fulfil one or more of these conditions, or to increase the scope of application of said procedures, but rather to simply state that article 24, no. 1, c) of the Public Contracts Code may apply (and will most probably apply) to Covid-19 related contracts.

The impact of this statement is that the burden of proof as regards verification of the applicable conditions is lightened. The awarding entities are not exempted from invoking the abovementioned conditions in their decision to contract, but the duty of reasoning has become less demanding.

In any case, the five conditions must be met and should be interpreted in line with article 24, no. 1, c) of the PCC general regime. The jurisprudence of the ECJ and of the Portuguese administrative courts has interpreted these conditions very restrictively. The examples are several:

(i) The contract's scope (e.g., quantities required) and duration should not be broader and longer than that strictly necessary to meet the public entity's immediate needs – i.e., needs that the public entity must unfailingly supply[19] – during the period necessary to pursue a competitive procedure and only to the extent necessary during that specific period, according to the proportionality principle.

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[17] Cases mentioned in footnote 6 above C-385/02, par. 19; C-318/94, par. 13; C-57/94, par. 23; and C-199/85, par. 14. The Court stated that "*the burden of proving the existence of exceptional circumstances justifying a derogation lies with the person seeking to rely on those circumstances".*

[18] Regarding direct award based on extreme urgency, see Mário Esteves de Oliveira and Rodrigo Esteves de Oliveira, "*Concursos e Outros Procedimentos de Contratação Pública*", Almedina, 2011, pp. 755-757, and Pedro Costa Gonçalves, "*Direito dos Contratos Públicos",* Almedina, 2020, pp. 527-532.

[19] Court of Auditors, cases no. 08/2015, proc. 459/2015, 30.06.2015, par. 17; and no. 40/2014, proc. 1323/2014, 10.11.2014, par. 27.

(ii) The level of urgency is deemed extreme only in cases where the non-acquisition of the relevant goods or services within a short period of time will significantly harm public interest – a "superior interest" that must be defended even at the cost of compromising transparency and competition, such as community, public security or public health interests. Extreme urgency is not a normal level of urgency. It indicates something that must be done immediately or within a very short period of time, at the risk of causing non-repairable damages[20].

(iii) If the public awarding entity, deemed as a normal awarding entity, acting as a real decision maker[21], could not have foreseen the inherent circumstances. If the entity is aware it will need a certain quantity of products or works completed within a short period of time, but delays the launch of a tender for the purpose, or launches a tender that fails to comply with the applicable rules and has thus no success[22], the urgent need cannot be considered unforeseen[23]. Similarly, if the public awarding entity knows that an approval will be needed, and the entity responsible for approval raises legitimate objections which end up delaying the approval process, this is "*something which is foreseeable on plan approval procedure*"[24] and thus the urgency of an acquisition to overcome the effects of delayed or non-approval will not be considered unforeseeable.

Additionally, it is clearly accepted that a causal link must exist between the unforeseeable event and the extreme urgency resulting therefrom[25].

(iv) The urgency justifying a direct award, given the impossibility of complying with the deadlines inherent to other competitive procedures, must be justified taking into account the consequences of adopting the latter option, including accelerated procedures such as urgent public tenders. The EUCJ has rejected the adoption of direct award when the public awarding entity fails to demonstrate its inability, during the period it has available, to adopt an accelerated procedure, such as an urgent public tender[26].

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[20] Court of Auditors, case no. 17/2014, proc. 1829/2013, 11.06.2014, par. II.2, on the need for the non-interruption of health care services.

[21] Court of Auditors, cases no. 17/2014, mentioned in footnote 20 above, par. II.2.(ii); and no. 13/2014, proc. 268/2014, 08.07.2014, par. III.1.1.

[22] Court of Auditors, case no. 08/2015, mentioned in footnote 19 above.

[23] ECJ, case no.194/88R, *Commission vs. Italy*, 27.09.1988, par. 14.

[24] Case C-318/94, mentioned in footnote 6 above, par. 18.

[25] Cases C-318/94, mentioned in footnote 6 above, par. 14; and C-107/92, *Commission vs. Italy,* 02.08.1993, par. 12.

[26] Case C-107/92, mentioned in footnote 25 above, par. 9. The court stated that "*more than three months elapsed between the presentation to the competent national authorities, on 10 June 1988, of the report from the Geological Department of the Ministry of the Environment recommending urgent action and the commencement of the works on 21 September 1988 and that, during that period, the Italian Government could have set in motion the 22-day accelerated procedure provided for by the directive*". See also Case C-24/91, *Commission vs. Spain*, 18.03.1992.

(v) If a public awarding entity has a shortage of a certain product due to lack of correct planning, the urgency will be deemed imputable to it. The urgency may not be caused by a fact imputable to the awarding entity[27].

As already mentioned, as regards the application of the exceptional Covid-19 regime, the scope (e.g., quantities required) and duration of contracts should not be broader and longer than that strictly necessary to meet the public entity's immediate needs to address the illness, namely during the period necessary to adopt a competitive procedure; urgency is deemed to exist only insofar as the short timing is not imputable to the awarding entity, for instance, due to lack of correct planning of the measures to address the Covid-19 crisis; the urgency must result from an unforeseen event related to the pandemic and only while said event or its effects remain unforeseeable; and the adoption of longer procedures (even procedures such as urgent public tenders) must have become impossible, putting at stake the fulfilment of public health needs.

However, the burden of proof has become less demanding. Covid-19 related contracts are generally assumed to be extremely urgent, resulting from pandemic-related unforeseen events, and the circumstances justifying their execution cannot be imputable to the awarding entity at stake.

This was certainly the undoubted reality at the start of the pandemic. However, as time goes by, these conditions will not be as easily demonstrated as before. One may question to what extent public entities were able to foresee the second or third waves of Covid-19 infection, or to plan public acquisitions to respond to the needs resulting therefrom; or to what extent those entities are responsible for the failure to launch timely public tenders ensuring the acquisition of all (or at least some) goods and services required for the prevention, contention, mitigation and treatment of Covid-19 during second, third or subsequent waves or for the replacement of normality. The burden of proof and the duty of reasoning should thus be as demanding as necessary to ensure that abusive applications of the exceptional regime are avoided, even in the current emergency situation, that, despite being globally exceptional and emergencial, may not, and will increasingly not, justify derogations from the general regime.

6. The repeated direct award procedures and the derogation to the preference of prior consultation

Exceptional derogations to the prohibition of adopting direct award procedures in circumstances where impartiality might be put at stake – as set forth in article 113 of the PCC – were approved, in two specific circumstances: (i) repeated direct awards to the same entity, with an aggregate contract price higher than the direct award legal threshold (article 113, no. 2 to 4); and (ii) direct award to a private contractor that has previously offered works, goods or services to the same awarding entity (article 113, no. 5).

At the same time, a derogation to article 27-A of the PCC was also introduced, thus allowing the adoption of direct award regardless of the preference that should be given to prior consultation procedure to at least three entities.

The limitations set forth in article 113 no. 2 to 5 of the PCC were introduced by Portuguese law in order to assure compliance with fundamental principles of the public procurement rules, of

[27] Court of Auditors, cases no. 3/11, proc. 1554/10, 21.01.2011, par. 3.2., 3.5.; and no. 4/2008, proc. 1019/07, 12.02.2008, par. III.2.3.

transparency and impartiality[28], on the choice of the co-contactors in direct awards[29]. These limitations, even though may be, sometimes, too burdensome – limiting repeated direct awards to the same entity regarding contracts with absolutely distinct scopes, or direct awards to entities that have offered any type of goods, services or works to the same awarding entity – the fact is that they apply generally to all awarding entities and aim at assuring impartiality.

We understand that the derogation to these limitations, not only facilitate fast awards to already known and "at hand" co-contractors, but also avoid administrative workload resulting from the monitoring and accounting of aggregate thresholds and of entities that have supplied to public entities by direct awards or at no cost.

Notwithstanding, considering the proportionality principle and the flexibility introduced by articles 2, n.o. 1 and 2, 2-A and 2-B of Decree-Law 10-A/2020, these derogations would probably be unnecessary. It must not be forgotten that the risk of corruption and abusive use of direct award procedure is a reality that gains a more significant impact when subsequent direct awards to the same entity is a free option for awarding entities.

Moreover, article 113 of the PCC applies to direct award procedures that are adopted on the basis of the contract value criteria, as per the applicable thresholds set forth in the law. Accordingly, extreme urgency may not be at stake on said acquisitions.

More incomprehensible is to, cumulatively with the above derogations, establish a further derogation to the provision of article 27-A of the PCC. In its Technical Orientation, IMPIC mentions that, despite this derogation, awarding entities should always choose, whenever possible, to adopt a prior consultation procedure. This is a valid indication, but it is not what is provided for in Decree-Law 10-A/2020, which sets forth a true derogation.

The truth is that the criteria set forth in article 27-A itself would be sufficient to allow awarding entities to make a reasonable choice of the prior consultation procedure, even in the context of the pandemic, "*whenever the resource to more than one entity is possible and it is compatible with the grounds for adoption of said procedure*".

Even if the legislator's intention was to assure that a deeper flexibility was to be given to the awarding entities, the exceptional regime could have expressly established that, whenever possible, considering the constraints of the extreme urgency at hand, awarding entities should prefer the prior consultation procedure. This solution is quite different from a simple derogation.

Additionally, considering the legitimate expectations of the economic operators, it will be crucial to assure that the supplies by direct awards based on the criteria of the contract value and the offers made during the period of validity of this exceptional regime are not accounted, under article 113, for purposes of future direct award or prior consultation procedures to be launched after expiry of this regime.

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[28] Article 18 of the Public Sector Directive, article 1-A, no. 1, of the PCC.

[29] Catarina Pinto Correia, "*As Ofertas no Código dos Contratos Públicos*", *Estudos em Homenagem a Mario Esteves de Oliveira*, Almedina, 2017, pp. 321-342.

7. Other exceptional measures adopted

Other rules were adopted to accelerate and facilitate the entry into force of contracts executed by direct award under the exceptional regime. This is the case of measures that establish an anticipated effectiveness of contracts.

Although awarding entities are not exempted from the obligation of publication, or from executing the contracts in writing, there is now a derogation to the rule that conditions a contract's effects to its publication[30], to the awardee qualification phase or to written execution (article 2, no. 5). The production of all contractual effects, including financial effects – such as contractual payments of any nature – is allowed immediately after award.

According to Law no. 1-A/2020, of 19 March, contracts are exempted from prior approval of the Court of Auditors[31] (article 6, no. 1). However, they should still be sent to the Court of Auditors, for information purposes, within thirty days of their execution (art. 6, no. 2).

When the availability of goods and services is at stake, awarding entities may make advance payments regardless of the conditions foreseen in the PCC[32] for that purpose (article 2, no. 6), i.e., regardless (i) of the respective value exceeding 30% of the contract price, (ii) of a bond being provided in an amount equal to or exceeding that of the advance payment, and (iii) of the provision of goods or services corresponding to the amount of the advance payment being performed in the same economic year as the respective payment.

Furthermore, private contracted entities may be exempted from (i) providing the performance bond, regardless of the price of the contract, and (ii) providing the qualification documents[33] that prove the non-existence of any impediment to contract (article 2, no. 9 and 10). Private entities remain prohibited from contracting if an impediment occurs (e.g., debts to the tax or social security authorities, or conviction for certain crimes), but the burden of proof may be greatly eased if the awarding entity grants the exemption. In any case, with the submission of their proposals, co-contractors deliver to the awarding entity the declaration set forth in article 57, no.1 a), and Annex I of the PCC, declaring that they are not under any situation of impediment. Accordingly, the exemption concern, in substance, to the proving documents set forth in article 81, no. 1 b).

Rules were also approved regarding the exemption and simplification of administrative authorisations.

Most public acquisitions in the health sector are subject to framework agreements and public entities of the National Health System are bound to acquire under, and subject to, the centralized procedure of the framework agreement[34]. Whenever a framework agreement is in force, public

[30] As set forth in article 127, no. 1, of the PCC.

[31] As required under the Court of Auditors' Organisation and Procedure Law, approved by Law no. 98/97, of 26 August, as amended.

[32] Article 292.

[33] Set forth in article 81, no. 1, a) and b), and Annex II of the PCC.

[34] Dispatch of the Minister of Health no. 1571-B/2016, of 1.2.2016, that differs from the solution of article 255, no. 2, of the PCC.

awarding entities covered by the National Public Acquisitions System are now exceptionally exempted from obtaining prior authorisation for acquisitions made outside the centralised acquisition mechanism. This means that public entities are now allowed to directly acquire, individually and autonomously, outside the scope of the centralized framework agreements that have been subject to competition, by direct award (article 2, no. 7).

Regarding authorisation of expenditure, exceptional measures set forth the tacit approval of requests for authorisation, of multiannual expenses or of release of funds to meet the objectives related to the fight against the pandemic, as well as simplified authorisation competences regarding budgetary changes involving reinforcement (article 3).

The exemption from administrative authorisations provided for by law and competence rules were also set forth regarding the decision to contract services for studies, opinions, projects, consulting services, and any specialised work, and the decision to contract services by specified bodies, agencies, services and other public entities (article 4).

These rules intend to achieve, not only the simplification of procedures prior to the entry in force of contracts, increasing speed and effectiveness of extremely urgent contracts, but also the elimination of conditions normally required to co-contractors that would assure security of public expenditure and of contractual compliance.

However, once again, the scope of these exceptional measures is too broad and unlimited in their application. In fact, the rationality of public spending – which, more than ever, should now, in times of economic contraction, be protected – may become affected[35].

For instance, the requirements for advance payments to co-contractors might have been lightened or reduced, but not eliminated, namely in what concerns those that contribute to a rational and sane budget execution and control, such as requiring that the provision of goods or services corresponding to the amount of the advance payment should be performed in the same economic year as the respective payment.

Also, in what regards centralized acquisitions under framework agreements, it would be important to include that acquisitions outside the scope of the latter should be limited to the price set forth therein.

8. European rules and the crucial principles of competition, equality, transparency and impartiality

If it is true that all these measures help increase the speed of urgent acquisitions and ensure the immediate availability of "Covid-19 related" works, goods or services, it is also true that these same measures may seriously undermine not only competition and equality, but also transparency and impartiality in public acquisitions. It would appear that the legislator's intention was to accelerate and facilitate public acquisitions at any cost, even if by jeopardising its crucial value of responsibility. Perhaps the legislator has gone too far in said measures, by allowing, for instance, acquisitions from suppliers that would normally be prevented from supplying due to serious

[35] See also Maria João Estorninho, "Covid-19: (novos) desafios e (velhos) riscos na contratação pública", Revista da Faculdade de Direito da Universidade de Lisboa, Ano LXI, 2020, 1, pp. 509-520.

impediments, or acquisitions made under illegal contracts that will not be subject to prior approval, or non-impartial acquisitions.

Some provisions were adopted with the intention of mitigating said pernicious effects, such as: the obligation to notify awards to the Ministry of Finance and the Ministry of Health and to have them published in the public contracts portal, including a statement of the reasons for the adoption of simplified direct award, when applicable (articles 2, no. 4, and 2-A, no. 5, of Decree-Law no. 10-A/2020); the obligation to notify all contracts to the Court of Auditors (article 6, no. 2, of Law 1-A/2020); or the publication of a joint report on simplified direct awards, their respective grounds and circumstances (article 2-A, no. 6, of Decree-Law no. 10-A/2020). These mitigation measures do not allow for control over irresponsible and non-impartial acquisitions, which, if occurring, will not be corrected. However, in the extreme situation currently faced, the defence of public health was deemed a higher value.

On the other hand, Portuguese law is far more flexible than the European Commission guidance on using the public procurement framework in the emergency situation related to Covid-19 crisis[36], which pointed out the options that public buyers can consider. In cases of urgency that render the applicable general time limits impracticable, awarding entities may shorten deadlines under open or restricted procedures.

Only subsidiary and in exceptional situations, awarding entities may adopt a negotiated procedure without publication (i) in unforeseeable events, (ii) as strictly necessary and under extreme urgency, making compliance with the general deadlines or reduced deadlines of competitive procedures impossible, (iii) in cases of undoubted causal link with the Covid-19 pandemic, and (iv) only in order to cover the gap until more stable solutions can be found – conditions which are to be interpreted restrictively. These rules are not only subsidiary and even more exceptional even vis-à-vis the exceptionality of the pandemic that we are living, but also do maintain the duty of reasoning as serious and demanding as in normal circumstances.

Accordingly, the significantly more flexible and general exceptional Portuguese measures must find their limits in European guidance, which shall apply, in any case, at least whenever the contract price exceeds European thresholds.

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Title:

European Journal of Public Procurement Markets - 3rd Issue (July 2021)

Publisher:

APMEP – Portuguese Society of Public Markets

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ISSN:

2184-3813

Date:

07.2021