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Procuring in a pandemic: assessing the use of the EU Public Procurement Directives, the Joint Procurement Agreement and advance purchase agreements

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ABSTRACT

Since the COVID-19 pandemic began, public procurers have faced an uphill battle to secure urgently required medical countermeasures. Contracting authorities in the face of extreme urgency at the start of the pandemic relied heavily on emergency provisions to deactivate procedural requirements and conclude contracts on the basis of direct negotiation. Additional procurements were conducted at a European Union (EU) level, leveraging the buying power of member states to rapidly secure the acquisitions of medical equipment, medicines, vaccines, booster shots and more recently COVID-19 therapeutics. The article offers an analysis of the use of the negotiation procedures and the European coordinated efforts to conclude COVID-19-related contracts. As we optimistically move towards the final stages of the pandemic, this article argues that it is time to retire the use of emergency procurements. It contends that such emergency provisions are no longer available for use and procurers, if not already, must return to the use of fully transparent and competitive procurement procedures. Furthermore, it suggests that the EU should build on the success of the coordinated approach of competitive tendering and extend the use of the Joint Procurement Agreement to prepare for future cross-border health crises and acquire in-demand medical countermeasures.

Keywords: EU public procurement; Joint Procurement Agreement; advance purchase agreements; COVID-19.

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INTRODUCTION

Public procurement has and is continuing to play an important role supporting healthcare systems during the COVID-19 pandemic. At the start of the pandemic, procurers scrambled to secure access to medical supplies, such as personal protective equipment (PPE), medical equipment and medicines. During the middle of the pandemic, the race began to secure the rapid acquisition of newly developed vaccines and booster jabs. As we hopefully and optimistically move into the final stages of the pandemic, procurers are now tasked with purchasing sufficient quantities of the new innovative COVID-19 therapeutics to treat those who are infected.

Under normal circumstances, the process for procuring affordable medical supplies is timely and administratively burdensome, and heavily dependent on market competition.[1] However, time and supply is a luxury that procurers do not enjoy. This article reflects on how contracting authorities in Ireland and the United Kingdom (UK) concluded public supplies and services contracts during the pandemic. Firstly, it reviews how contracting authorities availed of the flexibility in the current European Union (EU) public procurement framework to deactivate procedural requirements in the face of extreme urgency. Secondly, it analyses the unprecedented and ongoing joint procurement efforts co-ordinated by the European Commission. This paper argues that it is time to phase out the use of emergency procurement and re-assert the importance of upholding the principles of transparency and competition in procurement activities.

BACKGROUND TO THE EU PUBLIC PROCUREMENT DIRECTIVES

In the EU, the Public Procurement Directives[2] set out the procedures public bodies must follow when concluding public supplies and services contracts. The Council Directives are in place, harmonising contract tender procedures to facilitate cross-border trade in the internal

1 A Erridge and S Hennigan, 'Sustainable procurement in health and social care in Northern Ireland' (2012) 32(5) Public Money and Management 363; Y Askfors and H Fornstedt, 'The clash of managerial and professional logics in public procurement: implications for innovation in the health-care sector' (2018) 34(1) Scandinavian Journal of Management 78.

2 Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Public Sector Directive) OJ 2014 No L94/65; Council Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ 2014 No L94/243.

market.[3] In addition to the promotion of cross-border trade, public procurement is regulated to prevent public procurers purchasing in a reckless or discriminatory manner. When carrying out calls for tenders, public bodies must conform to the principles derived from the fundamental freedoms, including the principles of transparency,[4] mutual recognition,[5] proportionality,[6] non-discrimination[7] and equal treatment.[8]

While the rules complement and reflect broader EU policies and legislative developments, the Council Directives have been criticised harshly for being overly complex and administratively burdensome.[9] In particular, the Council Directives have been criticised for pursuing two competing sets of objectives: namely, a set of economic objectives and a set of social objectives.[10] Sánchez-Graells, in particular, argues that the '*ultimate*' purpose of the rules is to secure '*economic efficiency from undistorted competition*'.[11] This interpretation suggests that competition-orientated public markets result in the minimum

3 Council Directive 2004/18/EC (Public Sector Directive); Council Directive 2014/25/EU. Other directives in place not discussed in this article include: Directive 2014/23/EU on the award of concession contracts (2014) OJ L 94/1 (Concessions Directive); Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (2014) OJ L 216/76; and the Remedies Directive 2007/66/EC.

4 Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745.

5 Case T-258/06 *Federal Republic of Germany v European Commission* [2010] ECR-2027.

6 Case C-376/08 *Serrantoni Srl i Consorzio stabile edili Scrl v Comune di Milano* [2009] ECR I-12169.

7 Case C-225/98 *Commission v France ('Nord-pas-de-Calais')* [2000] ECR I-7445.

8 Case C-13/63 *Italy v Commission* [1963] ECR 165 at para III, (4)(a); Case C-306/93 *SMW Winzersekt v Land Rheinland-Pfalz* [1994] ECR I-5555 at para 30.

9 A Cox and P Furlong, 'European procurement rules and national preference: explaining the local sourcing of public works contracts in the EU in 1993' (1995) 1(2) Journal of Construction Procurement 87; C J Gelderman, W T Paul and M J Brugman, 'Public procurement and EU tendering directives – explaining non-compliance' (2006) 19 International Journal of Public Sector Management 702–714.

10 P Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2004) 123; S Arrowsmith and P Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press 2009); C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar 2016).

11 A Sánchez-Graells, *Public Procurement and the EU Competition Rules* 2nd edn (Bloomsbury 2015) 9 (emphasis added).

distortion of private sector activities, thus allowing for tenderers to submit competitive costs.[12] This approach places competition at the heart of the procurement actions.

Arrowsmith rejects this interpretation, submitting that revisions made to the Council Directives in 2014 have not elevated '*competition*' as a fundamental principle, and alternatively suggests that the fundamental purpose of the rules is to prevent preferential treatment, to remove barriers to trade for suppliers and support the sustainability of competitive public markets.[13] This approach suggests that alongside securing the best value for tax payers' money, public procurers should also consider the wider societal impact of the procurement spend. Alongside assessing submitted bids from interested economic operators on the grounds of costs, quality and performance criteria, procurers should also take into account considerations relating to labour equality, sustainable supply chains and the facilitation of small businesses in public contracts.[14]

Debate has long prevailed as to whether procurement rules should mandate the use of procurement spend to achieve policy goals. However, it is widely accepted that it is necessary to regulate public procurement activities to prevent the mismanagement of funds and prevent corrupt and collusive behaviour.[15] Open and transparent competitions are required to inform the market of contract opportunities and contract awards, facilitate competition and support review processes.[16] Contracting authorities at a minimum are required to advertise calls for competition notices:

> ... for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed.[17]

Despite the concerns raised that the revised rules are directing contracting authorities to purchase in a strategic manner, the rules do not dictate what purchasers should buy and instead set out procedures which must be followed to facilitate cross-border tendering in the internal market.

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12 Case C-240/83 *Waste Oils* [1985] ECR 531 9; Case C-55/06 *Arcor v Germany* [2008] ECR I-2931 Opinion of Advocate General Poires Maduro, para 49.

13 Public Sector Directive, recital 93.

14 S Arrowsmith, 'The purpose of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies' (2012) 14 Cambridge Yearbook of European Legal Studies 1.

15 A Jones, 'Combatting corruption and collusion in UK public procurement: proposals for post-Brexit reform' (2021) 84(4) Modern Law Review 667.

16 Case C-19/00 *SIAC Construction* [2001] ECR I-7725, para 35.

17 Case C-324/98 *Telaustria*, para 62.

When COVID-19 cases began to rise in member states, the Commission quickly directed public bodies to rely on the emergency provisions set out in the Council Directives, again merely indicating how purchasers should engage with the market.[18] It was the World Health Organization (WHO) that established guidelines outlining the specific medical countermeasures required for managing the pandemic.[19] For contracting authorities responsible for procuring health-related products and services, their procurement objectives changed from attempting to secure the optimum combination of whole-life costs and quality to securing supplies '*at all costs*'.[20] The Commission recognised this change of priorities and objectives, noting that contracting authorities may derogate from the basic principle of the Treaty on the Functioning of the European Union (TFEU) concerning transparency when rapidly purchasing medical supplies from an increasingly disrupted supply chain.[21] Although, in the same guidance note, the Commission continued to call for contracting authorities to comply with the broader policy objectives of the rules, rallying purchasers where possible 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.[22]

Contracting authorities were placed in a very difficult position, they were tasked with procuring scarce supplies while ensuring the efficient use of public spend. This article aims to offer an overview of the key legislative provisions available for use during the pandemic and questions if it is time to phase out the use of emergency procurement. The next section of the paper will review the emergency provisions relied on by contracting authorities to conclude public supplies and services contracts and will swiftly move on to reviewing the joint procurement actions taken by the Commission on behalf of member states.

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18 Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Communication on the Global EU response to COVID-18 [2020] JOIN/2020/11 final.

19 World Health Organization, 'Operational support and logistics disease commodity packages' [2020] V4 WHO/2019-nCoV/DCPv3/2020.4.

20 V Clarke and M Wall, 'Donnelly defends HSE over ventilator procurement after only 465 of 2,200 pre-paid machines delivered' *Irish Times* (Dublin, 1 September 2021) (emphasis added).

21 Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis OJ C108I/1.

22 Ibid.

PUBLIC PROCUREMENT LEGISLATIVE RESPONSES TO THE COVID-19 PANDEMIC

When the WHO declared the COVID-19 outbreak a pandemic, the EU swiftly coordinated a regional health response supported by various financial mechanisms.[23] In April 2020, the Commission published a guidance communication outlining the 'options and flexibilities available under the EU public procurement framework for the purchase of the supplies, services, and works needed to address the crisis'.[24] Similar advisory notes were issued in Ireland and Northern Ireland. The European Union (Award of Public Authority Contracts) Regulations 2016 (SI No 2016/284) implements Directive 2014/24/EU into Irish law. Public procurement is considered a transferred matter under the Northern Ireland Act 1998 as the UK Public Contracts and Utilities Contracts Regulations were adopted prior to the restoration of a devolved administration in Northern Ireland. As such, public procurement law in Northern Ireland falls within the scope of the UK procurement regulations, the Public Contracts Regulations 2015 implemented in England, Wales and Northern Ireland by Council Directive 2014/24/EU.[25]

Both the EU and national COVID-19 guidance notes reaffirmed that the procurement rules and policies were not relaxed in their entirety. Prior to engaging in any additional procurements, contracting authorities were firstly encouraged to exploit ongoing contracts with suppliers to increase supplies or extend concluded contracts. Procurers were encouraged to make purchases under existing contracts or conduct competitions under established 'framework agreements'.[26] If contracting authorities were unable to secure adequate supplies using or modifying contracts in place, procurers were encouraged to temporarily rely on the accelerated procedures and, as a last resort, direct awards.

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23 Primarily a rescEU stockpile of medical equipment was introduced and the EU4Health initiative was adopted. 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 prevention, preparedness and response to disasters. See European 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).

24 European Commission OJ C108I/1 (n 21 above).

25 As amended Public Contracts Regulations 2015 amended by Public Procurement (Amendment etc) (EU Exit) Regulations 2020 (SI 2020/1319).

26 Framework agreements are generally attached to the concluded contracts, allowing national, regional and local contracting authorities to purchase from the framework agreements using the stated and agreed-upon form of mini-competition or purchasing method.

INDIVIDUAL PROCUREMENT ACTIONS: ACCELERATED PROCEDURES AND DIRECT AWARDS

There are a number of 'flexible' options available under the Council Directives that procurers may rely on to secure 'urgently' required supplies and services. Provisions are in place to allow procurers to substantially reduce tendering deadlines in cases of urgency.[27] In cases of 'duly justified urgency', the deadline for submission of tenders under the commonly used 'open procedure' may be reduced to 15 days.[28] Similarly, the deadline to submit a request to participate under the 'restricted procedure' may be reduced to 15 days, with the deadline for tender submissions reduced to 10 days.[29] The Commission noted that the use of the accelerated open or restricted procedures must comply 'with the principles of equal treatment and transparency and ensures competition even in the cases of urgency'.[30] It appears that the accelerated procedures could be used to procure urgently required supplies and services while promoting the central objectives of the rules, although these procedures did not offer an immediate solution to the emerging COVID-19 crisis. Hospitals, in particular, required immediate access to PPE, ventilators, and other medical equipment and pharmaceuticals.

In circumstances where it is not appropriate to rely on the accelerated open or restricted procedures, contracting authorities may consider using a 'negotiated procedure without publication'.[31] Using this procedure, procurers are able to negotiate directly with suppliers. Unlike the accelerated open or restricted procedures, there are no set rules, time limits or procedural requirements attached to the negotiated procedure without publication.[32] This process allows procurers to conclude contracts immediately. Contracting authorities may rely on this procedure:

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27 When conducting a competition using the most straightforward 'open procedure', procurers are required to advertise the competition for a minimum of 35 days. Under the 'restricted procedure', interested economic operators must be provided with a minimum of 30 days to submit a tender. This procedure is carried out in two stages, with the second stage requiring an additional 30 days' submission requirement. Council Directive, art 27, art 28.

28 Ibid art 27(3).

29 Ibid art 28(3).

30 C-275/08, *Commission v Germany*, and C-352/12, *Consiglio Nazionale degli Ingegneri*, and Council Directive, art 32(2)(c).

31 Council Directive, art 32.

32 M Burnett, 'The new rules for competitive dialogue and the competitive procedure with negotiation in Directive 2014/24 – what might they mean for PPP?' (2015) 10(2) European Procurement and Public Private Partnership Law Review 62.

> insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.[33]

The conditions must be strictly met to prevent the misuse of public funds and non-compliance with the basic transparency principle of the Treaty.[34] However, it is obvious that the impact of the COVID-19 pandemic on the healthcare systems was an unforeseeable event for public bodies and contracting authorities could easily meet the set conditions when attempting to secure medical supplies.[35] Theoretically, procurers could use this procedure to finalise a contract within a number of hours, but the practical issues posed a greater problem, namely the lack of supply and increased costs.[36]

In response to lack of supply concerns, the Communication from the Commission on using public procurement procedures during the pandemic suggested that procurers should consider contacting or directly meeting with existing and potential contractors to confirm immediate delivery of available stocks.[37] Additionally, procurers were encouraged to accept tenders from companies and innovators that were willing to design solutions to solve the pressing challenges raised by COVID-19.[38] While the Communication aimed to assist procurers in accessing supplies and services to manage the pandemic, it additionally acted as a reminder to encourage procurers to integrate accessibility, environmental, innovative and social considerations in the procurement procedures.[39] All procurement activities not affected by the pandemic were required to respect the applicable requirements laid out in the Council Directives. Overall, the use of the accelerated and negotiated procedures for urgent medical supplies and medicines provided contracting authorities with the flexibility to conclude public contracts in a simplified and speedy manner.[40] However, allowing for

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33 Council Directive, art 32(2)(c)

34 C-275/08 *Commission v Germany* and C-352/12 *Consiglio Nazionale degli Ingegneri*, and Council Directive.

35 European Commission, 'Public procurement in healthcare systems' (2021) Opinion of the Expert Panel on effective ways of investing in Health (EXPH).

36 N Hawkes, 'Pfizer is fined £84m for "exploiting opportunity" to hike price of phenytoin' (2016) British Medical Journal 355.

37 European Commission OJ C108I/1 (n 21 above).

38 D Mwesiumo, R Glavee-Geo, K M Olsen and G A Svenning, 'Improving public purchaser attitudes towards public procurement of innovations' (2021) Technovation 102.

39 European Commission OJ C108I/1 (n 21 above).

40 Once they met the strict requirements laid out in 32(2)(c) of the Directive.

the use of the emergency provisions did not ease procurers' difficulties in acquiring scarce PPE, ventilators and additional hospital and intensive care infrastructure.

JOINT PROCUREMENT ACTIONS

Separately to the easing of the public procurement procedures, the Commission accelerated the use of the Joint Procurement Agreement (JPA).[41] Similarly, and not unsurprisingly, the previous H1N1 influenza pandemic in 2009 caused serious disruptions to supply chains. During the 'swine flu' outbreak member states competed against each other, often unsuccessfully, for scarce medical supplies, which led to price hikes, stock hoarding and inflated demand.[42] Consequently, the European Council sought to improve solidarity in times of emergencies and requested the Commission to introduce measures to support the use of joint procurement to prepare for future pandemics.[43] Subsequently, Decision 1082/2013/EU, on the basis of article 168(5) of the TFEU,[44] was introduced to prepare for serious cross-border threats to health. A specific provision is contained in that Decision to allow the EU institutions and the member states to engage in a joint procurement mechanism to enable 'the advance purchase of medical countermeasures for serious cross-border threats to health'.[45]

It is worth noting that the JPA itself is not a pure EU legal Act, it is merely a budgetary implementing measure of Decision 1082/2013/EU.[46] Therefore, article 5 is not the JPA's legal basis as the public law powers related to health policy are conferred under article 168

41 See European Commission, 'Explanatory note on the joint procurement mechanism' (December 2015).

42 N Azzopardi-Muscat, P Schroder-Bäck and H Brand, 'The European Union Joint Procurement Agreement for cross-border health threats: what is the potential for this new mechanism of health system collaboration?' (2017) 12(1) Health Economics, Policy and Law 43–59.

43 Ibid.

44 Art 5 provides for participating member states to engage in a joint procurement procedure conducted pursuant to the third subparagraph of art 104(1) of Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union and pursuant to art 133 of Commission Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union, with a view to the advance purchase of medical countermeasures for serious cross-border threats to health.

45 Decision 1082/2013/EU OJ 2013 L 293/1, art 5.

46 A Sánchez-Graells, 'Procurement in the time of COVID-19' (2020) 71(1) Northern Ireland Legal Quarterly 81–87.

TFEU.[47] The JPA is a *sui generis* legal instrument rooted in article 168 TFEU that allows member states to pool their resources to secure medical countermeasures in preparation for and during instances of cross-border health crises.[48] 'Medical countermeasures' refer to any medicines, medical devices, or any other related goods or services that are aimed at combating serious cross-border threats to health.[49] Since its introduction in 2014, the JPA has been used to procure and in some cases stockpile, vaccines, antivirals and other medical countermeasures in preparation for serious cross-border health emergencies.[50] However, the previous agreements concluded did not assist signatories adequately in preparation for the COVID-19 pandemic.

An initial procurement competition conducted under the agreement for PPE in February 2020 was unsuccessful. After a rocky start, the use of the JPA gained momentum and five competitions for the provision of ventilators, goggles, face shields and masks, laboratory equipment, testing kits and intensive care unit medicines were successfully concluded.[51] As noted by Sánchez-Graells, the success of the JPA is heavily reliant on competition in the marketplace.[52] Despite the disruptions in the global supply chain, the Commission successfully organised the procurements for critically needed medical supplies. The supplies were allocated on a needs basis, responding to signatories' immediate needs to prevent their healthcare systems from collapsing or becoming overwhelmed by surges of infections.[53]

It is important to note that the JPA mechanism is not subject to the same objectives and aims as the Council Directives. The JPA mechanism should be conducted in light of the aim of Decision 1082/2013/EU which is to assist coordinated approaches to improve

47 Art 168(5) TFEU allows for the adoption of 'incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health …'.

48 It is important to note that the JPA is fully governed by EU law and under the jurisdiction of the CJEU.

49 Separately, cross-border health crises are defined as: a life-threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin which spreads or entails a significant risk of spreading across the national borders of Member States, and which may necessitate coordination at Union level in order to ensure a high level of human health protection. Article 3 (lett g) of the Decision.

50 The first procurement competition conducted under the JPA for the provision of Botulinum anti-toxin was carried out in 2016.

51 European Commission, 'COVID-19 Response – Public Health'.

52 Sánchez-Graells (n 46 above).

53 L D Dąbrowski, 'Poland and EU cooperation – mechanism of joint public procurement (COVID-19)' in J Menkes and Magdalena Suska (eds), *The Economic and Legal Impact of COVID-19* (Routledge 2021) 53.

the prevention and control of the spread of diseases and other serious cross-border threats to health.[54] The JPA is therefore not concerned with ensuring the non-discriminatory completion of competitive public contracts. However, it appears from the outset that the procurement competitions organised under the JPA respected the Treaty principle of transparency. Call for competition notices were openly published in the Official Journal (OJ) outlining the procurement selection and award criteria. Additionally, contract award notices were published naming the preferred candidates.[55] If the successful use of the JPA is heavily reliant on competition in the marketplace, it is timely for the Commission to assess the JPA's objectives and responsibility for the promotion of sustainable competition in the global market.

In comparison with the successful use of the JPA to secure medical countermeasures, the EU's response for acquiring vaccines was more controversial and, arguably, less effective and tainted by political motives. Vaccines are society's best defence to fighting and protecting against pandemics and over the last 18 months states have scrambled to inoculate society to protect vulnerable members from illness and stabilise fluctuating economies.[56] Traditional procurement procedures are not appropriate for the purchase of vaccines under development as the product is not readily available on the market.[57] As such, the accelerated open or restricted procedures or the negotiated procedure without publication would not have secured timely acquisitions of vaccines once they became readily *available*. The JPA, in the same way, was also an inappropriate approach to take as the agreement is used to conclude contracts for the provision and supply of available medical countermeasures.

On the basis of Regulation (EU) 2016/369 (the ESI Regulation),[58] Decision 4192/2020/EU allows for the Commission to procure COVID-19 vaccines on behalf of the member states. Advance purchase agreements (APAs) were signed with vaccine manufacturers for the

54 Although art 5(2)(c) of Decision 1082/2013/EU specifically states that joint procurement does not affect the internal market, does not constitute discrimination or a restriction of trade or does not cause distortion of competition.

55 See Contract Award Notices: 2020/S 051-119976 of 12 March 2020; 2020/S 100-238632.

56 A S Rutschman, 'The COVID-19 vaccine race: intellectual property, collaboration(s), nationalism and misinformation' (2021) 64 Washington University Journal of Law and Policy 167–202, 'Introduction' 167.

57 Following the COVID-19 outbreak in 2020, the Council adopted Regulation (EU) 2020/521 activating emergency support measures under the ESI Regulation. The activation period was from 1 February 2020 to 31 January 2022.

58 Art 4, para 5, point (b) of the ESI Regulation provides that the Commission may grant emergency support in the form of procurement on behalf of the member states based on an agreement between the Commission and member states.

development, production and supply of COVID-19 vaccines.[59] This form of agreement requires initial financial support, which was provided for through the 'emergency support instrument' (ESI).[60] Upfront finances were provided for under the ESI to secure large volumes of vaccines '*in a given timeframe and at a given price*'.[61] The aim of the process as outlined in the 'EU Vaccines Strategy', is to 'ensure the production in Europe of qualitative, safe and efficacious vaccines, and to secure swift access to them for Member States and their populations'.[62] Moreover, the process was designed to reflect procedures often relied on to purchase pharmaceuticals from a limited and often closed market.[63] Procurement of pharmaceuticals and medical countermeasures, in particular, patented medicines and medical devices, often rely on prolonged negotiated procedures resulting in member states paying different costs for the same products.[64]

After a delayed start, the Commission succeeded in securing vaccines from several suppliers. Initial contracts were agreed with; BioNTech-Pfizer for up to 600 million doses; AstraZeneca for up to 400 million doses; Sanofi-GSK for up to 300 million doses; Johnson and Johnson (J&J) for up to 400 million doses; CureVac for up to 405 million doses; Moderna for up to 160 million doses; Novavax for up to 200 million doses; and Valneva for up to 60 million doses.[65] Originally, the Commission refused to publish information on the concluded agreements, suggesting that this was to protect sensitive financial information and information relating to product developments.[66] Furthermore, it was stated that:

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59 Decision 4192/2020/EU provides for the Commission to procure COVID-19 vaccines on behalf of the member states.

60 OJ L 70, 16 March 2016, p 1, as amended by Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under the ESI Regulation, and amending its provisions taking into account the COVID-19 outbreak, OJ L 117, 15.4.2020, 3.

61 European Ombudsman's Decision in the joint cases *85/2021/MIG* and *86/2021/MIG* (emphasis added).

62 European Commission, 'Coronavirus: towards a common vaccination strategy' (17 October 2021).

63 WHO Regional Office for Europe, *How Can Voluntary Cross-Border Collaboration in Public Procurement Improve Access to Health Technologies in Europe?* (WHO Regional Office for Europe Publications 2016).

64 M L Johnson, J Belin, F Dorandeu and M Guille, 'Strengthening the cost effectiveness of medical countermeasure development against rare biological threats: the Ebola outbreak' (2017) 31(6) Pharmaceutical Medicine 423–426.

65 European Commission Communication, 'EU strategy of COVID-19 vaccines' (2020).

66 European Ombudsman's Decision (n 61 above)

> Disclosing sensitive business information would also undermine the tendering process and have potentially far-reaching consequences for the ability of the Commission to carry out its tasks as set out in the legal instruments that form the basis of the negotiations.[67]

However, following the European Ombudsman's Decision in the joint cases *85/2021/MIG* and *86/2021/MIG*, the Commission has agreed to increase 'transparency' in future procurement processes for the supply and provisions of COVID-19 vaccines.[68] The Commission has since published redacted versions of all concluded APAs on its official website. Furthermore, the Commission agreed to review the documents on an ongoing basis with the view of removing redactions where possible.[69] Further commitment to improving transparency in the process can be seen in the recent compliance with freedom of information (FoI) requests from media outlets. Media outlets have been publishing vaccines costs retrieved from Commission Communications.[70] This is a somewhat unusual move, as pharmaceutical prices are rarely disclosed.[71] This is, however, a welcome move, as it will assist other non-EU countries with leveraging power when negotiating for future contracts.

Separately, the UK was more successful in securing COVID-19 vaccines in a compressed timeframe. The UK's mass vaccination plans were implemented 'before confirmation of the first Covid-19 case' was reported.[72] In a more aggressive manner than the EU, the UK concluded its first negotiated contract for the provision of 100 million doses of the Oxford-AstraZeneca vaccine in June 2020. Separate contracts were also negotiated for the provision of the Pfizer-BioNTech vaccine.[73] Alongside the use of the APAs to procure vaccines, member states conducted individual contracts to buy additional vaccines. While the use of the APAs might have been problematic, the upfront funding

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67 Ibid.

68 These cases arose over concerns filed by the not-for-profit company, Corporate Europe Observatory regarding the Commission's refusal to fully comply with two FoI requests regarding the vaccine's procurement procedures.

69 See European Commission, 'EU vaccines strategy'.

70 D P Mancini, H Kuchler, M Khan, 'Pfizer and Moderna ramp up EU COVID vaccine prices' *Irish Times* (Dublin, 1 August 2021). It was reported that the unit price for a Pfizer shot has increased from €15.50 to €19.50, and Moderna prices have increased from €21.49 to €24.02.

71 S G Morgan, H S Bathula and S Moon, 'Pricing of pharmaceuticals is becoming a major challenge for health systems' (2020) British Medical Journal. 368.

72 Department of Health and Social Care, 'UK COVID-19 vaccines delivery plan' 11 January 2021.

73 K Bingham, 'The UK Government's Vaccine Taskforce: strategy for protecting the UK and the world' (2021) 397(10268) The Lancet 68–70.

offered to the pharmaceutical companies significantly supported the rapid development and testing of the COVID-19 vaccines.

PROCURING IN A POST-PANDEMIC SOCIETY

An initial objective of this paper was to identify how the public procurement legislative framework supported the management of the pandemic. This section of the article summarises the key lessons learnt and offers some suggestions on how procurement should operate in a post-pandemic era. The findings are threefold. Firstly, the article argues that it is no longer appropriate for contracting authorities to rely on the accelerated procedures or directly awarded contracts. Secondly, the findings suggest that the process used to conclude the APAs for the supply of vaccines lacked transparency and need to be reviewed. Finally, on foot of previous research, the paper recognises the success of the JPA and calls for the further use of centralised procurement to obtain medical countermeasures, including COVID-19 vaccines and eventual therapeutics.[74] The paper concludes by suggesting that further research is needed to assess the importance of 'competition' as a fundamental objective of the Council Directives and coordinated joint procurement mechanisms.[75] Previous literature has questioned the elevation of competition as a fundamental principle of the Council Directives, however, as we enter this new post-pandemic stage, competition needs to be at the heart of procurement as global supply chains remain in a disrupted state and economies are fragile. The economic and social importance of public procurement was often overlooked in the past, but the pandemic has highlighted the significance of the activity and it is now the perfect time to review its objectives and potential to foster a sustainable, innovative, competitive and socially inclusive society.

Emergency provisions

During the early stages of the pandemic, contracting authorities, in the first instance, were able to rely on emergency 'accelerated' procedures or direct contracts to fast-track the purchase of PPE and medical equipment.[76] For the most part, these negotiations resulted in the timely acquisition of emergency supplies in Ireland and Northern

74 E McEvoy and D Ferri, 'The role of the Joint Procurement Agreement during the COVID-19 pandemic: assessing its usefulness and discussing its potential to support a European Health Union' (2020) 11(4) European Journal of Risk Regulation 851.

75 Building on the extensive and insightful scholarship conducted by Albert Sánchez-Graells, see A Sánchez-Graells, *Public Procurement and the EU Competition Rules* (Hart 2011). See also, Sánchez-Graells (n 11 above) 9.

76 See Council Directive 2014/24/EU, art 1(2).

Ireland.[77] Although, the reliance on the negotiated procedure without prior publication to deactivate procedural requirements quickly led to nationalistic purchasing actions.[78] Unsurprisingly, the unprecedented global demand for medical countermeasures quickly led to price hikes and supply shortages.[79] Recent reviews and audits of the public sector's early response to the pandemic have further shown that use of the accelerated contracts resulted in the purchase of PPE and supplies that have fallen short of expected standards.[80] The use of the accelerated procedures, particularly the negotiated procedure, without publication in the UK and Ireland resulted in high costs, non-delivery of pre-paid items, and the acquisition of poor or inferior products.[81] Additionally, there was evidence of poor management and non-compliance with internal policies when conducting accelerated procedures.[82]

There have been many examples of poor procurement actions, which illustrate the procurers' desperation to conclude risky contracts for the provision of medical supplies. In Ireland, a Health Service Executive (HSE) internal auditor's report harshly criticised the processes used to conclude contracts for the supply of ventilators.[83] It noted that the HSE pre-paid for the supply and delivery of 2200 ventilators, only 465 of which were delivered to date. None of the delivered 465 ventilators were put into use. The HSE defended its actions acknowledging that the procurement was conducted;

> ... in a volatile and effectively closed market where we had to secure equipment in extremely high demand, in an expedited timeframe and under considerable pressure, in the face of a global pandemic.[84]

Despite these justifications, significant sums of public money were misspent and wasted. Furthermore, safety tests completed by the

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77 K Burnett, S Martin, C Goudy, J Barron, L O'Hare, P Wilson, G Fleming and M Scott, 'Ensuring the quality and quantity of personal protective equipment (PPE) by enhancing the procurement process in Northern Ireland during the COVID-19 pandemic: challenges in the procurement process for PPE in NI' (2021) 27(1) Journal of Patient Safety and Risk Management 42–49.

78 European Commission, 'Coronavirus: European solidarity in action' (2020)

79 M Eßig, C von Deimling and A Glas, 'Challenges in public procurement before, during, and after the COVID-19 crisis: selected theses on a competency-based approach'(2020) 3 European Journal of Public Procurement Markets 65–80.

80 S Sian and S Smyth, 'Supreme emergencies and public accountability: the case of procurement in the UK during the COVID-19 pandemic' (2021) 35(1) Accounting, Auditing and Accountability Journal 146–157.

81 Ibid.

82 Ibid. See also Clarke and Wall (n 20 above). 'Donnelly defends HSE over ventilator procurement after only 465 of 2,200 pre-paid machines delivered' *Irish Times* (Dublin, 1 September 2021).

83 Clarke and Wall (n 20 above).

84 Ibid. The article included the HSE's response to the internal audit findings.

HSE found that the first 100 ventilators received had a 41 per cent failure rate.[85] The auditor's report further found that the HSE pre-paid €81 million to 10 new suppliers that had no previous experience of supplying ventilators to the state. The HSE's willingness to conclude high-risk contracts highlights the extreme urgency faced during this particular period and the political pressure placed on procurers 'to get these ventilators in at all costs'.[86] The UK's procurement actions have also been subject to scrutiny and criticism. A recent government report noted that large quantities of PPE procured during the pandemic did not meet contractual specifications or relevant safety standards, including 50 million face masks and 10 million surgical gowns.[87]

In his ongoing blog discussion of procurement during the pandemic, Telles has repeatedly questioned the lawfulness of the use of the negotiated procedure without prior publication via article 32(2)(c) of Directive 2014/24/EU and regulation 32(2)(c) to finalise the 'vast majority of contracts' in the UK in 2020.[88] Telles has consistently argued that the contracts concluded were unlawful due to the 'unnecessary discrimination they entail'. This argument is somewhat supported by the recent ruling in *R (Good Law Project and EveryDoctor) v Secretary of State for Health and Social Care*, which found that the UK Government was obliged to comply with the principles of equal treatment and transparency when relying on the emergency provisions to conclude 'High Priority Lane' COVID-19 response contracts in 2020.[89] While the High Court found that the fundamental principles were not lawfully displaced for these particular contracts, it confirmed that the public procurers were entitled to rely on regulation 32(2)(c) to directly award contracts, based on the facts that the global pandemic was unforeseeable and there was extreme urgency to acquire supplies.[90]

This ruling acts as a reminder to public procurers that the use of regulation 32(2)(c) is only lawful in exceptional circumstances, where the procurer can cumulatively meet the criteria set out in the regulation

85 KPMG, internal audit conducted on behalf of the HSE summarising procurement spend during the pandemic. This report has not been made available to the public. Certain information has been retrieved by the *Irish Times* through FoI requests.

86 Minister for Health, Stephen Donnelly's response to the internal audit. See Clarke and Wall (n 20 above).

87 Nicholas Barrett and Anthony Reuben, 'What is going on with government COVID contracts?' (*BBC News* 30 June 2021).

88 Pedro Telles, 'High Court rules (some) VIP route contract as unlawful' (*Telles.eu* 12 January 2022). See also 'Why those UK PPE contracts from 2020 are illegal' (*Telles.eu* 25 May 2021).

89 *R (Good Law Project and EveryDoctor) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC).

90 Ibid 329–338.

and in cases C-275/08 *Commission v Germany* and C-352/12 *Consiglio Nazionale degli Ingegneri*. It is difficult to see how procurers can lawfully displace the principles of equal treatment and transparency at this stage of the pandemic, as it can no longer be described as an unforeseen and extremely urgent situation. Sánchez-Graells warns that procurers may be tempted to use simplified negotiated practices during this stage of the pandemic to pursue specific economic goals or use procurement to channel additional public spend to revitalise national economies.[91] But the recent rise in procurement litigation and findings from government audits would indicate that procurers should avoid any form of uncompetitive tendering, as the closed procurements conducted over the course of the pandemic have resulted in inefficient and at times reckless spending.[92] While the use of emergency procurement is strongly discouraged at this stage of the pandemic, the availability and use of the accelerated procedures and negotiated procedure without prior publication was arguably one of the core legislative supports available to governments in early 2020.[93] European joint procurement efforts equally assisted member states navigating this extremely difficult stage of the pandemic.

Coordinated procurement at a European level

Prior to the COVID-19 pandemic, individual member states in an effort to improve purchasing power engaged in joint procurement activities to secure medical supplies. Member states, in their individual capacity, often struggle to secure competitive prices or access to patented or innovative medicines and technologies.[94] There are various examples, with varying degrees of successes, of states forming alliances to improve their access to required medical supplies, such as the failed joint procurement for the provision of the BCG vaccine undertaken by Latvia,

91 Sánchez-Graells (n 46 above)

92 A Sánchez-Graells, 'COVID-19 PPE extremely urgent procurement in England: a cautionary tale for an overheating public governance' in Dave Cowan and Ann Mumford (eds), *Pandemic Legalities: Legal Responses to COVID-19 – Justice and Social Responsibility* (Bristol University Press 2021) 93.

93 M Kubak, P Nemec and M Vološin, 'On the competition and transparency in public procurement during COVID-19 pandemic in European Union' (2021).

94 Johnson et al (n 64 above).

Estonia and Lithuania under the Baltic Partnership Agreement.[95] The H1N1 'swine flu' pandemic sounded the sirens that member states cannot manage cross-border health crises individually and paved the way for the introduction of the JPA.[96] Unfortunately, the JPA was not activated fully and the Commission did not have appropriate supplies or measures put in place to immediately support countries when the first wave crashed onto the Italian shores. The JPA was only used to its full potential when COVID-19 was surging through countries. This article argues that the use of the JPA, when activated, was one of the strongest and most effective (*voluntary*) legislative mechanisms relied on to fight the pandemic. Countries, such as the UK and Ireland, as noted above, struggled in an individual capacity to secure appropriate and cost-effective PPE, ventilators and other medicines and equipment during the first wave of the pandemic.[97] The JPA provided the lifeline for healthcare authorities by securing significant volumes of PPE.[98] In recognising the success of the JPA, the Commission plans to increase the use of collaborated health actions, including joint procurement, to support the creation and development of a European Health Union.[99]

However, the coordinated approach for the production and development of vaccines has been less than desirable.[100] The procurement procedures and concluded agreements were shrouded

95 Since 2012, other collaborative activities for innovative medicines and medical devices have been conducted, including: a BeNeLuxA Agreement between Belgium, Netherlands, Luxembourg and Austria; the Nordic Pharmaceuticals Forum between Denmark, Iceland, Norway and Sweden; Southern European initiative between Greece, Bulgaria, Spain, Cyprus, Malta, Italy and Portugal; and Central Eastern European and South Eastern European Countries Initiative between Romania, Bulgaria, Croatia, Latvia, Poland, Serbia, Slovakia, Slovenia, Republic of Moldova and FYR Macedonia.

96 S Ponzio, 'Joint procurement and innovation in the new EU Directive and in some EU-funded projects' (2014) Ius Publicum Network Review.

97 R Beetsma, B Burgoon, F Nicoli, A de Ruijter and F Vandenbroucke, 'Public support for European cooperation in the procurement, stockpiling and distribution of medicines' (2021) 31(2) European Journal of Public Health 253–258.

98 European Commission, 'Overview of the Commission's response' (7 July 2020). See also S Baute and A De Ruijter, 'EU health solidarity in times of crisis: explaining public preferences towards EU risk pooling for medicines' (2021) Journal of European Public Policy 1–23.

99 European Commission, 'Building a European Health Union: reinforcing the EU's resilience for cross-border health threats' (2020) COM 724 final; N Fahy, T Hervey, M Dayan, M Flear, M Galsworthy, S Greer, H Jarman and M McKee, 'Assessing the potential impact on health of the UK's future relationship agreement with the EU: analysis of the negotiating positions' (2021) 16(3) Health Economics, Policy and Law 290–307.

100 E Schanze, 'Best efforts in the taxonomy of obligation – the case of the EU vaccine contracts' (2021) 22(6) German Law Journal 1133–1145.

in secrecy.[101] When problems arose regarding delivery and safety of the vaccines, the Commission adopted a strong defensive stance.[102] Improvements have been made with the Commission recognising the need to improve transparency in the process.[103] Redacted versions of all concluded contracts are publicly available for perusal and review. However, when the current contracts come to an end in 2022, the Commission should consider retiring the APAs and return to using the JPA mechanism for procuring vaccines.

On a more general note, the WHO warns that large-scale centralised procurement can inadvertently result in the distortion of competition or a restriction in trade.[104] This is particularly evident in circumstances where exclusivity agreements are relied on as exclusivity restrictions during times of crisis can create unfair barriers to trade and hinder countries' access to critical medical supplies.[105] The concluded APAs have included exclusivity restrictions, and it is unknown at this stage what impact these inclusions are having on the equitable global distribution of COVID-19 vaccines.[106] Even though there were flaws, overall, the speedy development, testing, formal approval and supply of the COVID-19 vaccines was extraordinary. Additionally, the EU has significantly contributed to the COVAX Facility. The Facility is co-led by Gavi, the Vaccine Alliance, the Coalition for Epidemic Preparedness Innovations and the WHO and is driven by the purpose 'to accelerate the development and manufacture of COVID-19 vaccines and to guarantee fair and equitable access for every country in the world'.[107] Alongside these measures, the Commission, when designing future and extended

101 R Hyde, 'von der Leyen admits to COVID-19 vaccine failures' (2021) 397(10275) Lancet 655.

102 European Commission, 'Belgian Court orders AstraZeneca to deliver vaccine doses to the EU' (19 June 2021).

103 European Commission, 'Speech by President von der Leyen at the European Parliament plenary on the state of play of the EU's COVID-19 vaccination strategy' (10 February 2021).

104 WHO (n 63 above)

105 A McMahon, 'Patents, access to health and COVID-19: the role of compulsory and government-use licensing in Ireland' (2020) 71(3) Northern Ireland Legal Quarterly 331–359; C L Atkinson, C McCue, E Prier and A M Atkinson, 'Supply chain manipulation, misrepresentation, and magical thinking during the COVID-19 pandemic' (2020) (50) American Review of Public Administration 6; Z Yu, A Razzaq, A Rehman, A Shah, K Jameel and R S Mor, 'Disruption in global supply chain and socio-economic shocks: a lesson from COVID-19 for sustainable production and consumption' (2021) Operations Management Research 1.

106 E Brooks and R Geyer, 'The development of EU health policy and the COVID-19 pandemic: trends and implications' (2020) 42(8) Journal of European Integration 1057–1076.

107 European Commission, 'Coronavirus global response: Commission joins the COVID-19 Vaccine Global Access Facility (COVAX)' (1 September 2021)

use of the JPA or APAs, must take into account any potential adverse impact the planned procurements could have on global supply.

Review of procurement objectives

As mentioned at the start of this article, the Council Directives have a number of primary economic objectives and secondary horizontal policy goals. An underpinning goal of the EU public procurement rules is to promote cross-border trade in the internal market by harmonising the use of transparent tendering processes.[108] These objectives were quickly side-lined when procurers were tasked with securing COVID-19-related contracts. Contracting authorities in Ireland and Northern Ireland were continuously reminded to ensure that their procurement processes secure 'value for money, transparency and equal treatment' in circumstances where the procurement was unaffected by COVID-19-related issues.[109] However, these objectives may prove difficult to achieve as procurers are no longer facing just the health crisis and are now additionally facing a global supply chain crisis.[110] There are several reasons for this emerging global supply chain crisis. Temporary and continued closures of factories in Asia due to COVID-19 outbreaks, shortages of shipping containers and personnel, the impact of Brexit and the consequences of the Suez Canal blockage in March 2021 have all contributed to the current disruption to the supply chain.[111]

As procurement will only yield cost savings, efficiencies and generate social impact when the market is competitive, it is timely for procurers to re-evaluate the relationship between competition and procurement. Bovis reminds us that competition and public procurement law are two separate doctrines, acknowledging that EU competition law is underpinned by a principle of uniformity and possesses a corrective characteristic whereas public procurement rules allow for member state discretions and have an underlying convergence character.[112]

108 European Commission, *Proposal for a Directive of the European Parliament and of the Council on Public Procurement* (2011) COD 0438.

109 Department of Finance, 'Procurement guidance note 01/20: supplier relief due to COVID-19'.

110 P Haren and D Simchi-Levi, 'How coronavirus could impact the global supply chain by mid-March' (2020) Harvard Business Review 28; P Chowdhury, S K Paul, S Kaisar and M A Moktadir, 'COVID-19 pandemic related supply chain studies: a systematic review: transportation research part E' (2021) Logistics and Transportation Review 102271.

111 Ibid.

112 C Bovis, 'The social dimension of EU public procurement and the "social market economy"' in D Ferri and F Cortese (eds), *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU* (Routledge 2018) 105; A Heinemann, 'Social considerations in EU competition law: the protection of competition as a cornerstone of the social market economy' in ibid 129.

This convergence nature suggests that public procurement seeks to harmonise 'behavioural norms' including legal efficiency, simplification and cross-border trade through the use of harmonised procedures and rules.[113] Furthermore, Bovis confirms that public procurement 'serves as a negation agent to state aid and competition regulation', which is firstly concerned with the promotion of a cross-border competition by respecting the fundamental freedoms and principles.[114]

While the two legal doctrines sit separately, competition and procurement are naturally interlinked activities. Sánchez-Graells suggests that a standalone 'principle of competition' is embedded in the Council Directives. This view implies that 'contracting entities must refrain from any procurement practices that prevent, restrict or distort competition'. This view has been similarly expressed by the Court of Justice of the European Union (CJEU) in the *Commission and Germany*: 'the principal objective of the Community rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States'.[115] It is still disputed as to whether 'competition' is a standalone principle of the Council Directives in the same manner as the fundamental Treaty principles of transparency, equal treatment and non-discrimination. However, as contracting authorities continue to procure from disrupted supply chains and the Commission plans to extend the use of coordinated procurement actions, public bodies must properly assess their role and responsibilities for engaging in activities that will not distort market competition. This is particularly important for large cross-border procurement healthcare projects concluded using the JPA or APAs, as such contracts have the potential to generate significant cost-savings through competitive tendering and price convergence.[116]

Currently, Decision 1082/2013/EU and Decision 4192/2020/EU do not instruct the JPA or APAs to be conducted in a transparent manner that promotes sustainable competition. Sánchez-Graells suggests that it is time to overhaul the legislation to harness the 'potential for digital technologies to accelerate' the use of procurement to effectively respond to future emergencies, in particular, future climate change-related emergencies.[117] Perhaps it is also timely to review if voluntary coordinated JPA and APA mechanisms should mirror the long-term strategic objectives of the Council Directives. In the meantime, as

113 Bovis (n 112 above). See also Trepte (n 10 above)123.

114 Bovis (n 112 above) 106.

115 Case C-480/06 *Commission v Germany*, EU:C:2009:357, [47].

116 Bovis (n 10 above) ix.

117 A Sánchez-Graells, 'Procurement and Commissioning during COVID-19: reflections and (early) lessons' (2020) 71(3) Northern Ireland Legal Quarterly 523–530.

supply chains are forecast to remain in a state of fluctuation for the remainder of 2022, contracting authorities should continue to make best use of the 'competitive procedure with negotiation', the 'innovation partnerships' and other forms of innovative procurements.[118] Contracting authorities should maintain or develop relationships with suppliers and potential suppliers to identify or develop solutions to any supply issues.

CONCLUDING REMARKS

It is time for procurement to return to normal. It is no longer appropriate for contracting authorities to rely on the emergency 'accelerated' provisions set out in the Council Directives to purchase medical supplies and other goods and services required to navigate the pandemic in Ireland and Northern Ireland. Fortunately, the threat of COVID-19 overwhelming health systems is dwindling and national emergency response measures are being gradually reduced. In line with these reductions, procurement procedures for medical equipment, such as PPE and ventilators, should resume as normal if they have not already done so. And for the most part these activities have returned to normal. However, if the virus makes a resurgence these provisions may be relied on again.

A more difficult question should be asked: should the rules be simplified in general? As briefly discussed above, prior to the COVID-19 pandemic, the Council Directives were subject to a number of criticisms. The objectives of the rules are often unclear and the procedures set out are often cited as being overly complex resulting in expensive and administratively burdensome tendering processes. The use of the emergency and direct award procedures during the first wave of the pandemic offered an unplanned experiment of simplified negotiated practices. The results of this experiment were mixed. Initially, Ireland and Northern Ireland struggled to purchase medical equipment due to global supply-chain disruptions. When the contracting authorities did secure the supplies, significant quantities did not meet the required health and safety standards. There was evidence of poor contract management, misspent funds and irregular practices being followed. There is limited evidence or research conducted to suggest that the rules should be relaxed to allow for continued use of the negotiated procedure without publication or direct

118 For a further discussion on innovative procurement see: L Georghiou, J Edler, E Uyarra and J Yeow, 'Policy instruments for public procurement of innovation: choice, design and assessment' (2014) 86 Technological Forecasting and Social Change 1–12.

awards for current contracts related to the pandemic.[119] Additionally, there is no evidence to suggest that there is a need to review the use of direct awards for non-COVID-related contracts to address these criticisms. However, the UK has indicated that, when it implements national procurement legislation to replace the Council Directives, it 'does not want to go beyond the minimal provisions of the WTO's Agreement on Government Procurement'.[120] It is hoped that the new rules will promote competitive tendering without placing burdensome administrative responsibilities on contracting authorities.

While it is time for procurement to return to normal, it is also pertinent for researchers and policymakers to assess the role of coordinated joint procurement actions. The use of the APAs to secure COVID-19 vaccines was less than desirable, the negotiation processes were conducted in secrecy and the contracts appear poorly managed, and in some cases, poorly executed. This research suggests that it is time to retire the use of APAs, and instead the Commission should consider relying on the JPA mechanism to purchase future vaccines and medical countermeasures. Moving forward, the EU should build on the success of the coordinated approach of competitive tendering and extend the use of the JPA to prepare for future cross-border health crises. Finally, as we move into a post-pandemic stage, it is timely for public bodies and the Commission to assess their roles and responsibilities for engaging in procurement activities that will not distort market competition and that will facilitate sustainable competition in the UK and the internal market.

119 There are several provisions contained in the rules to ease administrative burden, such as the use of electronic procurement to speed up timeframes.

120 Fahy et al (n 99 above).