



Şimal Efsane Erdoğan
PhD candidate
King's College London



Oana Ştefan
Reader, European Law
King's College London

Emerging Challenges to Public Procurement: COVID-19 and Regulatory Approaches to Public Contracting in the EU, the United Kingdom, and France^{*1}

Abstract. In recent years, the use of public procurement as a tool to manage the health crisis and, most recently, the Ukraine crisis, has raised concerns. In their efforts to fight the pandemic, as well as for palliation of the economic effects of lockdowns, Member States have implemented various procurement adjustments, and since 2020 we have seen the European Commission resorting to guidance that, in effect, puts in abeyance public procurement rules related to transparency, equality, and competition. Against this backdrop, the article reflects on the regulatory tensions stemming from the use of public procurement as a crisis management tool. Relying on comparative legal analysis, the article looks at the changes in public procurement spurred by the SARS-CoV-2 crisis in the EU, France, and the UK. The article expresses particular interest in evaluating the discretion left to the contracting authorities and the extent to which allowing such discretion can negatively influence public procurement principles such as transparency, legal certainty, equality, and open competition.

Keywords: public policy, comparative perspective, Europeanisation through law, Brexit, regulation, solidarity, governance, negotiated procedure without prior publication

1. Introduction

Every passing year witnesses a multitude of regional emergency situations and catastrophes that profoundly affect the lives of countless individuals. Recent examples include the devastating earthquakes that struck Türkiye in 2023, resulting in more than 50,000 casualties; severe floods and landslides in Pakistan in 2022, causing widespread destruction and displacement; and the bushfires in California in 2021 that left a trail of destruction in their wake. In the face of such regionally focused sudden-onset disasters, governments have

¹ The authors can be contacted at simal.erdogan@kcl.ac.uk and oana.stefan@kcl.ac.uk, respectively. This article states the law as it stood at the time of writing, June 2023. Authors have verified all online resources to be current as of 30 June 2023.

consistently acted swiftly to address the immediate needs of affected populations by providing fundamental supplies such as clean water, shelter, and food, which serve as crucial temporary relief for those affected by the catastrophes.^{*2} Not surprisingly, public procurement has always been one of the first tools to be resorted to by governments for crisis management in such times.^{*3}

In 2019, the coronavirus pandemic differentiated itself from any other national crises or regional disasters both in magnitude and in geographic reach, and it was categorised as a global health pandemic by the WHO.^{*4} In response to the unfolding crisis, governments all over the world simultaneously took extraordinary steps, including general lockdown measures and large-scale shutdown of economic activities of businesses, also closing their borders to other countries to mitigate the spread of the virus. One of the challenges of the pandemic involved being able to access healthcare products,^{*5} with devastating consequences for human lives.^{*6} This has disrupted public procurement unprecedentedly, reversing general assumptions that public procurement rules can allow governments to procure essential equipment in a fair manner and exposing massive inequalities between various parts of the world.^{*7} A much more long-term challenge of the pandemic is related to the inevitable blow to the economy and the snowball effects of the lockdowns and various restrictions, most recently accentuated by the Ukraine war and the economic sanctions imposed on Russia.

This article shows how the public-procurement-related legal framework is used and evolves as a crisis management tool. In the wake of the pandemic, public procurement rules were bent to facilitate purchasing of vital healthcare products without reliance on some of the essential procurement principles. Secondly, contracts already in place needed to be adapted to the new realities of COVID pandemic. Thirdly, centralised public procurement has been relied on at both the EU and the national level. The European joint procurement initiatives included, for instance, ensuring the supply of personal protective equipment (PPE) and an unprecedented centralised vaccine procurement. Joint initiatives emerged also at the national level, with centralised public procurement playing an important role. In France, the Government requisitioned PPE from the main body responsible for supplying materials for administration and public services (the UGAP), and the Île-de-France region set up a central procurement body to fight COVID-19.^{*8} These bodies also responded to private orders.^{*9} Fourthly, public procurement has been evolving in the Member States toward becoming an essential tool to stimulation of the economy, create jobs, and repair the damage caused by the pandemic. However, such a task is rendered difficult by the superposition of yet another crisis, the war in Ukraine.

In such circumstances, undertaking a comparative analysis of public procurement rules and their evolution is useful, to trace whether and how this field of law and its general principles may transform. The article explores the general EU framework, showing how contracting authorities^{*10} were authorised

² For a brief on national catastrophes, see Robert Handfield and others, 'Assessing State PPE Procurement during COVID-19: A Research Report' (2021) <<https://www.naspo.org/assessing-state-ppe-procurement-during-covid-19-a-research-report/>>.

³ See Robert N Katayama, 'Emergency Procurement Powers' (1969) 2 Pub Cont LJ 236.

⁴ Domenico Cucinotta and Maurizio Vanelli, 'WHO Declares COVID-19 a Pandemic' (2020) 91 Acta Bio Medica : Atenei Parmensis 157.

⁵ Talha Burki, 'Global Shortage of Personal Protective Equipment' (2020) 20 The Lancet. Infectious Diseases 785. – DOI: [https://doi.org/10.1016/s1473-3099\(20\)30501-6](https://doi.org/10.1016/s1473-3099(20)30501-6).

⁶ Ezekiel J Emanuel and others, 'Fair Allocation of Scarce Medical Resources in the Time of Covid-19' (2020) 382 New England Journal of Medicine 2049. – DOI: <https://doi.org/10.1056/nejmsb2005114>; Edward Livingston, Angel Desai and Michael Berkwits, 'Sourcing Personal Protective Equipment During the COVID-19 Pandemic' (2020) 323 JAMA 1912. – DOI: <https://doi.org/10.1001/jama.2020.5317>.

⁷ Laurence Folliot Lallion and Christopher R Yukins, 'COVID-19: Lessons Learned in Public Procurement: Time for a New Normal?' (2020) 3(3) Concurrences 46, 49.

⁸ Fanette Akoka and François Lichère, 'Central Purchasing Bodies in France' in Carina Risvig Hamer and Mario Comba (eds), *Centralising Public Procurement* (Edward Elgar 2021) 184. – DOI: <https://doi.org/10.4337/9781800370418.00019>; Île de France Smart Services – see <<https://smartidf.services/fr/industrie-solidarite-covid19>>.

⁹ S de La Rosa, 'La crise sanitaire du Covid-19 et la transformation du droit de la commande publique. Une perspective européenne : s'adapter à l'urgence' (29 April 2020) Le Club des juristes, Blog du Coronavirus <<https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/la-crise-sanitaire-du-covid-19-et-la-transformation-du-droit-de-la-commande-publique-une-perspective-europeenne-sadapter-a-lurgence>>.

¹⁰ Throughout this article, we will stick with the legal jargon used in 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 L094/65 ('the Procurement Directive'). According to Article 1 of the Procurement Directive, 'contracting authority' means 'the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law', whereas 'economic operator' means 'any natural or legal person or public entity

to suspend ordinary procurement procedures and purchase vital healthcare products without relying on fundamental procurement principles. As summarised by Sanchez-Graells, the early days of the pandemic marked the longest span of time since the beginning of the EU where public procurement was left unregulated.^{*11} This state of affairs has impacted other areas of EU law too, with public procurement falling short of providing European standards for the various goods such that the Commission and Comité Européen de Normalisation (CEN) allowed access to European standards for countering the shortfall of medical supplies, to facilitate an increase in production.^{*12} Centring its discussion at the national level, the article draws on a France–UK comparison. This is because France and the UK both have been severely impacted by COVID-19, with the two registering some of the highest mortality rates in Europe.^{*13} In the UK, the COVID-19 crisis was superposed upon Brexit, making for a very interesting case study since it allows us to explore both the changing legal framework and the inevitable influence of EU law at a time of crisis.^{*14} The tortuous process of Brexit was reflected also in pandemic-linked procurement, with high-profile court cases being currently decided that involve such major political players in Brexit as Dominic Cummings, former chief advisor to the Prime Minister of the United Kingdom. Similarly, several reports point to several public contracts awarded to economic operators chosen by way of the exceptional procurement rules, beyond public scrutiny, and without advertising and without being subjected to competitive tendering.^{*15} The French case study allows us to explore the way in which a legal system grounded in codes and established written law adapts to extraordinary circumstances. Also, France has been rather competitive in the COVID-linked procurement market and had the buyer power necessary to win in the fierce race among governments to secure essential supplies.^{*16} For example, with regard to purchasing prices, reports show that at the height of the pandemic, in March–May 2020, French authorities paid 50% less for FFP2 masks than the lowest average price secured by its Italian counterparts.^{*17}

Our research is looking mainly at the obvious case of procurement of medical equipment during the pandemic by individual states and the use of the negotiated procedure without prior publication. A brief analysis of the evolution of the procurement framework after the pandemic allows us to reflect on the use of public procurement as a tool to relaunch the economy, showing how the legal procurement framework was altered to achieve this goal. At the European level, such an objective was pushed by the Council in its Conclusions of November 2020,^{*18} with France recently taking legislative action in this regard. However, such an objective is currently rendered difficult by the ongoing Ukraine war. This is due, on one hand, to the shortage of certain products coming from that region and, on the other hand, to the economic sanctions imposed on Russia. With Russian businesses barred from benefiting from EU public money and, specifically, from accessing public procurement,^{*19} detailed guidance and instruction are being adopted at the national level.^{*20}

or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market’.

¹¹ Albert Sanchez-Graells, ‘Procurement and Commissioning during COVID-19: Reflections and (Early) Lessons’ (2020) 71 N Ir Legal Q 523. – DOI: <https://doi.org/10.53386/nllq.v71i3.882>.

¹² European Commission, ‘Coronavirus: European standards for medical supplies made freely available to facilitate increase of production’ (2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_502>.

¹³ At the time of writing, more than 228,000 deaths in the UK (according to the data provided by the official UK Government Web site – see <<https://coronavirus.data.gov.uk/details/deaths>>) and more than 160,000 in France (per data provided by the European Centre for Disease Prevention and Control – see <<https://www.ecdc.europa.eu/en/cases-2019-ncov-eueea>>)) had been recorded.

¹⁴ We evaluate only the procurement rules covering England, Wales, and Northern Ireland for the purposes of this article.

¹⁵ Gareth Davies, ‘Investigation into Government Procurement during the COVID-19 Pandemic – National Audit Office (NAO) Report’ (National Audit Office, 2020) <<https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>>.

¹⁶ Laurence Folliot Lallion and Christopher R Yukins, ‘COVID-19: Lessons Learned in Public Procurement: Time for a New Normal?’ (2020) 3(3) Conurrences 46, 49.

¹⁷ Gian Luigi Albano and Annamaria La Chimia, ‘Emergency Procurement: Italy’ in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in (a) Crisis?* (Bloomsbury 2022).

¹⁸ Council Conclusions: Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy 13352/20 (Brussels, 25 November 2020).

¹⁹ Article 1 (23) of Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine [2022] OJ L111, 8.4.2022.

²⁰ DAJ Fiche Technique ‘Mise en œuvre de l’interdiction d’attribuer ou d’exécuter des contrats de la commande publique avec la Russie’ <https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/fiches-techniques/crise/FT-Sanctions-Russie-Commande-publique150422.pdf?v=1651063140>.

We show that the evolution of the legal frameworks reflects a tension between, on the one hand, the necessity of ensuring flexibility and legal certainty in extraordinary circumstances, and, on the other hand, the need to preserve classic public procurement principles such as transparency, equality, and open competition. The latter principles have suffered overall amid the pandemic, pointing to concerns similar to those expressed by literature exploring the promotion of environmental or societal goals through public procurement.^{*21} This shows that whenever public procurement is used as a tool for anything other than the efficient allocation of public money, the resulting outcomes are controversial, complex, and fraught with difficulties.

The article proceeds as follows: The next part looks at the general EU framework of public procurement, applicable as a baseline throughout the Union, and the way it adapted during the pandemic. We examine the conditions of the negotiated procedure without prior publication and explain why this procedure is an exception to all procurement rules and principles and should be narrowly interpreted.^{*22} The third and fourth parts explore the UK and the French case studies before the article presents our final conclusions.

2. The legal framework for public procurement in the EU: Procurement procedure and standards for ordinary times and times of urgency

a. The role of general principles in EU public procurement law

The public procurement law of the EU regulates the purchasing behaviour of the public authorities within the Member States to some extent. The procurement rules originated from internal market integration as stipulated in the TFEU and from secondary legislation in the form of directives, covering several types of public contracts.^{*23} Just as any other liberal procurement system in the world, the body of regulation is primarily designed to protect taxpayers' interests and for the best use of public money, and to support the full functioning of the internal market. To this end, the procurement rules impose certain barriers on contracting authorities' behaviour and restrict their freedom – in other words, discretion – to choose economic operators by way of defining procedures and obligations to be followed before a contract is awarded. The main principles behind restricting contracting authorities' discretion can be found embedded in fundamental principles of the TFEU such as equal treatment and transparency, with de Mars arguing that the aggressive promotion of these principles by the CJEU has constrained the content of the procurement directives.^{*24}

The regulation of public procurement is deemed one of the main drivers of competition and a vital instrument for delivering public services in the EU.^{*25} Therefore, the cardinal tenet of the European public procurement regime is to help establish competitiveness in the internal market and eliminate all non-tariff barriers stemming from preferential purchasing practices of governments that may favour national undertakings.^{*26} In addition to the economic objectives sought through competitive procurement markets

²¹ Some scholars express the idea that horizontal objectives in public procurement distort the free market and eventually bring additional costs. See Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (Second edition, Hart Publishing 2015). For more on inclusion of social objectives in procurement and a regulatory welfare state, see Miriam Hartlapp, 'Measuring and Comparing the Regulatory Welfare State: Social Objectives in Public Procurement' (2020) 691 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 68. – DOI: <https://doi.org/10.1177/0002716220952060>.

²² See *Commission v Greece*, C-250/07, EU:2009:338, paras 34–39.

²³ The Procurement Directive and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L094/243; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L094/1. This article focuses on the Procurement Directive, which addresses the acquisition of work, supplies, or services by means of public contracts.

²⁴ Sylvia de Mars, 'General Principles in EU Public Procurement Law' in KS Ziegler, PJ Neuvonen, and V Moreno-Lax (eds), *Research Handbook on the General Principles of EU Law* (Elgar 2022). – DOI: <https://doi.org/10.4337/9781784712389.00036>.

²⁵ Christopher Bovis, 'The Priorities of EU Public Procurement Regulation' (2020) 21 *ERA Forum* 283, 283. – DOI: <https://doi.org/10.1007/s12027-020-00608-8>.

²⁶ Christopher Bovis, *EU Public Procurement Law* (Edward Elgar Publishing 2012) viii. – DOI: <https://doi.org/10.4337/9780857938428>. 'Undertaking' is the term used by the EU Treaties to refer to a business entity, and therefore it shall be used throughout this text.

as a way to achieve ever deeper integration and support the single market^{*27}, effective competition is another safeguard of protecting taxpayers' interests. To reach the desired level of competition for the proper functioning of the single market and uphold the principles of the TFEU, the legal principle of transparency and its corollaries, open competition and non-discrimination, need to be observed by the contracting authorities in the Member States.^{*28}

b. Procurement procedures in ordinary times

In line with such goals, the Procurement Directive recognises open and restricted procedures as constituting the ordinary procedure of procurement.^{*29} The procurement rules for ordinary times are designed to establish accountable governance standards for spending of public money, by enforcing competition and transparency requirements. Under these procedures, contracting authorities are asked to publish their contract opportunities in advance, so that these are transparent and visible to private entities and eventually attract as many economic operators as possible, providing equal opportunities to all players. Time is of the essence here, as the long period from the beginning to the end of procurement should give enough time to accommodate protection of the principles of transparency, equal treatment, and ultimately fair competition.^{*30} In the context of a crisis, however, time is a luxury contracting authorities do not have. Acknowledging that some days bring turbulence, the Procurement Directive allows deviations from the above-mentioned principles whereby the discretion of contracting authorities is restricted, and it provides a spectrum of procedural options that can be quicker to administer.

Below we briefly discuss the standards of public procurement procedures and restrictions on contracting authorities' discretion in 'extremely urgent' times.

c. Derogations under the Procurement Directive: Negotiated procedures without prior publication

Although the default procedure is an open and restrictive one, the Procurement Directive enables public authorities to derogate from standard rules in situations wherein this is justifiable, either by accelerating the process of buying to meet public needs or where some special procedures could be rendered more expedient via employment of some additional mechanisms. The Procurement Directive opens the way for permitting contracting authorities to conduct accelerated open, restricted, and negotiated procedures where urgency requires quick actions from governments.^{*31} As it can be easily deduced, the spectrum of non-ordinary procedures ranges from shortening the time frame of procurement to direct awarding. In parallel, each mechanism allows public authorities to deactivate some essential features and principles of public procurement and provides more flexibility and discretion in choosing economic operators. Eventually, by the gradual bypassing of rules, public procurement becomes more of a powerful crisis management tool free from restrictions imposed on public buyers.^{*32}

The unprecedented pandemic situation required the strictest rules to be put in place. Hence, many governments utilised the 'nuclear option' whereby public authorities need not advertise and were able to award contracts via directly negotiating with suppliers. This is the 'negotiated procedure without prior publication' option given to public authorities by the Procurement Directive under Article 32(2)(c).

²⁷ C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605.

²⁸ Kirsi-Maria Halonen and others, 'Transparency in EU Procurements: An Introduction' in Kirsi-Maria Halonen and others (eds), *Transparency in EU Procurements: Disclosure within Public Procurement and during Contract Execution* (Edward Elgar Publishing 2019). – DOI: <https://doi.org/10.4337/9781788975674.00007>.

²⁹ See articles 26, 27, and 28 of the Procurement Directive.

³⁰ Recital 46 of the Procurement Directive. Furthermore, Article 47 (1) of the Procurement Directive requires public authorities to set a certain time limit, irrespective of the minimum legislative requirement; Pedro Telles, 'Extremely Urgent Public Procurement under Directive 2014/24/EU and the COVID-19 Pandemic' [2022] *Maastricht Journal of European and Comparative Law* 4. – DOI: <https://doi.org/10.1177/1023263x221077006>.

³¹ Articles 27(3) and 28(6) of the Procurement Directive.

³² Telles (n 30).

The procedure puts to the side regular standards of transparency and competition, giving public authorities a wide discretion without them being constrained by such principles. In this procedure, public authorities can carry out the whole process nearly in secrecy until they decide to award the contract to an economic operator. Said procedure lacks *ex-ante* transparency, as it does not provide equal tendering opportunity and rules are not shared with the public in advance.^{*33} In parallel to the exceptional nature of this procedure, the lack of transparency jeopardises the principle of equal treatment between participants or potential economic operators and bypasses fair competition in the end. *Ex-post* transparency is nevertheless still ensured, with public authorities required to justify their decisions by providing procurement reports.^{*34} This is particularly important for auditing purposes in the context of COVID-19-related procurement – for seeing how public money has been spent.

Of course, given such severe restrictions on fundamental principles, the procedure is to be used only ‘in very exceptional circumstances’,^{*35} as also underlined by CJEU case law.^{*36} Therefore, the grounds from Article 32 must be narrowly interpreted^{*37}, and the reasons behind the sharp derogations from the ordinary procedures should be detailed sufficiently by the contracting authorities^{*38}; hence, Member States ultimately cannot extend the grounds for the application of this procedure or make the application of said procedure for contracting authorities more relaxed and easily available.^{*39}

The test for triggering Article 32 (2) (c) comprises three conditions, which must apply jointly. Firstly, a strict necessity must have arisen for the contracting authorities: the contracting authority must have no feasible solutions other than applying negotiated procedure without prior publication. It has been argued that the strict necessity test casts aside the full application of the proportionality test.^{*40} In other words, if a contracting authority would be able to fulfil its needs through accelerated open procedure rather than by directly awarding the contract to a specific economic operator, then that selection of the economic operator would fail the strict necessity test.

Secondly, the situation of ‘extreme’ urgency must involve events that are unforeseeable for the contracting authorities. Although the notion of ‘extreme urgency’ is not defined anywhere in the Procurement Directive, the directive sheds some light on the concept by describing the situations wherein an ‘immediate action’ is needed, and illustrates extreme urgency by citing natural disasters.^{*41} The emphasis on required immediate action legitimises derogations from the ordinary mode of procurement, which is lengthier than direct awarding. At the same time, this emphasis may mean that contracting authorities shall use this procedure only to aid with urgent needs that are present and immediate. The notion of unforeseeable events refers to situations that could not have been predicted by the contracting authority given the nature and characteristics of the specific project and good practice in the field in question.^{*42} Equally, assessing foreseeability is unclear. As some commentators argue, the foreseeability element of the extreme urgency

³³ Article 32(2)(c) of the Procurement Directive.

³⁴ According to Article 84(1)(f) of the Procurement Directive, for every public contract awarded via a negotiated procedure without prior publication, each of the contracting authorities issues a written report that shall cite the circumstances justifying the choice of this procedure. After the conclusion of a contract, contracting authorities should send the notices to the Publications Office. Nevertheless, the data gathered by Transparency International UK attest to an array of compliance performances. For instance, 55% of public contracts in the UK had their materials either not published by the recommended deadline or never published. See Transparency International UK, ‘Track and Trace: Identifying Corruption Risks in UK Public Procurement for the Covid-19 Pandemic’ (2021) 27 <<https://www.transparency.org.uk/sites/default/files/pdf/publications/Track%20and%20Trace%20-%20Transparency%20International%20UK.pdf>>.

³⁵ Recital 50 of the Procurement Directive; particulars are outlined in art 32.

³⁶ Case C-292/07 *Commission v Belgium*, EU: C: 2009:246, para 19; *Commission v Germany*, ECLI: EU: C: 1996: 149, para 13.

³⁷ C-275/08 *Commission v Germany* and C-352/12 *Consiglio Nazionale degli Ingegneri*.

³⁸ See also C-57/94 *Commission v Italy*, ECLI: EU: C: 1995: 150, para 23; C-318/94 *Commission v Germany*, ECLI: EU: C: 1996: 149, para 13; C-20/01 and C-28/01 *Commission v Germany*, ECLI: EU: C: 2003: 220, para 58; C-385/02 *Commission v Italy*, ECLI: EU: C: 2007: 445, para 19; C-26/03 *Stadt Halle and RPL Lochau*, ECLI: EU: C: 2005: 5, para 46; C-84/03 *Commission v Spain*, ECLI: EU: C: 2005: 14, para 48; Case C-394/02 *Commission v Greece*, EU: C: 2009: 338, para 33 and the Advocate General’s Opinion in its para 130.

³⁹ *Commission v Spain*, ECLI: EU: C: 2005: 14, para 48.

⁴⁰ Telles (n 30) 5.; Bogdanowicz, ‘Article 32’ in R Caranta and A Sanchez-Graells (eds), *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar 2021), para 32.21. – DOI : <https://doi.org/10.4337/9781789900682.00041>.

⁴¹ Per the Procurement Directive’s Recital 80.

⁴² P Bogdanowicz (n 40) para 32.22.

can be subjected to the diligence test as put forward in the *Fastweb* judgement.^{*43} Although the judgement dealt with the application of negotiated procedure without prior publication in circumstances of exclusivity rights, it still provides guidance for understanding the extent of the unpredictability test. In *Fastweb*, the CJEU questioned whether the contracting authority acted diligently. It held that, if a contracting authority acts diligently, then it may use this procedure but only provided that it also clearly discloses the reasons that convinced the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice.^{*44} This conclusion of the Court can be translated into practices wherein each contracting authority needs to show evidence explaining why it preferred the negotiated procedure without prior publication over other procedures and clarifying that it acted diligently.

The third and final requirement is that the state of extreme urgency not be attributable to the contracting authorities themselves. This requirement indicates that contracting authorities should assess whether the conditions are attributable to them. The question of how to assess the attributability is a subject of debate among commentators, as the legislation is silent about the conditions.^{*45} It has been posited that this requirement can be read together with the second requirement, which imposes an obligation of providing evidence as to the choice of procedure.^{*46} In a similar vein, Sanchez-Graells has put forward the idea that ‘the objective analysis needs to concern whether a reasonably informed and diligent contracting authority would have been able to avoid the extreme urgency or, in other words, whether the extreme urgency is attributable to the contracting authority actions or omissions, and not to external factors or third parties’.^{*47} Yet, in an unprecedented health crisis such as the COVID-19 pandemic, it is rather complicated to identify who is responsible for what, and the question becomes more complex when governments centralise their procurement to meet the ensuing needs. However, we posit that completely overlooking the attribution test solely because of the pandemic ignores the case law of the CJEU court and the legislation specifying that this exceptional procedure needs to remain exceptional and that the conditions need to be interpreted in a restrictive way.

It is evident from the wording of the Procurement Directive that the legislation leaves elbow room for contracting authorities at one point to use their discretion without constraint by transparency and competition in pressing times. However, it does so by foreseeing certain criteria still being met. Reading all the conditions cumulatively means that contracting authorities’ discretion is still restricted by certain standards and not every kind of urgency can be used as an excuse by those authorities. Whereas the letter of the law is clear and imposes very robust tests that are to be passed, we argue that soft law guidance failed to reflect the spirit of the law in the early days of the COVID-19 pandemic.

d. The soft law approach: Commission guidance on COVID-19-related procurement

The European Commission resorted to soft law to help uniform application of the procurement rules respond to the COVID-19 pandemic.^{*48} By so doing, the Commission aimed to accommodate healthcare product needs arising out of the pandemic within the range of flexibility provided under the Procurement Directive, and also it targeted fulfilling its responsibility to assist the Member States in tackling public health issues under the principle of solidarity.^{*49} By way of a preliminary note, it should be pointed out that the Commission enjoys discretion in issuing non-binding instruments to explain and interpret directives or regulations; however, this has to be done within certain limits. The Court has already decided that soft law

⁴³ Case C-19/13 *Fastweb*, EU:C:2014:2194, para 50; Telles (n 30) 7.

⁴⁴ *Fastweb*, para 48; also see Telles (n 30) 7.

⁴⁵ See Telles (n 30) and also A Sanchez-Graells, ‘More on Covid-19 Procurement in the UK and Implications for Statutory Interpretation’ (2020) <<https://www.howtocrackanut.com/blog/2020/4/6/more-on-covid-19-procurement-in-the-uk-and-implications-for-statutory-interpretation>>.

⁴⁶ Telles (n 30) 9.

⁴⁷ Sanchez-Graells (n 45).

⁴⁸ Communication from the Commission: 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 OJ C108I, 1.4.2020 (‘Guidance’).

⁴⁹ Roberto 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 - A Journal on Law and Integration* 365.

cannot add to the obligations written in hard law.^{*50} Our argument, in what follows, is that the Commission cannot annihilate, through soft law obligations written in hard law either. Even though soft law has no legally binding force, the fact that the Commission has, in practice, issued a blanket exemption from public procurement rules through its SARS-CoV-2-linked guidance is particularly problematic. This is because the guidelines, in effect, empower national authorities to disregard the strict requirements set out in the hard law framework.

In its guidance, the Commission rejects the idea of evaluating the contracting authorities' choice of Article 32(2)(c) on a case-by-case basis, by stating that 'for a situation such as the current COVID-19 crisis[,] which presents an extreme and unforeseeable urgency, the EU directives do not contain procedural constraints'.^{*51} The Commission appears to consider all contracting authorities under the same umbrella, thus eliminating the requirement for passing the attribution test as foreseen under Article 32(2)(c). The Commission reiterates its position throughout the 'Guidance' communication by stating:

These events and especially their specific development have to be considered **unforeseeable for any contracting authority**. The specific needs for hospitals, and other health institutions to provide treatment, personal protection equipment, ventilators, additional beds, and additional intensive care and hospital infrastructure, including all the technical equipment[,] could, certainly, not be foreseen and planned in advance, and **thus constitute an unforeseeable event for the contracting authorities**.^{*52} [emphasis added]

Such a wide, blanket approach to the pandemic is a legal slap in the face to the exception in Article 32(2)(c). The black letter law reality is that the extraordinary nature of the negotiated procedure without publication requires a narrow, case-by-case interpretation,^{*53} which would be more respectful to the principles of transparency and open competition. This is true for several reasons. The first is that the blanket approach offered by the Commission diminishes the foreseeability test whereby contracting authorities must show evidence that they acted in a diligent way to minimise the effects of urgency. Since the Guidance accepted the pandemic as presenting extreme and unforeseeable urgency for procurement purposes, it is clear that the Commission legalised the use of negotiated procedures without prior publication and this without emphasising the expectation for diligent behaviour from contracting authorities. Second, the Guidance declared that the pandemic was an unforeseeable event for any contracting authority without assessing the attribution test or evaluating whether or not said authority contributed to the negative impact of the COVID-19 pandemic.^{*54} Again, the approach taken by the Commission suggests that contracting authorities do not necessarily have to show evidence of their choice of procedure, as the Guidance does not differentiate contracting authorities from each other in this regard. In other words, the individual responsibilities of contracting authorities, whether they took part in emergency planning or acted diligently on time to take precautions against the pandemic, was completely overlooked in the preparation of the Guidance.^{*55}

Whilst the Commission has the discretion to interpret, through its soft law instruments, what is written in hard law, we find the guidance presented above problematic precisely because it puts into abeyance the existing hard law. Indeed, the procurement directives have been issued through the usual decision-making mechanisms at the EU level, respecting the expected legitimacy safeguards. The Guidance was published by the Commission without giving much information with regards to the decision-making process involved in its creation. For instance, there are no indications of whether public consultations were carried out. Such lack of public consultations is a characteristic quite usual for emergency soft law.^{*56} Yet, in the defence of this soft law approach, an argument can also be made that the pandemic was unforeseeable for each

⁵⁰ Case C-325/91 *France v Commission* [1993] ECR I-3283, para 31.

⁵¹ *Ibid*, para 2.

⁵² Guidance (n 48) 4 at para 2.3.1.

⁵³ Telles (n 30) 11 and Albert Sanchez-Graells, 'Procurement in the Time of COVID-19' (2020) 71(1) *N Ir Legal Q* 81, 83. – DOI: <https://doi.org/10.53386/nlq.v71i1.531>.

⁵⁴ Guidance (n 48) 4 at para 2.3.1.

⁵⁵ The novel coronavirus was first identified as such in the city of Wuhan, in China's Hubei Province, in December 2019, and the WHO declared the resulting outbreak a public health emergency in December 2020. For a timeline of the pandemic, see <<https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov>>.

⁵⁶ Mariolina Eliantonio and Oana Ştefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 *European Journal of Risk Regulation* 159. – DOI: <https://doi.org/10.1017/err.2020.119>.

contracting authority and government, and that in such context blanket exemptions are proportionate.^{*57} Such a blanket approach is perhaps conducive to more legal certainty for public buyers and winners of bids, vital in times of crisis. It is no secret that during the pandemic the market in the public procurement sphere shifted considerably and that, encountering conditions of scarce supply and fierce competition among states worldwide, suppliers would have chosen the most legally certain regime. An expectation that a contract won without publicity or competition will not be challenged successfully might be beneficial both for the contracting authority and for the supplier winning the bid. In other words, the guarantee of a quick and straightforward procedure might have been equally competitive to the proverbial government agent carrying suitcases full of cash.^{*58} We observe a certain tension here between, on one hand, the imperative to ensure fair and transparent decision-making and, on the other, the need for effective, fast, and clear regulation in times of crisis. Such tension between key principles can be observed at the national level too, as indeed transpired in the UK and France – which we examine in the two case studies addressed next.

3. The public procurement framework in the UK in the context of the COVID-19 pandemic

The public procurement framework of the only former member of the EU is a verbatim adaptation of the Procurement Directive and is regulated by the Public Contracts Regulations (hereinafter ‘the Procurement Regulation’).^{*59} Following in the footsteps of European legislation, the development of today’s procurement framework for the UK was designed to secure fair competition, transparency, and value for money. Public contracts for goods, work, and services valued at more than £10,000 must be publicly advertised, to enhance competition and equal treatment.^{*60} Also, in parallel with the Procurement Directive, the Procurement Regulation foresees the use of negotiated procedure without prior publication as an exceptional rule under Article 32(2)(c)-(4).^{*61} The conditions that need to be fulfilled such that contracting authorities may appeal to the negotiated procedure without prior publication are the same as the ones in the Procurement Directive.^{*62}

a. The soft law approach in the UK: The Cabinet Office’s note

Shortly before the release of the Commission’s Guidance, the UK’s Cabinet Office published its Policy Note on responding to COVID-19^{*63} (hereinafter ‘the PP01/20 Note’), a soft law instrument to guide contracting authorities in the early days of the pandemic in relation to their purchasing practices. The note explains the grounds for employing the negotiated procedure without prior publications. Compared to the European Commission Guidance, the note is lengthier, and more cautious language is preferred throughout the PP01/20 Note, such as ‘in responding to COVID-19, contracting authorities **may** enter into contracts without competing or advertising the requirement’^{*64} [emphasis added].

⁵⁷ T Kotsonis, ‘EU Procurement Legislation in the Time of COVID-19: Fit for Purpose?’ (2020) 4 Public Procurement Law Review 199.

⁵⁸ Shuki Sadeh, ‘In Israel’s Race To Get Medical Gear, Suitcases Full of Cash Win the Day’ Haaretz (24 April 2020) <<https://www.haaretz.com/israel-news/business/2020-04-24/ty-article/.premium/in-israels-race-to-get-medical-gear-cash-in-suitcases-wins-the-day/0000017f-f5cb-ddde-abff-fdef66060000>>.

⁵⁹ Public Contracts Regulation 2015. For the purposes of this article, procurement rules of Scotland will not be examined.

⁶⁰ Article 26(2) of the Public Contracts Regulation states that ‘contracts may be awarded only if a call for competition has been published in accordance with the Public Contracts Directive’.

⁶¹ The following language is employed: ‘The negotiated procedure without prior publication may be used for public works contracts, public supply contracts, and public service contracts in any of the following cases ... 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’, and for said purposes ‘the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority’.

⁶² See section 2.c as cited in n 61 (‘insofar...’).

⁶³ UK Cabinet Office, ‘Policy Note – Responding to COVID-19’ (March 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873521/PPN_01-20_-_Responding_to_COVID19.v5__1_.pdf>.

⁶⁴ PP01/20 Note, 3.

After pointing out the possibility of derogations from competition and transparency requirements, the PP01/20 Note clearly elucidates four conditions for using negotiated procedure without prior publication, by providing short clarifications. A holistic appraisal of the Cabinet Office's approach leads us to both positive and negative conclusions with regard to general principles. Beginning with the extreme and unforeseeable urgency requirement, the PP01/20 Note takes an approach similar to the Commission's and qualifies the COVID-19 pandemic as a case of extreme and unforeseeable urgency for the purposes of utilising negotiated procedure without prior publication.^{*65} To illustrate the extreme urgency requirement, the following language was chosen:

The events that have led to the need for extreme urgency were unforeseeable, eg: the **COVID-19 situation is so novel** that the consequences are not something you should have predicted.^{*66} [emphasis added]

The example shows that the Cabinet Office adopted a similarly questionable stance and characterises the coronavirus pandemic as a single instance of extreme and unforeseeable urgency. When it comes to assessing the attribution-test-related requirement under the extreme urgency exemption of the Procurement Regulation, the PP01/20 Note takes a different approach and provides more details. Accordingly, the note details the attribution test thus:

The situation is not attributable to the contracting authority, e.g.: you have not done anything to cause or **contribute to the need for extreme urgency**. ... Contracting authorities should ... keep a written justification that satisfies these tests^{*67} [emphasis added].

Furthermore, the note takes the emphasis on the attribution test one step further and stresses that

'[...] a contracting authority's **delay or failure to do something** is likely to mean that the situation is attributable to the contracting authority' (emphasis added).

Translating this suggestion of the PP01/20 Note into practice, we conclude that the emergency preparedness of contracting authorities, the timeliness of their decisions, and so on are recommended for consideration as the attribution test requires. The specific emphasis on the attribution test connected with the negotiated procedure without prior publication and emphasis on separate assessments for each procurement decision are more than welcome for the sake of transparency.

Yet practice proved to be different. Some negative audit reports were followed by a series of litigation challenging the government's first reactions to pandemic-related procurement. At the same time, the post-Brexit change in public procurement rules includes some substantial provisions regarding future crises.

b. Public procurement litigation in the UK

The UK government initially responded to the pandemic by attempting to obtain herd immunity and delaying nationwide lockdown measures until the end of March 2020.^{*68} Unsurprisingly, the rapid circulation of the virus caused the number of cases and deaths on the island to soar. Under the shadow of criticism over the government's pandemic policies in the press, the exponential rate of increase in the number of cases eventually required immediate healthcare supplies and, thereby, prompted the government to find innovative and expeditious purchasing mechanisms to regain the lost time by making recourse to direct negotiations with suppliers.^{*69} Numerous issues in relation to circumventing the ordinary mode of procurement and using direct solicitation were raised and brought before the judiciary, in several cases,

⁶⁵ PP01/20 Note, 3–4.

⁶⁶ PP01/20 Note, 4.

⁶⁷ Ibid.

⁶⁸ See Barry Colfer, 'Herd-Immunity across Intangible Borders: Public Policy Responses to COVID-19 in Ireland and the UK' (2020) 6 European Policy Analysis 203. – DOI: <https://doi.org/10.1002/epa2.1096>.

⁶⁹ See Holly Ellyatt, 'Lawmakers Slam UK's Covid Response, Say "Herd Immunity" Strategy a Public Health Failure' (CNBC, 12 October 2021) <<https://www.cnbc.com/2021/10/12/uks-herd-immunity-covid-strategy-a-public-health-failure-inquiry.html>>; Ed Yong, 'The UK's Coronavirus "Herd Immunity" Debacle' *The Atlantic* (16 March 2020) <<https://www.theatlantic.com/health/archive/2020/03/coronavirus-pandemic-herd-immunity-uk-boris-johnson/608065/>>.

among them *R (GDL) v Secretary of State for Health and Social Care* and *R (GLP) v Minister for the Cabinet Office*.^{*70} These cases are particularly important in that with them the UK judiciary tested the grounds for using public procurement under the rules for extremely urgent procurement.

The *R (GDL) v Secretary of State for Health and Social Care*^{*71} case concerned, among others, the Department of Health and Social Care, which applied the 'High Priority Lane' or so-called VIP Lane for quick awarding. The High Priority Lane allowed interested suppliers to be quickly considered for the award of contracts, provided that a referral from government officials, ministers, or members of the parliament existed. Among other things, the interpretation of the authorisation to use negotiated procedure without prior publication on grounds of extreme urgency and its limits were negotiated in that case. Most notably for this article, it seems that the High Court favoured the blanket approach used in the soft law instruments and confirmed that the pandemic was indeed an unforeseeable event for all contracting authorities; therefore, the grounds listed in Article 32(2)(c) were considered met without necessarily having to be met by each contract.

In *R (GLP) v Minister for the Cabinet Office*^{*72}, the civic organisation the Good Law Project challenged the Cabinet Office's decision to award a contract to a company called Public First, founded and directed by persons having ties to then Chief Adviser to the Prime Minister Dominic Cummings, one of the key names behind the Brexit campaign. The contract was directly awarded, with no advertising or competition procedure in accordance with the Procurement Regulation. The Good Law Project brought judicial review claim over the decision based on arguments, among other things, that there was no extreme urgency, the work having been possible via other procedures, and the contract's length exceeding what was strictly necessary under Article 32(2)(c).^{*73} The High Court declared the contract unlawful for reason of the appearance of bias. The Court of Appeal overturned the High Court's decision and held that, since the grounds for using the negotiated procedure without prior publication applied, consideration of other suppliers was not required. Most importantly for the purposes of this article, the Court of Appeal rejected the claimant's strict necessity arguments on the basis of Article 32(2)(c).^{*74}

c. Audit reports

The increased flexibility given to the governments in their procurement decisions also attracted media attention to such purchases, with the UK government having spent millions on health equipment. Although the effects of external media pressure are hard to assess, one thing is clear: the early days of CoViD-related procurement ended up subjected to numerous investigations by the National Audit Office (NAO).^{*75} The data presented in the NAO report represent that 95% of public spending in this time until July 2020 was carried out through direct contracting without any competition.^{*76} This is confirmed by EU data retrieved from the Tenders Electronic Daily database for between 1 February 2020 and 31 December 2020. Whilst in Europe open procedures still prevailed during the pandemic, the UK is a curious case, with 357 negotiated

⁷⁰ Sue Arrowsmith and Luke Butler, 'Emergency Procurement and Regulatory Responses to COVID-19: The Case of [the] United Kingdom' in Sue Arrowsmith and others (eds), *Public Procurement in (a) Crisis ? Global Lessons from the COVID-19 Pandemic* (Hart 2021) 367. – DOI: <https://doi.org/10.5040/9781509943067.ch-015>.

⁷¹ *R (Good Law Project Limited, Everydoctor) v The Secretary of State for Health and Social Care and Crisp Websites Limited (t/a Pestfix), Clandeboye Agencies Limited, Ayanda Capital Limited* [2022] EWHC 46 (TCC). The Good Law Project's appeal claim was refused on all grounds by Lord Justice Coulson on 29 April 2022.

⁷² *R (The Good Law Project) v Minister for the Cabinet Office and Public First Limited* [2021] EWHC 1569 (TCC), later appealed: *R (The Good Law Project) v Minister for the Cabinet Office and Public First Limited* [2022] EWCA Civ 21.

⁷³ Arrowsmith and others (n 71) 367.

⁷⁴ *R (The Good Law Project) v Minister for the Cabinet Office and Public First Limited* [2022] EWCA Civ 21, para 89.

⁷⁵ NAO, 'Report by the Comptroller and Auditor General: The Supply of Personal Protective Equipment (PPE) during the COVID-19 Pandemic' HC 961 Session 2019–2021 (25 November 2020); NAO, 'Report by the Comptroller and Auditor General: Investigation into How Government Increased the Number of Ventilators Available to the NHS in Response to COVID-19' HC 731 Session 2019–2021 (30 September 2020); NAO, 'Report by the Comptroller and Auditor General: Investigation into Government Procurement during the COVID-19 Pandemic' HC 959 Session 2019–2021 (26 November 2020); House of Commons Public Accounts Committee, 'COVID-19: Supply of Ventilators – Twenty-Seventh Report of Session 2019–21 Report, Together with Formal Minutes Relating to the Report' HC 685 (16 November 2020).

⁷⁶ See <<https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>> (especially 21). For detailed analysis of the report, see Pedro Telles, 'Fisking the UK Government Response to the NAO Report on COVID Procurement' (Telles EU, 24 November 2020) <<http://www.telles.eu/blog/tag/public+procurement>>.

procedures without a call for competition and only 33 open procedures organised.^{*77} The NAO has repeatedly raised concerns about several controversy-raising issues surrounding the direct and quick awarding of contracts by the Cabinet Office, including contracting authorities neglecting to produce documents and spending excessive amounts of money on equipment that was not fit for purpose.^{*78}

d. A new Procurement Bill after Brexit

As stated above, the current legislation, which served in combating the pandemic, is a verbatim adaptation of the Procurement Directive. This will not be the case for much longer, however.^{*79} The COVID pandemic coincided with the time in which the UK was parting from the EU. In one part of Brexit, the UK government underwent a complete overhaul and promised ‘to move away from the complex EU rules-based approach that was designed first and foremost to facilitate the single market’ with the new Procurement Bill (hereinafter ‘the Bill’).^{*80} At the time of writing, the Bill is in its final stages before Royal Assent. This legislative change is extremely noteworthy for this article’s argument, as it offers a close look at how emergency procurement procedures may be transformed by the Bill as proposed.

As part of cutting off ties with the EU *acquis*, the Government published its Green Paper ‘Transforming Public Procurement’ on 15 December 2020 in efforts to modernise procurement rules and to simplify procedures.^{*81} One selling point of its new proposal, among others, was the aim to ‘cut the red tape’ and bring more transparency and competitiveness to procurements during emergencies by bringing ‘effective crisis procurement’.^{*82} The pandemic was still ongoing when the Green Paper was issued, so the UK government had an opportunity to reflect on some initial lessons learnt from a year’s pandemic experience. The Green Paper acknowledged that the pandemic had ‘underlined the need for an effective regulatory regime for public procurement’, pointing out further structural changes desired for the existing legislation.^{*83} With reference to shortcomings of the EU procurement rules in place, the Cabinet Office proposed including crisis as new grounds for application of limited tendering and requiring public authorities to publish ‘transparency notices’ if they rely on grounds of crisis or extreme urgency.^{*84} The current European regime is frequently criticised for giving too much unrestricted discretion to public authorities in emergencies.

Stakeholders were mostly supportive of the new proposal of the Cabinet Office but expressed reservations as to appealing to crisis as grounds for limited tendering.^{*85} According to the report published by the Cabinet Office, there were concerns about the process for the declaration of a crisis, the scope of the term ‘crisis’, and whether these grounds would cause an additional delay to urgent procurements.^{*86} Against the Cabinet Office’s initial offering, the crisis procurement concept did not receive praise from the

⁷⁷ Luís Valadares Tavares and Pedro Arruda, ‘Public Policies for Procurement under COVID-19’ [2021](3) European Journal of Public Procurement Markets, 22–23. – DOI: <https://doi.org/10.54611/cuin2767>.

⁷⁸ For discussion of similar problems in the EU, see Staffan Dahllöf and Adriana Homolova, ‘Billions of Euros, Millions of Faulty Masks, and No Answers’ (EUobserver, 4 November 2020) <<https://euobserver.com/health-and-society/149898>>. Also see UK Department of Health and Social Care, ‘Annual Report and Accounts 2020–2021’ <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052421/dhsc-annual-report-and-accounts-2020-2021-web-accessible.pdf>.

⁷⁹ Further, the government has announced that the sunset for all EU laws retained will be on 31 December 2023 in accordance with the Retained EU Law (Revocation and Reform) Act 2023. After agreement by both Houses on the text for the Retained EU Law (Revocation and Reform) Act, Bill 2022 received Royal Assent on 29 June 2023. The bill thus became an Act of Parliament (a law).

⁸⁰ Cabinet Office, ‘Transforming Public Procurement: Government Response to Consultation’ (December 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038516/Transforming_Public_Procurement_-_Government_response_to_consultation.v3_.pdf> (‘Response to Green Paper’).

⁸¹ Cabinet Office, ‘Transforming Public Procurement’ (December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943946/Transforming_public_procurement.pdf> (‘Green Paper’).

⁸² Cabinet Office, ‘New Plans Set Out To Transform Procurement, Providing More Value for Money and Benefitting Small Business’ (Cabinet Office News Release of 20 December 2020) <<https://www.gov.uk/government/news/new-plans-set-out-to-transform-procurement-providing-more-value-for-money-and-benefitting-small-business>>.

⁸³ Green Paper (n 81) para 21.

⁸⁴ Green Paper (n 81) paras 78–81 and 213–216.

⁸⁵ Response to Green Paper (n 80) paras 94–97.

⁸⁶ Response to Green Paper (n 80) para 100.

stakeholders. In its response, the Cabinet Office stated that they would move away from the term ‘crisis’ and instead would give additional power to a Minister of the Crown to declare when action is necessary to protect life and allow contracting authorities to engage in procurement without having to meet all tests connected with the current ‘extreme urgency’ grounds.^{*87}

Nearly six months later, the Procurement Bill was published, on 26 May 2022, and the text underwent some changes in the process of the Bill moving through the various steps of legislation in Parliament. In the current form of the Bill, published on 14 June 2023, direct awarding without prior publication is rebranded as to be used in special cases and in circumstances that involve protecting life, etc.^{*88}

The new proposed rules state:

(1) If a Minister of the Crown considers it necessary, the Minister may by regulations provide that specified public contracts may be awarded under section 41 as if a direct award justification applies.

(2) In subsection (1), ‘necessary’ means necessary to— (a) protect human, animal or plant life or health, or (b) protect public order or safety.

In addition, public authorities would have to publish the above-mentioned transparency notices, setting out their intention to award a direct contract, with the content and form of such notices being left to the relevant authorities.^{*89}

It is evident that the bulk of the rules and conditions for emergency procurement remained similar to the EU rules while notification is made mandatory and a specific set of grounds for direct awarding is established.^{*90} Clearly, the pandemic played a decisive role in the creation of a new category of rules distinct from the body of the Procurement Directive of the EU and the current Procurement Regulation in the UK.^{*91}

4. The public procurement framework in France

France implemented Directive 2014/24/EU through a decree in 2016.^{*92} Since 2019, the ‘Code de la commande publique’ (hereinafter ‘the Public Procurement Code’) has been in force in French law, where it compiles rules on concessions and public procurement, including public/private partnerships. In terms of general ethos, the legislation reaffirms the principle of awarding contracts to the party making the economically most advantageous tender. However, the criteria for awarding contracts are numerous, with environmental and social criteria promoted by French procurement regulation since 2004. The Climate and Resilience Act^{*93} requires that by 2026 public procurement contracts include environmental and social clauses.

With regard to situations of urgency, French law provided for a long time that the urgency should be external to the buyer.^{*94} Two situations need to be distinguished: simple urgency can lead to a mere simplification of procedures, whilst extreme urgency can lead to a waiver of the publicity requirement. For cases of simple urgency, the French Public Procurement Code provides for a reduction of the period required for consultation. The burden of proof related to urgency rests with the buyer, yet the code does not require this urgency to be **external** to the buyer.^{*95} Some transparency / good administration duties are articulated by the legal framework, such as the obligation to state the reasons for urgency in the notice of the tender,^{*96}

⁸⁷ Response to Green Paper (n 80) para 102.

⁸⁸ Articles 41 and 42 of the Draft Procurement Bill.

⁸⁹ Draft Procurement Bill, art 44.

⁹⁰ Chapter 3 of art 40(5)(d), on direct award in special cases.

⁹¹ The first reading of the draft bill was held in the House of Lords on 11 May 2022 and proceeded in the House of Commons for further amendments. The draft bill went through its report stage and third reading on Tuesday, 13 June 2023. The House of Commons passed the draft with amendments. At the time of this writing, 30 June 2023, said bill is with the House of Lords, awaiting consideration of Commons amendments.

⁹² Decree of 25 March 2016.

⁹³ Of 20 July 2021.

⁹⁴ Per the ‘Code de marchés publics’, now abrogated.

⁹⁵ CCP, arts R.2161-3, R.2161-6, R.2161-8, R.2161-12, and R.2161-15.

⁹⁶ DAJ Fiche Technique : ‘MINEFI, « Comment utiliser les formulaires europeens ? », mise à jour le 1er avril 2019’.

to notify of the rejections, and to state reasons for them^{*97}; a standstill obligation for judicial protection reasons^{*98}; and, finally, the drawing up of a report in accordance with the European rules.^{*99}

With respect to extreme urgency, the Public Procurement Code exempts both concessions^{*100} and public procurement^{*101} from the publicity requirement. The code transposes the European rules regarding the negotiated procedure without publication in Article R.2122-1, noting that this procedure is limited to what the emergency situation necessitates. Accordingly, the buyer may launch a public procurement procedure without publicity **or competitive bidding** in cases of extraordinary urgency resulting from external circumstances that could not have been foreseen by the buyer and that do not allow the buyer to respect the deadlines provided for by the law. The code also supplies a non-exhaustive list of examples, such as the execution in emergency of certain work mentioned in the Public Health Code and the Construction and Housing Code. The Code de commande publique allows more leeway in cases of extreme urgency, in the event of which public buyers may undertake procurement without publicity or competition, whereas the European Directive terms mention only the negotiated **procedure without publication** for such cases. According to articles R.2112-17 and R.2312-13 of the Public Procurement Code, extreme urgency can also justify conclusion of contracts with a provisional price.

The hard law framework in France provided for enough flexibility to weather a pandemic; however, supplementary explanations were needed to bring clarity, especially given the complex set of contractual sanctions that can apply should the contract not be fulfilled. In this light, clarification as to the application of the criteria for *force majeure* was vital. The three conditions for *force majeure* are the unpredictability of the event, the event being external to the parties, and the irresistibility of the event (in other words, this is the ‘attribution’ test as described above). Whilst it is quite straightforward to determine that the pandemic fulfilled the first two conditions, the third condition needs to be assessed on a case-by-case basis.

a. The soft law approach in France

France had two main ‘sanitary emergency’ periods, one in March–July 2020, the second from 17 October 2020 to 1 June 2021. The first procurement instrument issued by the authorities was a ‘fiche technique’ prepared by the legal service of the Finance and Economy Ministry in the wake of the lockdown measures imposed on the 16th of March 2020. The fiche recognised that the pandemic was a *force majeure* event. This was ‘without prejudice to future provisions that might be adopted by emergency legislation’.^{*102} With regard to the conditions for *force majeure*, the document expressly states that the pandemic was not foreseen and was external to the parties but also points out that it needs to be checked, on a case-by-case basis, whether any failure to fulfil contractual obligations is due to the sanitary crisis and, in particular, to lockdown. The document reiterates the Government recommendation to public buyers to admit that the difficulties encountered by their partners might be due to *force majeure*. However, this does not remove the possibility of a case-specific analysis concluding that the pandemic does not preclude certain obligations being fulfilled, which means that providers needed, at least theoretically, to be vigilant.

Similarly, the fiche also interprets the Public Procurement Code – namely, Article R.2161-8 and Article R.2122-1, allowing for shortened publication periods as well as the engagement of the procedure without publicity and competition requirements. There is also a reminder that orders pursuant to such procedures are only to be made for the prices and the term strictly necessary to satisfy urgent needs.

All this somehow is an attempt to reconcile the need for legal certainty that the pandemic will be recognised as a *force majeure* event with the need to ensure public procurement principles of transparency, legal certainty, and competition, even in situations of crisis. Yet such a ‘fiche technique of the Direction Affaires Juridiques’ is merely an information document, with no legally binding force, which could eventually fall in the wide category of ‘soft law’ we identify at the European level. What is more, it is quite difficult

⁹⁷ CCP, arts R.2181-1 and R.2181-6.

⁹⁸ ‘Code de justice administrative’, L. 551-1ff.

⁹⁹ CCP, art R.2184-1.

¹⁰⁰ CCP, art R.2122-1 (on ‘marches classiques’) and art R.2322-4 (on ‘marches de defense et securite’).

¹⁰¹ CCP, art R.3121-6, 3°.

¹⁰² See <https://www.economie.gouv.fr/files/files/directions_services/daj/fiche-passation-marches-situation-crise-sanitaire.pdf>.

to determine how this carefully drafted text adds something or clarifies anything of the legal framework. Hard(er) law was soon authorised, when France passed law 2020-290 of 23 March 2020, allowing the Government to take measures in order to fight the pandemic. Namely, the law calls for ordinances to 'adapt the rules concerning the award, the payment deadlines, the execution and termination, especially those related to penalties, provided in the Public Procurement Code'.

b. Law hardens

Issued on the mandate of Law 2020-290, Ordinance 2020-319, of 25 March 2020^{*103}, provided that special adjustments can only be introduced if they are necessary for coping with the pandemic and with the restrictions imposed by the pandemic, whereby the **default** applicable provisions remain those of the Public Procurement Code. Interestingly, there is no presumption of *force majeure*, which needs to be qualified on a case-by-case basis (and no reference to 'urgency' is made in the decree on specific COVID-related measures accompanying Law 290).^{*104} The burden is on the authorities and on the economic operators to prove that they are encountering difficulties due to the pandemic and that prevent them from following the normal procedures or following the normal manner of execution of contracts. This case-to-case approach appears to defeat the objective of clarity and legal certainty, which the ordinance was supposed to follow.^{*105} However, this cautious approach allows the necessary flexibility to protect such principles in times of crisis. For example, public authorities 'can', according to Article 3 of the ordinance, adjust the conditions of competition for public procurement as provided for in the Public Procurement Code in the event that it is impossible to respect such conditions. The public authorities appear to have freedom in this regard, provided that they can justify their choice and that it respects equal treatment.

The ordinance established various adjustments, such as extending the term of contracts already in place, allowing subcontractors, and even providing for aid measures. The ordinance also allows such adjustments to existing procedures as postponing deadlines for application and adapting the selection procedures to the exigencies of the lockdowns. Finally, the ordinance limits the sanctions in cases of non-execution due to *force majeure*, thus adapting public procurement further.^{*106} As pointed out in the literature, the smart use of sanctions and enforcement is important, as strict sanctions might deter providers from participating to bids, which could have been catastrophic amid the pandemic's conditions of scarce supply.^{*107}

This ordinance does not necessarily deal with new procedures – or indeed with the procedure without competition or publication – thus leaving the explanations of the *fiche technique* as to the notion of urgency standing and allowing for full application of the Public Procurement Code in this regard. However, a wave of relaxation of public procurement rules has occurred in France since the COVID pandemic. A set of these involves raising the threshold for publicity and competition. Such an increase in thresholds started even before the pandemic, with its first increase being from 25K euros to 40K euros in January 2020.^{*108} This was followed by a COVID-related temporary increase to 75K euros for public works, public supplies, and foodstuffs,^{*109} then, finally, by an increase to 100K euros for public works until 31 December 2022.^{*110} Pandemic-related adjustments were made by other instruments too, specifically by Ordinance 2020-391, entrusting certain duties related to the organisation of public procurement to executives at the local level (rather than deliberative structures) and thus speeding up the decision-making process. This could, in turn,

¹⁰³ 'Ordonnance n° 2020-319 du 25 mars 2020 portant diverses mesures d'adaptation des règles de passation, de procédure ou d'exécution des contrats soumis au code de la commande publique et des contrats publics qui n'en relèvent pas pendant la crise sanitaire née de l'épidémie de covid-19, JO 26 mars 2020, texte 43', modified by art 20 of Ordinance 2020-460, of 22 April 2020.

¹⁰⁴ 'Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire.'

¹⁰⁵ Mathias Amilhat, 'La commande publique face au COVID-19 : dans l'attente de mesures réellement efficaces' [2020] *Journal du Droit Administratif* <<http://www.journal-du-droit-administratif.fr/la-commande-publique-face-au-covid-19-dans-l-attente-de-mesures-reellement-efficaces/>>.

¹⁰⁶ Ibid.

¹⁰⁷ Laurence Folliot Lallion and Christopher R Yukins, 'COVID-19: Lessons Learned in Public Procurement: Time for a New Normal?' (2020) 3(3) *Concurrences* 46, 49.

¹⁰⁸ 'Décr. n° 2019-1344 du 12 déc. 2019, JO 13 déc.'

¹⁰⁹ 'Décr. n° 2020-893 du 22 juill. 2020, JO 23 juill.'

¹¹⁰ 'Amtd n° 1106 (rect.)', 24 September 2020.

be problematic from the standpoint of legitimization of these measures and also, certain authors argue, the efficiency of the procedures.

c. Beyond COVID?

French legislation and judicial practice is in a process of ongoing adaptation to the various current crises, not only post-COVID but also during the Ukraine war. For instance, the Conseil d'Etat has clarified, at the request of the Government, the possibility to revisit financial clauses in contracts impacted by the current economic situation if the partner public authority agrees. In writing its opinion, the Conseil d'Etat relies on European legislation on public procurement, as well as on EU case law.^{*111}

Further relaxation of procedural rules for public procurement was performed through legislation – namely, the Act on the acceleration and simplification of public action ('ASAP').^{*112} Accordingly, construction contracts under 100,000 euros were exempted from publicity and competition requirements (until the end of 2022), yet, as the Constitutional Council reminded, public buyers have to respect the principle of equality and good use of public money as mentioned in Article L3 of the Public Procurement Code.^{*113} Article 131 of the Act complements the Public Procurement Code^{*114} with a supplementary reason for suspending prior publicity and competition rules, namely if such a procedure would be contrary to the public interest. Yet, assessing this reason is not left to the discretion of the buyers but, rather, it falls within the powers of the regulator. Moreover, the measures taken must be precise and proportionate, in order to respect constitutional requirements, and shall cover only actions falling outside the scope of application of EU law. This measure is in line with the Council Conclusions of November 2020, which elevated public procurement to the status of an essential tool to relaunch the economy, create jobs, and repair the damage caused by the pandemic. Article 132 of the ASAP law generalises the measures provided for in the CoViD ordinance by adding two new books to the Public Procurement Code, with specifications for specific emergency measures, hence increasing preparedness for future crises. These measures shall be activated by decree and only pursuant to specific delegation provided for by a legislative measure. The principles of ensuring fair competition and equality, even in emergency circumstances, are expressly enshrined in Article L 2711-3 and Article L3411-3 of the code.

The ASAP law and its relaxation of public procurement rules were needed in order to save failing undertakings. As noted in the literature, the objectives for public procurement, aimed at protecting the interest of public buyers, are not always in harmony with the objective of saving failing undertakings.^{*115} Yet the ASAP law eases the access of such undertakings to public procurement, allowing firms that have a rescue and restructuring plan to proffer bids. This possibility did not exist before the pandemic and was introduced by Ordinance 2020-738 of 17 June 2020. Undertakings subject to a rescue and restructuring plan can be partners in public procurement contracts for a ten year term, which is likely to help companies suffering long-term effects of the COVID-related restrictions and difficulties. However, the devil is in the detail, as the undertakings would still need to satisfy the criteria set for the procurement they apply for and must win the competition with the other tenders (this suggests that the general public procurement principles should not be diverged from). At the same time, the ASAP law extends and better streamlines the rule that a public buyer cannot terminate a contract merely because the partner is an undertaking in difficulty / subject to a judicial reorganisation procedure.

The aim to relaunch the economy seems prioritised over equal treatment and transparency. However, provision is made that the public buyers need to make sure they choose an appropriate offer, make good use of public money, and do not systematically choose the same operator in cases featuring a plurality of offers.^{*116} Notions such as 'appropriate offer' or 'good use of public money' are rather fluid, and their precise legal boundaries will probably be left to judicial interpretation. With regard to the obligation not

¹¹¹ Opinion N 405540 of the Conseil D'Etat, 15 September 2022.

¹¹² 'LOI n° 2020-1525 du 7 décembre 2020 d'accélération et de simplification de l'action publique JORF n°0296 du 8 décembre 2020.'

¹¹³ 'Cons. const., déc. n° 2020-807 DC du 3 décembre 2020', pt 57.

¹¹⁴ Articles L2122-1 and L2322-1.

¹¹⁵ Grégory Kalfleche and Francine Macorig-Venier, 'Loi ASAP, entreprise en difficulté et commande publique'.

¹¹⁶ Article R.2122-8.

to systematically choose the same operator in cases of a plurality of offers, it is not difficult to imagine a certain scenario of collusion between operators to ‘take turns’ in winning public bids, especially in remote and small communities.

5. Concluding remarks

This article explored regulatory responses of governments in procuring under extreme urgency situations and offered evidence from the EU, the UK, and France. What emerges from the exploration of the regulatory framework is a mix of soft and hard law used to various degrees in the different jurisdictions. Whilst the European Union and the UK decided to resort to soft law to relax public procurement, France used soft guidance only to a limited extent, partly because rules addressing public procurement (including urgency clauses) have been established in hard codes and legislation. Challenges to core general principles such as transparency and equal treatment are present, though, however soft or hard the legal framework is, and they surface in requests for judicial review, as exemplified in some high-profile UK cases.

As we have reiterated throughout this article, we argue that the grounds for the negotiated procedure without prior publication should be interpreted narrowly as the case law suggests and as the nature of the rule requires. In contrast, we observed varying degrees of compliance with the letter of the law in the soft law instruments of the EU, the UK, and France. If we were to accept the approach of the Commission as suitable for the spirit of the times, it can be deduced that Article 32(2)(c) gains a whole new meaning under a health crisis – a meaning that is not found directly written down or implied under either the hard law or case law pertaining to procurement. Our conclusion is supported by the findings from the UK in particular. Although UK case law did endorse the vague approach taken in the soft law instruments, it is evident from recent legislative development of the UK in which the government proposed the ‘crisis’ / ‘procurement to protect human life’ concept that the gap between the rules and practice was a huge one to fill with current legal tools. One principle that stands out in the wake of the use of public procurement amid the pandemic is transparency. This can and should be ensured during the crisis but also *ex post*, through publication of relevant information. As the literature argues, such a task is made even easier in a digitalised world, wherein procurement activity can and should be traceable online.^{*117}

As for the way forward, public procurement reforms are being put in place in order to accommodate the revival of the economy, which might be conflictual with principles regulating other areas of law, such as bankruptcy. Matters are complicated further by the circumstances of economic sanctions, which, beyond any considerations related to efficacy, raise tricky administrative questions about their implementation at the national level.

¹¹⁷ Laurence Folliot Lallion and Christopher R Yukins, ‘COVID-19: Lessons Learned in Public Procurement: Time for a New Normal?’ (2020) 3(3) *Concurrences* 46, 52.