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Telles, Pedro

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Extremely urgent public procurement under Directive 2014/24/EU and the COVID-19 pandemic

Pedro Telles¹

Abstract

The COVID-19 pandemic swept throughout the European Union swiftly and led to significant changes in how we live and operate. Some of those changes occurred in public procurement as well, with Member States struggling to react to the dissemination of the virus. The purpose of this paper is to assess what scope the EU's public procurement legal framework provides to deal with a crisis, and how the rules should be interpreted.

This paper will show how the EU public procurement legal framework deals with extreme urgency situations and how it has been intentionally designed to allow Member States flexibility within very clearly defined boundaries. This means that the path to award contracts without competition on the grounds of extreme urgency is narrow due to Article 32(2)(c) of Directive 2014/24/EU² and the case law from the CJEU. The narrowness of this path is due to the exceptional nature of procedure and the obligation for the contracting authority to discharge the tight grounds for use in full for every contract. Therefore, this paper concludes that the view exposed by the European Commission on its guidance from April 2020 that the pandemic is a single unforeseeable event amounts to an incorrect reading on how the grounds for the use of Article 32(2)(c) operate. If such interpretation was already too broad in April 2020, it certainly is no longer in line with the transition from an unfolding crisis into a new and more permanent equilibrium.

In the context of COVID-19, particularly the need for the crisis to be unforeseeable and the extreme urgency not being attributable to the contracting authority raise significant difficulties for some contracting authorities to discharge the grounds for use of the negotiated procedure without prior notice. This is particularly the case in those situations where Governments centralized pandemic related procurement.

As such, the paper concludes that existing substantive rules for extremely urgent procurement are adequate and albeit sufficient to respond to crisis situations that does not entail that the wholesale use of the negotiated procedure without prior notice is necessary legal.

Keywords: COVID-19; EU; Public Procurement; Emergency procurement

¹ Associate Professor in Procurement Law at Copenhagen Business School, pt.law@cbs.dk.

² 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 [2004] OJ L 94.

1. Intro

Within the EU, how public bodies from Member States enter into public contracts is subject to specific rules which have to be complied with under the penalty of a contract being annulled by the courts. These legal obligations originate from EU primary law, namely principles from Treaty on the Functioning of the European Union, such as equal treatment, non-discrimination, mutual recognition and transparency,³ as means to achieve ever deeper integration and the single market. These have been then densified in secondary legislation via successive rounds of Directives since the late 1960's.⁴

The EU's secondary legislation on public procurement aims to ensure free and equal access to economic operators irrespective of where they are based in the Union, so that they can compete for contracts without being discriminated against. Therefore, they aim to help complete the EU's internal market and therefore EU public procurement rules establish that public contracts are to be awarded in accordance with principles such as transparency, competition⁵ and equal treatment. As such, the rules impose certain restraints on contracting authorities' behaviour and restrict their margin of discretion⁶ by means of defining procedures and obligations to be followed before a contract is awarded and entered into. For example, contract opportunities need to be published in advance so that they are transparent and visible to economic operators, thus potentially generating more competition and guaranteeing equal opportunities for any economic operator that may be interested in taking part.

The EU's current substantive public procurement legal framework⁷ is divided into three different Directives that cover different types of public contracts and contracting authorities. Directive 2014/24/EU⁸ is the main public sector Directive regulating how public bodies are to deal with works, goods and services contracts. Directive 2014/23/EU⁹ applies to concessions and Directive

³ On the principle of transparency see, I. Georgieva, *Using Transparency Against Corruption in Public Procurement: A Comparative Analysis of the Transparency Rules and their Failure to Combat Corruption*, (Springer, 2017) and K. Halonen, R. Caranta and A. Sanchez-Graells, *Transparency in EU Procurements: disclosure within public procurement and during contract execution* (Edward Elgar, 2019).

⁴ On these early Directives see, P. Trepte, 'Regulating procurement: understanding the ends and means of public procurement regulation', (Oxford University Press, 2004), p. 342-367 and P. Telles, 'Procurement financial thresholds in the EU: the hidden relationship with the GPA', 3 *European Procurement and Public Private Partnerships Law Review*, (2016), p.205-219.

⁵ On the principle of competition see, A. Sanchez Graells, *Public procurement and the EU competition rules*, (2nd edition, Hart, 2015).

⁶ On discretion in public procurement see S. Bogojevic, X. Groussot and J. Hettne (eds), *Discretion in EU Public Procurement Law* (Bloomsbury, 2020).

⁷ For a general overview of EU public procurement rules see, A. Semple, *A practical guide to public procurement* (Oxford University Press, 2015) and C. Bovis, *The law of EU procurement* (2nd edition, Oxford University Press, 2015).

⁸ On this Directive see, M. Steinicke and P. Vesterdorf (eds), *Brussels Commentary on EU public procurement law* (Bloomsbury, 2018), R. Caranta and A. Sanchez-Graells, *European public procurement: Commentary on Directive 2014/24/EU* (Edward Elgar, 2021) and S. Treumer and M. Comba (eds), *Modernising public procurement: the approach of the Member States* (Edward Elgar, 2018).

⁹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts OJ L 94/1 [2004]. For an overview of the Concessions Directive see P. Bogdanowicz, R. Caranta and P. Telles (eds), *Public-Private Partnerships and Concessions in the EU* (Edward Elgar, 2020).

2014/25/EU¹⁰ to the utilities sector.¹¹ For this paper's purpose, the analysis will be focused on Directive 2014/24/EU since it covers the purchase of works, goods and services most affected by the COVID-19 crisis, that is, in the healthcare sector.

2. The general procurement rules of Directive 2014/24/EU

Within Directive 2014/24/EU we can find two main legal regimes directly relevant for the healthcare sector. First, the general rules of Title II (Articles 25-73) and then the special rules for social and other services of Title III, Chapter I (Articles 74-77). Overall, the former crystallizes key principles such as transparency, competition and equal treatment, whereas the latter (partially) derogates from said principles under specific circumstances. Furthermore, the special regime only applies to services contracts and not to works or goods which appear to be the most common areas of procurement connected with COVID-19 where general rules have not been observed. As such, the subsequent analysis will be focused on the general rules and in particular the extreme urgency exception of Article 32(2)(c).

Directive 2014/24/EU establishes the open and restricted procedures¹² as the default procedures to be used for the award of contracts and it is no surprise that they have been branded as the 'gold standard' for procurement. A tradeoff with the level of protection for the principles they afford is their long lead in times that may span multiple months between start and contract award. Therefore, the Directive recognizes that there may be justifiable situations where the contracting authority needs to depart from them, either because some special procedures could be used instead, or time pressures call for quicker turn arounds. For these situations, the Directive rightly includes a suite of cascading options to be adopted depending mostly on the grounds leading to the urgency of the situation. The more urgent the situation, the more derogation can be achieved from the general rules and procedures but at the expense of compromising the main features of the system and introducing ever more risks to the principles as we move further away from the general procurement procedures.¹³

The first step in this cascade is to adopt accelerated versions of the open and restricted procedures,¹⁴ which the CJEU has considered multiple times as the legal solution if the timescales

¹⁰ 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 OJ L 94/243 [2004].

¹¹ In addition, Directive 2009/82/EC of the European Parliament and of the Council of 13 July 2009 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 OJ L 1216/76 [2009], applies to the defense sector. On this Directive, B. Heuinckx, *The law of collaborative defence procurement in the European Union* (Cambridge University Press, 2016) and M. Trybus, *Buying defence and security in Europe: the EU defence and security procurement Directive in context* (Cambridge University Press, 2014).

¹² Articles 26-28 of Directive 2014/24/EU.

¹³ On the integrity risks posed by urgent procurement in the context of COVID-19, see OECD, *Policy measures to avoid corruption and bribery in the COVID-19 response and recovery* (May 2020) and OECD, *Public integrity for an effective COVID-19 response and recovery* (April 2020).

¹⁴ Articles 27(3) and 28(6) of Directive 2014/24/EU. On these see, T. Kotsonis, 'EU procurement legislation in the time of COVID-19: fit for purpose?', 4 *Public Procurement Law Review* (2020), p. 199-212.

allow for their use.¹⁵ These require urgency and said urgency needs to be duly substantiated by the contracting authority, effectively burdening it with justifying the choice. As the only change here are shortened timescales, these procedures represent a minor restriction to the principles established by the Directive. It is thus logical that the bar to clear by the contracting authority is set reasonably low. This is not the case when the need justifies more significant exceptions to the general rules and procedures, namely the recourse to awarding contracts directly via a negotiated procedure without prior publication, which is the focus of the present paper.

3. Negotiated procedure without prior publication

This procedure is the antithesis of legal procurement framework described above and can only be used in the specific cases and circumstances set forth in Article 32 of Directive 2014/24/EU. Whereas the other procedures strive to protect transparency, equal treatment, non-discrimination and competition, the negotiated procedure without prior publication of Article 32 does the opposite by providing significant discretion to the contracting authority to award contracts without being constrained by such principles.

Since the whole procedure is done privately until the contract award information is published, there is no transparency in the sense of a contract opportunity and its rules being made public in advance. There are no guarantees of equal treatment between participants or potential participants. As for competition, since the contract can be awarded directly to an economic operator, competition is also not observed. It is no surprise then that this procedure appears at the end of the cascading mechanism of exceptions to the general procurement rules and their standard procedures.

While open and restricted procedures are the standard procedures that can be used by a contracting authority in any circumstance, the negotiated procedure without prior publication is an exceptional procedure.¹⁶ This classification is not without consequence, since the exceptional nature carries with it an obligation to narrowly interpret its grounds¹⁷ to use and with the burden of proof resting in the party invoking them, as recognised by the CJEU in case C-250/07 *Commission v Greece*.¹⁸

Article 32(2) of Directive 2014/24/EU¹⁹ includes three sets of reasons for the adoption of a negotiated procedure without prior publication. It can be used when one of the standard or special procedures was attempted and failed,²⁰ when only a single economic operator can supply the works,

¹⁵ Cases C-24/91, *Commission v Spain*, ECLI:EU:C:1992:134, para. 15, C-126/03, *Commission v Germany*, ECLI:EU:C:2004:728, para. 23 and C-337/05, *Commission v Italy*, ECLI:EU:C:2008:23 para. 75.

¹⁶ Case C-292/07 *Commission v Belgium*, [EU:C:2009:246](#), para. 106. For a more complete taxonomy, P. Telles and L. Butler in F. Lichere, R. Caranta and S. Treumer (eds), *Novelties in the 2014 Directive on Public Procurement*, p. 131-184.

¹⁷ Opinion of Advocate General Kokott in Case C-385/02 *Commission v Italy*, EU:C:2004:276, para. 30.

¹⁸ Case C-250/07 *Commission v Greece*, EU:C:2009:338, para. 34-39.

¹⁹ Paragraphs 3 through 5 add other grounds too, but they are not particularly useful in the context of responding to COVID-19 and as such will not be covered in this paper.

²⁰ Article 32(2)(a) of Directive 2014/24/EU.

goods or services,²¹ or when extreme urgency so requires.²² For the purposes of the current paper and how to deal with the COVID-19 crisis, it is this latter set of grounds of use that is relevant.

4. Negotiated procedure without prior publication due to extreme urgency (Article 32(2)(c))

The grounds included on paragraph 32(2)(c) are usually described as ‘extreme urgency’ grounds and have been – correctly – described as a ‘get out of jail’ card for the general procurement rules,²³ but that is not to say this card is free or not subject to stringent conditions to be exercised.

The paragraph is dense and composed of multiple layers of requirements that need to be met in full so that the negotiated procedure without prior notice may be used. In addition, these grounds for use need to be met for every single contract awarded by this procedure. As such, even in the context of an unfolding crisis like the response to COVID-19,²⁴ it cannot be considered that the requirements for use of the procedure are automatically complied with simply because there is an overarching crisis to respond to. This is a crucial point that will be addressed when discussing the Commission’s Guidance from April 2020²⁵ in section 5.

The three grounds for use of the negotiated procedure without prior notice are (i) strict necessity, (ii) unforeseeable extreme urgency and (iii) extreme urgency not being attributable to the contracting authority. As mentioned above, it is up for the contracting authority as ‘beneficiary’ of the procedure to discharge the burden of evidence associated with all the requirements. These grounds are to be assessed *ex-ante*, that is, based on the information the contracting had (or should have had) considered at the time the decision was taken and not with information which was made available afterwards or with the benefit of hindsight. This is necessary to set the correct threshold for the burden of evidence the contracting must discharge for each requirement.

A. *Strict necessity*

The first requirement is that the intervention, in this case the adoption of a negotiated procedure without prior publication, passes a strict necessity test.²⁶ To do so it must be the least damaging way to achieve the necessary outcome. This means only the smallest exception necessary to solve the problem at hand will meet the strict necessity test. This is a logical requirement due to the exceptional nature of this procedure and the possibility of using alternatives less damaging for the principles of transparency, equal treatment and competition. It is posited that this strict necessity

²¹ Article 32(2)(b) of Directive 2014/24/EU.

²² Article 32(2)(c) of Directive 2014/24/EU.

²³ A. Sanchez-Graells, ‘Procurement in time of COVID’, 71 *Northern Ireland Legal Quarterly* (2020) p. 83.

²⁴ On what kinds of purchases that would prima facie fit in this context, see L. Valadares Tavares and P Arruda, ‘Public Polices for Procurement under COVID19’, *European Journal of Public Procurement Markets* – 3rd Issue July 2021, p. 14.

²⁵ 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). This was argued as well in the literature, T. Kotsonis, ‘EU procurement legislation in the time of COVID-19: fit for purpose?’, 4 *PPLR* (2020), p. 201.

²⁶ The wording adopted by Article 32(2)(c) implies only the necessity test is required and not full application of the principle of proportionality. With a similar view, P. Bogdanowicz, ‘Article 32’ in R. Caranta and A. Sanchez-Graells, (Eds) *European Public Procurement: Commentary on Directive 2014/24/EU* (2021) at para. 32.21.

requirement applies not only to the moment when the decision to use the negotiated procedure itself is made, but also subsequent decisions on how to configure it in practice. Therefore, even if it is legal to use the negotiated procedure in theory, the actual application of it is still subject to strict necessity test. Therefore, if the need of the contracting authority can be met in time by consulting three economic operators instead of directly awarding the contract to an economic operator without competition, only the first will comply with the strict necessity test.

It is debatable if such strict necessity makes sense in the context of an emergency since it can generate legal uncertainty and reduce the flexibility available to contracting authorities,²⁷ but the fact of the matter is that it is the law in force. Furthermore, if one looks at the strict necessity requirement from a systemic perspective approach of its place in the procurement legal framework then it makes perfect sense since it is a complete departure from what said legal framework is trying to achieve. As such, it works as an inbuilt safety mechanism to ensure contracting authorities are not using the flexibility afforded by the exception for situations where it is not needed. And in fact, looking at the bulk of the CJEU's case law on the use of this procedure indicates a clear care in restricting the role of this procedure.²⁸

B. Unforeseeable extreme urgency

The second requirement is one of extreme urgency brought about by events unforeseeable by the contracting authority.²⁹ This requirement is to be divided into two sub-requirements, the extreme urgency in of itself and the events being unforeseeable. Taken together, these two sub-requirements constitute the core of the reasoning to justify the use of the negotiated procedure without prior publication by a contracting authority.

As for the extreme urgency, the contracting authority needs to be in a situation where the issue requires an immediate solution which would make the use of other procedures such as the accelerated open or restricted procedures as unsuitable. For the use of the negotiated procedure on the grounds of Article 32(2)(c), a solution is needed *immediately* and not sometime in the future.³⁰ It is this *immediateness* that justifies the use of the negotiated procedure because any other option will not be able to solve the contracting authority's issue in time.³¹

As such, it is not possible to use the negotiated procedure to either solve a future problem or to solve a current one in the future in case any other procedure less damaging to the general principles is suitable. The negotiated procedure is instead to be used to serve a need *now*, when time is of the essence to solve an existing problem. In consequence, using an *ex-ante* analysis it is not possible to use this procedure in situations whereby the product being procured will not be available in time to

²⁷ T. Kotsonis, 'EU procurement legislation in the time of COVID-19: fit for purpose?', 4 *PPLR* (2020), p. 203.

²⁸ For example, Case C-318/94 *Commission v Germany*, ECLI: EU:C:1996:149 at para. 18 and C-394/02 *Commission v Greece*, ECLI:EU:C:2005:336, paras 42 and 43.

²⁹ On unforeseeable events see Opinion of Advocate General Jacobs in Case 525/03 *Commission v Italy*, ECLI:EU:C:2005:343, paras 61-64.

³⁰ This is the implication of the CJEU's reading on case C-250/07 *Commission v Greece* and also C-385/02 *Commission v Italy* at paras 27-28.

³¹ On this issue, albeit specifically about the purchase of personal protective equipment in England, A. Sanchez-Graells, 'COVID-19 PPE Extremely Urgent Procurement in England', in D. Cowan and A. Mumford (eds), *Pandemic Legalities* (Bristol University Press, 2021).

answer to the emergency. In that scenario the correct procedure would either be one of the accelerated procedures (if the requirements are met), or one of the general ones if they are not. Therefore, the view that immediate procurements undertaken to safeguard uncertain future needs³² does not fit within the legal definition of extreme urgency of Article 32(2)(c).

The second sub-requirement is that of the urgency being unforeseeable by the contracting authority, thus leading to the question of how compliance with this requirement should be assessed. To reach a conclusion, one must consider if the unforeseeable nature of the urgency is subject to the reasonably diligent test set forth by the *FastWeb* judgment.³³ Although *FastWeb* is a case about Article 31(1)(b) of Directive 2004/18 and therefore the use of negotiated procedure without prior notice due to exclusive rights, the reasonably diligent test it applies to establish if the grounds for use of the procedure are met is relevant in this instance as well. It is fair to however say that the threshold for what constitutes a diligent behaviour in a situation of extreme urgency needs to be lower from that of a situation where the other grounds for the negotiated procedure without prior notice is being used. Having said that, if the contracting authority acts diligently, it can avail itself of the procedure, otherwise it cannot do so, and any resulting contract is ineffective. In addition the Court held in *FastWeb* that the contracting authority must set out in the justification of choice of the procedure “*must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice*”³⁴ effectively meaning that it is crucial for the justification to be provided and in full in the contract award notice so that interested parties may have recourse to the appropriate remedies. Even in a situation of urgency, it does not make sense to obviate the need for proper justification of the reasons that led to the use of the negotiated procedure without prior notice.

In practice, what that means is that how the contracting authority acts on the run up to a decision to use a negotiated procedure without prior publication has an impact in the legality of such decision.³⁵ That is not to say that there is no scope to use it, only that the contracting authority must provide evidence it acted in a reasonably diligent way. This requirement naturally goes beyond simply claiming an extreme urgency exists and that it was unforeseeable by the contracting authority, therefore rendering moot the idea that simply because of the unfolding COVID-19 crisis it would immediately justify the use of this procedure.

It has been argued that Member States enjoy a margin of discretion in regards with policy decisions where risk is involved, therefore the risk/harm threshold should not be unreasonably high.³⁶ Whereas it is indeed the case that Member States do enjoy a degree of discretion when undertaking a risk analysis, the second element is a step too far in this regard. First, the

³² With this view, S. Arrowsmith, ‘Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and beyond in S. Arrowsmith, L. Butler, Annamaria La Chimia and Christopher Yukins, *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, (Hart, 2021) p. 78.

³³ Case C-19/13 *Fastweb* ECLI:EU:C:2014:2194, para. 50.

³⁴ Cases C-19/13 *Fastweb*, para. 48 and C-275/08, *Commission v Germany*, ECLI:EU:C:2009:632, para 72.

³⁵ With a similar view while focusing on the means of the contracting authority, nature and characteristics of the specific project and good practice in that particular area, P. Bogdanowicz, ‘Article 32’ in R. Caranta and A. Sanchez-Graells, (Eds) *European Public Procurement: Commentary on Directive 2014/24/EU (2021)* at para 32.22.

³⁶ S. Arrowsmith, in S. Arrowsmith, L. Butler, Annamaria La Chimia and Christopher Yukins, *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, p. 78.

unforeseeable extreme urgency is to be assessed on a case-by-case basis, thus implying that for each contract (and each contracting authority) a specific assessment must be carried out. Second, whereas the Member State may have such discretion at a policy making level it is not relevant when public bodies (with or without such policy-making powers such as ministries) are operating as a contracting authority awarding contracts. In this context they are constrained instead by the requirements of Article 32(2)(c).

The above shows that the unforeseeable nature of the extreme urgency is an objective-subjective test to be discharged and not a purely objective one. It is objective because the cause of urgency must be in general terms be possible of being unforeseeable. But it is subjective as well since it depends on the behaviour of the contracting authority and if it has acted diligently or not. Therefore, it is conceivable that the same situation may be in 'unforeseeable' for one contracting authority but not another, depending on the information available to and behaviour of each contracting authority.

C. Extreme urgency not attributable to the contracting authority

The next requirement set forth on Article 32(2)(c) relates to the attribution for the situation of extreme urgency. The logic behind this requirement is self-evident and is a defense against actions (or inactions) from the contracting authority which bring about the situation of extreme urgency. It thus implies defining how attribution is to be assessed and which party bears the burden of proof for it. As established above, the burden of proof needs to be discharged by the contracting authority benefiting from the negotiated procedure, and this obligation applies here as well. This sub-criterion is distinct from the previous one as while the other focus on the underlying situation being unforeseeable, this one applies instead to the behaviour of the authority creating or not the situation of extreme urgency in itself. Therefore, it is possible for an event to be unforeseeable under the previous criterion and still fail in the urgency being attributable to the contracting authority. For example, an unexpected storm hits a city, damaging a bridge which is not assessed by the local authority. The local authority only assesses the bridge 6 months later in accordance with its regular maintenance schedule by which time the bridge is now in immediate risk of collapse and needs to have urgent repairs. In this scenario the damaging event is unforeseeable (the storm) but the extreme urgency for the repairs is attributable to the contracting authority since it did not act in due time immediately after the storm.

Article 32(2)(c) is silent regarding how the attribution requirement is to be assessed, as in what test is needed to consider for compliance. It is posited here that this test can be laid down and discharged via two different mechanisms.

The first is based on non-contractual or tortious liability, that is by looking at intention and negligence. In this regard, there is no reference in Article 32(2)(c) for the need for intent by the contracting authority in the creation of the extreme urgency situation. Bearing in mind the objective of the provision, the logical conclusion here is that the attribution requirement does not depend on it but simply upon mere negligence by the contracting authority bringing about the urgency. In addition, this is the only possible interpretation compatible with the obligation of a restrictive interpretation as required for the use of an exceptional rule. Otherwise, the exception is not as narrow as it could be while still achieving its goals. At first sight, this seems like an obvious solution to determine the test, but it is arguable that liability is assessed after the grounds for have checked and in this way one would pre-judge liability as well in case the grounds had not been met.

The other option is to look into Article 32(2)(c) and in particular the requirement analysed in the previous section, that is the unforeseeable nature, specifically the diligence test. In both what is important is the behaviour of the contracting authority in the lead up to initiating a procedure and as such they share similarities. Whereas in the unforeseeable nature we assess the behaviour vis-à-vis the event that gives origin to the urgency, in this one we look instead into the behaviour on the run up to initiating the procedure, irrespective of the existence of an event that brought about the extreme urgency and if it was foreseeable.

Therefore, it is posited here that the diligence test from *FastWeb* could be applicable here. The use of a diligence test in this regard allows us to assess for example how the risk arising from an event has been considered and if the contracting authority's behaviour has discharged its duty in this regard.

There is a concern, however, that the contracting authority would be put in the position of proving a negative in the context of the extreme urgency not being attributable to it since it carries the burden of proof.³⁷ In reality, the test is not negative but positive instead as the contracting authority's threshold is to prove it acted as a reasonably diligent contracting authority,³⁸ which means looking into the actions it took. In consequence, the logical conclusion is that a contracting authority which cannot prove it was reasonably diligent will be considered to have failed the attribution test.

The attribution test is relevant only within the confines of a single contracting authority as the text of Article 32(2)(c) so defines. It would make no sense for a contracting authority to be deprived of the use of an exceptional tool for the negligence of another contracting authority. In normal times, the behaviour of individual contracting authorities is easily firewalled by the operation of Article 32(2)(c) and the list of Annex II to Directive 2014/24/EU. Every body contained there is an individual contracting authority for the purposes of determining the attribution of extreme urgency.

Usually, public procurement of medical equipment or supplies is done either centrally by the Health Ministry (national or regional) or locally in hospitals or commissioning groups, depending on how each Member States organizes its healthcare sector. Therefore, defining the contracting authority for the purposes of the attribution test in normal times tends to be easy and to map out its competencies and how they were used, seems unproblematic as well.

During an unfolding health crisis like COVID-19, however, we have seen procurement being done very differently with a rush to centralise procurement activities³⁹ and, crucially, contract award decisions. Spain re-centralised the health sector which was hitherto a devolved competency and

³⁷ A. Sanchez-Graells, 'Drilling down on the statutory interpretation of extreme urgency procurement exemption in the context of COVID-19', <https://www.howtocrackanut.com/blog/2020/4/16/drilling-down-on-the-statutory-interpretation-of-the-extreme-urgency-procurement-exemption-in-the-context-of-covid-19>.

³⁸ Stating the need to apply this test, A. Sanchez-Graells, 'More on COVID-19 procurement in the UK and implications for statutory interpretation', <https://www.howtocrackanut.com/blog/2020/4/6/more-on-covid-19-procurement-in-the-uk-and-implications-for-statutory-interpretation>.

³⁹ 68% of OECD countries centralised public procurement in the immediate response to COVID-19, OECD, OECD Policy Responses to Coronavirus (COVID-19), Public procurement and infrastructure governance: Initial policy responses to the coronavirus (Covid-19) crisis, July 2020.

Italy moved at least some local purchasing responsibility to some regional and national bodies.⁴⁰ Others, like Ireland⁴¹ and Germany⁴² appeared to have centralised at least some key decisions at Government level based on direct dealings between Government members and their equivalents in countries which could sell them the equipment needed.⁴³

The implications of this centralisation for the use of the negotiated procedure by Governments are significant, since **all** decisions taken by the contracting authority need to be taken into account to assess if the extreme urgency is attributable to it or not. This means that even decisions taken outside the context of a procurement procedure are relevant, thus including political or wider public health decisions. This is the logical reading of the requirement since it does not limit the scope of decisions to be assessed to any given nature. In addition, this is also the only reading compatible with a narrow interpretation of the grounds for use as required by the exceptional nature of the procedure. In consequence, policy decisions related to allocating resources even when taken under the guise of a risk analysis⁴⁴ are subject to the restraints imposed by the grounds of the procedure.

It has been argued, however, that political decisions cannot be syndicated in the context of public procurement and, in consequence, cannot be used to determine the attribution requirement.⁴⁵ Such view can be set aside based on multiple arguments. First, what is being syndicated in this context of the attribution is the procurement decision and not the political considerations behind it. The latter continue to produce their effects but, it is possible, that for the purposes of the legality of the use of the negotiated procedure they may not assist in meeting the attribution criterion. Second, political decisions in themselves are syndicated in terms of compliance and they do not obviate existing legal obligations. In fact, there is no discussion that even political decisions at legislative or administrative levels are also subject to judicial review and that is a key

⁴⁰ V. Vecchi, N. Cusumano and, E.J. Boyer. 'Medical Supply Acquisition in Italy and the United States in the Era of COVID-19: The Case for Strategic Procurement and Public-Private Partnerships', 50 *The American Review of Public Administration* (2020), p. 643-644. On Italy's response in general, G. L. Albano and A. La Chimia, 'Emergency Procurement and Responses to COVID-19: the case of Italy'. in S. Arrowsmith, L. Butler, Annamaria La Chimia and Christopher Yukins, *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, p. 350.

⁴¹ Leading to a large purchase of PPE, which started arriving in late March 2020, RTE, 'Shipment of PPE supplies arrives in Ireland from China', 29 March 2020, <https://www.rte.ie/news/2020/0329/1127076-ppe-equipment-china/>, with a Chinese ambassador interview providing background info on how the deal was brokered; Embassy of the People's Republic of China in Ireland, 'Coronavirus: China working with Ireland to help combat virus', 25 March 2020, <http://ie.china-embassy.org/eng/sgxw/t1761158.htm>, and; Embassy of the People's Republic of China in Ireland, 'China and Ireland work together to keep PPE supply running smoothly', 5 April 2020, <http://ie.china-embassy.org/eng/sgxw/t1766380.htm>.

⁴² Angela Merkel's speech of April 23rd, 2020 available at <https://www.lengoo.de/blog/angela-merkel-we-are-walking-on-thin-ice/>.

⁴³ On how countries managed their trade policy in connection with COVID-19 procurement, B. Hoekman, A. Shingal, V. Eknath and V. Ereshchenko, 'COVID-19, public procurement regimes and trade policy', *The World Economy* (2021), p. 1-21.

⁴⁴ S. Arrowsmith, in S. Arrowsmith, L. Butler, Annamaria La Chimia and Christopher Yukins, *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, p. 82.

⁴⁵ A. Sanchez-Graells, 'More on COVID-19 procurement in the UK and implications for statutory interpretation' <https://www.howtocrackanut.com/blog/2020/4/6/more-on-covid-19-procurement-in-the-uk-and-implications-for-statutory-interpretation>.

tenet of the rule of law. Third, while a decision may be relevant to assess if the attribution criterion is met or not, trying to purge such decision from the analysis seems artificial and contrary to the letter and spirit of Article 32(2)(c) since the article includes no such limitation. Finally, this is an exceptional procedure and one which requires a narrow interpretation of its grounds. If one would accept that political decisions would be set aside from scrutiny for the purposes of determining the attribution requirement, then potentially the scope of the interpretation (and application) of the procedure would not be as narrow as it could otherwise be. In consequence, such interpretation would be illegal.

5. The Commission's Guidance on COVID-19 related procurement

The European Commission published in early April 2020 a guidance document on procurement related with COVID-19.⁴⁶ In this document the Commission attempted to explain what different procurement options were available to contracting authorities reacting to the COVID-19 crisis. For the most part, the Commission stayed close to the letter of the law in relation to Directive 2014/24/EU and to (some) case law as well. The guidance sets out how contracting authorities should choose between the different procurement mechanisms available to them, starting from the general procedures and moving on firstly to the accelerated procedures and, only if these are not suitable, to the negotiated procedure without prior notice. In this context, the Commission correctly mentions that each negotiated procedure needs to be justified via an individual report.⁴⁷

It is thus surprising that the Commission did not take the idea of justifying each and every use of the procedure to its logical conclusion, stating instead that “[p]recisely 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”, thus effectively negating the application and verification of requirements needed to establish the extreme and unforeseeable urgency. Taken as a single sentence, perhaps the correct interpretation might be different, but further ahead the Commission exposes its views in more detail:⁴⁸

These events and especially their specific development has 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. [emphasis by the author]

Herein lies the crux of the matter with the guidance since it is evident that the Commission arguing that reacting to the pandemic could not be planned in advance and that it constitutes an unforeseeable event. This is a misguided view of how the rules of Article 32(2)(c) operate and at least in what concerns governments, that could not be farther for the truth for four reasons.

The Commission's view is misguided because the COVID-19 pandemic cannot be subsumed to a

⁴⁶ 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).

⁴⁷ Ibid, p. 4.

⁴⁸ Ibid, p. 4.

single event that would lead to any procurement decision connected with it to be considered as unforeseeable. However, all elements of Article 32(2)(c) must be individually assessed and present for every single contract awarded under this exceptional regime since they depend on objective and subjective elements as mentioned above. There is no provision in Article 32(2)(c) for a blanket approach as that professed by the Commission and others.⁴⁹ Every single procurement decision taken in the context of the COVID-19 is a reaction to the specificity of each contracting authority at that moment in time and needs to be assessed as such. This means as well that our analysis of the unforeseeable nature and the non-contribution to the emergency will depend on the nature of the contracting authority and the moment the grounds of Article 32(2)(c) are to be assessed. As mentioned above, in general, the answer for procurement decisions taken by governments will naturally be different from those taken elsewhere in any given health sector.

As for the remaining reasons why one cannot assume that governments could not foresee the pandemic, first, countries do plan for pandemics and, in fact, for example, Lithuania had since 2010 a State Emergency Plan covering pandemics⁵⁰ and the UK did in 2016 multiple pandemic exercises, one of them based on the Mers virus⁵¹ and another on a simulated variant of influenza.⁵² The question here is really what we consider either to be a negligent or diligent behaviour by contracting authorities depending on what information they have had access to or should have had access to, particularly in what concerns governments. Therefore, at least for these as contracting authorities is obvious that a pandemic is predictable and should be planned for in advance. That does not mean of course that all eventualities can be planned in detail, and for those the procedure of Article 32(2)(c) is still available if all grounds are met. That takes the negotiated procedure without prior notice to its correct realm of application, that is the exceptions that do not fit in the pre-existing pandemic plans. Not having planned at all or not having acted on the existing plans is thus a contributory fact by governments to create the situation of urgency when they act as contracting authorities, irrespective of the adoption of the negligent or diligent behaviour test for attribution.

Second, in response to the H1N1 pandemic influenza of 2009 the Commission set up in 2014 a Joint Procurement Agreement (JPA) for medical countermeasures to which most (though not all) Member States were party at the beginning of 2020.⁵³ This, in fact, constitutes a degree of planning for future medical emergencies, therefore amounting to a diligent measure to handle a situation such as that of the COVID-19 pandemic. However, not all Member States joined the JPA in 2014 with some only deciding to do so already in 2020 indicating a difference in diligence amongst the Member States.⁵⁴ In February 2020, some Member States were already asking the European

⁴⁹ T. Kotsonis, 'EU procurement legislation in the time of COVID-19: fit for purpose?', 4 *PPLR* (2020), p. 203.

⁵⁰ J. Dvorak, 'Lithuanian COVID-19 Lessons for public governance' in P. Joyce, F. Maron and P. S. Reddy, *Good Public Governance in a Global Pandemic* (The International Institute of Administrative Sciences, 2020) p. 330.

⁵¹ *The Guardian*, 'Secret planning exercise in 2016 modelled impact of Mers outbreak in the UK', 10 June 2021, <https://www.theguardian.com/society/2021/jun/10/secret-planning-exercise-in-2016-modelled-impact-of-mers-outbreak-in-uk>.

⁵² Department of Health and Social Care, 'Annex B: exercise Cygnus Report (accessible) (2020).

⁵³ On this mechanism, 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', 11 *European Journal of Risk Regulation* (2020), p. 851-863.

⁵⁴ Sweden (February), Poland (March) and Finland (March) only joined in 2020, European Commission, *Signing ceremonies for Joint Procurement Agreement*,

Commission to activate the JPA for the purchase of medical supplies,⁵⁵ thus indicating they were aware of the risks for public health arising from the novel coronavirus and foreseeing the need for medical supplies. Again, this can be interpreted as a measure of diligence by the Member States involved and, in consequence, lack of diligence by those who did not do as such.

The third is the actual delay between the news arising from China in the beginning of the year and the arrival of the COVID-19 pandemic in Europe a couple of months later. The signs were there to see and be acted upon in good time to avoid making matters worse. That included acting regarding the procurement of medical equipment. However, the difference in behaviour between Taiwan, which was exposed to the SARS epidemic a decade ago, and most EU Member States is striking. As far as could be established for this paper, for the purchasing of personal protective equipment (PPE) only Ireland reacted quickly, by centralizing the purchasing of PPE in March and bought directly from China for immediate delivery of 13x the annual spend in those items.⁵⁶ As such, it is logical to conclude that Ireland acted diligently (and swiftly) to react at least in part to serve its immediate needs for medical supplies.

As for contracting authorities other than the Health Ministries in Governments, such as hospitals the answer is indeed more complex and turns on the actual circumstances of each authority. Did they take part in pandemic planning? Were they under the obligation to have pandemic response plans? What were their resource levels in the run up to first pandemic wave? It is impossible to be as prescriptive as with Governments which have competences in the field of public health. For these and baring any specific information stating otherwise vis-à-vis the information they had access to, the Commission's guidance was indeed helpful at the time it was issued. But for governments acting as contracting authorities who deployed the negotiated procedure without notice based on the guidance, it helpfully provided a degree of legal cover to the Member States who could point out to it as a justification for poor or illegal procurement practices in the context of COVID-19 procurement.

In conclusion, each pandemic will always be different from the previous ones and require some decisions at governmental level that will necessarily be different as well, with some fulfilling the requirements of Article 32(2)(c) on a case-by-case basis. However, that is different from taking a blanket approach that any procurement decision taken in the context of COVID-19 will be absconded from the checks required by such article.

6. Conclusion

This paper has shown how the EU public procurement legal framework, while allowing Member States flexibility on how to react to a crisis such as that of COVID-19, does so with very clearly defined boundaries. In the context of the negotiated procedure without prior notice on grounds of

https://ec.europa.eu/health/preparedness_response/joint_procurement/jpa_signature_en. This was based on the Decision 1082/2013/EU on serious cross-border threats to health which is now under review as part of a new health security framework, Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU COM(2020) 727 final.

⁵⁵ *Euobserver*, 'Will coronavirus lead to medicine shortage in EU?', 14 February 2020, <https://euobserver.com/coronavirus/147449>.

⁵⁶ *BBC*, 'Coronavirus: Historic Ireland-China PPE flights lands in Dublin', 29 March 2020, <https://www.bbc.co.uk/news/world-europe-52085363>.

extreme urgency, Article 32(2)(c) and the case law from the CJEU provide a narrow path to its use. This path is narrow due to the exceptional nature of procedure and the grounds for use which are to be discharged in full by the contracting authority.

In the context of COVID-19, particularly the need for the crisis to be unforeseeable and the extreme urgency not being attributable to the contracting authority raise significant difficulties for some contracting authorities, namely governmental departments with public health responsibilities. The Commission issued guidance on the topic in April 2020, but it is posited that the interpretation of the extreme urgency grounds there provided is incorrect since it creates a general presumption of compliance with the requirements which does not find support in the actual text of the Directive. In addition, even if a generous interpretation of the grounds could make sense in early 2020 it certainly does not do so at the time of writing (December 2021) and it is time the guidance was either revoked or amended.

As of late 2021 the COVID-19 pandemic has been running for almost two years, effectively meaning that we are no longer in a situation of crisis but instead on a new permanent equilibrium where our lives changed due to the challenges imposed by the SARS-COV2 virus. Since the requirements for use of the negotiated procedure without prior notice for urgency in Article 32(2)(c) depend on foreseeability and the contracting authority not contributing to the urgency, it is relevant to enquire how the grounds for extreme urgency are to be assessed today.