

The Limitations and Opportunities of Cross-border Procurement during the COVID-19 Crisis and Recommendations for the Future



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Maastricht University

The Limitations and Opportunities of Cross-border Procurement during the COVID-19 Crisis and Recommendations for the Future

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PANDEMERIC examines the benefits of euregional cooperation in the event of a pandemic or a large scale outbreak of an infectious disease. The project is financially supported via the Interreg Euregio Meus-Rhine COVID-19 call, by the European Regional Development Fund.



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1. Introduction

The COVID-19 pandemic has proven a challenge to all aspects of life. Looking at cross-border regions these have particularly been affected by measures taken to contain the spread of the disease. Indeed, the pandemic has affected the way actors cooperate in these regions. For example, in the Euregio Meuse-Rhine (EMR) partners saw their regional cooperation structures overruled in favour of national structures. This re-nationalisation of certain aspects of cross-border cooperation did not take away the fact that stakeholders at different sides of the border experienced similar issues and challenges originating directly related to the pandemic. One such issue concerns the availability and purchase of protective materials and other equipment needed to effectively combat the COVID-19 crisis. The sudden and intense surge of the Coronavirus led to a shortage of materials such as protective equipment and ventilators challenging the treatment of critically ill patients.¹ The shortage of materials led some to plead for a pooling of purchasing power to insure timely purchases of necessary materials.²

When it comes to the purchase of necessary materials, an important role is reserved for state actors. Public procurement is particularly relevant when such actors purchase medical equipment (e.g. respiratory machines), medicines, personal protection materials (gloves, protective clothing, mouth masks) and certain services. These actors need to comply with necessary provisions on public procurement for the purchase of such goods. As far as the procurement landscape is concerned, it is vast with legislation existing at both the EU as well as national or even regional levels. The exceptional nature of the COVID-19 crisis furthermore led to the need to adapt and speed up existing procedures to ensure the timely purchase of necessary materials. In this context, questions may be raised as to how procurement has taken place during the COVID-19 crisis. Questions may thereby particularly be aimed at cross-border regions where cooperation on emergency and medical services is advanced.

An example of such a region is the Euregio Meuse-Rhine (EMR). In the EMR, national police forces, fire brigades, hospitals and medical organisations are each responsible in their own country for disaster and crisis management. Nevertheless, despite their respective national competences, these parties also cooperate cross-border in the context of EMRIC (Euregio Meuse-Rhine Incident Control and Crisis management). EMRIC consists of 7 partners: the GGD Zuid-Limburg, Kreis Heinsberg, Province de Liège, Provincie Limburg (BE), Stadt Aachen, Städteregion Aachen and the Veiligheidsregio Zuid-Limburg. In total, over 30 services and public authorities actively cooperate with EMRIC.³ Although the management of emergencies and disasters is central to the organisations cooperating in the context of EMRIC, these parties also play an important role in combatting infectious diseases. Considering the latter, the aforementioned public services play a vital role in the fight against COVID-19.

Despite their national competences and duties, these services have been working together intensively across the EMR's borders for years. Indeed, EMRIC serves as a bridge between the operational and

¹ 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. 851-852.

² *Ibid.*, p. 852.

³ For more information on EMRIC see EMRIC, 'What is EMRIC?', https://www.emric.info/en/citizens/what-is-emric?set_language=en.

legal systems of the Netherlands, Belgium, and Germany (North Rhine-Westphalia) to facilitate cooperation on crisis management and the combatting of infectious diseases. EMRIC partners exchange information on the state of affairs in the three countries in which the EMR partner regions are located and even exchange the resources needed by the other partner or provide services that one partner cannot provide. Bi- or multilateral agreements exist within the EMR to achieve this advanced cooperation on incident control and crisis management.⁴

As far as combating infectious diseases is concerned, each of the Dutch, Belgian, and German regions taking part in the EMR has its own authorities responsible for tracing the source of infection and taking measures to prevent further spread. A local outbreak can nevertheless also have cross-border consequences in a border region such as that of the EMR. For this reason, the infectious disease control authorities in the EMR have cooperated intensively and exchanged vast amounts of information in order to minimise the spread of these diseases during the COVID-19 pandemic.⁵ Nevertheless, despite their rich experience in cooperation, EMRIC and its partners were confronted with a re-nationalisation of crisis management. During the COVID-19 crisis, their regional cooperation was often cast aside in favour of national structures, meaning that the Euregional method of cooperation could no longer be followed. In order to examine how cross-border cooperation may be maintained during future crises, the PANDEMERIC project seeks to dive into different aspects of cross-border crisis management and incident control during the COVID-19 crisis.⁶

As far as public procurement is concerned, many of the partners cooperating in the context of EMRIC have indicated to have experienced shortages of necessary materials and difficulties in acquiring them. These challenges concerning the purchase of necessary materials have led to the desire to have procurement processes examined in-depth. The present study covers the purchase of materials and related goods and services necessary to effectively combat a crisis such as the COVID-19 pandemic. Indeed, the urgency and intensity of the COVID-19 crisis has led to questions regarding the purchase of such materials, whether they were available, to which extent tender procedures should be used, which procedures originating from national or European law were relevant for crisis time procurement, and what bottlenecks were encountered when purchasing necessary goods. More specifically, the following central research questions are maintained to examine procurement processes during the COVID-19 pandemic:

1. Which opportunities do the national and European procurement frameworks provide to purchase materials during the COVID-19 crisis?
2. What possibilities are there to cooperate on procurement in cross-border regions and what role can EMRIC take in this process?
3. How did public procurement take place during the COVID-19 crisis – did regional actors make use of opportunities provided by the national and European procurement frameworks?
4. How may crisis-time procurement be improved in the future?

⁴ For an overview of agreements applicable to EMRIC see EMRIC, 'Legal framework', <https://www.emric.info/en/professionals/legal-base/framework-agreements>.

⁵ B.J. Buiskool, J. van Lakerveld & M. Unfried, Covid-19 Crisis-management in the Euroregion Meuse-Rhine: Study on lessons learned of cross-border cooperation in the field of healthcare during the Pandemic crisis (study 1) – PANDEMERIC Final Report, August 2021.

⁶ For more information on the PANDEMERIC project see Interreg EMR Pandemic, 'About', <https://pandemic.info/about/>.

To answer the abovementioned research questions, legal and policy analysis is combined with a literature study and semi-structured interviews with practitioners. In relation to legislation and policy, particular focus is placed on the EU legal framework for public procurement and procurement procedures at the national level. It is important to also focus on the procurement procedures at the national level since the EU legal framework applies only if certain thresholds have been met.⁷ Furthermore, specific attention is to be dedicated to emergency procurement procedures facilitating procurement processes for the purchase of materials necessary to combat the COVID-19 pandemic. In order to ensure that findings from this study are placed in their relevant practical context, semi-structured interviews were conducted with representatives of organisations who have experienced first-hand the process of acquiring materials, goods, and services necessary to combat the COVID-19 pandemic.

In terms of Structure, this report consists of five Sections. Section 2 examines the legal framework on public procurement at the European level thereby focusing particularly on emergency procedures and opportunities to cooperate on procurement. Attention is thereby given to examining both the applicable legislation (i.e. the Procurement Directive 2014/24/EU)⁸ and the essential principles originating from the EU Treaties and relevant case law from the Court of Justice of the EU (CJEU) constituting the foundation of action on procurement at all administrative levels in the EU. Section 3 subsequently examines such emergency procurement procedures and opportunities for cooperation at the national level in the three countries in which regions constituting part of the EMR are located (NL/BE/DE). In Section 4, the connection to practice is made by presenting the results of the stakeholder interviews. Apart from examining the practice of crisis time procurement, this Section also enables a discussion concerning the relevance and suitability of legal opportunities concerning emergency procurement and cross-border cooperation for the EMR, EMRIC, and its partners. The ultimate objective of this study is to identify best practices and recommendations for the future that can help to improve the purchase of necessary materials, goods, and services in future crises. Section 5 therefore concludes the research and provides policy recommendations aimed at improving crisis time procurement practices in the EMR in the future.

⁷ For an overview of the current thresholds see European Commission, 'Thresholds', https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en.

⁸ 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, OJ L 94, 28.3.2014, p. 65–242.

2. The Legal Framework on Public Procurement: A Multilevel Playing Field

Public procurement can truly be described as a multilevel playing field. In an EU context, Member States have been cooperating on the purchase of goods by public authorities and bodies since the early 1960s.⁹ Over the years, several directives have been adopted, all with the objective to eliminate legal and administrative barriers to interstate trade and achieve the free movement of establishment and of service provision. Nevertheless, as mentioned in the introduction, public procurement takes place at different levels. Whereas the EU as a supranational organization can procure goods and services, so are authorities at different administrative levels in the Member States. Indeed, public procurement falls under the EU's internal market competence, meaning that competences are shared between the EU and the Member States.¹⁰ The purpose of the present and following Sections is to explore the dynamics of these respective levels. Particular attention is thereby given to exploring emergency procurement procedures as well as opportunities for cross-border cooperation on public procurement.

2.1 Objectives of EU Public procurement

The removal of legal and administrative barriers increases competitiveness on the procurement markets as undertakings from across the single market and beyond have the opportunity to compete for public contracts. Opening up public markets to international trade will contribute to obtaining better value for money. In principle, more competition leads to more choice and lower prices. Next to purely economic goals, public procurement rules also aim to contribute to the avoidance of corruption, fair treatment of economic operators and over the last years there is an increased focus on strategic objectives (innovation, social and environmental objectives) as well.

2.2. The Principles of Public Procurement

The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.¹¹ These principles have to be respected, even if the thresholds set out in the Procurement Directive (2014/24/EU) have not been met and the procurement has a value net of value-added tax below the amounts stipulated in the Directive as long as there is a cross-border interest. Even though it cannot be just "presumed" in the abstract, without looking at the specific circumstances of the contract at issue,¹² that there is a cross-border interest because the place where a contract should be performed is a border region, procurement contracts that are instigated by contracting authorities located in the EMR, being a Euregion covering parts of three Member States, will in essence always/mostly have a cross-border interest. Indeed, it is not hard to imagine that

⁹ For an introduction to the EU public procurement regime see S. Schoenmaekers, 'Public Procurement', in: Kuijper, Ambtenbrink, Curtin, De Witte, McDonnell & Van den Bogaerts (eds.), *The Law of the European Union*, Wolters Kluwer, Alphen aan den Rijn, 2018, pp. 805-828.

¹⁰ See Articles 4(2)(a), 53(1), 62 and 114 Treaty on the Functioning of Europe (TFEU).

¹¹ Recital 1 Directive 2014/24/EU.

¹² Case C-318/15 *Tecnoedi Construzioni* ECLI:EU:C:2016:747, §24.

economic operators from across the EMR are attracted as language barriers are rather small (Dutch is spoken in Belgium and the Netherlands; German is spoken in Germany and parts of Belgium).

2.3. The General framework for EU Procurement of Directive 2014/24/EU

Directive 2014/24/EU entered into force in April 2014. The deadline to implement the Directive in the national legislation of the Member States (for most provisions) was set two years after, in 2016. Some of the European principles mentioned in Section 2.2 above can also be found codified in Article 18 of the Directive. The Procurement Directive applies to public procurement procedures conducted by contracting authorities and entities. As defined in Article 2(1), the concept “contracting authority” refers to the State, regional or local authorities, bodies governed by public law or associations formed by one or more of such authorities or one or more of such bodies governed by public law. Under this notion, bodies governed by public law must be established for a specific purpose meeting a general interest (as opposed to having merely commercial or economic character), have a legal personality and be mostly financed by the state or a body appointed by the state. As the CJEU has held in its judgement in *Beentjes*, the term “contracting authority” enjoys a wide interpretation and must be interpreted in a functional and not a formal manner.¹³

As held above, not all procurement conducted by the contracting authorities is subject to the Directive. The public contracts or design contests must meet a monetary threshold as provided in Article 4. Social and other specific services require a higher threshold (as set out in Annex XIV), and the Directive excludes from its application certain purchases and sectors¹⁴ and design contests and public awards organised pursuant to international rules.¹⁵ Under strict conditions, public contracts between entities within the public sector fall outside the scope of the Directive.¹⁶ This is namely when the contracting authority exercises control over a legal person, similarly to that it exercises over its own departments; when more than 80% of the activities of the controlled legal persons are carried out for the controlling contracting authority and, finally, when there is no direct private capital participation of the controlled legal person. Similar exceptions apply when authorities exercise control jointly or when they conclude a contract between two or more contracting authorities.¹⁷

Furthermore, only public contracts or design contests fall under the Directive. Design contests are procedures that enable the contracting authority to acquire a plan or design selected by a jury after being put out to competition.¹⁸ Public contracts on the other hand are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.¹⁹ Contracts which have as their subject two or more types of procurement (works, services or supplies), classify as mixed procurement contracts, where the applicable rules are determined by the main subject that has the highest value under the contract.²⁰

¹³ Case C-31/87 *Beentjes*, ECLI:EU/C:1988:422.

¹⁴ Articles 7-17 Directive 2014/24/EU, for instance certain utilities, electronic communications, acquisition or rental of land.

¹⁵ Article 9 Directive 2014/24/EU.

¹⁶ Article 12(1)-(2) Directive 2014/24/EU.

¹⁷ Article 12(3)-(4) Directive 2014/24/EU.

¹⁸ Article 2(21) Directive 2014/24/EU.

¹⁹ Article 2(5) Directive 2014/24/EU.

²⁰ Article 3 Directive 2014/24/EU.

In case the contract fulfils these criteria, it is subject to the rules and requirements of the Directive. Every procurement procedure must follow rules on advertisement and publicity (Articles 48-55 and 75), technical specifications (Article 42), selection and qualification of tenderers (Articles 57 and 58) and award procedures. When awarding public contracts, the contracting authorities apply national procedures in conformity with the Directive.²¹ Member States may provide the use of an open or restricted procedure, or an innovation partnership. A competitive procedure with negotiation or a competitive dialogue may also be used by the contracting authority if certain conditions are met.²² Moreover, the Directive provides specific rules, for instance, on publication requirements, time limits and the amount of candidates to be invited.

Before assessing compliance with the selection criteria, contracting authorities should verify whether certain operators should/could be excluded from participation in case one of the mandatory or discretionary exclusion grounds of the Directive would be applicable. This should for example happen when an operator is convicted for participation in a criminal organisation, corruption, fraud, terrorist offence, money laundering or child labour, or he has breached his obligations on payment of taxes or social security contributions.²³ Operators can, for example, also be excluded in case of grave professional misconduct or when there were significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract.²⁴

After the exclusion, the contracting authorities proceed to selection, where they can assess the operators' suitability to pursue the professional activity, economic and financial standing and/or technical and professional ability. The criteria must be applied in a proportionate and transparent manner and must be related to the subject-matter of the contract and be accessible for the economic operators.²⁵ In certain procedures, it is also possible to impose quantitative criteria next to the qualitative ones by limiting the number of candidates invited to the tender process.²⁶

The public contract will be awarded by the contracting authority to the most economically advantageous tender.²⁷ This is identified by applying a cost-effectiveness analysis, such as life-cycle costing and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative environmental and/or social aspects that are linked to the subject-matter of the contract in question.²⁸

2.3.1. Specific opportunities for Aggregated Procurement

Apart from the "standard" procedures described in Section 2.3 above, the Procurement Directive also provides for specific techniques and instruments for electronic and *aggregated* procurement. Furthermore, the Directive provides opportunities for contracting authorities to engage in collaboration when awarding public contracts. A "public contract" is defined as a contract for pecuniary interest concluded in writing between one or more economic operators and *one or more*

²¹ Article 26(1) Directive 2014/24/EU.

²² Articles 27-32 Directive 2014/24/EU.

²³ Article 57(1)-(2) Directive 2014/24/EU.

²⁴ Article 57 of Directive 2014/24/EU.

²⁵ Article 58(1) Directive 2014/24/EU.

²⁶ Article 65(1) Directive 2014/24/EU.

²⁷ Article 67(1) Directive 2014/24/EU.

²⁸ Article 67(2) Directive 2014/24/EU.

contracting authorities and having as their object the execution of works, the supply or the provision of services. All procurement procedures can hence be conducted by more than one contracting authority. It is not hard to imagine that this can create several difficulties as contracting authorities have to come to an agreement on how they want to conduct the procedure, what they want and need to buy, and what kind of selection and award criteria they believe to be important.. The Directive contains some specific rules on aggregated procurement. We will now focus on describing the following techniques that are specifically relevant for aggregated procurement: framework agreements, centralized purchasing activities and central purchasing bodies, occasional joint procurement and procurement involving contracting authorities from different Member States. Needless to say, the latter form of aggregated procurement is particularly relevant as this study focusses on the EMR as a cross-border region.

2.3.1.1. Framework Agreements

A framework agreement under Article 33 of the Procurement Directive refers to an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. The maximum duration of such framework agreement is generally four years.²⁹ Contracts based on a framework agreement follow an awarding procedure as specified in the Directive.³⁰ When a framework agreement is concluded with a single operator, the contracts will be awarded within the terms laid down in the framework agreement. The contracting authorities may consult the economic operator and request it to supplement its tender as necessary.³¹ When a framework agreement is concluded with more than one economic operator, the award will be performed according to the agreement either without reopening competition, or partly reopening competition amongst the economic operators party to the framework agreement. When the terms governing the provision of work, services and supplies in the framework agreement are not fully covered, the procedure will be performed by reopening competition amongst all the economic operators who are a party to the agreement.³² A framework agreement falls within the concept of public procurement to the extent that it turns into a whole the various specific contracts that it governs.

Framework agreements can be concluded by several contracting authorities from ***different Member States***.³³ Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities are required to conclude an agreement that determines the responsibilities of the parties and the relevant applicable national provisions and the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.³⁴ It is unclear in how far such contracting authorities (and not the

²⁹ Article 33(1) Directive 2014/24/EU.

³⁰ Article 33(2) Directive 2014/24/EU.

³¹ Article 33(3) Directive 2014/24/EU.

³² Article 33(4) Directive 2014/24/EU.

³³ Article 39(4) Directive 2014/24/EU.

³⁴ Article 39(4) Directive 2014/24/EU.

Member States) are even allowed to negotiate outside the framework of international agreements concluded by their States.³⁵

Framework agreements offer contracting authorities the possibility to enter into an agreement with several economic operators and to award contracts when actual purchasing needs arise for the contracting authority. At that moment there will be a quick and simple manner to order the required products, services or supplies. This brings about reduced contract management costs, no waste of time when time is of the essence, more flexibility and allows contracting authorities to benefit from economies of scale pricing. This may give SMEs more opportunities to compete for contracts that they are able to perform. In addition, contracts that are based on a framework agreement can also be awarded by contracting authorities that were not part of the initial framework agreement. Indeed, a contracting authority that has concluded a framework agreement is allowed to give other contracting authorities that were no direct parties to that agreement but that are specifically indicated in the specific invitation to tender or the invitation to confirm interest, access to that framework agreement. In this regard practical effect is given to the desire to streamline public purchasing by encouraging collective public purchasing through framework agreements in order to achieve economies of scale.³⁶

When considering the suitability of framework agreements to be employed in a crisis such as that of COVID-19, it can be noted that the agreements appear to be particularly relevant for actors in a cross-border region such as the EMR. It follows that specifically in the health sector, where difference in demand over the year are unpredictable and needs are difficult to anticipate, framework agreements are a useful tool specifically as they contribute to act quickly in case of shortages in case of unexpected events. The framework agreement can lay down the requirements in the selection criteria for acceleration of deliveries thereby proving particularly suitable for potential crisis situations.³⁷ Furthermore, as the previous paragraph shows, framework agreements are flexible in the number of contracting authorities involved in them and may be expanded when required. The fact that framework agreements can take up to four years also means that they may be adopted for shorter periods of time again making them suitable for cooperation in crisis situations that do not consist of a single event (such as the COVID-19 pandemic). The possibility for several contracting entities to be united in a joint entity such as a EGTC also opens the way for the EMR (which is already an EGTC) to also conduct certain procurement activities.

2.3.1.2. Centralized Purchasing

The Procurement Directive stipulates that Member States may provide that contracting authorities may acquire supplies and/or services from a central purchasing body offering central purchasing activities. The Directive provides an opportunity of centralised purchasing for contracting authorities – to employ a body to perform centralised purchasing activities on their behalf on a permanent basis.³⁸ Contracting authorities can directly award public service contracts for the provision of centralised

³⁵ A. Sanchez-Graells, Collaborative Cross-border Procurement in the EU: Future or Utopia?, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734123, p. 34.

³⁶ Case C-216/17 Autorità Garante della Concorrenza e del Mercato v Azienda, ECLI:EU:C:2018:1034, §§53-55.

³⁷ OECD, Application of public procurement rules during the COVID-19 crisis from the perspective of the European Union's Procurement Directives and the Government Procurement Agreement, 8 April 2020 at : <http://www.sigmaxweb.org/publications/Public-procurement-COVID-19-crisis-SIGMA-April-2020.pdf>, p. 4.

³⁸ Article 2(1)(14) Directive 2014/24/EU.

purchasing activities, without being subject to the procurement rules to a centralized purchasing body.³⁹ Once the centralised purchasing body has been tasked with a centralised purchasing activity it must again follow the provisions of the Directive.

Central purchasing bodies operate in two manners: acting as wholesalers for buying, stocking, and reselling, or acting as intermediaries by awarding public contracts for contracting authorities.⁴⁰ Hence, the contracting authorities may either acquire supplies and/or services from a central purchasing body, or acquire works, supplies, and services by using contracts awarded by the body.⁴¹ The centralised purchasing body may also conclude framework agreements or provide ancillary purchasing services related to the conclusion of management of the public contracts.⁴² The Directive provides centralised purchasing bodies as an option, but the Member States may require contracting authorities to conduct certain purchases through these bodies.⁴³

Contracting authorities may furthermore use purchasing offered through centralised purchasing bodies **located in another Member State**.⁴⁴ This will offer concrete alternatives compared to the actions of national centralised purchasing bodies. The latter, in turn, shall compete with European similar entities within a range which shall take the form of a direct competition among public procurement conducted on the same products and leads to buying from different framework agreements.⁴⁵ Centralised purchasing activities by a central purchasing body located in another Member State have to be conducted in accordance with the national provisions of the Member State where the central purchasing body is located.⁴⁶ This brings about the difficulty that contracting authorities of a Member State may have to apply the procurement law and regulations of a different Member States which significantly decreases the chances of cross-border collaborative procurement.

In addition, cross-border collaboration *between central purchasing bodies* in different EU Member States is also possible and is promoted by the European Commission to multiply their effect on cross-border trade.⁴⁷ Held by the Commission, central purchasing bodies in different Member States are the ideal candidates for applying the provisions on joint cross-border procurement.⁴⁸

Advantages of centralised purchasing activities and central purchasing bodies are the benefits relating to economies of scale (if large volumes purchased this may increase competition and help professionalising public purchasing) and the related stronger position and increased purchasing power on the market. It can also circumvent unnecessary stockpiling at many different contracting authorities so that shortages elsewhere can be avoided. Central purchasing bodies combine several

³⁹ Article 37 (4) Directive 2014/24/EU.

⁴⁰ Recital 69 Directive 2014/24/EU.

⁴¹ Article 37 Directive 2014/24/EU.

⁴² Recital 70 provides that ancillary purchasing services may be excluded from the scope of the Directive.

⁴³ Article 37(1) Directive 2014/24/EU.

⁴⁴ Article 39(2) Directive 2014/24/EU.

⁴⁵ S. Ponzio, 'Joint Procurement and Innovation in the New EU Directive and in some EU-Funded Projects, IUS Publicum, http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf, p. 30, referring to R. Cavallo Perin, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttivi*, Rome, 2014 p. 42.

⁴⁶ Article 39(3) Directive 2014/24/EU.

⁴⁷ European Commission, Proposal for an action plan on cooperative procurement, 5 February 2016 as referred to by A. Sanchez-Graells, Collaborative Cross-border Procurement in the EU: Future or Utopia?, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734123.

⁴⁸ See in particular Articles 33 and 37 through 39 of Directive 2014/24/EU.

professional skills (legal, economic, technical, methodological, etc) which are often out or reach for most individual contracting authorities and which are often necessary for the implementation of joint procurement.⁴⁹

There is proof that the EU actively supports the establishment of European public purchasers' networks. Under the Competitiveness and Innovation Framework Programme, the HAPPI Project, for example, aimed to establish a strategic cooperation among healthcare central purchasing bodies from several EU Member States that is also open to other Member States. The framework agreement delegated the French central purchasing body for the conduction of the award procedure in accordance with EU and French law and to regulate all the elements connected with the allocation of roles and responsibilities to the partners. On the basis of this agreement, each procurer will award contracts based on the framework agreement and execute them according to the respective national legal system and through purchasing orders. The identified added value of the project was the achievement of real cross border joint procurement overcoming legal and linguistic barriers, with the publication of the contract notice and of the tender documents, based on French law, in three different languages.⁵⁰

Nevertheless, when it comes to promoting the joint public procurement model for strengthening cross-border relationships, criticism was also raised that the relevant knowledge about the connection between joint procurement and centralisation is missing.⁵¹ When central purchasing bodies of different Member States decide to collaborate for the cross-border procurement of specific goods, and a framework agreement is made that is administered by the central purchasing authority of Member State A, difficult situations can arise. Indeed, the establishment of a collaborative mechanism between a central purchasing body of Member State A and a central purchasing body of Member State B will raise issues of international public law, constitutional law and administrative law which will prevent most of such initiatives.⁵² In addition, contracting authorities of Member State B have a relationship with central purchasing body B while it is possible that central purchasing body A is appointed to administer the framework agreement. The question is then whether the law of Member State A or B is applicable to actual procurement contracts that will follow that are domestic to Member State B.⁵³ Comparable questions arise when there is a soft collaborative procurement between the central purchasing bodies of A and B. Furthermore, excessive aggregation of demand can also hamper SME participations, which can in turn be remedied by buying in lots. Notwithstanding the fact whether the application of a different set of rules is even allowed for/possible, it brings about substantial costs and risks.

It is clear that complications such as the ones described above can dissuade contracting authorities in cross-border regions and located in different Member States from making use of centralised purchasing bodies. An added layer of complexity may be found in the fact that centralised purchasing

⁴⁹ S. Ponzio, 'Joint Procurement and Innovation in the New EU Directive and in some EU-Funded Projects, IUS Publicum, http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf, p. 11.

⁵⁰ S. Ponzio, 'Joint Procurement and Innovation in the New EU Directive and in some EU-Funded Projects, IUS Publicum, http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf, p. 22-26.

⁵¹ T. Tatrai, 'Joint Public Procurement', ERA Forum 7-24, 16(1), 2015

⁵² A. Sanchez-Graells, Collaborative Cross-border Procurement in the EU: Future or Utopia?, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734123, p. 23.

⁵³ A. Sanchez-Graells, Collaborative Cross-border Procurement in the EU: Future or Utopia?, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734123, p. 23.

bodies operate on a permanent basis. When it comes to crisis time procurement, the biggest challenge concerns the *ad hoc* nature of the need for certain materials and therefore coincidentally the need to be able to react and purchase *ad hoc*. Once established, centralised purchasing bodies are the appropriate party to aptly achieve swift procurement due to their expertise. Nevertheless, the challenges expressed in the previous paragraph show that establishing such a body may be challenging. In relation to the EMR, the question is whether there is sufficient interest in the establishment of a centralised purchasing body. Particularly relevant here is whether there is also a desire or need to cooperate on procurement in non-crisis times. If such is the case, a centralised procurement body may prove a particularly suitable solution. If this is not the case and cooperation on procurement is merely sought on an *ad hoc* basis in crisis times, challenges related to the creation of such a body may outweigh its benefits.

2.3.1.3. Occasional Joint Procurement

Joint procurement can take many different forms, ranging from coordinated procurement through the preparation of common technical specifications for works, supplies or services that will be procured by a number of contracting authorities, each conducting a separate procurement procedure, to situations where the contracting authorities concerned jointly conduct one procurement procedure either by acting together or by entrusting one contracting authority with the management of the procurement procedure on behalf of all contracting authorities.⁵⁴ Under Article 38 of the Procurement Directive, two or more contracting authorities may agree to perform certain specific procurements jointly, which is also referred to as occasional joint procurement. When the procurement procedure is entirely carried out jointly on behalf of all the contracting authorities involved, the authorities are jointly responsible for fulfilling the obligations under the Directive. Either the procurement is carried out jointly, or one contracting authority manages the procedure on behalf of all authorities. If only part of procurement is jointly conducted, joint responsibility applies only on those parts. The contracting authority is responsible for those parts of the procedure that they perform only on their own behalf.⁵⁵

In essence, occasional joint procurement can be defined as less institutionalised and systematic common purchasing (compared to centralised purchasing and central purchasing bodies) or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting authority and under its instructions. The joint procurement may be agreed with contracting authorities **from different Member States**. However, the possibilities of cross-border joint procurement should not be used for the purposes of circumventing the legislation of the Member States which would be otherwise applicable.⁵⁶ Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities are required to conclude an agreement that determines the responsibilities of the parties and the relevant applicable national provisions and the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion

⁵⁴ Recital 71 Directive 2014/24/EU.

⁵⁵ Article 38(1) Directive 2014/24/EU.

⁵⁶ Article 39 and Recital 73 Directive 2014/24/EU.

of contracts.⁵⁷ It is unclear in how far such contracting authorities (and not the Member States) are even allowed to negotiate outside the framework of international agreements concluded by their States.⁵⁸ Several contracting authorities from different Member States can also decide to set up a joint entity, including European Groupings of Territorial Cooperation as meant by Regulation 1082/2006 or other entities established under EU law. In such case they should, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules which are either those of the Member State where the joint entity has its registered office or where the joint entity is carrying out its activities.⁵⁹

In any case, benefits of joint procurement include economies of scale, including risk-benefit sharing. Furthermore, it can secure lower prices, administrative cost savings, better skills and expertise.⁶⁰ On the other hand, excessive aggregation of demand can also hamper SME participations, which can in turn be remedied by buying in lots. Furthermore, joint procurement can also bring about significant political difficulties from a perspective of institutional design and interaction between bodies, civil servants and politicians. It can sometimes also be more time consuming. Looking at the situation in the EMR and the COVID-19 pandemic joint authorities may indeed benefit from the advantages related to joint procurement described above. Nevertheless, one may wonder whether the disadvantages related to institutional design, administrative cooperation, and the time these take up actually render occasional joint procurement a less suitable means of cooperation in times of crisis when swift action is to be taken. Much can perhaps be held to depend on the expertise of the contracting authorities with prior cooperation on joint procurement (both nationally and in a cross-border sense).

2.3.1.4. Conclusion on Cross-border Collaborative Procurement as Provided for by the Directive

It is hard to assess whether there is a net positive or negative political and economic case for cross-border collaborative procurement.⁶¹ Savings and a higher degree of professionalization by means of centralized and collaborative procurement needs to be counter-balanced with the impact it has on the internal organisation of the state and its administration.⁶² The Procurement Directive does not provide for sufficient rules or guarantees to deal with aspects of public, administrative and contract law, specifically when it comes to the applicable rules from a territorial point of view. Indeed, there can be conflicts between national procurement rules. This makes cross-border collaborative procurement often impracticable. Furthermore, collaborative procurement can provide less opportunities for SMEs and may not always meet local (clinical) needs and practices.⁶³

⁵⁷ Article 39(4) Directive 2014/24/EU.

⁵⁸ A. Sanchez-Graells, Collaborative Cross-border Procurement in the EU: Future or Utopia?, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734123, p. 34.

⁵⁹ Article 39(5) Directive 2014/24/EU.

⁶⁰ LEAP Toolkit-Local Authority Environmental Management and Procurement taken from Local Authority Procurement: A research report, commissioned by the United Kingdom Office of the Deputy Prime Minister, <http://www.leap-gpp-toolkit.org/index.php?id=43>, p. 1-2.

⁶¹ A. Sanchez-Graells, Collaborative Cross-border Procurement in the EU: Future or Utopia?, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734123, p. 27.

⁶² A. Sanchez-Graells, Collaborative Cross-border Procurement in the EU: Future or Utopia?, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734123, p. 27.

⁶³ L. Lee, R. Williams & A. Skeihk, 'How does joint procurement affect the design, customisation and usability of a hospital ePrescribing system', in: *Health Informatics Journal*, 2016 vol. 22(4), p. 828.

Indeed, the previous Sections have shown that the complexity of putting into operation different forms of collaborative procurement may prove to be a considerable disadvantage dissuading the use of such instruments in cross-border regions – and especially in crisis situations where time is of the essence. Although each of the collaborative procurement forms has its complexities when applied in a cross-border context, these are particularly relevant for centralised purchasing bodies/activities and occasional joint procurement. More specifically, a centralised purchasing body is paired with the most extensive creation process, meaning that its benefits are likely to come to fruition if extensive use is made of the body's services (i.e. ranging beyond sheer crisis-time procurement). In relation to occasional joint procurement its occasional nature also means that the terms of the cooperation are to be re-established each time authorities cooperate – again resulting in a loss of valuable time in crisis situations. In relation to framework agreements these can perhaps be designated to have the greatest potential of the EU-level collaborative procurement forms. The fact that the framework agreement sets out provisions on the contracts to be awarded means that it can be tailored to fit particular needs in times of crisis. This also means that authorities do not have to re-establish terms each time they wish to award a contract (as in the case of occasional joint procurement). The fact that authorities who are not part of a framework agreement can also join a contract can be particularly suitable in crisis times since it allows authorities experiencing pressing – perhaps unexpected – shortages to also see their needs met. Nevertheless, it must again be ensured that valuable time is not lost in the negotiation to establish the framework agreement. In this context, it is imaginable that authorities who have prior experience cooperating on framework agreements are more likely to cooperate successfully on such agreements also in times of crisis.

2.3.2. Public Procurement Framework in Emergency Situations

Public Procurement has shown to be crucial for economic growth and economic recovery after crises situations. After the 2008 financial and economic crisis, for example, Directive 2014/24/EU aimed to simplify procedures and increase market access for SMEs. Indeed, Directive 2014/24/EU provides for several possibilities that can be very helpful in emergency situations.

First of all, the Directive allows for **shortening of the time limits** of the 'regular' procurement procedures in state of urgency.⁶⁴ Secondly, the **negotiated procedure without prior publication** can be used in so far as it 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 of competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify the extreme urgency cannot in any event be attributable to the contracting authority.⁶⁵ This procedure allows contracting authorities to directly negotiate with potential contractors or to directly award a contract to a specific supplier without any competition at all. In any case, for this procedure to be invoked there should be extreme urgency that is unforeseeable, there is no alternative approach possible/useful and there is a causal link between the extremely urgent need and the scope of the procurement.⁶⁶ As this constitutes a derogation from the basic principle of transparency, the criteria that have to be met are applied restrictively and contracting authorities must justify the use of this option (ex-post transparency). As held by the Commission in its Guidance

⁶⁴ See e.g. Article 27(3) and 28(6) of the Directive.

⁶⁵ Article 32(2)(b) Directive 2014/24/EU.

⁶⁶ Case C-107/92 *Commission v Italy* ECLI:EU:C:1993:344; Case C-275/08 *Commission v Germany* ECLI:EU:C:2009:632; Case C-352/12 *Consiglio Nazionale degli Ingegneri* ECLI:EU:C:2013:497.

on using the public procurement framework in the emergency situations related to the COVID-19 crisis of 1 April 2020,⁶⁷ the COVID-19 crisis presents an extreme and unforeseeable urgency. While in the early stages of the COVID-19 pandemic, it was mostly not problematic to invoke Article 32, this was certainly not the case anymore in the later phases, as the emergency situation was no longer unforeseeable. Nevertheless, in order to establish whether a situation of extreme urgency exist, contracting authorities will have to assess this on a case-by-case basis based on the parameters set in the Procurement Directive.

Another helpful procurement tool in emergency situations may be found in **forms of collaborative procurement** provided by the Procurement Directive. These were discussed in-depth in the previous Section. Suffice it to say, that the relevant forms of collaborative procurement are framework agreements, centralised purchasing, and occasional joint procurement. In the case of framework agreements, their particular advantage lies in the fact that the terms of such agreements are laid down in advance. Furthermore, it is not necessary to reopen an actual (full) procurement competition when the emergency arises as contracting authorities can call off potential suppliers from lists of prequalified contractors. Of course, this does not entail that the necessary materials are always available on the market as the supply chain may not have sufficient stocks. When it comes to central purchasing, this collaborative procurement form has also been identified to help increase competition and to lead to a more effective response in tackling large-scale supply chain disruptions as it enables increased coordination and more efficient application of contracting expertise to difficult market situations. Finally, joint purchasing is also named when it comes to benefitting from shared expertise and increased opportunities.

On the side it can be noted that when it comes to already existing contracts , economic operators often invoked Article 72 of the Directive which allows for such contracts to be **modified**. In this regard, extensions were asked or compensation of additional costs or contracts were terminated due to force majeure. Modifications cannot be substantial however.

Finally, from a procedural point of view, the remedies Directive 2007/66/EC allows Member States to provide that the review body independent of the contracting authority may not consider a contract ineffective in crisis times in case of a direct award. The contract may thereby not be considered ineffective – even if it has been awarded illegally – if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained.⁶⁸ In this case, Member States shall provide for alternative penalties which shall be applied instead.⁶⁹

2.4. High-level Cooperation on Procurement: Agreements between the EU and Member States

Looking beyond the perspective of cross-border regions, cooperation on procurement may also take place between the EU and Member States. As far as the Member States are concerned the cooperation on procurement here concerns the highest administrative levels. Contracting authorities in cross-border regions may indirectly also experience effects of such high-level procurement since they may

⁶⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2020:108:FULL>

⁶⁸ For instance, in the Netherlands this option is provided under Art. 4.18 of the Procurement Act. See Section 2.3.1.3.

⁶⁹ Article 2d(3) of Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

receive materials purchased through such agreements. However, the use of these methods of procurement can contribute to what has been described as the re-nationalisation of crisis management. Since procurement is conducted by the highest administrative levels in the different Member States, authorities in border regions may have less opportunities to procure materials themselves. Indeed, the results from the interviews conducted in this study also show that procurement activities were occasionally taken over by national-level actors.⁷⁰ Although contracting authorities in cross-border regions are therefore unable to directly rely on these types of procurement cooperation it is necessary to briefly discuss these forms of “high-level cooperation” in order to provide a full image of possibilities to cooperate in the area of crisis time procurement. Particular attention will thereby be given to the Joint Procurement Agreement and Advanced Purchase Agreements.

2.4.1 Joint Procurement Agreement

Soon after the beginning of the COVID-19 pandemic it became clear that the possibilities in the general Procurement Directive were not sufficient to tackle the health crisis. Within the framework of a coordinated EU health response, together with the “rescEU stockpile” adopted under the EU Civil Protection Mechanism, the Joint Procurement Agreement (JPA) has emerged as a core instrument to support a pan-European purchasing of personal protective equipment (PPE), ventilators and devices necessary for coronavirus testing.⁷¹ Although the JPA is therefore not available as an instrument to be used by national, regional or local contracting authorities, it may provide them with necessary materials if the Member State in which they are located is part of a JPA. More specifically, national and/or regional contracting authorities may receive materials purchased by their Member State via the JPA.

The JPA was introduced in 2014 in order to improve Member State’s purchasing powers after the H1N1 pandemic influenza. Already in 2010, the Council invited the Commission to report on and develop a mechanism for the joint procurement of vaccines and antiviral medication which would allow Member States on a voluntary basis to adopt common approaches to the negotiation of contracts with the industry on matters such as liability, availability and prices. Decision 1082/2013 on serious cross-border threats to health was therefore adopted on the basis of Article 168(5) TFEU. Article 5 allows the EU institutions and Member States to engage in a joint procurement procedure with a view to the advance purchase of medical countermeasures (which are defined as any medicines, medical devices or any other related goods or services that are aimed at combatting serious cross-border threats to health) for serious cross-border health threats. The Decision bases the joint procurement involving the Commission and the Member States on Financial Regulation 966/2012 which sets up detailed financial rules on the general EU budget and regulates the procurement by the EU institutions.

The JPA is a *sui generis* agreement concluded by the Commission and the participating Member States, determining the practical arrangements governing the joint procurement procedure and the decision-making process with regard to the choice of the procedure, the assessment of the tenders and the

⁷⁰ See, for example, Section 4.6 of this report.

⁷¹ E. McGevoy & 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.852-853.

award of the contract. To date, the JPA for medical countermeasures has 37 members, including all EU and EEA countries, the UK, Albania, Montenegro, North Macedonia, Serbia and Bosnia and Herzegovina, as well as Kosovo. It allows its signatories to jointly procure the medical countermeasures mentioned above. It has an intergovernmental character and is based on the voluntary participation of countries.

The collective mechanism aims to secure high-quality public medical services and goods but also to ensure the efficient use of public finances.⁷² In addition, the JPA aims to secure more equitable access to these medical countermeasures, improved security of supply and more balanced prices. It can improve the countries' bargaining power and can reduce administrative costs for the participating Member States as it seeks to avoid duplication of public procurement procedures at national level. The JPA is based on specific case-by-case agreements on how to distribute the quantities procured across participating countries, allowing for a concentration of supplies for those in acute need as well as donations of quotas.

All contract notices under the JPA are public and published in the official journal, unless the negotiated procedure without prior publication is used. A joint procurement procedure can start if at least four Member States and the Commission vote in favour and participate in the procurement process. The European Commission acts on its own behalf and on behalf of the contracting parties and is the sole representative of the parties throughout the joint procurement procedure including the award of the framework contract(s). In case of urgency the specific procurement procedure steering committee may approve that the Commission signs the framework contract on behalf of all participating members. In essence, it has only an executive role in the design and execution as every participating country should enter into direct legal and economic relationships with the relevant contractors. Indeed, when a contract is awarded under the JPA, the individual contracts are signed by the participating Member States and not by the EU.

Joint procurement procedures under the JPA were launched six times in response to the COVID-19 pandemic (protective goggles-surgical masks-filtering face piece respirators; PPE equipment including clothing gloves, face shields; respiratory protection PPE); ventilators; laboratory equipment for diagnoses; drug Remdesivir; equipment for vaccination. These procedures were based on the negotiated procedure without prior publication of a contract notice. Not all procurement procedures led to tender proposals, but some allowed for more than twenty companies to deliver the requested material.⁷³ While contracting parties will receive the total quantity of the medical countermeasures they have reserved or ordered, the rate of delivery shall depend on the production capacity of the contractor and the generally applicable allocation criteria. Derogations are possible in case of emergency. After the award decision is adopted, the participating parties shall sign the contract and implement the framework contract. However, the JPA does not entail any obligation for the parties to subsequently participate in public procurement procedures launched to acquire a specific medical countermeasure based on that agreement. In addition, participating countries are still allowed to engage in parallel procurement procedures at national level.

⁷² Ibid, p. 853.

⁷³ All contract award notices can be found online.

In any case, improving a centralised procurement mechanism via the JPA would carve out an important role for the EU in ensuring that all EU citizens have equitable access to high-quality and affordable healthcare.⁷⁴ The possibility of launching a procedure even if there are only four countries and the European Commission is positive as such initiatives grow and develop over time. This provides room for small Member States to collaborate even if larger Member States would not be interested.⁷⁵ This was of course not the case in the COVID-19 Pandemic as the JPA has been signed by 37 countries, including all EU Member States.

Despite its positive attributes, the JPA can also be said to contain certain complexities. First, in relation to funding, the lack of EU funding for the JPA can be identified as a factor hindering the programme's sustainability.⁷⁶ Furthermore, the fact that participating countries are allowed to engage in parallel procurement may lead to questions regarding the overall effectiveness of the procurement system since Member States who are partners in the context of the JPA may become competitors when they engage in parallel tendering. Nevertheless, prohibiting parallel tendering of Member States involved in the JPA risks eroding the added value of that Agreement since Member States may not want to participate due to such a restriction to procure independently. The same applies also in relation to lower-level contracting authorities. Although these authorities likely issue smaller contracts (and may therefore not be direct competitors of national-level actors), one may nevertheless wonder to which extent parallel procurement across administrative levels leads to overconsumption of materials for which markets are already overheated. At the same time, if lower-level authorities would not have the opportunity to themselves procure materials this would result in these authorities becoming dependent on higher-level authorities for the supply of materials, which in crisis times could be risky if materials are not supplied in a timely manner. All in all, the interaction of authorities across administrative levels demonstrates the tensions connected

2.4.2 Joint Procurement of Vaccines: A Different Approach

It is important to note that the Commission did not use the JPA for COVID-19 vaccines. After the COVID-19 pandemic started, the Commission created an EU Strategy for Vaccines that would allow for a smooth and organized distribution of doses after their authorization by the competent EU bodies.⁷⁷ As doses would have to be made available globally and as the crises needed to stop as soon as possible, the Commission tried to secure sufficient supplies for all Member States through Advanced Purchase Agreements (APA) and by making use of the Emergency Support Instrument (ESI) that was set up by Council Regulation 2016/369 and activated and amended by Regulation 2020/521⁷⁸ in the framework of the EU's powers in the field of civil protection. The APA and ESI therefore constitute other branches of the EU procurement system.

⁷⁴ E. McGevoy & 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', *European Journal of Risk Regulation*, 11, 2020, p. 853.

⁷⁵ N. Azzopardi-Muscat, P. Schröder-Bäck & H. Brand, 'The European Union Joint Procurement Agreement for cross-border health treats: what is the potential for this new mechanism of health system collaboration?', in: *Health Economics, Policy and Law*, 2017, 12, p. 52.

⁷⁶ N. Azzopardi-Muscat, P. Schröder-Bäck & H. Brand, 'The European Union Joint Procurement Agreement for cross-border health treats: what is the potential for this new mechanism of health system collaboration?', in: *Health Economics, Policy and Law*, 2017, 12, p. 52.

⁷⁷ See https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en#:~:text=On%2019%20January%202021%2C%20the,Member%20State%20should%20get%20vaccinated.

⁷⁸ https://ec.europa.eu/echo/what/civil-protection/emergency-support-instrument_en.

To ensure a fair distribution of vaccines among Member States, the Commission held that a joint action at EU level would be most suitable. As vaccines were not available on the market, the EU committed to assist scientific research and concluded APAs with the vaccine manufacturers who could benefit from financial support from the ESI funds to recover their initial investments. On the basis of the Regulation, the Commission can initiate a procurement on behalf of the Member States for the purpose of facilitating emergency support.⁷⁹ As an example of such procurement, it is important to refer to the Commission Decision of 18 June 2020 approving the agreement with Member States on procuring Covid-19 vaccines on behalf of the Member States. This Decision enables a single central EU-level procurement procedure by way of APA with vaccine manufacturers. The Commission is not actually buying or acquiring the vaccines but is acting as an intermediary. On the basis of the APA, Member States have the right to acquire vaccines, but they are not obliged to. Separate agreements with the same manufacturers are not allowed in order to avoid conflicts of interest. While all vaccine producers were invited by the Commission to conclude an APA, the EU only selected those who can prove that they are able to conduct the necessary clinical trials, while their scientists can develop a harmless yet effective antidote which can be further authorized by the competent bodies of the EU and the production capacity can successfully manufacture a considerable number of doses.⁸⁰ To date, six different APAs have been concluded for up to 4.4 billion doses.

2.4.3. Other initiatives

It is interesting to note is that upon urgent request of the European Commission, the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC) have made available a number of European standards for certain medical devices and PPE.⁸¹ This has helped to increase production. In addition, the European Commission has adopted a proposal for a regulation on serious cross-border threats to health repealing Decision 1082/2013/EU which aims to strengthen the EU's health security framework and to reinforce the crisis preparedness in which procurement obviously has an important role.⁸²

⁷⁹ Article 4(5)(b) of Regulation 2016/369 as amended by Regulation 2020/521.

⁸⁰ https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans_en.

⁸¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_502.

⁸² 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.

The proposal aims to strengthen EU interventions and trigger increased coordination and allow for the development, stockpiling and procurement of crisis-relevant products. The Parliament's Committee on the Environment, Public Health and Food Safety (ENVI) is expected to plenary adopt the negotiating mandate in September 2021. ENVI calls for clear procedures and increased transparency for EU joint procurement activities and related purchase agreements. Joint procurement is considered important to strengthen the negotiating position of participating countries, improve the security of supply and ensure equitable access to medical products. See <https://www.europarl.europa.eu/news/es/press-room/20210707IPR07902/boosting-the-eu-s-capacity-to-anticipate-and-respond-to-health-crises>.

3. Procurement at National Level

After having examined procedures for crisis-time procurement and opportunities for cooperation at EU level, the focus in the present Section is shifted to the national level. Since the EU procedures taken up in the Procurement Directive are only applicable to contracts the value of which exceeds the thresholds taken up in the Directive,⁸³ there is a need to also examine emergency procurement procedures and opportunities for procurement cooperation at the national level. It is thereby also important to emphasise that – apart from these EU-level thresholds crucial for the application of the Procurement Directive – thresholds may also be maintained at national level. More specifically, Member States can maintain thresholds under which competent authorities do not need to apply procurement procedures at all. National procurement legislation is then aimed at contracts the value of which lies between the minimum national threshold for procurement and the minimum levels for EU procurement. The following Sections examine the relevant legislation for the three countries in which the EMR's regions are located: the Netherlands, Belgium, and Germany (with a focus on North Rhine-Westphalia).

3.1 The Netherlands

3.1.1 Overview of the Legal Framework

In the Netherlands, public procurement is regulated by the Procurement Act (*Aanbestedingswet 2012*). Following the adoption of the EU Directives on procurement, the Act was adapted by the *Wet tot wijziging van de Aanbestedingswet 2012*. The legal amendments sought to, among other changes, facilitate better access for SMEs and to reduce administrative burden for contracting authorities and economic actors.⁸⁴ Moreover, the Public Procurement Decree (*Aanbestedingsbesluit*)⁸⁵ and Works Procurement Regulations 2016 (*Aanbestedingsreglement Werken*) provide further rules on procurement procedures.

The Procurement Act applies to public contracts and concessions awarded by contracting authorities,⁸⁶ subject to exceptions.⁸⁷ The Act lays down minimum requirements and criteria on selection and award procedures and lays down the principles on public procurement.

As set in the Procurement Directive, the tendering procedures must follow the principles of equality (non-discrimination), transparency, proportionality, mutual recognition and objectivity, and must prevent fraud, corruption and favouritism.⁸⁸ Nationally, the proportionality assessment is further described in the Proportionality Guide (*Gids Proportionaliteit*) laying down legally binding guidelines

⁸³ See European Commission, 'Thresholds', https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en.

⁸⁴ European Commission, 'Public procurement – Study on administrative capacity in the EU - The Netherlands Country Profile' https://ec.europa.eu/regional_policy/sources/policy/how/improving-investment/public-procurement/study/country_profile/nl.pdf.

⁸⁵ Full legal text found here: <https://wetten.overheid.nl/BWBR0032919/2020-07-01>.

⁸⁶ Part 2 applies to public contracts, Part 2a on concessions, Part 3 on public contracts in special sectors.

⁸⁷ For instance, exceptions apply to defence and security procurement or acquisition or rental of land, see Section 2.1.3 of the Procurement Act.

⁸⁸ Section 1.2.2. of the Procurement Act lays down principles of European tenders (meeting the thresholds of the Directives), Section 1.2.3. is applicable for national tenders.

for all procurement procedures,⁸⁹ ensuring that the requirements imposed by the contracting authority are proportionate to the public contracts' object and scope, and that the principle is followed throughout all phases of the procedure. Next to these principles, contracting authorities are (based on national civil and case law) subject to the principles of pre-contractual good faith and good administration.⁹⁰ The Procurement Act also lays down the general principles of creation of social value (contracting authorities must conclude any contract for the performance of works, supplies or services, on the basis of objective criteria⁹¹ and with the aim to deliver as much social value as possible),⁹² cluster ban⁹³ (avoiding unnecessary mergers of contracts), and the limitation of administrative burdens.⁹⁴

The Procurement Act applies same thresholds as the EU Directives.⁹⁵ Therefore, Part 2 of the Procurement Act only applies in case the EU thresholds are met.⁹⁶ For instance, public contracts concerning health and social services may apply a special procedure for contracts equal or greater of threshold 750 000€ unless the contracting authority decides otherwise.⁹⁷ When these thresholds are met, the contracting authorities may apply an open procedure,⁹⁸ restricted procedure,⁹⁹ negotiated procedure with¹⁰⁰ and without prior publication,¹⁰¹ competitive dialogue,¹⁰² or proceed through innovation partnership.¹⁰³ However, specific purchases (such as social, and other specific services¹⁰⁴, and framework agreements¹⁰⁵) are subject to a special procedure. By contrast, when the contract does not meet the thresholds, the contracting authorities may nevertheless decide to still follow the procedures provided by the Procurement Act. The contracting authority may apply an open or restricted procedure¹⁰⁶, single private procedure or multiple private procedure, inviting two or more pre-selected tenderers to submit an offer.¹⁰⁷ Furthermore, although the thresholds are not met, the procedure must comply with the general principles of procurement law.

At the national level, general government terms and conditions are laid down for public services,¹⁰⁸ purchasing conditions¹⁰⁹ and IT contracts¹¹⁰. Next to these legal instruments, procurement procedures may be subject to separate regulations organized by specific contracting authorities, for example by

⁸⁹ Unless derogation is justified, e.g. Art. 1.16(4) Procurement Act.

⁹⁰ See for instance case *Gemeente Noordwijk*, ECLI:NL:GHSGR:2010:BO2080.

⁹¹ Art. 1.4(1) Procurement Act.

⁹² Art. 1.4(2) Procurement Act.

⁹³ Art. 1.5(1) Procurement Act.

⁹⁴ Art. 1.6 Procurement Act.

⁹⁵ European Commission, 'Thresholds', https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en.

⁹⁶ Section 2.1 Procurement Act.

⁹⁷ Art. 2.38 Procurement Act, referring to threshold set in Arts. 74 and 4(d) Directive 2014/24/EU.

⁹⁸ Art. 2.26 Procurement Act.

⁹⁹ Art. 2.27 Procurement Act.

¹⁰⁰ Art. 2.30 Procurement Act.

¹⁰¹ Art. 2.32 Procurement Act.

¹⁰² Art. 2.28 Procurement Act.

¹⁰³ Art. 2.31a Procurement Act.

¹⁰⁴ Art. 2.39 Procurement Act.

¹⁰⁵ Art. 2.44 Procurement Act.

¹⁰⁶ Article 1.22 Procurement Act.

¹⁰⁷ Art. 1.14 Procurement Act.

¹⁰⁸ General Government Terms and Conditions for Public Services 2018 (ARVODI).

¹⁰⁹ General Government Purchasing Conditions 2018 (ARIV).

¹¹⁰ General Government Terms and Conditions for IT Contracts 2018 (ARBIT).

provinces or municipalities, that are intended to supplement and further regulate the purchases. The regulations usually relate to contracts below the thresholds set in the Procurement Act.¹¹¹

3.1.2 Cooperation Methods under National Law

Following the EU Procurement Directive, the Dutch Procurement Act provides an opportunity to conclude framework agreements.¹¹² For example, framework agreements have been used during the COVID-19 crisis by the Ministry of Defence to purchase safety equipment and by the municipality of Den Haag to purchase clothing and personal protective equipment.¹¹³ It is also possible for the contracting authorities to purchase supplies or services from a central purchasing body,¹¹⁴ or to carry out procurement jointly.¹¹⁵ Art. 2.11b of the Act further specifies that framework agreements or joint procurement are also possible for contracting authorities in different Member States. In this situation – similar to what is provided at EU level – the participating contracting authorities make an agreement providing the division of responsibilities, applicable national provisions, and the organisation of the procurement procedure, unless these elements are already covered by international agreement concluded between the Member States.¹¹⁶ When establishing a joint entity with contracting authorities from different Member States, the participating authorities agree which national tendering rules apply.¹¹⁷

3.1.3 Procurement during the COVID-19 Crisis: Emergency Procedures

The Dutch legislation also provide procedures to be initiated in case of emergency. Similarly, as provided under the European Commission guidelines, the contracting authorities may modify contracts, or make the use of accelerated procedure or negotiated procedure without notice.

Current contracts may be modified on the basis of Arts. 2.163a-2.163g of the Procurement Act: for instance, in case of unforeseen circumstances, when the changes do not materially differ from the original contract, or on the basis of review clauses in the tender documents. However, in case the modification leads to a change of the general nature of the public procurement, a new procurement procedure may be needed. In this case, an accelerated procedure may provide a good option for contracting authorities in times of urgency. Such an accelerated procedure, following Art. 2.74 of the Procurement Act, may be used in urgent situations. The procedure allows for the shortening of tender deadlines. Urgency must be duly substantiated by the contracting authority. For instance, in case of an open procedure the time limit for submission of tenders may be changed from 45¹¹⁸ to 15 days.¹¹⁹

¹¹¹ P. Kuypers, 'Boom Basics Aanbestedingsrecht' 2e druk, 2014, Chapter 2: Bronnen aanbestedingsrecht.

¹¹² Art. 2.44 Procurement Act.

¹¹³ TED COVID-19-related tenders, <https://ted.europa.eu/udl?uri=TED:NOTICE:325500-2021:TEXT:EN:HTML>;
<https://ted.europa.eu/udl?uri=TED:NOTICE:318390-2021:TEXT:EN:HTML>.

¹¹⁴ Art. 2.11 Procurement Act. Example of such centralised purchasing body is *Het Landelijk Consortium Hulpmiddelen* (LCH) that was founded during the COVID-19 crisis. The tasks of the LCH are to centrally procure personal protective equipment for healthcare, manage emergency supplies and distribute them. See more at <https://www.lchulpmiddelen.nl/over-het-lch>.

¹¹⁵ Art. 2.11a Procurement Act.

¹¹⁶ Art. 2.11b Procurement Act.

¹¹⁷ Art. 2.11b(6) Procurement Act.

¹¹⁸ Art. 2.71(1) Procurement Act.

¹¹⁹ Art. 2.74(a) Procurement Act.

If the accelerated procedure does not provide a fast enough procedure due to the pressing urgency, the contracting authority may use a negotiated procedure without prior notice (Arts. 2.32-2.37). The opportunity provided by such negotiated procedure without prior notification in context of COVID-19 has, for example, been used by the Maastricht University Medical Centre (MUMC+) for the purchases of disposable medical examination gloves.¹²⁰ In case of these procedures, the extreme urgency, on the basis of which the procedure is invoked, must be unforeseen and not relate to the contracting authorities.¹²¹ This provision must be used only when strictly necessary and should be interpreted restrictively. Furthermore, the quantity of orders may not exceed what is necessary to procure.¹²² Furthermore, an official report must be drawn justifying the application of the procedure, and the circumstances leading to it.¹²³ Finally, the award must be published.¹²⁴

As stated above, specific contracting authorities may apply additional regulations, which are especially used for contracts below the EU thresholds. In these regulations, for instance, the municipality of Maastricht provides that deviation from the standard procedures is possible, within the framework of the Procurement Act 2012 and the proportionality guidelines, if there is an urgent urgency not caused or foreseen by the municipality.¹²⁵ Similarly, *Veiligheidsregio Zuid-Limburg* provides the possibility to deviate in situations of pressing urgency when unforeseen circumstances require immediate action.¹²⁶

Furthermore, from a procedural aspect it is possible to invoke ineffectiveness under Dutch legislation. As provided by Art. 4.18 of the Procurement Act, even though all legal aspects of the procurement procedure have not been complied with (for instance, the time limits), the Court may decide not to annul the agreement in case overriding reasons of public interests.

3.1.4 Conclusion on Procurement in the Netherlands

The above section has examined the legal framework on public procurement in the Netherlands. The Procurement Act, which closely follows the EU Directive, could be regarded the most relevant legislative act. Next to the Act, contracting authorities must follow general government terms and conditions, and nationally set legally binding guidelines such as the *Gids proportionaliteit*. Furthermore, separate regulations have been adopted by specific contracting authorities, such as the provinces and municipalities. Such regulations allowed for deviations from standard procedures in exceptional circumstances, such as the COVID-19 crisis in addition to the emergency procedures established by national law (accelerated procedure, modification of contracts, negotiated procedure without notice). It was also found that, in addition to these emergency procedures, contracting authorities made use of framework agreements in order to obtain protective materials during the crisis.

¹²⁰ Published tender, see more at

<https://platform.negometrix.com/PublicBuyerProfile/PostedTenderInformation.aspx?isPublicProfile=false&tenderId=163522&tab=&page=1&searchParam=&sortParam=Id&sortDirection=False>.

¹²¹ Art. 2.32(1)(c) Procurement Act.

¹²² Pianoo Expertiecentrum Aanbesteden, 'Gevolgen van de coronacrisis voor inkoop' <https://www.pianoo.nl/nl/themas/coronacrisis-en-inkoop/veel-voorkomende-vragen>.

¹²³ Art. 2.37 in conj. Art. 2.132 Procurement Act.

¹²⁴ Art. 2.37 Procurement Act.

¹²⁵ Section 4.3 *Inkoop- en aanbestedingsbeleid gemeente Maastricht*, <https://lokaleregelgeving.overheid.nl/CVDR624129/1>.

¹²⁶ Section 2.6 *Veiligheidsregio Zuid-Limburg: Inkoopbeleid*, https://www.vrzl.nl/application/files/1815/5363/6210/inkoopbeleid_VRZL_2017.pdf.

3.2 Belgium

3.2.1 Overview of the Legal Framework

In Belgium, public procurement is regulated at the federal level by the Law of June 2016 on public procurement, transposing the EU Procurement Directive into Belgian legislation. Furthermore, various Government Decrees further specify the rules. For example, the Royal Decree of 14 January 2013 establishes the general rules for the execution of public contracts. The Royal Decree of 18 April 2017 applies to awarding of contracts in classic sectors, and Royal Decree of 18 June 2017 on special sectors (such as water, energy, and transport). This Section will mainly focus on the classic sectors since crisis-time procurement mainly falls within the scope of these sectors.

Legislation on public procurement is generally the competence of the federal legislator. However, in matters where the regions have responsibility, additional regulations may be applied. For instance, in the Brussels-Capital Region legal texts have been adopted on the inclusion of environmental, ethical, and social clauses in public contracts.¹²⁷

The Belgian legislation on public procurement follows the principles of constitutional and administrative law on government transparency, equality, proportionality, and non-discrimination. In addition, the principles of free movement, proportionality, and mutual recognition must be respected as set out in the EU Directive.¹²⁸ These principles are also reflected in Chapter 2 of the Law of June 2016 which provides the general principles applicable to public procurement as established above: equality, non-discrimination, transparency, and proportionality.¹²⁹ Furthermore, contracting authorities may not restrict or distort competition¹³⁰ and must comply with environmental, social, and labour law obligations.¹³¹

The Law of June 2016 particularly applies to public contracts concluded by contracting authorities. Following this Law, the definition of a contracting authority enjoys a broad interpretation – not only public entities such as the State, regions and public authorities are subject to the legislation, but also some private entities.¹³² Following the Procurement Directive, the legislation excludes certain contracts from its application, such as employment or legal service contracts.¹³³ In order to define the application of the Law of June 2016, reference is again made to the EU thresholds: the Law applies to procurement below, equal or higher than the set thresholds¹³⁴ defined by the Royal Decree of 18 April 2017.¹³⁵ In principle, all contracts are subject to the publication of tenders in Belgium regardless of whether EU thresholds are met or not.¹³⁶

¹²⁷ For instance, list of legal texts in the Brussels-Capital Region is available here: <http://pouvoirs-locaux.brussels/theme/marches-publics/marches-publics-et-contrats-de-concession-locaux/reglementation-applicable/reglementation-et-documents-types-au-niveau-regional>.

¹²⁸ D. D'Hooghe, A. Carton, 'International Comparative Legal Guide on Public Procurement 2016: A practical cross-border insight to public procurement' 8th edition. Chapter 4: Belgium, p. 25.

¹²⁹ Art. 4 Law of 17 June 2016.

¹³⁰ Art. 5 Law of 17 June 2016.

¹³¹ Art. 7 Law of 17 June 2016.

¹³² Art. 2 Law of 17 June 2016.

¹³³ Art. 28 Law of 17 June 2016.

¹³⁴ Art. 19 Law of 17 June 2016.

¹³⁵ Art. 11 Royal Decree of 18 April 2017.

¹³⁶ Art. 19 Royal Decree of 18 April 2017.

In order to set the procurement process in motion, several procedures may be used. In particular, the procurement may be conducted by an open procedure,¹³⁷ restricted procedure,¹³⁸ competitive procedure with negotiation,¹³⁹ negotiated procedure without prior publication,¹⁴⁰ simplified negotiated procedure with prior publication,¹⁴¹ dynamic purchasing systems,¹⁴² competitive dialogue,¹⁴³ contest¹⁴⁴ or via innovation partnership^{145, 146}. The applicable procedure is determined by the applicable thresholds and for which type of works, supplies or services the contract is concluded.¹⁴⁷ For instance, one of the situations where competitive procedure with negotiation may be used is when the value of the contract is below the EU threshold.¹⁴⁸ Social and other specific services however follow special rules. In these sectors, the contracting authorities may use simplified negotiated procedure with prior publication, or negotiation procedure without prior publication if the estimated amount of the contract is less than 750,000 euros. In any case, the procedure must respect the principles of transparency, proportionality, and equal treatment.¹⁴⁹

Contracts with lower value enjoy a more flexible regime. Contracting authorities may use a special procedure of “orders with accepted invoice” when the estimated value does not exceed a threshold of 30,000 euros. Besides the obligation to follow the basic principles of public procurement, these limited value contracts are not subject to most of the formalities of the public procurement legislation.¹⁵⁰

3.2.2 Cooperation Methods under National Law

Procurement cooperation methods seen in Belgian national legislation very much mirror those seen in the EU Procurement Directive. Pursuant to Article 43 of Law of 17 June 2016, contracting authorities may conclude framework agreements with one or more economic operators. In the context of COVID-19, framework agreements have often been used for example when purchasing disinfectants,¹⁵¹ sterilization and hygiene devices,¹⁵² disposable gloves¹⁵³ and protective clothing.¹⁵⁴ Furthermore, two or more contracting authorities may conduct procurement jointly.¹⁵⁵ It is also possible to acquire

¹³⁷ Art. 36 Law of 17 June 2016.

¹³⁸ Art. 37 Law of 17 June 2016.

¹³⁹ Art. 38 Law of 17 June 2016.

¹⁴⁰ Art. 42 Law of 17 June 2016.

¹⁴¹ Art. 41 Law of 17 June 2016.

¹⁴² Art. 44 Law of 17 June 2016.

¹⁴³ Art. 39 Law of 17 June 2016.

¹⁴⁴ Art. 50 Law of 17 June 2016.

¹⁴⁵ Art. 40 Law of 17 June 2016.

¹⁴⁶ Art. 35 Law of 17 June 2016.

¹⁴⁷ Table of requirements simplifying the legislation may be found here: <http://pouvoirs-locaux.brussels/theme/marches-publics/marches-publics-et-contrats-de-concession-locaux/reglementation-applicable/reglementation-federale/principaux-seuils-belges-secteurs-classiques>.

¹⁴⁸ Art. 38 Law of 17 June 2016.

¹⁴⁹ Art. 89 Law of 17 June 2016.

¹⁵⁰ Art. 92 Law of 17 June 2016.

¹⁵¹ Belgium-Hasselt (Vzw Jessa Ziekenhuis), <https://ted.europa.eu/udl?uri=TED:NOTICE:350373-2021:TEXT:EN:HTML>.

¹⁵² Belgium-Antwerp (Het Ziekenhuisnetwerk Antwerpen), <https://ted.europa.eu/udl?uri=TED:NOTICE:345784-2021:TEXT:EN:HTML>.

¹⁵³ Belgium-Namur (CHR Sambre & Meuse), <https://ted.europa.eu/udl?uri=TED:NOTICE:328063-2021:TEXT:EN:HTML>.

¹⁵⁴ Belgium-Liège (Province de Liège), <https://ted.europa.eu/udl?uri=TED:NOTICE:286577-2021:TEXT:EN:HTML>.

¹⁵⁵ Art. 48 Law of 17 June 2016.

supplies and/or services from a central purchasing body.¹⁵⁶ Article 49 of Law of 17 June 2016 furthermore provides the opportunity for contracting authorities of different Member States to conclude framework agreements, operate dynamic purchasing systems, perform joint procurement, or use centralized purchasing bodies. In this situation, the centralized purchasing activities take place in accordance with the national provisions of the Member State where the purchasing body is located. Where several contracting authorities of different Member States establish a joint entity, the participating authorities must agree which national legislation apply.¹⁵⁷

3.2.3 Procurement During the COVID-19 Crisis: Emergency Procedures

Belgian legislation provides several possibilities to be employed by contracting authorities during times of emergency. The authorities may make use of an accelerated procedure, where applicable time limits may be reduced. The use of the procedure must be duly justified and may only be used if the normal time limits are not feasible in light of an urgency.¹⁵⁸ Contracts may furthermore be modified under certain grounds provided by the legislation, or when the contract includes review clauses.¹⁵⁹ Minor modifications may be done in case the value is below the applicable EU threshold and the general nature of the contract is not changed.¹⁶⁰ Contracts may also be amended on the basis of unforeseeable circumstances. In these situations, the modifications are subject to strict conditions: the change must be necessary due to the circumstances that the contracting authority could not have foreseen. Again, it is required that the modifications do not change the general nature of the contract.¹⁶¹

Next to the possibilities of accelerated procedure and modification of contracts, the contracting authorities may use a negotiated procedure without prior notice. As stipulated in Article 42, this procedure may only be used when it is strictly necessary, and when other procedures (such as open or restricted procedures) are unable to be respected due to the extreme urgency arising from unforeseeable events. The use of this procedure must always be justified. Furthermore, the contract must be limited for the duration that is necessary to meet the urgent needs. This procedure may be invoked for both contracts below and above the EU thresholds. However, when the contract meets the EU thresholds, the contracting authorities are also obliged to publish the award within 30 days of the conclusion of the contract.¹⁶²

Next to the options already provided in the legislation, the Belgian government has announced measures on public procurement to mitigate the impact of COVID-19 crisis, both on the award of new public contracts and the execution of ongoing contracts. In March 2020, the Council of Ministers adopted a plan on social and economic protection following the crisis, providing special rules on the

¹⁵⁶ Art. 47 Law of 17 June 2016. Examples of such centralised purchasing bodies are MSF Supply, Koopkoepel and Hospilim (see more at <https://www.msf-azg.be/nl/msf-supply>, <https://koopkoepel.be/samenaankoop-overheidsopdrachten>, <https://www.hospilim.be/home>). During the COVID-19 crisis, *Het Facilitair Bedrijf* was dedicated as unique purchasing center for employers of the Flemish government for the purchases of mouth masks and other hygiene and protection materials (see more at <https://web.archive.org/web/20210128130326/https://overheid.vlaanderen.be/nieuws/het-facilitair-bedrijf-als-unieke-aankoopcentrale-voor-werkgever-vlaamse-overheid-6-mei-2020>).

¹⁵⁷ Art. 49 Law of 17 June 2016.

¹⁵⁸ Law of 17 June 2016, see open and restricted procedure Arts. 36-37.

¹⁵⁹ Arts. 37-38(6) Royal Decree of 14 January 2013.

¹⁶⁰ Art. 38(4) Royal Decree of 14 January 2013.

¹⁶¹ Art. 38(2) Royal Decree of 14 January 2013.

¹⁶² Art. 62 Law of 17 June 2016.

application of penalties and contractual liability in the event of delays in performance of public contracts.¹⁶³ At the regional level, additional circulars on the management of the crisis have been adopted. For instance, Circular KB 2020/01 is applicable in Flanders and elaborates on the impact of corona measures on government contracts and provides recommendations for contracting authorities in the Flemish region.¹⁶⁴ In the Walloon Region, recommendations have been issued in March 2020 to advise contracting authorities on the consequences of the COVID-19 crisis on Walloon public contracts. The recommendation presses that as the situations may be very diverse depending on the nature of the market and contracts, no general line of conduct can be drawn but every situation must be analysed on a case-by-case basis. Nevertheless, contracting authorities may modify the contracts (as discussed above) or suspend the performance of contracts.¹⁶⁵

3.2.4 Conclusion on Procurement in Belgium

In Belgium, legislation on public procurement can be found on the federal level: in Law of June 2016 and various Government Decrees. However, in matters where the regions have responsibility, additional regulations may be concluded. When examining the legislation, it was seen that the legislation reflects the EU Directive in its principles, thresholds, cooperation methods and procedures. Depending on the applicable thresholds and for which type of works, supplies or services the contract is concluded, the procurement process may be put in motion with various procedures. Next to these procedures, the Belgian legislation also provides a possibility for more flexible procurement for contracts of lower monetary value. This procedure could also be relevant in crisis time procurement, next to the measures and possibilities announced by the Belgian government and regional authorities during the COVID-19 crisis. In urgent and unforeseen situations, it was advised that the contracting authorities could invoke the accelerated procedure, use negotiated procedure without prior notice or modify their current contracts. Furthermore, it was seen that on several occasions contracting authorities procured protective materials via framework agreements.

3.3 Germany and North Rhine-Westphalia

3.3.1 Overview of the Legal Framework

In Germany, public procurement is organised across different administrative levels. Considering that Germany is a federal state, some procurement procedures take place at the federal level while others take place at the level of the *Bundesländer*. The basis of public procurement in Germany is found in Part 4 of the *Gesetz gegen Wettbewerbsbeschränkungen – GWB* (Act against Restraints on Competition). As is the case for the Procurement Directive, the principles of competition, transparency, equal treatment, non-discrimination, and proportionality are at the basis of public

¹⁶³ OECD, 'Application of public procurement rules during the COVID-19 crisis from the perspective of the European Union's Procurement Directives and the Government Procurement Agreement' 8 April 2020, pp. 7-8.

¹⁶⁴ Circular KB 2020/01, available at

<https://overheid.vlaanderen.be/sites/default/files/media/Overheidsopdrachten%20en%20raamcontracten/VR%202020%201004%20MED.0132-2%20OZB%20corona%20en%20overheidsopdrachten%20-%20bijlage.pdf?timestamp=1586880864>.

¹⁶⁵ Walloon Region recommendations issued in March 2020, available at

<https://marchespublics.wallonie.be/files/Circulaire%20du%2023.03.2020%20publi%3%a9e%20au%20MB%20le%2026.03.20.pdf>.

procurement in Germany.¹⁶⁶ Whereas the Act against Restraints on Competition sets out the general principles and provisions on procurement, the *Vergabeverordnung* (Ordinance for Public Procurement) elaborates on the Act.¹⁶⁷

Although there are different categories of contracting authorities,¹⁶⁸ public contracting authorities are to be considered the most important when looking at procurement in the context of COVID-19. Following § 98 of the Act, these are primarily regional and local authorities and their special funds, other legal persons under public or private law whose purpose is meeting non-commercial needs in the general interest, associations, and natural or legal persons receiving funds under specific circumstances for, among others, civil engineering projects, building hospitals, and school, university or administrative buildings. As far as definitions are concerned, purchases of protective materials necessary to combat the COVID-19 pandemic are likely to take place in the context of public contracts (i.e. “contracts for pecuniary interest concluded between public contracting authorities or sector contracting entities and undertakings for the procurement of services whose subject is the delivery of goods...”).¹⁶⁹

Under the Act against Restraints on Competition, five different procedures may be applied: open procedures, restricted procedures, negotiated procedures, competitive dialogue, and innovation partnerships.¹⁷⁰ It is up to contracting authorities to decide on the open or restricted procedure, the other procedures are subject to the conditions in the Act and the Ordinance for Public Procurement.¹⁷¹ Under the open procedure, contracting authorities will publicly invite undertakings to submit tenders.¹⁷² The restricted procedure, by contrast, involves the contracting authority issuing a public invitation after which it selects a limited number of undertakings who are subsequently invited to submit tenders.¹⁷³

Again, similar to the Procurement Directive, the Act requires the tender to be described clearly and as comprehensively as possible thereby including the functional and performance requirements.¹⁷⁴ In order to be eligible for a public contract, undertakings must prove not to fulfil any of the grounds for exclusion¹⁷⁵ and be skilled and efficient to perform the activities at stake. Furthermore, selection criteria may only relate to qualifications and authorization to pursue the professional activity,

¹⁶⁶ § 97 Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021; Beschaffungsamt des BMI, ‘Rechtsgrundlagen – Das Vergaberecht’, http://www.bescha.bund.de/DE/Rechtsgrundlagen/node.html;jsessionid=27E3D3A6EE5D9D709E2E09F7C2007C74.2_cid325.

¹⁶⁷ Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021

¹⁶⁸ See § 98 and § 100-101 Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021.

¹⁶⁹ § 103(1) Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021.

¹⁷⁰ § 119 Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021.

¹⁷¹ See § 119 Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021 and § 14(3)(4) and § 17-19 Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021.

¹⁷² § 119(3) Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021 and § 15 Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021.

¹⁷³ § 119(3) Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021 and § 16 Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021.

¹⁷⁴ § 121(1) Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021.

¹⁷⁵ In principle, certain criminal offences or conviction or issuance of administrative fines are considered grounds for exclusion from tendering procedures. Additionally, public authorities may – taking into account the principle of proportionality – exclude undertakings from participation in the tendering procedure if the undertaking has, for example, breached environmental, social or labour obligations in carrying out public contracts, is insolvent, or has committed grave professional misconduct; see § 123 and 124 Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021.

economic and financial standing, and technical and professional ability.¹⁷⁶ Contracts are then awarded to the most economically advantageous tender determined in accordance with the best price-quality ratio whereby qualitative aspects (e.g. environmental or social) may also be taken into account.¹⁷⁷

As far as thresholds are concerned, these are based on the relevant EU legislation (i.a. Directive 2014/24/EU, Directive 2014/25/EU, Directive 2009/81/EC).¹⁷⁸ This means that amounts over the thresholds determined at EU level fall within the scope of the Act against Restraints on Competition. If amounts are below that threshold, a different piece of legislation applies, namely the *Unterschwelvenvergabeordnung* (Ordinance for Subthreshold Procurement).

3.3.2 Procurement under EU Thresholds

The Ordinance for Subthreshold Procurement was updated in 2017 together with the implementation of reforms at EU level.¹⁷⁹ The Ordinance for Subthreshold Procurement largely resembles the Ordinance for Public Procurement (applicable to procurement above EU thresholds).¹⁸⁰ Accordingly, the same principles concerning competition, proportionality and non-discrimination apply to procurement below EU thresholds.¹⁸¹ Similarly, the open and restricted procedures are freely available while any other type of procedure is subject to the provisions set out in the Ordinance for Subthreshold Procurement.¹⁸² By contrast, any contract worth a maximum of 1.000 euros can be directly awarded without an award procedure as long as the contracting authority alternates between commissioned companies.¹⁸³ The Ordinance for Subthreshold Procurement furthermore sets detailed provisions to be followed by contracting authorities when issuing a tender and the award thereof as well as the requirements of suitability to be fulfilled by companies.¹⁸⁴ Whereas these provisions merit a study in their own right, these will not be discussed in-depth in the present report. Instead, the focus will be placed on opportunities for contracting authorities to cooperate with one another (both nationally and in a cross-border situation) as well as possible derogations applicable to the regular procurement procedures in order to combat the COVID-19 crisis.

¹⁷⁶ § 122(2)(1-3) Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021.

¹⁷⁷ § 127(1) Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021.

¹⁷⁸ § 106 Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021. See § 3 Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021 for provisions on the determination of the contract value. For an overview of the current thresholds see European Commission, ‘Thresholds’, https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en.

¹⁷⁹ Bundesministerium für Wirtschaft und Energie, ‘Unterschwelvenvergabeordnung (UVgO)’, <https://www.bmwi.de/Redaktion/DE/Artikel/Service/unterschwelvenvergabeordnung-UVgO.html>.

¹⁸⁰ Bundesministerium für Wirtschaft und Energie, Bekanntmachung der Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwelvenvergabeordnung – UVgO) vom 2. Februar 2017; § 1(1) Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwelvenvergabeordnung – UVgO), v. 7.2.2017.

¹⁸¹ See § 2 Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwelvenvergabeordnung – UVgO), v. 7.2.2017.

¹⁸² However, different from procurement that is above the EU thresholds, there is a more limited choice in procedures.

Apart from open and restricted procedures, the Ordinance for Subthreshold Procurement includes a restricted procedure without competitive bidding, and negotiation with or without competitive tendering; see § 8 and 9-12 Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwelvenvergabeordnung – UVgO), v. 7.2.2017. When a contracting authority is issuing a tender for social and other specific services, another procedure (Verhandlungsvergabe mit Teilnahmewettbewerb) is also available to them; see § 49 of the Unterschwelvenvergabeordnung – UVgO.

¹⁸³ § 14 Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwelvenvergabeordnung – UVgO), v. 7.2.2017.

¹⁸⁴ Abschnitt 2 – Unterabschnitte 3-7 Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwelvenvergabeordnung – UVgO), v. 7.2.2017.

3.3.3 Cooperation Methods under National Law

Starting with cooperation methods under national law, it may be seen that both the Ordinance for Public Procurement as well as the Ordinance for Subthreshold Procurement provide for the same procedures as set out in the Procurement Directive (2014/24/EU) at EU level.¹⁸⁵ As is the case for the Procurement Directive at the EU level, it is possible for contracting authorities (within Germany or across Member States), to establish framework agreements (*Rahmenvereinbarungen*), cooperate jointly on procurement (*Gelegentliche gemeinsame Auftragsvergabe*) or to set up centralized purchasing activities/bodies (*Zentrale Beschaffungstätigkeiten/Beschaffungsstellen*).¹⁸⁶

In the case of a **framework agreement** under the Ordinance for Public Procurement (above EU thresholds), that agreement is guiding for the grant of subsequent contracts. This is the case for both individual contracts as well as those granted to more than one enterprise.¹⁸⁷ As far as the procedure for individual contracts is concerned, this generally follows the procedural requirements applicable to any tender issued under procurement legislation although it is possible that more specific provisions are set in either the contract notice or in the framework agreement.¹⁸⁸ When it comes to a framework agreement in the context of the Ordinance for Subthreshold Procurement, such an agreement must be concluded in accordance with one of the regular procedures provided for in the Ordinance.¹⁸⁹ As is the case for procurement exceeding EU thresholds, the framework agreement is guiding for procedures through which individual contracts are to be awarded.¹⁹⁰

In the case of **occasional joint procurement**, such procurement may take place by contracting authorities within Germany, but also with contracting authorities located in other EU Member States.¹⁹¹ In the latter case, contracting authorities are to make agreements on the responsibilities of each of the authorities and applicable provisions of national law.¹⁹² When it comes to **centralized purchasing activities** these constitute framework agreements concluded by one contracting authority on behalf of other such authorities.¹⁹³ By contrast, a **centralized purchasing body** means that one

¹⁸⁵ In particular, these concern framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, centralized purchasing activities/bodies, and occasional joint procurement; See Chapter II (Articles 33-18 Directive 2014/24/EU).

¹⁸⁶ § 4 and § 22 Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021; § 15 and § 16 Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwellenvergabeordnung – UVgO), v. 7.2.2017.

¹⁸⁷ § 21(2)(3) Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021.

¹⁸⁸ § 21(5) Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021.

¹⁸⁹ § 15(2) Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwellenvergabeordnung – UVgO), v. 7.2.2017.

¹⁹⁰ § 15(3) Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwellenvergabeordnung – UVgO), v. 7.2.2017.

¹⁹¹ § 4(1) Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021; and § 16 Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwellenvergabeordnung – UVgO), v. 7.2.2017.

¹⁹² § 4(2) Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021; and § 16 Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwellenvergabeordnung – UVgO), v. 7.2.2017.

¹⁹³ § 120(4) Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021. Evidence can be found of such activities having taken place during the COVID-19 pandemic in Germany. See, for example, Bundesrechnungshof, Bericht an den Haushaltsausschuss des Deutschen Bundestages nach § 88 Absatz 2 BHO – Prüfung der zentralen Beschaffung von persönlicher Schutzausrüstung für das Gesundheitswesen: Feststellungen zu übergeordneten und haushaltwirksamen Gesichtspunkten, 16 Juni 2021; Kma Online, ‚Zentrale Beschaffung für Intensivstationen während des Coronavirus‘, <https://www.kma-online.de/aktuelles/klinik-news/detail/zentrale-beschaffung-fuer-intensivstationen-waehrend-des->

contracting authority acts on behalf of other authorities to award contracts. In the case of such a body, contracting authorities can again purchase supplies and activities from the body. In order to designate a centralized purchasing activity, public contracts for the performance of centralized purchasing activities may be awarded to a central purchasing body without conducting a procurement procedure under national procurement legislation.¹⁹⁴ Nevertheless, the German Federal Government can establish administrative regulations regarding the use of centralized purchasing bodies in designated areas for its departments.¹⁹⁵

3.3.4 From National to *Bundesland*: Legislation on Public Procurement in North Rhine-Westphalia

The abovementioned Sections have shown how public procurement is shaped according to German federal legislation. Nevertheless, the Federal State is not the only actor setting standards on procurement in Germany. Considering the country's federal structure, both the *Bundesländer* as well as municipalities are competent to shape public procurement law by further transposing national provisions.¹⁹⁶ As a consequence of Germany's federal structure, the federal government cannot impose legislation on the *Bundesländer*. In the case of public procurement, this subsidiarity means that the *Bundesländer* are free to decide whether to transpose federal law or to adopt their own procurement laws.¹⁹⁷ This means that particularly the provision of the Ordinance for Subthreshold Procurement (*Unterschwelvenvergabeordnung*) may be transposed by the *Bundesländer*.¹⁹⁸

When it comes to procurement that is below EU thresholds in North Rhine-Westphalia, additional provisions to be followed in case of such procurement are found in the *Gesetz über die Sicherung von Tariftreue und Mindestlohn bei der Vergabe öffentlicher Aufträge (Tariftreue- und Vergabegesetz Nordrhein-Westfalen – TVgG)*. This law therefore applies in addition to the Ordinance on Subthreshold Procurement and has the dual purpose of ensuring fair competition for the most economically advantageous tender and of ensuring compliance with collective agreements and minimum wage.¹⁹⁹ This means that contractors must adhere to relevant collective agreements and provisions on minimum wages when drafting their tenders. Provisions of the TVgG apply for contracts with a minimum value of 25.000 euros.²⁰⁰

As far as procurement by municipalities is concerned, a 2019 OECD report shows that this constitutes the largest category of procurement in Germany with 58% of all procurement taking place at the level

[coronavirus-a-42798](https://www.pharmazeutische-zeitung.de/zentrale-beschaffung-von-arzneimitteln-eingeleitet-116474/); Pharmazeutische zeitung, ‚Zentrale Beschaffung von Arzneimitteln eingeleitet‘, <https://www.pharmazeutische-zeitung.de/zentrale-beschaffung-von-arzneimitteln-eingeleitet-116474/>.

¹⁹⁴ § 120(4) Gesetz gegen Wettbewerbsbeschränkungen (GWB), v. 9.3.2021

¹⁹⁵ § 4(3) Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV), v. 9.6.2021; and § 16 Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwelvenvergabeordnung – UVgO), v. 7.2.2017.

¹⁹⁶ OECD, Public Procurement in Germany: Strategic Dimensions for Well-being and Growth, OECD Public Governance Reviews 2019, p. 74.

¹⁹⁷ *Ibid.*, p. 78-79.

¹⁹⁸ *Ibid.*, p. 82.

¹⁹⁹ § 1(1) and § 2 Gesetz über die Sicherung von Tariftreue und Mindestlohn bei der Vergabe öffentlicher Aufträge (Tariftreue- und Vergabegesetz Nordrhein-Westfalen – TVgG NRW), v. 22.03.2018. In the case of public contracts awarded through joint procurement with authorities from within or outside Germany, an agreement is generally to be sought on compliance with the provisions of the law; see also § 1(8) of the TVgG.

²⁰⁰ § 1(5) Gesetz über die Sicherung von Tariftreue und Mindestlohn bei der Vergabe öffentlicher Aufträge (Tariftreue- und Vergabegesetz Nordrhein-Westfalen – TVgG NRW), v. 22.03.2018.

of municipalities.²⁰¹ In North Rhine-Westphalia, municipalities must adhere to a separate regulation detailing procedures for them to follow.²⁰² This regulation was updated in part due to the COVID-19 pandemic so as to give municipalities more flexibility in relation to the purchase of, among others, protective equipment and materials.²⁰³ This facilitated regulation entered into force on 4 July 2020 and will be assessed over the course of 2021 (whereby the application of the regulation is to be discontinued after 31 December 2021).²⁰⁴ The following Section will dive into the legal provisions made in Germany at the federal level and in North Rhine-Westphalia to navigate procurement during the COVID-19 pandemic.

3.3.5 Procurement During the COVID-19 Pandemic: Emergency Procedures

Many of the facilitations of procurement legislation adopted in Germany during the early stages of the COVID-19 pandemic were based on the Guidance established by the European Commission.²⁰⁵ By means of a circular, the German Federal Government published instructions as early as March 2020 on how to approach procurement during of the COVID-19 pandemic.²⁰⁶ For procurement over EU thresholds, the Federal Government proposed the use of a negotiated procedure without prior publication (*Verhandlungsverfahren ohne Teilnahmewettbewerb*).²⁰⁷ In particular, the expected increase in COVID-19 infections, pressing need for materials, and expected shortages on the labour market led the Federal Ministry for Economic Affairs and Energy to conclude that the conditions for such procedures were fulfilled (an event is unforeseeable and particularly urgent). Under these procedures, the terms normally applied for procurement procedures could be shortened considerably. Furthermore, the negotiated procedure without prior publication also provided contracting authorities with the possibility to approach a single company (as opposed to approaching several as would usually be required). In a later document (published in July 2020), the Federal Ministry for Economic Affairs and Energy indicated that the urgency of investment measures was still

²⁰¹ OECD, Public Procurement in Germany: Strategic Dimensions for Well-being and Growth, OECD Public Governance Reviews 2019, p. 99.

²⁰² Vergabegrundsätze für Gemeinden nach § 26 der Kommunalhaushaltsverordnung Nordrhein-Westfalen (Kommunale Vergabegrundsätze) Runderlass des Ministeriums für Heimat, Kommunales, Bau und Gleichstellung 203-48.07.01/01-169/18 v. 28.08.2018 (mit Stand vom 23.7.2021); Ministerium für Wirtschaft, Innovation, Digitalisierung und Energie des Landes Nordrhein-Westfalen, 'Öffentliche Aufträge in Nordrhein-Westfalen', <https://www.wirtschaft.nrw/oeffentliches-auftragswesen-vergaberecht-nordrhein-westfalen>.

²⁰³ Ministerium für Heimat, Kommunales, Bau und Gleichstellung des Landes Nordrhein-Westfalen, 'Kommunale Vergabegrundsätze und Haushaltsrecht', <https://www.mhkgb.nrw/themen/kommunales/kommunale-finanzen/kommunale-vergabegrundsätze-und-haushaltsrecht>.

²⁰⁴ Ibid.

²⁰⁵ It may be recalled that some of the measures proposed by the European Commission in this respect are the reduction of deadlines for open and restricted procedures, use of negotiated procedure without publication, and possibilities for direct award; see 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] OJ C 108/1.

²⁰⁶ Bundesministerium für Wirtschaft und Energie, Rundschreiben zur Anwendung des Vergaberechts im Zusammenhang mit der Beschaffung von Leistungen zur Eindämmung der Ausbreitung des neuartigen Coronavirus SARS-CoV-2, 19.03.2020. At the time when the Federal Government published these guidelines, the European Commission had not yet published theirs. The Federal Ministry for Economic Affairs and Energy however adopted the aforementioned guidelines on the basis of a prior Commission Communication on procurement during the refugee crisis (COM(2015) 454 final).

²⁰⁷ Bundesministerium für Wirtschaft und Energie, Rundschreiben zur Anwendung des Vergaberechts im Zusammenhang mit der Beschaffung von Leistungen zur Eindämmung der Ausbreitung des neuartigen Coronavirus SARS-CoV-2, 19.03.2020, p. 2.

to be assumed, meaning that for procurement exceeding the EU thresholds authorities could still make use of the possibilities to shorten procurement procedures.²⁰⁸

In the case of procurement under EU thresholds, the Federal Ministry for Economic Affairs and Energy proposed the application of a similar negotiated award without prior publication (*Verhandlungsvergabe ohne Teilnahmewettbewerb*).²⁰⁹ The difference with procurement over EU thresholds is the legislation in which the procedure is laid down (Act against Restraints on Competition and Ordinance for Public Procurement for procurement over EU thresholds and the Ordinance for Subthreshold Procurement for procurement under EU thresholds). For this type of procurement, the *Bundesländer* were given the possibility to allow negotiated awards without contracting authorities having to observe certain admission criteria. The *Bundesländer* were thereby free to themselves set the thresholds (which could go as high as the EU thresholds). Furthermore, direct awards could also be granted for amounts up to 3.000 euros.²¹⁰ These exceptional guidelines continue to apply up to 31 December 2021.²¹¹

Apart from adhering to the exceptional rules set out at national level, North Rhine-Westphalia has also set some additional provisions on procurement related to COVID-19 (for contracting authorities at the level of the *Bundesland* as well as for municipalities). In particular, the Ordinance for Subthreshold Procurement was suspended for those goods and services serving the containment and short-term management of the COVID-19 pandemic.²¹² Authorities nevertheless did have to take into account the principles of efficiency and economy. For procurement over EU thresholds, North Rhine-Westphalia enabled authorities to make use of the negotiated procedure without prior publication (*Verhandlungsverfahren ohne Teilnahmewettbewerb*).²¹³ Furthermore, similar to the provisions made at national level, terms could be shortened and authorities had the possibility of only approaching a single company if it had particular capacities to provide necessary materials quickly. These measures remained in place until 30 June 2021.²¹⁴ Additional rules were also established through regulations applying in addition to the *Landeshaushaltordnung* (Land Budget Regulation) which are applicable from 1 January up to 31 December 2021.²¹⁵

²⁰⁸ Section II Bundesministerium für Wirtschaft und Energie, Verbindliche Handlungsleitlinien für die Bundesverwaltung für die Vergabe öffentlicher Aufträge zur Beschleunigung intensiver Maßnahmen zur Bewältigung der Wirtschaftlichen Folgen der COVID-19 Pandemie, 08.07.2020.

²⁰⁹ Bundesministerium für Wirtschaft und Energie, Rundschreiben zur Anwendung des Vergaberechts im Zusammenhang mit der Beschaffung von Leistungen zur Eindämmung der Ausbreitung des neuartigen Coronavirus SARS-CoV-2, 19.03.2020, p. 5. See also Bundesministerium für Wirtschaft und Energie, Verbindliche Handlungsleitlinien für die Bundesverwaltung für die Vergabe öffentlicher Aufträge zur Beschleunigung intensiver Maßnahmen zur Bewältigung der Wirtschaftlichen Folgen der COVID-19 Pandemie, 08.07.2020.

²¹⁰ Section I Point 1(1)(c) Bundesministerium für Wirtschaft und Energie, Verbindliche Handlungsleitlinien für die Bundesverwaltung für die Vergabe öffentlicher Aufträge zur Beschleunigung intensiver Maßnahmen zur Bewältigung der Wirtschaftlichen Folgen der COVID-19 Pandemie, 08.07.2020.

²¹¹ *Ibid.*, Point 4.

²¹² Point 2.1 Anwendung des Vergaberechts im Zusammenhang mit der Beschaffung von Leistungen zur Eindämmung der Ausbreitung des neuartigen Coronavirus SARS-CoV-2 – Gemeinsamer Runderlass des Ministeriums der Finanzen und des Ministeriums für Wirtschaft, Innovation, Digitalisierung und Energie, v. 27.03.2020 mit Stand vom 29.12.2020.

²¹³ *Ibid.*, point 2.2.

²¹⁴ *Ibid.*, point 6.

²¹⁵ Anwendungshinweise insbesondere zu den Verwaltungsvorschriften zu den §§ 23, 44 und 53 Landeshaushaltordnung im Zusammenhang mit der Bewältigung der Corona-Krise und weitere Hinweise – Corona-Erlass II – Runderlass des Ministeriums der Finanzen – I C 2 – 0044-1.1.7 v. 01.01.2021.

In a similar vein, municipalities were held to follow the negotiated procedure without prior publication in the case of procurement exceeding EU thresholds whereby the same practicalities regarding terms and number of companies were generally maintained as for contracting authorities at the level of the *Bundesland*.²¹⁶ For procurement below the EU thresholds, municipalities were able to directly award contracts up to 5.000 euros.²¹⁷ For contracts up to 100.000 euros, municipalities had the possibility to choose between a negotiated award (*Verhandlungsvergabe*) or restricted invitation to tender (*Beschränkte Ausschreibung*) each of them without a call for competition.²¹⁸ When it came to procurement aimed at materials to handle the COVID-19 crisis, municipalities were able to procure materials without applying the Ordinance for Subthreshold Procurement (*Unterschwelvenvergabeordnung*) until 30 June 2020 by providing a motivation for the decision not to apply the Ordinance.²¹⁹ New regulations have been in place since July 2020 in relation to procurement by municipalities. In drafting these new regulations, specific attention was given to drive forward procurement in the years 2020 and 2021.²²⁰ In particular, the regulations set out that the Ordinance on subthreshold procurement will also apply to contracts concerning supplies and services issued by municipalities.²²¹ However, different from that Ordinance, municipalities can directly award contracts of up to 15.000 euros.²²² Furthermore, the procedures set for contracts up to 100.000 euros in the earlier COVID-19 regulations on procurement (i.e. negotiated award and restricted invitation to tender) are maintained in the present regulation.²²³ The regulations are to apply until 31 December 2021.

3.3.6 Conclusion on Procurement in Germany – North Rhine-Westphalia

The previous Sections on the German and North Rhine-Westphalian system for public procurement have shown the multi-layered nature of the area of law. More specifically, procurement was divided across three levels: the national level of the federal state, the level of the *Bundesländer*, and the level of municipalities. Within each of these levels a further distinction can be made between procedures exceeding EU thresholds, procedures for contracts up to EU thresholds, and direct awards (i.e. low-level contracts for which no procurement procedure is necessary). Despite all these different regulations and levels, it is clear that there is a strong resemblance to the EU Procurement Directive in terms of principles, procedures, and opportunities for aggregated procurement. As far as procurement in times of COVID-19 is concerned, it has become clear that a strong link could also be identified to the EU-level since the facilitated procedures adopted strongly followed the guidelines set by the European Commission for crisis-time procurement. Whereas negotiated procedures without prior publication were often used during the height of the crisis, shortened procedures continue to be maintained as the COVID-19 pandemic went on.

²¹⁶ Ministerium für Heimat, Kommunales, Bau und Gleichstellung des Landes Nordrhein-Westfalen, Hinweise zu aktuellen Vorgehensweisen im Zusammenhang mit Vergaben durch kommunale Auftraggeber, 14.04.2020, p. 6-8.

²¹⁷ Ibid., p. 9.

²¹⁸ Ibid., p. 9 and 11.

²¹⁹ Ibid. p. 10.

²²⁰ Ministerium für Heimat, Kommunales, Bau und Gleichstellung des Landes Nordrhein-Westfalen, 'Kommunale Vergabegrundsätze und Haushaltrecht', <https://www.mhkgb.nrw/themen/kommunales/kommunale-finanzen/kommunale-vergabegrundsätze-und-haushaltsrecht>.

²²¹ Point 5.1 Vergabegrundsätze für Gemeinden nach § 26 der Kommunalhaushaltsverordnung Nordrhein-Westfalen (Kommunale Vergabegrundsätze) Runderlass des Ministeriums für Heimat, Kommunales, Bau und Gleichstellung 203-48.07.01/01-169/18 v. 28.08.2018 (mit Stand vom 23.7.2021).

²²² Ibid., point 5.2.

²²³ Ibid., point 6.1.

4. Cross-border Perspectives to Procurement: Testimonials from the Euregio Meuse-Rhine

Over the course of the previous Sections, it has become apparent that ample opportunities exist to cooperate on procurement across borders. Furthermore, the previous Sections have also shown how regular procurement procedures were altered in light of the COVID-19 pandemic and thereby how procurement can take place in times of crisis or emergency. The shortening of time periods, use of alternative procedures (predominantly procedures without publication), allowing tenders to be issued to less potential bidders, and increasing amounts for direct awards were some of the measures seen most frequently at various levels of procurement during the COVID-19 pandemic.

Despite opportunities for cooperation on procurement and emergency procedures appearing to be suitable means to ensure sufficient protective materials would be available to combat the COVID-19 pandemic, the question rises to which extent these measures have been used and have actually facilitated crisis-time procurement in the EMR. In order to answer this question 12 interviews were conducted between February and June 2021 with representatives of local authorities, hospitals, partnerships, and public health services. Questions particularly focused on the way procurement took place during COVID-19, differences in procurement between the first and second waves, the building of stock and redistribution in case of surpluses, role of the national government, cross-border cooperation on procurement, and best practices and recommendations for future crisis-time procurement.

4.1 Challenges of Procurement during the COVID-19 Pandemic

Starting with a core challenge experienced during the COVID-19 pandemic, many of the interviewees unsurprisingly indicated that the biggest challenge related to COVID-19 concerned the shortage of necessary materials (e.g. personal protective equipment such as mouth masks and disinfectant).²²⁴ Beyond shortages in necessary materials, interviewees reported experiencing shortages of personnel and lack of ICU beds during the early stages of the pandemic.²²⁵

Some of the interviewees indicated to have been overcome by the intensity of the COVID-19 crisis.²²⁶ However, organisations involved in COVID-19 relief efforts (such as local authorities and hospitals), were not the only organisations overcome by the intensity and severity of the pandemic. Suppliers were also affected by the surges of infections and need for materials. Apart from experiencing difficulties finding relevant suppliers, interviewees also reported that suppliers were not able to meet the sudden high demand in products.²²⁷ More specifically, companies also needed time to adjust their production processes and especially increase production of certain materials. One interviewee employed at a local hospital reported that the regular logistics and supply structures could not have anticipated the high demand in products meaning that the hospital itself had to find materials.²²⁸

²²⁴ For example, Interview 1 – Local authority – 1 February 2021; Interview 3 – Local hospital – 23 February 2021; interview 4 – Partnership – 24 February 2021; Interview 5 – Local authority – 25 February 2021; Interview 9 – Local hospital – 24 March 2021; Interview 12 – Partnership – 10 June 2021.

²²⁵ Interview 2 – Local hospital – 4 February 2021.

²²⁶ Interview 1 – Local authority – 1 February 2021.

²²⁷ Interview 2 – Local hospital – 4 February 2021.

²²⁸ Interview 9 – Local hospital – 24 March 2021.

In this context, multiple interviewees indicated that personal contacts were of paramount importance to secure sufficient materials.²²⁹ By contrast, organisations that did not yet have contacts with companies supplying medical materials experienced difficulties finding suppliers. One interviewee indicated that the search for suppliers in the early stages of the pandemic was particularly frustrating due to the difficulty to find new suppliers since – in light of their shortages – these gave precedence to their regular clients and could not take up new ones.²³⁰ Hence, the approach was to first go to known providers and to look for new ones in the event that these were out of materials. Furthermore, some organisations experienced massive pressure in finding materials in time to prevent the looming closure of certain healthcare facilities.²³¹ Whereas facilities such as hospitals, general practitioners, elderly homes and even funeral facilities would normally undertake their own purchasing, the COVID-19 pandemic rendered this impossible meaning a local authority stepped in to purchase and distribute materials to prevent the closure of such facilities.

According to some interviewees, the shortage of materials and pressing need therefore resulted in panic buying and hoarding during the early stages of the COVID-19 pandemic.²³² Indeed, one of the interviewees indicated that the need for products was so high that persons simply purchased what was available to prevent or combat acute shortages.²³³ One interviewee reported experiencing extreme competition and wild west practices on the market when actors purchased what limited stock was available.²³⁴ In light of the overheated market and shortages of materials, several interviewees indicated that a pragmatic approach had to be adopted to ensure the purchase of necessary materials.²³⁵ Some interviewees thereby even report having had to purchase materials from hardware stores and Amazon to directly alleviate shortages.²³⁶

As far as procedures were concerned, different courses of action could be defined. For example, some interviewees reported having received materials as a consequence of national-level procurement actions.²³⁷ However, these were usually limited – or, in the case of hospitals – calculated on the number of beds a hospital had, meaning that organisations themselves were still mainly responsible for procuring necessary materials.²³⁸ Some hospitals made purchases following their internal procedures.²³⁹ Even though procurement procedures may not always have been applied,²⁴⁰ necessary

²²⁹ Interview 2 – Local hospital – 4 February 2021; Interview 7 – Local authority – 3 March 2021; Interview 9 – Local hospital – 24 March 2021.

²³⁰ Interview 8 – Local authority – 11 March 2021.

²³¹ Interview 8 – Local authority – 11 March 2021.

²³² Interview 4 – Partnership – 24 February 2021.

²³³ Interview 6 – Public health service – 1 March 2021.

²³⁴ Interview 5 – Local authority – 25 February 2021.

²³⁵ Interview 1 – Local authority – 1 February 2021; Interview 2 – Local hospital – 4 February 2021; Interview 3 – Local hospital – 23 February 2021.

²³⁶ Interview 1 – Local authority – 1 February 2021.

²³⁷ Interview 3 – Local hospital – 23 February 2021; Interview 6 – Public health service – 1 March 2021; Interview 7 – Local authority – 3 March 2021.

²³⁸ Interview 2 – Local hospital – 4 February 2021.

²³⁹ Interview 3 – Local hospital – 23 February 2021; Interview 9 – Local hospital – 24 March 2021.

²⁴⁰ It has to be noted that not all hospitals are necessarily contracting authorities and subject to the public procurement procedures. For instance, in the Netherlands the notion of “contracting authority” is subject to stricter interpretation than in Belgium (see Section 3.2.1). In case *Amphia* (ECLI:NL:HR:2007:AZ9872) and *Sint Antonius Ziekenhuis* (ECLI:NL:RBUTR:2012:BY5442), the national court in the Netherlands evaluated whether a healthcare institution can be considered as a body governed by public law. However, not all requirements were fulfilled, namely that the institution received government funding and that the management was subject to supervision by the state. However, different conclusion can be drawn for academic hospitals whose financing and organisational structure differs from general hospitals, and thus can be considered contracting authorities.

standards as to the quality of medical equipment and medical care were indicated to have always been maintained. One interviewee indicated that although procurement procedures may help in guaranteeing the quality of goods, they are liable to take away flexibility especially when pressing shortages exist.²⁴¹ More specifically, it was pointed out that there comes a point where it is the shortage of materials that jeopardises the quality of care (as opposed to non-adherence to procedural requirements). Other interviewees also indicated that the health situation became so pressing early in the crisis that it was impossible to maintain regular procurement procedures.²⁴² They report having made use of emergency procedures (e.g. negotiated procedures without an open call for competition) set out in national law.²⁴³ These procedures were said to have facilitated quicker decision-making since they enabled less bureaucracy. As pressure lessened, it was possible to move away from these emergency procedures and to use procedures including an open call for competition as well as maintaining the most economically advantageous tender principle.²⁴⁴ EU law procedures were thereby reportedly not used since the thresholds for their application were not met.²⁴⁵

Apart from having to overcome shortages, some in-house procurement services faced an additional challenge in venturing on markets that were – until the pandemic – unknown to them.²⁴⁶ In particular, these services had to quickly acquaint themselves with the procurement of, for example, medical mouth masks and disinfectant, materials which differed considerably from their regular procurement activities in office materials. These services had to learn from experience, whereby the challenge was particularly to distinguish serious offers from non-serious ones and the need to become acquainted with quality certifications.²⁴⁷ The inexperience, uncertainty, and pressure of the early stages of the pandemic at times led to defective purchases.²⁴⁸ Nevertheless, defective purchases were said to have been limited and procurement structures were soon set up to first find suitable suppliers and guarantee the quality of their materials.²⁴⁹ Some organisations set up purchasing structures with trusted suppliers to ensure later orders – during the later stages of the pandemic these were then contacted directly whereby more thorough procurement procedures could be used.²⁵⁰

4.2 Differences in Procurement between the First and Second Waves of the COVID-19 Pandemic

The biggest difference seen between the earlier and later stages of the COVID-19 pandemic concerns the availability of materials and back-stock organisations have now built up.²⁵¹ Where organisations interviewed experienced shortages during the first wave of the crisis, by the time of the second wave

²⁴¹ Interview 5 – Local authority – 25 February 2021.

²⁴² Interview 8 – Local authority – 11 March 2021.

²⁴³ Interview 1 – Local authority – 1 February 2021; Interview 8 – Local authority – 11 March 2021; Interview 12 – Partnership – 10 June 2021.

²⁴⁴ Interview 8 – Local authority – 11 March 2021; Interview 9 – Local hospital – 24 March 2021. However, some interviewees indicated that the most economically advantageous tender principle did not always work, first of all, in healthcare and, secondly, during a pandemic/crisis. In particular, price was held to take precedent over the quality of materials purchased, something considered detrimental to providing high quality healthcare; Interview 3 – Local hospital – 23 February 2021.

²⁴⁵ Interview 1 – Local authority – 1 February 2021; Interview 8 – Local authority – 11 March 2021; Interview 9 – Local hospital – 24 March 2021.

²⁴⁶ Interview 1 – Local authority – 1 February 2021 and Interview 8 – Local authority – 11 March 2021.

²⁴⁷ Interview 8 – Local authority – 11 March 2021.

²⁴⁸ Interview 8 – Local authority – 11 March 2021; Interview 12 – Partnership – 10 June 2021.

²⁴⁹ Interview 8 – Local authority – 11 March 2021; Interview 12 – Partnership – 10 June 2021.

²⁵⁰ Interview 8 – Local authority – 11 March 2021.

²⁵¹ Interview 1 – Local authority – 1 February 2021; Interview 2 – Local hospital – 4 February 2021; Interview 3 – Local hospital – 23 February 2021; Interview 12 – Partnership – 10 June 2021.

an abundance of necessary materials became available. One hospital reported not to have experienced large differences between the first and second waves since it was able to anticipate severe effects of the pandemic by developing a suitable workflow to manage COVID-19 patients and by strictly rationing protective materials early in the crisis.²⁵²

Apart from the availability of materials, interviewees indicated that the management of the COVID-19 crisis had improved considerably by the second wave.²⁵³ For example, emergency departments found effective workflows to isolate COVID-19 patients from regular patients and were able to manage supplies more effectively. In relation to procurement, some interviewees indicated that purchasing became more structured and better organised. Indeed, experience and familiarity with protective materials and suppliers was deemed to be a big improvement between the first and second waves.²⁵⁴ The diminution of pressure experienced at the time of the second wave also meant that attention could be devoted to aptly organising follow-up orders. Lessons learnt from the first wave also meant that the industry was able to adapt and that it became easier to anticipate which materials were needed to mitigate the crisis.²⁵⁵ Furthermore, the creation of digital stock systems (similar to those used by companies) was also considered a positive difference between the first and second waves of the pandemic.²⁵⁶

4.3 Stocking Materials and Redistributing Surpluses

The keeping of an excess stock of certain materials can be cause for challenges. In particular, large amounts of stock are challenging in light of expiration dates and finding room to store available materials. Some interviewees experienced difficulties with certain protective materials not being resupplied in time to meet expiration dates.²⁵⁷ Others stressed the importance of being aware of the stock kept and maintaining a suitable distribution network.²⁵⁸ One authority responsible for distributing certain materials to other facilities indicates to have created packages with fixed quantities of materials to be distributed.²⁵⁹ As additional stock was built up materials could be distributed more freely. Indeed, the building up of additional stock led some organisations to reach out to other partners to see whether they could aid in remedying shortages.²⁶⁰

Despite all the challenges faced, some interviewees indicated to have experienced particular solidarity during the COVID-19 pandemic – especially in relation to surplus materials. For example, one authority received materials from various sources such as hospitals, the military, and even private persons.²⁶¹ In a way, the publicity concerning the severity of the situation in the region in which the authority is located actually led to its mitigation since help was offered from different sources. In particular, the solidarity experienced was said to have contributed considerably to mitigating initial deficits.²⁶²

²⁵² Interview 11 – Local hospital – 31 March 2021.

²⁵³ Interview 2 – Local hospital – 4 February 2021.

²⁵⁴ Interview 3 – Local hospital – 23 February 2021; Interview 8 – Local authority – 11 March 2021.

²⁵⁵ Interview 9 – Local hospital – 24 March 2021.

²⁵⁶ Interview 10 – Local authority – 25 March 2021.

²⁵⁷ Interview 2 – Local hospital – 4 February 2021.

²⁵⁸ Interview 5 – Local authority – 25 February 2021; Interview 12 – Partnership – 10 June 2021.

²⁵⁹ Interview 10 – Local authority – 25 March 2021.

²⁶⁰ Interview 1 – Local authority – 1 February 2021.

²⁶¹ Interview 8 – Local authority – 11 March 2021.

²⁶² Interview 1 – Local authority – 1 February 2021.

4.4 The Role of National Governments in the Procurement of Materials

Earlier in this Section it was already indicated that some of the organisations consulted in the context of this study also received materials from national governments. Although national governments were considered to be key players in purchasing materials necessary to combat a crisis such as a pandemic, approaches for crisis time procurement could be improved since government procurement was not always successful.²⁶³ Action by national governments was nevertheless considered successful in taking away harmful effects of competition by distributing materials evenly across, for example, hospitals.²⁶⁴ It was nevertheless noted that more cooperation could have taken place at the national level between governments. One particular example concerned difficulties arising from restrictions to freedom of movement taken to contain the spread of the virus. More specifically, in cases where necessary materials were only available in another country, these restrictions to movement also led to restrictions in the availability of materials which were experienced as problematic.²⁶⁵

4.5 Experiences and Views on Cross-border Cooperation on Emergency Procurement

As far as cooperation on procurement was concerned during the COVID-19 crisis, none of the interviewees indicates to have cooperated with other parties either nationally or cross-border. One interviewee considered the capacity to be flexible the most important asset in relation to procurement during the first wave of the COVID-19 pandemic and attributed that capacity to the ability to act independently.²⁶⁶ Another challenge for crisis-time cross-border cooperation was identified in relation to available manpower. In particular, concerns were expressed that those responsible for the management of crises across organisations already have a lot on their plate in times of crisis whereby undertaking additional coordinating and cross-border activities could be challenging.²⁶⁷ In fact, as indicated in Section 4.3, the only cooperation that seemingly took place in relation to necessary materials consisted of the redistribution thereof in case of surpluses.²⁶⁸

Some interviewees considered that regional cooperation was difficult to achieve in the context of infectious diseases due to travel and transport restrictions made at national level.²⁶⁹ They also considered infectious diseases to be different from other disasters or crises due to their long duration. A further challenge was identified in the competences on crisis management being scattered across different ministries at national level.²⁷⁰ Nevertheless, multiple interviewees saw opportunities for cooperation especially when it came to the coordination of crisis management and particularly saw a role for EMRIC in this context.²⁷¹ Other parties indicated that – although they were intent on continuing cross-border cooperation during the pandemic – this was all but facilitated from the level

²⁶³ Interview 2 – Local hospital – 4 February 2021.

²⁶⁴ Interview 3 – Local hospital – 23 February 2021.

²⁶⁵ Interview 3 – Local hospital – 23 February 2021.

²⁶⁶ Interview 1 – Local authority – 1 February 2021.

²⁶⁷ Interview 1 – Local authority – 1 February 2021.

²⁶⁸ Interview 2 – Local hospital – 4 February 2021.

²⁶⁹ Interview 1 – Local authority – 1 February 2021; Interview 2 – Local hospital – 4 February 2021.

²⁷⁰ Interview 12 – Partnership – 10 June 2021.

²⁷¹ Interview 1 – Local authority – 1 February 2021; Interview 4 – Partnership – 24 February 2021. See also B.J. Buiskool, J. van Lakerveld & M. Unfried, Covid-19 Crisis-management in the Euroregion Meuse-Rhine: Study on lessons learned of cross-border cooperation in the field of healthcare during the Pandemic crisis (study 1) – PANDEMERIC Final Report, August 2021.

of the national government.²⁷² The crisis was, however, also said to have strengthened the awareness of cross-border cooperation (also in non-crisis times) since “a good neighbour is better than a faraway friend”. Another interviewee remarked that the COVID-19 crisis led to more awareness on the position of border regions – although not enough to grant those regions sufficient priority.²⁷³ This should change in future since certain challenges experienced in the context of the COVID-19 pandemic were said to be difficult to reconcile with the current advanced state of European integration.

As to the question whether cooperation on emergency and crisis-time procurement should take place in future, several parties questioned the added value of such cooperation.²⁷⁴ In fact, most interviewees only saw an added value in centralised procurement if it could lead to a considerably lower administrative burden or involved considerable economies of scale. Interviewees thereby questioned whether cooperation on cross-border procurement would lead to a decrease in administration and feared that more bureaucracy would take away valuable room to manoeuvre. Cooperation on procurement in times of crisis was even considered a risk since it could considerably slow down the procurement process resulting in longer waiting periods and lack of available material. Challenges were thereby also held to exist in relation to politics, complex decision-making, and matters concerning competences. Furthermore, interviewees considered that the national interests prevailing in times of crisis would lead cooperation on procurement to be overruled by national governments or regional actors having to compete with national governments.²⁷⁵ A different argument against cooperation on procurement by hospitals concerned the characteristics of necessary materials. Since hospitals do not all work with the same materials, issues of compatibility may exist meaning individualised procurement could better fit the needs of individual hospitals.²⁷⁶ In another line of reasoning, procurement across organisations, regions, and countries was held to already run sufficiently smoothly due to procedures being streamlined under EU and/or national law.²⁷⁷

A window of opportunity was nevertheless seen to cooperate in the context of procurement of necessary materials where this concerned the redistribution of surpluses. In this context, a role was seen for EMRIC which was, for example, held to be the suitable forum to take up a coordinating and organising role in such a redistribution.²⁷⁸ Furthermore, EMRIC could also play a role in safeguarding supply chains by connecting organisations with relevant suppliers (a role it had already taken up during the COVID-19 crisis) or providing alternatives in case regular suppliers were unavailable.²⁷⁹

4.6 Best Practices and Recommendations for the Future

The particular nature of crises concerning infectious diseases was pointed out earlier in this Section. Indeed, one interviewee considered pandemics difficult to anticipate in terms of reserves of products

²⁷² Interview 3 – Local hospital – 23 February 2021.

²⁷³ Interview 12 – Partnership – 10 June 2021.

²⁷⁴ Interview 1 – Local authority – 1 February 2021; Interview 2 – Local hospital – 4 February 2021; Interview 3 – Local hospital – 23 February 2021; Interview 4 – Partnership – 24 February 2021; Interview 5 – Local authority – 25 February 2021; Interview 8 – Local authority – 11 March 2021; Interview 11 – Local hospital – 31 March 2021; Interview 12 – Partnership – 10 June 2021.

²⁷⁵ Interview 3 – Local hospital – 23 February 2021; Interview 2 – Local hospital – 4 February 2021.

²⁷⁶ Interview 9 – Local hospital – 24 March 2021.

²⁷⁷ Interview 4 – Partnership – 24 February 2021.

²⁷⁸ Interview 1 – Local authority – 1 February 2021; Interview 10 – Local authority – 25 March 2021.

²⁷⁹ Interview 4 – Partnership – 24 February 2021; Interview 9 – Local hospital – 24 March 2021.

and materials since they have a limited shelf life and cannot be stored indefinitely.²⁸⁰ Accordingly, there is a need to find the golden mean between keeping reserves and taking action to purchase materials in times of crisis. Opinions on whether or not to keep stock and the extent in which to do so were divided between interviewees. Whereas some pleaded in favour of setting up an adequate stock of relevant materials such as protective equipment, disinfectant, and quick tests,²⁸¹ others indicated to plan on reverting back to regular material provision systems after the pandemic.²⁸²

Another challenge in this respect concerns the absence of a proper oversight of the equipment and materials that were needed during the early stages of the pandemic.²⁸³ Accordingly, several interviewees indicate that one of the first courses of action undertaken by their organisations was to immediately take stock of which materials were going to be necessary and anticipate purchasing so as to avoid shortages.²⁸⁴ In terms of recommendations, it was considered essential to keep a good record and be aware of which products were necessary (and prone to shortages) so as to anticipate their purchase.²⁸⁵ In relation to the materials stocked, one interviewee pointed to the importance of considering – apart from core materials – also additional materials needed for the functioning of core materials (e.g. tubes to connect a person to a respiratory machine).²⁸⁶

In order to guarantee that sufficient necessary materials can be found, interviewees generally supported the idea of having a central inventory list of necessary materials and trusted suppliers.²⁸⁷ Such a list should then be shared with crisis centres and should include core information on the supplier, materials that are supplied, quality testing, and certification status.²⁸⁸ One party having attempted to undertake the creation of such a list noted it was not without challenges. Since national-level actors had often taken over purchasing, it became more difficult for regional parties to find possible suppliers since sources from which materials were purchased were not always shared between administrative levels. It was thereby noted that the creation of an inventory was to be considered the minimum to insure the availability of sufficient materials in future crises.²⁸⁹ The proposal for a Regulation on serious cross-border threats to health that was published by the European Commission in November 2020 aims for increased coordination and allows for the development, stockpiling and procurement of crisis-relevant products.²⁹⁰

To venture beyond the mere idea of an inventory list, would be the creation of a match-making system – following, for example, the German model – where companies producing complementary products can meet each other to increase their productivity by merging activities (in addition to being taken up

²⁸⁰ Interview 6 – Public health service – 1 March 2021; Interview 11 – Local hospital – 31 March 2021.

²⁸¹ Interview 5 – Local authority – 25 February 2021; Interview 8 – Local authority – 11 March 2021; Interview 10 – Local authority – 25 March 2021.

²⁸² Interview 9 – Local hospital – 24 March 2021.

²⁸³ Interview 3 – Local hospital – 23 February 2021.

²⁸⁴ For example, Interview 1 – Local authority – 1 February 2021; Interview 3 – Local hospital – 23 February 2021; Interview 8 – Local authority – 11 March 2021; Interview 9 – Local hospital – 24 March 2021.

²⁸⁵ Interview 1 – Local authority – 1 February 2021; Interview 8 – Local authority – 11 March 2021

²⁸⁶ Interview 3 – Local hospital – 23 February 2021.

²⁸⁷ Interview 1 – Local authority – 1 February 2021; Interview 4 – Partnership – 24 February 2021; Interview 12 – Partnership – 10 June 2021.

²⁸⁸ Interview 12 – Partnership – 10 June 2021.

²⁸⁹ Interview 12 – Partnership – 10 June 2021.

²⁹⁰ 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.

on a list of potential suppliers). The most important success factor for such a system is the capacity to build trust and to network. These were considered the basis of all cooperation, but also need time – and real-life contact – to develop.²⁹¹ Whereas the intention was to set up such a system of cross-border innovative cooperation during the COVID-19 crisis, the urgency of the pandemic meant that there has been yet no possibility to explore this further.²⁹² Accordingly, the intention is to explore opportunities for such cooperation further after the direct emergency of the pandemic has been resolved.

For future crises, the importance of anticipating a possible crisis and taking early action was also pointed out as an important recommendation.²⁹³ Here, reference can be made to a hospital which started to use mouth masks in the hospital early in the crisis (before it was mandated by the national government). The hospital was thereby able to anticipate the need in protective materials such as medical grade mouth masks and face shields and to procure accordingly.²⁹⁴

In a broader sense, being proactive in times of crisis was considered to be essential. Although crisis management was said to be per definition reactive, one interviewee considered that awareness needed to be raised on what action could be taken on each level from the regional to the European and designating which activities were relevant for crisis management and which were not.²⁹⁵ Another interviewee thereby stressed the importance of cooperating on making joint plans on how similar crisis situations could be tackled in the future.²⁹⁶ In this context, it was indicated that past experience in cooperation proved very useful in the pandemic. One of the interviewees thereby reports having cooperated before with partners on an exercise and action plan for an epidemic – an exercise that already taught them that shortages of materials and hospital personnel could occur quickly (and hence how to anticipate such a situation).²⁹⁷ By contrast, the unique nature of pandemics in terms of crisis management was not always said to be taken into account. Hence, the need exists to develop plans completely tailored to handling pandemics.²⁹⁸ Accordingly, several interviewees saw added value in the organization of a “lessons learned” session after the pandemic to share knowledge and experiences with other stakeholders on how they managed and solved shortages of products – and managed the crisis as a whole.²⁹⁹

²⁹¹ Interview 12 – Partnership – 10 June 2021.

²⁹² Interview 12 – Partnership – 10 June 2021.

²⁹³ Interview 9 – Local hospital – 24 March 2021.

²⁹⁴ Interview 11 – Local hospital – 31 March 2021.

²⁹⁵ Interview 4 – Partnership – 24 February 2021.

²⁹⁶ Interview 9 – Local hospital – 24 March 2021.

²⁹⁷ Interview 7 – Local authority – 3 March 2021.

²⁹⁸ Interview 11 – Local hospital – 31 March 2021.

²⁹⁹ Interview 9 – Local hospital – 24 March 2021; Interview 10 – Local authority – 25 March 2021; Interview 11 – Local hospital – 31 March 2021.

5. Conclusions & Policy Recommendations

Over the course of the previous Sections different aspects of procurement in times of crisis have been discussed. It may be recalled that the origin of this research may be found in both the re-nationalisation of crisis management and shortages experienced by organisations involved in managing the COVID-19 pandemic in the EMR and cooperating within EMRIC. To examine the process of procuring materials during the COVID-19 pandemic, several research questions were maintained focusing on the opportunities for cooperation and emergency procurement and how materials were actually procured during the pandemic. Hence, findings based on the legislative framework for procurement were combined with findings from practice based on the testimonials of practitioners having experienced procuring during COVID-19 firsthand.

Starting with the procedural side as laid down in legislation, it may be noted that the procurement framework constitutes a multilevel playing field where the EU, Member States, regions, and even municipalities are all active in procuring materials – and often do so in parallel to one another. Accordingly, the legislative framework is divided between contracts the value of which is above thresholds set in EU legislation and contracts the value of which is below that. Whereas the former is subject to Directive 2014/24/EU (i.e. the Procurement Directive), the latter is subject to national law which is structured differently depending on the Member State concerned.

As far as cooperation on procurement was concerned, the legal analysis of the Procurement Directive shows that ample opportunities may be defined for aggregated procurement. The analysis of national legislation on procurement showed that Member States took over EU forms for aggregated procurement in their national legislation. As far as the forms of collaborative procurement are concerned, reference can be made to framework agreements, centralized purchasing activities and central purchasing bodies, and occasional joint procurement. For each of these forms of aggregated procurement it became apparent that these could also be used by contracting authorities from different Member States and could hence be suitable for partners cooperating in the EMR or in cooperation with EMRIC who want to cooperate on procurement. Whereas each of these forms of collaborative procurement could therefore be applied in cross-border regions, some proved to be more suitable than others. **In general, it is important to note that (cross-border) cooperation on procurement can be challenging since contracting authorities must agree on, among others, how to conduct the procedure, the materials to purchase, and the type of selection and award criteria they want to maintain for firms replying to the tender. Other circumstances such as conflicts of national laws, limited opportunities for SMEs, and the fact that collaborative forms of procurement do not always meet local needs and practices may further challenge the suitability of aggregated procurement in border regions during crisis times.**

Of the instruments analysed, centralized purchasing bodies/activities and occasional joint procurement appeared to be paired with the most complexities. In the case of centralized purchasing activities/bodies, this type of collaborative procurement is paired with the most extensive creation process. This extensive process accordingly also means that benefits are only likely to come to fruition if the purchasing body/activity is used on a permanent basis as opposed to being used only in crisis times. Considering the rarity of an emergency such as a pandemic, the intensive process of establishing a centralized purchasing body/activity may not outweigh its benefits. By contrast, the main challenge

in relation to occasional joint procurement lies in its occasional nature. Since this type of procurement does not have pre-determined parameters, it also means that the terms of the cooperation must be re-negotiated each time materials are procured which may, in crisis situations, result in a loss of valuable time. **Based on the legal analysis, framework agreements appear to have the greatest potential for crisis-time procurement in border regions.** The fact that certain provisions on the contracts to be awarded can be pre-determined means that the agreement can be tailored to the needs of contracting authorities while its framework nature means that provisions do not have to be re-negotiated for each contract. Furthermore, centralized purchasing bodies/activities (i.e. framework contracts) dedicated to purchasing materials to combat the COVID-19 crisis were seen in the Netherlands, Belgium, and Germany.

Turning to special provisions made for emergency procurement, several measures could be identified in both the EU procurement framework as well as that of the Member States. Starting at the highest level, regional stakeholders could benefit indirectly from high-level cooperation on procurement between at the EU level between Member States, for example, in the context of the Joint Procurement Agreement or Advanced Purchasing Agreements. Additionally, other provisions on emergency procurement were directly available to regional stakeholders. In this context, the primary measures imposed to facilitate crisis-time procurement concerned the shortening of time limits, increasing of opportunities for direct awards, and the application of negotiated procedures without prior publication. Such procedures particularly became available since the extreme urgency necessary to trigger their application could of course be proven in light of the COVID-19 pandemic. Referring back to the country analyses, accelerated procedures, negotiated procedures without prior notice or modifications of existing contracts were some of the measures seen most often to facilitate procurement during the COVID-19 pandemic in all three countries analysed in the context of this report.

Moving from the legislative framework to experiences from practice, these can indeed be said to attest to the **extreme urgency experienced in relation to the purchase of materials – especially during the early stages of the COVID-19 pandemic.** However, based on the interviews the extreme urgency and lack of materials did not give way to cooperation in this area since stakeholders indicated to not have cooperated with other authorities on the purchase of materials. Furthermore, the interviews also showed that, despite their potential to speed up regular procurement processes, **emergency procedures were at times not fast enough to mitigate immediate shortages experienced early in the crisis.** Interviewees furthermore reported not to have made use of EU emergency procedures since **thresholds triggering the application of the Procurement Directive were not met.** Whereas shortages were experienced on the demand side, they also existed on the side of the suppliers. Interviewees therefore indicated to have experienced particular challenges finding suitable materials and suppliers early in the crisis. Stakeholders thereby had to rely on, for example, personal contacts, donations of materials, or even direct purchases from hardware or online stores to ensure sufficient materials were made available. Lack of knowledge and unfamiliarity with the types of products and the quantities necessary posed as a further challenge to crisis-time procurement. Whereas hospitals and other medical facilities were of course experienced in purchasing materials such as protective equipment, certain procurement services of, for example, local authorities faced additional challenges **venturing in new and overheated markets.** Lessons had to quickly be learned

and processes developed to distinguish serious offers from non-serious ones and make timely purchases of quality materials.

The interviews also showed that, as the pandemic progressed, the shortage of materials was mitigated and sometimes even translated to an abundance. Availability of materials (or abundances thereof) also fostered solidarity since interviews showed that cooperation on necessary materials during COVID-19 mostly took place in the form of sharing available materials with parties in need of them. **By contrast, as indicated above, cooperation on the procurement of those materials was reported not to have taken place. Stakeholders thereby questioned the added value of cooperation on procurement fearing primarily the added administrative burden and complex decision-making paired with such cooperation. Furthermore, flexibility was held to have played an important role in being able to procure materials in a timely manner. The added value of collaborative procurement was found to lie in a considerable decrease in administration and the existence of economies of scale, something of which stakeholders were not convinced would be possible. Cooperation on procurement was met with further hesitance since it could risk slowing down procurement processes resulting in longer waiting periods and lack of available materials.**

Ultimately, the purpose of this research was to identify best practices and recommendations for the future that could help to improve the purchase of necessary materials, goods, and services in future crises. Considering the urgency experienced by stakeholders in practice any opportunity to speed up procurement procedures, use **negotiated procedures without calls for competition, or to award contracts directly can be held to have the most effect in practice.** Although collaborative procurement was not held to provide the greatest potential to facilitate procurement processes, the **use of framework agreements could be considered for the future.** This would particularly be the case if partnering contracting authorities already had experience cooperating with one another on the procurement of certain materials, meaning that negotiations to establish the framework agreement could be swift. One could even imagine drafting a concept framework agreement based on experiences during the COVID-19 pandemic that could be integrated into further crisis management plans.

Indeed, evidence from the interviews conducted in the context of this study attested to **the need for dedicated crisis management plans for pandemics** due to their particular (long-term) nature in relation to other disasters or emergencies.³⁰⁰ In relation to procurement of materials, efforts should be undertaken to establish a **common list of necessary materials and of suppliers** able to provide such materials in times of crisis. Following the interviews, such an inventory list should then be **embedded into a broader community of suppliers and paired with a match-making system** where companies producing complementary products can meet each other to increase their productivity by merging activities (in addition to being taken up on a list of potential suppliers). Apart from these activities, a **common strategy should also be developed for the redistribution of surplus materials.**

Another recommendation issued by the stakeholders interviewed concerns the **organization of a “lessons learned” session** to discuss experiences, challenges, best practices, and solutions found to

³⁰⁰ See also B.J. Buiskool, J. van Lakerveld & M. Unfried, Covid-19 Crisis-management in the Euroregion Meuse-Rhine: Study on lessons learned of cross-border cooperation in the field of healthcare during the Pandemic crisis (study 1) – PANDEMERIC Final Report, August 2021.

cope with shortages of materials. Another recommendation originating from the interviews is to **issue joint plans on how to tackle situations similar to the COVID-19 pandemic** in the future. Combined with the general importance of anticipating a possible crisis and being proactive in the management thereof, it would be recommendable to **include a section on procurement of materials in such crisis management plans**. Particular topics to be taken up could then include (1) the inventory of suppliers and reference to a potential future platform/network where suppliers and demanders may meet, (2) a concept framework agreement for the regional purchase of core materials, and (3) a strategy for stakeholders to report potential surpluses and subsequent redistribution thereof. Throughout the interviews, stakeholders particularly considered there to be **a role for EMRIC when it came to the coordination of activities** surrounding inventories of suppliers and redistribution strategies. Considering EMRIC's experience in coordinating crisis management and capacity to bring together a network of essential stakeholders, EMRIC indeed appears to be the suitable platform in which to integrate activities such as the ones proposed in the context of this study.

Annex I – Overview of Interviews Conducted

Interview	Party	Date
Interview 1	Local Authority	1 February 2021
Interview 2	Local Hospital	4 February 2021
Interview 3	Local Hospital	23 February 2021
Interview 4	Partnership	24 February 2021
Interview 5	Local Authority	25 February 2021
Interview 6	Public Health service	1 March 2021
Interview 7	Local Authority	3 March 2021
Interview 8	Local Authority	11 March 2021
Interview 9	Local Hospital	24 March 2021
Interview 10	Local Authority	25 March 2021
Interview 11	Local Hospital	31 March 2021
Interview 12	Partnership	10 June 2021

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