EU procurement legislation in the time of Covid-19: fit for purpose?[1]

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1. Introduction

The world is living through extraordinary times. The Covid-19 pandemic has disrupted normal lives and slowed down or, in many cases, brought to a complete standstill, economic activity. Within this extraordinary framework, governments must continue to function and respond to new and urgent requirements brought about by this crisis.

This raises the question as to whether existing legislation is sufficiently flexible to allow governments, at all levels, to take the necessary action to deal with the consequences of the pandemic effectively and indeed, to continue to perform their normal functions during this period.

This article considers the case of EU procurement legislation[2] and the extent to which, in the time of Covid-19, it can be considered fit for purpose. In doing so, it identifies the legislative provisions which might offer the necessary flexibility to contracting authorities in the current context, as well areas where the legislation might be seen to be lacking.

The article concludes that. whilst in certain respects the legislation offers contracting authorities appropriate flexibility in dealing with the effects of a crisis such as this, at the same time, it has a number of shortcomings. These include the lack of appropriate guidance as to how to deal compliantly with changed circumstances in the context of ongoing contract award procedures and the possibly that whilst the accelerated contract award procedures might be adequate in dealing with crisis *events,* they might be less adept in the context of *unfolding* crises such as this. In this respect, The article puts forward certain ideas as to how it might be possible to address some of the shortcomings that have been identified that seem both appropriate and proportionate in providing contracting authorities with the necessary tools to address the challenges brought about by a crisis such as the Covid-19 pandemic.

2. Need for urgent action

From a public procurement law perspective, the most obvious consequence of the pandemic is that it has led to new urgent requirements: ventilators, personal protective equipment and the construction of temporary hospitals, are some such examples.

Where a contracting authority cannot rely on existing arrangements, such as a framework agreement, subject to an exemption being available, it is necessary to carry out a new advertised competitive contract award process to meets its requirements.

Regulated procurement procedures must provide for certain time limits which, irrespective the minimum legislative requirements in this regard, must be reasonable, in the light of the complexity of the contract and the time required for drawing up tenders.[3]

At the same time, the legislation permits contracting authorities to conduct "accelerated" open, restricted and negotiated procedures, where urgency renders the normal minimum

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2 For the sake of simplification, the article focuses its analysis on 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.* Unless otherwise specified, any reference to legislation, rules or the public sector directive in this article should be construed accordingly.

3 Article 47(1). Unless otherwise specified any references to Articles should be construed as references to articles in Directive 2014/24.

time limits provided for in the legislation, impracticable.[4] In principle, provisions for the carrying out of accelerated procedures offer flexibility in cases where, despite the urgency, the award of a contract is still feasible under the accelerated timetable for which these procedures provide.

For example, in urgent cases, a contracting authority has the option of awarding a contract using the accelerated open procedure. This allows the contracting authority to require interested parties to submit tenders and their credentials for qualitative selection within a period of only 15 days from the date on which the contract notice was sent for publication.

However, in practice, the period necessary to carry out a regulated procurement process can be substantively longer. One obvious reason for this is that, contracting authorities would need to factor into their timing calculations the preparation of procurement documents and the carrying out, among other things, of tender evaluation.

An additional complication in this context is that, it is not always easy to calculate accurately the time that evaluation might take, not least in the context of an open procedure where following the publication of a contract notice, market interest turns out to be more substantial than the contracting authority might have anticipated.

Separately, accelerated procedures still require contracting authorities to notify bidders of the contract award decision and maintain a standstill period which at a minimum must be 10 calendar days.[5] This extends further the timeline between sending the contract notice for publication and contract conclusion to at least 25 days in the case of an accelerated open procedure and 35 days in the case of an accelerated restricted procedure. In reality, it would seem unlikely that all other aspects of a tender procedure, including the evaluation and preparation of contract award decision notices, could be completed within these overall minimum timelines, so that in practice, the actual period to contract conclusion, would be even longer. Related to this, is the possibility of a disgruntled bidder complaining following the notification of the contract award decision. If so, the contracting authority might consider it appropriate to extend the standstill period and indeed, it would be required to suspend the contract award process, in the event of a legal challenge.[6]

It is true that, if a legal challenge were to materialise, the contracting authority could apply to the relevant review body for an order to lift the automatic suspension of the process, so that it may conclude the contract. However, even assuming that such application is successful,[7] it should be clear that, these additional considerations and unknown risks, render the usefulness of the accelerated procedures in the context of the current crisis more limited than it could have been.

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4 Articles 27(3), 28(6) and 29(1), respectively. See further Sue Arrowsmith, "The Law of Public and Utilities Procurement", Vol. 1, 3rd Ed., Chapters 7 and 9.

5 Article 2a(2), Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC), (OJ L 395 30.12.1989, p. 33) as amended (the "Remedies Directive").

6 Article 2(3), Remedies Directive.

7 The chances of a contracting authority being successful in its application to lift the automatic suspension vary considerably between Member States. For example, in Germany it is generally difficult to do so, whilst in Ireland, comparatively much easier. See further, Commission Staff Working Document, Evaluation of the Modifications Introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/EEC concerning the European Framework for Remedies in the Area of Public Procurement / Refit Evaluation Accompanying the document Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement, COM(2017) 28 final, SWD/2017/013 final. See also Sue Arrowsmith The Law of Public and Utilities Procurement, Vol. 2, 3rd Ed., Chapter 22.

3. Need for extremely urgent action

The extreme urgency ground of the negotiated procedure without a call for competition

At the same time, the legislation provides for additional flexibility in the form of the "extreme urgency" exemption.[8] Where relevant conditions are met, this permits the conduct of negotiations for the award of a contract without the need for the prior publication of a contract notice, using the negotiated procedure without prior publication of a contract notice.[9] The application of this exemption is subject to three key cumulative requirements. More specifically:

(a) the extreme urgency must have arisen as a result of unforeseeable events which are not attributable to the contracting authority;

(b) the extreme urgency must render impossible the award of a contract that respects the time limits for which the legislation provides, including the minimum time limits permissible under the accelerated procedures; and

(c) there is a causal link between the unforeseeable event in question and the extreme urgency that has arisen.

The legislation also makes it clear that a contracting authority may rely on this exemption " insofar as it is strictly necessary". In the light of the requirement to interpret derogations from EU procurement law strictly,[10] this is likely to mean that a contracting authority should limit extremely urgent awards to shorter-term requirements or, in any event, to the minimum necessary to cover the period during which it can conduct a competitive tender process for the award of a contract or framework agreement, that covers more substantial or longer-term needs.

Was the pandemic an unforeseeable event?

Arguably, there should be no doubt that the Covid-19 pandemic meets the legislation's strict requirement for a truly unforeseeable event which is not attributable to the contracting authority seeking to rely on this exemption. This is on the basis that, despite the fact that the Court has interpreted the question of unforeseeability strictly,[11] the current pandemic is exceptional and unprecedented in modern times. Accordingly, even if it were the case that the abstract possibility of some form of a pandemic could not have been excluded by health authorities and governments in Member States,[12] it would seem disproportionate and indeed, unconscionable to use this as an argument to prevent the procurement of urgent requirements that can help save lives and protect livelihoods in Member States.

Similarly, it could be argued that relevant authorities in Member States, could have taken a view on the increasing risk of the spread of the coronavirus in January and February of 2020 so as to conduct timely procurements to prepare better for that risk. Even if that were true, it would again seem disproportionate and inappropriate to accept that this should lead to the conclusion that the extreme urgency is attributable to health and other relevant authorities which now have the responsibility to procure urgent requirements, when the question of what might constitute a national emergency is determined at central

8 Article 32(2)(c).

9 Arrowsmith, Chapter 10.

10 See for example Case C-394/02, *Commission v Greece* at [33] and the case law to which it refers.

11 See for example, Case 194/88R, *Commission v Italy* [1988] E.C.R. 4547 and Arrowsmith Chapter 10 more generally.

12 In the past 20 years there have been *epidemics* affecting parts of Asia. Separately, in 2016, the UK Government ran an *influenza* pandemic simulation which, according to reports, concluded that the National Health Service would find it difficult to cope with its effects, if it were to materialise. See for example, "NHS fails to cope with bodies in flu pandemic test", *The Times,* 27 December 2016.

government level and, separately, in view of the fact that the World Health Organisation itself did not declare Covid-19 a pandemic until 11 March 2020.

Equally inappropriate in the current context would seem to be an approach which seeks to differentiate between requirements which *could* have been reasonably foreseeable (for example, the need for greater volumes of PPE) and those which could not (for example, greater number of ventilators), so as to prevent relevant contracting authorities from relying on the "extreme urgency" exemption in relation to the former. When lives are at risk, so that there is a real extreme urgency to procure a requirement as quickly as possible, the question of foreseeability should ultimately be interpreted appropriately and, where necessary, less strictly.

Indeed, the current crisis raises the pertinent question as to whether, in the event of an emergency, it can ever be appropriate to interpret the notion of "unforeseeable event" so strictly, that contracting authorities are prevented from procuring urgently needed supplies, works or services despite the fact that this approach can put lives at risk. This issue is discussed later in this article. For current purposes it is assumed that, for the reasons set out above, the pandemic was, in fact, unforeseeable. This conclusion is also consistent with the view of the European Commission.[13]

How to determine whether minimum time requirements for a competitive procedure can be met

Once an unforeseeable event has arisen, the question which contracting authorities must then consider is whether, in view of the extreme urgency, it is possible to procure urgent requirements by means of contract award procedures which respect the legislation's minimum time limits.

It is noted that, there is arguably some doubt as to whether, in this regard, the legislation permits contracting authorities to take into account also reasonable assumptions as to the time required to prepare procurement documents, carry out evaluation as well as the need for a standstill period of at least 10 calendar days before contract conclusion. It is submitted that this should be permissible. However, this is not as clear as it should be in the legislation[14] and the Commission's recent guidance might be read, inappropriately, as providing further support for this stricter interpretation of the law.[15]

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13 See the European Commission Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis [2020] OJ C108I/1 at para 2.3.1 (the "Covid-19 Guidance"). See also various Commission statements in the context of State aid Covid-19 related authorisations, including in relation to the approval of a Danish public guarantee to compensate airline SAS for damage caused by coronavirus outbreak on 15 April 2020: "The Commission considers that the coronavirus outbreak qualifies as an exceptional occurrence, as it is *an extraordinary, unforeseeable event* having a significant economic impact. As a result, exceptional interventions by the Member States to compensate for the damage linked to the coronavirus outbreak are justified." [Emphasis added]. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_667

14 The possible confusion arises from the fact that Article XIII(1)(d) of the revised Agreement on Government Procurement, on which this exemption is based, provides for the use of this exemption when, among other things, goods or services (including works) cannot be obtained "in time" using one of the tender procedures with advertisement. This wording makes it much clearer that is permissible for contracting authorities to take a view on the feasibility of an advertised tender process by taking into account all aspects of a tender process and their timing requirements, including, for example, the time that would be necessary for the preparation of procurement documents and the carrying out of the evaluation. On the other hand, Article 32(2)(c) permits the use of the "extreme urgency" exemption when, among other things, the "time limits" for the open, restricted or competitive procedures with negotiation "cannot be complied with". The only "time limits" which the Directive considers, discusses and regulates are the "time limits" for the receipt of tenders and requests to participate in a competition.

15 In its Covid-19 Guidance (see in particular para 2.3.2), the Commission also focuses on the question of whether the accelerated time limits permissible under the Directive might be feasible, without commenting on the need for contracting authorities also to take into account in this regard, reasonable assumptions as to the time required, for example, to prepare procurement documents, evaluate tenders and implement a standstill period.

What requirements might be deemed to be extremely urgent?

As to the question of what supplies, works or services might have become so urgent that a contract award cannot await the carrying out of an advertised procurement process in line with minimum time requirements, this must be determined on a case by case basis.

Undoubtedly, medical supplies or equipment which are required to help save lives would meet the requirements for extremely urgent contract awards. However, the pandemic has also had knock-on effects which have themselves created additional extremely urgent requirements. For instance, all EU member states have now mandated lockdowns which, among other things, affect the way in which public bodies carry out their functions. That might mean that, as a result, a local authority now has an extremely urgent need to purchase specialist software to allow its employees to connect (or to connect more quickly and securely) to office computer servers remotely.

Whether the lockdown is deemed to constitute an unforeseeable event on its own or whether it is viewed as part and parcel of the unforeseen Covid-19 crisis is arguably irrelevant. The key point here is that ultimately, it is not only purchases which relate to fighting the pandemic itself which should meet the conditions for the application of the extreme urgency exemption.

What type of contract awards might be permissible under this exemption?

A more difficult question is whether the law should be interpreted as permitting the extremely urgent award of contracts which are not limited to filling a gap until longer-term solutions can be found. For example, in making purchases of medical grade face masks or other personal protective equipment (PPE), would it be reasonable for hospitals to take a longer-term view as to their requirements, not only where it is clear that the price per unit would be lower if the volumes purchased are larger, but also where there are valid concerns about the longer-term ability of suppliers to meet future demands?[16]

Arguably, in cases where there are objective grounds for longer contracts to be awarded or larger purchases to be made, the law should be interpreted as permitting these on the basis that in the light of specific circumstances, they would satisfy the requirement of limiting the extremely urgent purchase to that which is strictly necessary. However, the legitimacy of this approach is by no means certain in a legislative context which, as already noted, requires the strict interpretation of exemptions.[17]

Equally, it is not clear what the position might be in relation to requirements which are not of immediate urgency but which ultimately become so with the passage of time. Ordinarily such delay would be deemed to be attributable to the contracting authority so that the extreme urgency exemption should not be available.[18]

However, what if the reason for the delay in carrying out a public procurement process in a timely fashion was related to the need for the contracting authority to direct reduced resources to other more urgent tasks, with a knock-on effect on its ability to carry out other procurement functions? It is arguable that in the current context this should be

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16 EU warns of global bidding war for medical equipment, *Financial Times*, 7 April 2020, https://www.ft.com/content/a94aa917-f5a0-4980-a51a-28576f09410a

17 See Case C-328/92, *Commission v Spain* and more generally Sue Arrowsmith, "The Law of Public and Utilities Procurement, Vol. 1, 3rd Ed., Chapter 10. It is also noteworthy that in the Covid-19 Guidance, the Commission seems to take a stricter approach on this issue noting only that "it cannot be doubted that the immediate needs the hospitals and health institutions (supplies, services and public works) have to be met with all possible speed", that "for the satisfaction of the immediate needs of hospitals and health institutions within a very short timeframe the causal link with the COVID-19 pandemic cannot reasonably be doubted" and that the exemption should be used only to cover the "gap until more stable solutions can be found" (paras 2.3.2 to 2.3.4).

18 Case 194/88R, Commission v Italy [1988] E.C.R. 4547.

deemed to be permissible. However, in the absence of relevant judicial guidance and the risk that this approach might be deemed to rely on an inappropriately flexible interpretation of the extreme urgency exemption, the issue remains uncertain.

Is the extreme urgency exemption adequately flexible for the current circumstances?

Indeed, the real possibility that the interpretation of the conditions for the application of this exemption require certain flexibility that would appear inconsistent with the principle of strict interpretation of derogations, supports the view that ultimately, the extreme urgency exemption might not be adequate in enabling contracting authorities to respond to the urgencies created by the pandemic.

Indeed, it is arguable that the extreme urgency exemption might be well suited for dealing with unforeseen crisis *events*, such as natural disasters, but less adept in dealing with unforeseen crises which unfold or persist over a longer period or which affect not only a region or a particular Member State but the EU in its entirety. If so, this is of course not the fault of legislators who could not have reasonably foreseen this type of crisis emerging. The issue does, however, raise the question of whether there is an urgent need for greater legislative clarity or amendment.

Further highlighting the difficulties which the lack of legislative clarity and the requirement for strict interpretation of derogations create, is the European Commission's suggestion that even where the conditions for the use of the extreme urgency exemption are met, this may not lead to a de facto direct award other than where there are "physical/technical constraints related to the actual availability and speed of delivery" of an extremely urgent requirement.[19] In other words, the default position when relying on this exemption should be to carry out direct negotiations with more than one bidder, other than in the circumstances described above.

This interpretation would seem inappropriate, in that it imposes additional requirements over and above the conditions which the legislation provides for the use of the extreme urgency exemption. Indeed, once a contracting authority can demonstrate that the conditions that permit the use of the extreme urgency exemption have been met, it should be for that contracting authority to decide whether, in the circumstances, it is appropriate for it to negotiate the award of a contract directly with one bidder or more.[20]

Assuming that the conditions for the use of the extreme urgency exemption have in fact been met, the subsequent decision to negotiate the award of a contract directly with only one supplier would not breach EU procurement legislation. Accordingly, the decision to do so, can be reviewable only under domestic laws that, among other things, allow the judicial review of the fairness or reasonableness of public body decisions.

4. The impact of unforeseen circumstances on ongoing contract award procedures[21]

The pandemic has not only led to new urgent purchasing requirements for the public sector, it also has had a knock-on effect on on-going tender procedures. The need for contracting authorities to re-focus their resources on new urgent requirements as well as

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19 *Communication from the Commission — Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01),* 1 April 2020, Introduction and in section 2.3.

20 Support for this interpretation may arguably be found in the Court's more recent case law. See in particular the discussion in Totis Kotsonis, "Case C-515/18, Autorità Garante della Concorrenza e del Mercato v Regione Autonoma della Sardegna – Direct awards and Treaty principles"*, Public Procurement Law Review* (2020) 3 NA83.

21 This issue of changes in the context of an ongoing award procedure is discussed in some detail in Arrowsmith, Chapter 7, section 20, including the relevance of foreseeability in justifying changes before the selection of the winner or contract conclusion (see for example, Arrowsmith, 7-311 and 7-114).

the practical effects of the lockdown might mean that there are difficulties in carrying out evaluation or negotiations with bidders. Equally, the ability of bidders to meet original deadlines, participate in negotiations or remain appropriately engaged in ongoing tender procedures could also be affected.

This raises the question as to whether it might be permissible under the legislation to make changes to ongoing procedures so as to take into account the changed context within which both contracting authorities and bidders are now operating. For example, would it be permissible to extend deadlines or amend technical or other specifications in an ongoing competition? This issue has already been considered in academic literature where, quite rightly, attention has been drawn to the relevance of unforeseeability as a factor in determining the right approach to possible amendments in an ongoing contract award process.[22]

Ultimately, each amendment would require careful consideration on a case by case basis by reference to the particular circumstances of an ongoing procurement procedure and the question of whether any changes in terms of procedural or contract specifications, would breach the principles of transparency, equality of treatment and non-discrimination.

In this regard, it is relevant to consider Article 47(3)(b) and Recital 81 to the preamble of the public sector directive. These acknowledge indirectly the principle that it might be appropriate and indeed, necessary to make "significant changes" to the procurement documents in an ongoing procedure.

According to Article 47(3)(b), contracting authorities must extend the time limits for the receipt of tenders so that economic operators are aware of all the information necessary to prepare tenders where "significant changes" are made to the procurement documents. As to Recital 81, this clarifies that the significant changes may relate, in particular, to the technical specifications, in respect of which economic operators would need additional time in order to understand and respond appropriately.

At the same time, changes to the procurement documents cannot be so substantial that they would have led to additional economic operators expressing an interest in the competition or the selection of bidders other than those that have already been selected. That could be the case, in particular, where the changes render the contract materially different in character from the one initially set out in the procurement documents.

In the current context, Recital 81 gives rise to two pertinent observations. First, extending the original deadlines, so as to ensure that these continue to be reasonable in the light of significant changes in the procurement documents or indeed, the impact of unforeseen circumstances on the bidders' ability to comply with the original requirements, might itself constitute a discriminatory substantial modification. Second, the question of whether an amendment to the contractual specifications or procedural requirements of an ongoing process should be deemed discriminatory, would depend on the test applied in order to determine this issue. In the absence of more specific guidance in the legislation, the following approach would seem appropriate and proportionate in regulating changes that become necessary in an ongoing contract award procedure, as a result of unforeseen circumstances.

Changes to contractual specifications in an ongoing procedure

As already noted, Recital 81 clarifies that whether a change to the procurement documents should be deemed discriminatory should be determined by reference to whether it is so substantial that, had it been advertised at the start of the process, it would have led to

[22] See Arrowsmith, Chapter 7, section 20.

additional economic operators expressing an interest in the competition or the selection of bidders other than those that have already been selected.

At the same time, it would seem appropriate to interpret the legislation as permitting reliance on the Article 72(1)(c) by analogy. Where the conditions of this provision are met, modifications to concluded contracts are deemed permissible. More specifically, Article 72(1)(c) provides that a modification would be permissible where:

(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;

(ii) the modification does not alter the overall nature of the contract; and

(iii) any increase in price is not higher than 50 percent of the value of the original contract.[23]

It is important to clarify that for condition (i) above to be met, the changes to the contract specifications should be limited to the minimum necessary to address the effects of the unforeseen circumstances.

Where the above conditions cannot be met, because for example, the modification to the contractual requirements that are necessary to address the effects of the unforeseen circumstances would alter the overall nature of the contract, the contracting authority could consider the appropriateness of abandoning an ongoing process and awarding a new contract on the basis of an accelerated procedure or, where this is warranted, on the basis of the negotiated procedure without prior notification.

Changes to procedural requirements in an ongoing procedure

The need for changes to procedural requirements might not be limited to the question of whether to extend deadlines. As a result of the changed circumstances, the contracting authority might consider it necessary, for example, to change previously notified award criteria or indeed, the basis for shortlisting bidders in an ongoing competition.

At the same time, the question of how one should determine whether, in the light of unforeseen circumstances, certain changes to procedural requirements, should be deemed permissible is less evident than in relation to the question of changes to contractual specifications. This is on the basis that the legislation deals only with the circumstances in which certain *contract* modifications would be deemed acceptable following the conclusion of a contract, without the need for a new contract award procedure. As such, it is difficult to apply these provisions by analogy to *procedural* changes in an ongoing competition. It is true that, to some extent, EU case law deals with the question of procedural amendments, such as in relation to actual or deemed changes to award criteria in ongoing contract award procedures.[24] However, arguably, these cases are not helpful for the purposes of determining the appropriate legal position in relation to procedural changes that become *necessary* as a result of unforeseen circumstances. More specifically, related case law focuses on the basic principle that changes should not give rise to discrimination. However, as explained further below, it would seem appropriate to accept that certain procedural changes might be justifiable in the context of unforeseen

[23] Article 72 also sets out certain other requirements in relation to successive modifications in the context of this safe harbour and imposes certain transparency obligations. These are not considered further in this section. However, it is arguable that, *mutatis mutandis*, these are equally relevant in the context of changes to contractual specifications in the context of an ongoing procedure.

[24] See for example, *EVN AG and Wienstrom GmbH v Republik Österreich* (C-448/01) EU:C:2003:651 [2003] E.C.R.I-14527; Case C-331/04, ATI EAC Srl e Viaggi di Maio Snc v ACTV Venezia SpA [2005] E.C.R. I-10109; Case C-226/09, Commission v Ireland [2010] E.C.R. I-11807.

circumstances, even if that means that these would be discriminatory, in that, they would have affected the identity of participants in the tender process.

Indeed, the absence of any express exemptions of the type available under Article 72 for concluded contracts, combined with the need to interpret derogations strictly, might mean that, even in cases where there is a genuine need for procedural changes as a result of unforeseen circumstances, it would be easy to conclude that such changes should be prohibited in that had they been made known at the start of the process they would have led to additional economic operators expressing an interest in the competition or the selection of bidders other than those that have already been selected.

For example, what if a contracting authority were to consider that as a result of the effects of the lockdown on its employees but also on bidders, it has no option but to conduct the process at a slower pace than originally anticipated in the contract notice so that contract award is delayed by an additional six months? Similarly, what if, as a result of the Covid-19 pandemic, it is necessary to change the award criteria, so as to increase further the price weighting, in view of the fact that the crisis has led to budgetary pressures on its limited budget?

It is submitted that it would seem both appropriate and proportionate, that where procedural changes are required so as to address the impact of unforeseen circumstances in an ongoing procurement procedure, these should be deemed permissible where:

(a) the need for procedural modifications has been brought about by circumstances which a diligent contracting authority could not foresee;

(b) the procedural modifications in question are kept to the minimum necessary to address the effects of unforeseen circumstances on the ongoing procurement procedure; and

(c) in the light of the specific circumstances, it would be disproportionate to re-advertise and re-commence the procurement procedure on the basis of amended procedural specifications.

What would be disproportionate under (c) should be assessed by relevant factors such as the additional costs involved, the nature and extent of the procedural changes, as well as the point in the procurement procedure at which these changes become necessary. Clearly, the earlier the stage in the process, the more difficult it should be to justify making those changes without starting a new contract award procedure. Equally, even where the above conditions are met, the contracting authority should still be required to limit to the extent possible the risk of discrimination in the context of the existing competition. That might mean that although the contracting authority does not have to re-start the contract award process, it should still consider whether the specific amendments would have affected the position of bidders already in the competition or which might have been disqualified at one of its earlier stages.

For example, in the case of the contracting authority which now considers it necessary to allocate a greater weighting to price, it should consider whether this would have made a difference to the outcome of earlier bidding rounds and if so, allow the affected bidder or bidders to re-enter the competition.

On the other hand, where the subsequent delay in contract award by six months would have affected the preparation of tenders in a restricted procedure, the contracting authority should allow shortlisted bidders to amend and resubmit their tenders. At the same time, there should be no requirement for the contracting authority to re-open the

competition even if it is the case that the six-month delay would have affected the identify of economic operators expressing an interest in the competition.[25]

The rationale for this approach is based on the principle that, in cases of unforeseen circumstances not attributable to the contracting authority, the question of discrimination should be determined solely by reference to the question of whether the amendments are driven by an *intention* to discriminate against economic operators not participating in the contract award process, rather than the question of whether the *effect* of the amendments is to cause such discrimination.

In other words, it should be acknowledged that, in principle, some of the procedural changes that might be necessary to address the effects of unforeseeable circumstances could be deemed to be substantial in that they would have led to additional economic operators expressing interest in, or being selected for, the competition. However, where those changes are limited to the minimum necessary to address the unforeseen circumstances in question, it could be proportionate and appropriate to allow a contracting authority to proceed with the competition rather than recommence the procurement process.

Indeed, a similar rationale would seem to be the basis for the extreme urgency exemption, where it is clear that the award of a contract without advertisement would be discriminatory vis-à-vis those economic operators that are not invited to negotiate the award of that contract. Nonetheless, this is deemed appropriate and proportionate where the conditions set out in that exemption are met.

5. Unforeseen circumstances and the amendment of concluded contracts

The question of amending concluded contracts in the context of the Covid-19 crisis arises in two particular ways. First, it might offer the most time-efficient solution to the State's need to meet increased or additional requirements. For example, where there is a contract in place for the provision of X number of medical-grade face masks, it should be relatively easy for a contracting authority to negotiate additional supplies of the product within the limits of what is permissible under the law.

Second, the amendment of concluded contracts might become necessary as a result of the original terms of contracts no longer being capable of performance. For example, that might mean changes to the time or method of delivery or to the contract's technical specifications. In certain cases, it might also involve an agreement to reduce the scope of the original contract, such as where as a result of the lockdown, only part of the original requirement can be delivered. In other words, the Covid-19 pandemic, including the subsequent lockdown, might affect contracts which have nothing to do with the delivery of Covid-19 related supplies, works or services.

For instance, it is possible that construction work for the delivery of a local housing project would have to be suspended as a result of the lockdown and social distancing restrictions with effects on the time of delivery of the project and costs. Equally, it might mean that in view of a newly-stretched budget, the contracting authority might ask for compromises to be made in the quality of the material used in the construction. Alternatively, it might consider it necessary to cut costs by reducing the scope of the project so that fewer houses get built or it might decide to do so as a realistic response to the difficulty the contractor might be facing in delivering the project.

Both of these issues are considered below.

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[25] Compare this scenario with *R. v Portsmouth City Council Ex p. Coles and Ex p. George Austin (Builders) Ltd judgment of June 6, 1995,* where the English High Court considered that, among other things, the delay in contract award by six months was one of the reasons why tit concluded that there was a material change to what had been advertised.

Additional purchases on the basis of an existing contract

As noted earlier, EU procurement legislation allows the amendment of concluded contracts under certain circumstances and provided relevant conditions are met. The "unforeseen circumstances" provision (set out in Article 72(1)(c)), has already been considered in the context of changes to contractual specifications in an ongoing procedure. It will be recalled that, subject to certain conditions, this permits the amendment of an existing contract where the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee.

It is likely that Article 72(1)(c) will play an important role in enabling contracting authorities to meet increased or additional needs at least in the shorter term where appropriate contracts are already in place. In this regard, it is relevant to note that this exemption allows for the possibility of making several successive modifications provided that the value of each modification does not exceed 50 per cent of the value of the original contract and all other relevant conditions are met. In practice, continued reliance on this exemption for several successive purchases would seem difficult. One reason for this is that the legislation requires that the overall nature of the contract should not change as a result of the contract's amendment. The greater the number or scope of successive modifications the greater the likelihood that these would affect the overall nature of the contract.

Even more importantly, in the light of the need to interpret derogations strictly, it would seem difficult for a contracting authority to continue to claim that Covid-19 constitutes an unforeseen circumstance in relation to subsequent purchases. Instead, it is likely that, in most cases, the law must be interpreted as only permitting an appropriate initial extension to an existing contract (or indeed, a framework agreement) as a result of the Covid-19 crisis. The contracting authority would then be expected to take action to advertise and procure competitively any further additional requirements, other than where some other exemption applies.

Depending on the specific facts of each case, other modification safe harbours might be relevant in the Covid-19 crisis context, including Article 72(1)(b). This permits contracting authorities to purchase additional works, services or supplies in cases where, among other things, these have become necessary and a change of contractor cannot be made for economic or technical reasons. For example, in the light of the pandemic, a health authority might consider it necessary to ensure that in the future it has adequate intensive care capacity. On that basis, it could ask an existing contractor to amend plans for the construction of a new hospital so that this incorporates additional capacity, including a larger intensive care unit. In these circumstances, it should be possible to rely on this exemption so that the existing contractor carries on the additional work. This could be on the basis that, for instance, there would be significant complications with insurance requirements if two different contractors work on the same site at the same time but are responsible for separate albeit interconnected aspects of the same project under separate contracts.

Contract amendments that have become necessary as a result of Covid-19

As noted earlier, amendments to existing contracts might be effected not only so as to enable a contracting authority to meet increased or additional requirements that have become necessary as a result of the Covid-19 pandemic. It is also possible that the parties to a contract might be willing to amend it, in a manner which reflects the fact that its original terms can no longer be met.

In principle, Article 72(1)(c) allowing amendments for unforeseeable circumstances might, once again, be useful in this context. However, there are limits to the extent to which it

would be possible to rely on this provision where, for example, the scope of the original contract is reduced to such an extent that its overall nature is altered.

Indeed, whilst Article 72(1)(c) provides for the possibility of the value of an original contract increasing (by up to 50 percent, each time) without that giving rise to substantial modification concerns, where the contract's overall nature is not altered, it does not offer protection where the same unforeseen circumstances require a reduction in the value of the original contract.

This is problematic, in that, case law has already established that reducing the value of a contract can, in principle, constitute a prohibited substantive modification.[26]

In cases where a "reduction in value" modification were to be deemed substantial so that amending the contract would amount to the award of a new contract, a contracting authority would either have to carry out a new contract award procedure or seek to rely on some other exemption. For example, to the extent that the modified contract constitutes a new direct award, a contracting authority might be able to demonstrate that the conditions for the application of the extreme urgency exemption, that would permit direct negotiations and a contract award, are met. However, in those circumstances, it is likely that the amended contract should only remain in place for the minimum period necessary for the contracting authority to award a new contract by means of an advertised competitive tender process.[27]

6. Fit for purpose?

As it should be clear from the above analysis, current EU procurement legislation offers at least some options for the procurement of new urgent requirements that have become necessary as a result of the Covid-19 pandemic. For example, in a number of cases, contracting authorities are able to rely on accelerated procedures to award contracts urgently and indeed, on the extreme urgency exemption that permits the carrying out of direct negotiations, when the time limits for the conduct of an accelerated procedure cannot be met.

At the same time, the current crisis has made it clear that the legislation does not provide all the necessary tools that would enable contracting authorities to award contracts most effectively in the context of unforeseen circumstances such as these. This is understandable. As noted earlier, it could not have been in the reasonable contemplation of EU legislators that an unforeseen and unfolding crisis would have affected the EU as a whole, and indeed, the wider world. This has had unexpected repercussions on, among other things, the availability of important supplies and the ability of contracting authorities across the EU to conduct public procurements. In addition, the pandemic has affected bidders' ability to continue to participate in contract award procedures whilst many contractors might no longer be able to continue to perform existing contracts as originally agreed.

Whilst EU initiatives such as the Joint Procurement Agreement[28] can provide an important additional tool in helping contracting authorities in signatory states to meet certain urgent

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[26] *Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation* (C-549/14) EU:C:2016:6342016; [2016] P.T.S.R. 1569.

[27] It is noted that, the possibility of justifying a "reduction in value" exemption under Article 72(2)(e), that is, on the basis that the modification, irrespective of its value, is not "substantial" within the meaning of the legislation, is not available in this context. This is on the basis that a substantial modification is defined in Article 72(4) as also including cases where the modification would have attracted additional participants in the competition, which was the concern raised in the context of *Finn Frogne.*

[28] Joint Procurement Agreement, 20 April 2014, implementing Article 5 of Decision 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC, OJ L 293, 5.11.2013, p.1.

medical requirements[29], this does not do away with the need to acknowledge, consider and address the limitations of current EU procurement legislation, some of which have been discussed here.

The extreme urgency exemption

As noted earlier, one concern under current rules is the effect of the EU law requirement to interpret derogations strictly. This creates legal uncertainties and, arguably, imposes disproportionate limitations on contracting authorities seeking to rely on the extreme urgency exemption in the current crisis.

It is true that the European Commission has provided some further clarifications as to the appropriate use of this exemption in the context of the Covid-19 pandemic[30]. However, there are important limits on the extent to which the Commission itself may seek to interpret the legislation flexibly in the absence of specific judicial guidance and in the light of the continued obligation to interpret derogations strictly. Ultimately, it would be for EU legislators to clarify and address this and other related issues by making appropriate changes to the EU procurement legislation.

In this regard, it is relevant to acknowledge that there are limits on the EU's ability to extend the basis on which contracts may be awarded by means of negotiations without prior notification, under its rules. The reason for this is that the grounds on the basis of which such direct negotiations may be permitted are regulated under the World Trade Organization's Agreement on Government Procurement (GPA)[31] with which EU procurement legislation must continue to comply.

However, it is arguable that legislating so as to incorporate in EU law a more flexible interpretation of the requirements of the extreme urgency exemption would not breach GPA obligations. This is on the basis that the requirement for strict interpretation of derogations is an EU law principle which is concerned with limiting the effects of derogations on the operation of the internal market.

On that basis, a more flexible interpretation of how the extreme urgency exemption should apply in the context of a crisis such as the Covid-19 pandemic, should not give rise to any compliance issues under the GPA. Further support for this conclusion may be found in the recitals to the preamble of the revised GPA. This recognises that "the procedural commitments under this Agreement *should be sufficiently flexible to accommodate the specific circumstances of each Party".*[32] Accordingly, this possibility should be considered further by the EU.[33]

Need for additional legislative amendments

Over and above the extreme urgency exemption, there are a number of other issues which would benefit from clarification and express consideration in an amended EU procurement legislation. For example, it is important that the legislation should provide clear guidance

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29 On this see S. Smith, "COVID-19 and the EU Joint Procurement Agreement on medical countermeasures" (2020) 29 P.P.L.R. xxx

30 *Communication from the Commission — Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01),* 1 April 2020.

31 Robert D. Anderson and Anna Caroline Müller, "Keeping public markets open while ensuring due flexibility for governments in a time of economic and public health crisis: the role of the WTO Agreement on Government Procurement (GPA)" (2020) 29 P.P.L.R. xx

32 Emphasis added.

33 For the sake of completeness it is noted that Article III paragraph 2(b) of the GPA also provides for a conditional general exemption in relation to measures which are necessary to protect, among other things, human life or health. However, on the basis of the more flexible interpretation of the extreme urgency exemption discussed above, it should not be necessary to seek reliance on that exemption to justify the carrying out of emergency public purchases in the context of a crisis such as this.

to contracting authorities as to the circumstances in which they can amend contractual specifications and procedural requirements in the context of an ongoing procedure, at least in cases when this becomes necessary as a result of unforeseen circumstances. Possible ways of dealing with these issues have already been discussed elsewhere in this article.

Equally, in line with earlier comments, there is a need to amend the basis on which accelerated procedures are regulated when used to meet requirements that arise from unforeseen circumstances. Separately, EU procurement legislation would benefit from amendment so as to enable contracting authorities to reduce to some extent the scope and value of existing contracts, when this becomes necessary as a result of unforeseen circumstances, without the risk that this might amount to a substantive modification.

Possible ways of addressing both of these issues are considered below.

Modification of the provisions applying to the accelerated contract award procedures

In seeking to render the use of accelerated procedures a more effective option when unforeseen circumstances arise, the legislation should differentiate between the use of accelerated procedures in cases where a state of urgency renders impracticable "normal" time limits and cases where "normal" time limits are rendered impracticable specifically as a result of unforeseen circumstances not attributable to the contracting authority.

In the former case, existing rules should continue to apply. However, in the latter case, the use of the accelerated procedures should benefit from a separate and more flexible set of rules. For example, in these circumstances, the use of an accelerated procurement procedure should not require the contracting authority to:

- maintain a standstill period between the notification of the contract award decision and the contract's conclusion; or

- suspend the contract award process in the event of a legal challenge to its decision.

Indeed, Member States should consider further how remedies operate in relation to urgent contract awards following an accelerated procedure which was rendered necessary as a result of unforeseen circumstances not attributable to the contracting authority. Arguably, these require a more bespoke approach to ensure that, in the context of a crisis such as this, where potentially even a day's delay may be significant, urgent contract awards following accelerated procedures are not at risk of being held up in court proceedings.

Modification of Article 72(1)(c)

Separately, in seeking to provide for duly justified additional flexibility in the event of an unforeseen crisis, Article 72(1)(c) should be modified so that it permits the modification of concluded contracts *also* where:

(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;

(ii) the modification does not alter the overall nature of the contract; and

(iii) any *decrease* in price is not higher than 50 percent (or such other percentage which EU legislators consider appropriate) of the value of the original contract or framework agreement.

In addition, where several successive modifications are made, the limitation about the maximum possible decrease in the value of the original contract should apply in respect

of the collective value of *all* successive modifications and the successive modifications should, in any event, not be aimed at circumventing the Directive.[34]

7. Concluding remarks

The application of EU procurement legislation in the context of the unprecedented Covid-19 pandemic has shone a light on the flexibilities but also the limitations of the current legislative framework. Accordingly, the answer to the question of whether EU procurement legislation is fit for purpose in the current crisis, is surely "up to a point".

Currently, contracting authorities across the EU continue to face new urgent purchase requirements whilst seeking to proceed with ongoing tender procedures under difficult conditions. At the same time, they have to consider how to deal with existing contracts that are no longer capable of performance on the basis of their original terms. These are real challenges which current legislation is not fully equipped to address.

In the light of the issues as well as possible solutions identified above, it is important that EU legislators should consider how to address the limitations of the legislation so as to render EU procurement rules fully effective in dealing with unprecedented crises such as the current pandemic now facing all EU Member States.

[34] While the legislation allows for each successive modification to increase the value of the original contract by 50 percent (subject to the other conditions of this exemption, including the requirement that successive modifications should not be aimed at circumventing the Directive), clearly such an approach makes no sense in relation to successive modifications that lead to the decrease in the value of the original contract.