

ROUTLEDGE HANDBOOK  
OF PUBLIC PROCUREMENT  
CORRUPTION

*Edited by Sope Williams and Jessica Tillipman*

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# 6 EMERGENCY PROCUREMENT AND CORRUPTION

*Gabriella M. Racca and Christopher Yukins*

## Introduction

Urgent situations require prompt action. Emergencies arise because of both natural disasters and man-made crises, including earthquakes, wars, epidemics and pandemic threats, military security crises, and, now, digital security crises. Under most regulatory regimes, urgencies permit agencies to derogate from normal competitive procedures for the award of public contracts (Racca, 2013). In practice, however, those derogations have been read expansively, and the broad discretion allowed has raised the risk of abuses and corruption all over the world (Racca and Yukins, 2014; Racca and Yukins, 2014b). The emergency procurement procedures chronicled in Part 18 of the U.S. Federal Acquisition Regulation, for example, generally do not offer special protections for integrity; instead, those emergency procedures streamline procurement quite appropriately but at the risk of corruption.

Thus, following the onset of a crisis, corruption risks are rarely on the agenda, and so the risk of corruption rises unchecked at the worst of possible times (Racca, 2019). Corruption reduces the resources available to address emergencies by diverting funds and eroding the quality of urgently needed products and services (De Benedetto, 2021; Schultz and Søreide, 2008). Corruption, perceived or actual, also undermines the social cohesion essential to success in the face of a national (or international) crisis (Racca, Cavallo Perin, and Albano, 2016).

At the same time, different situations demand different responses; thus, the specific challenges of corruption and their solutions depend on how acute, or rather how inherently unpredictable, the emergency situation is – and that, in turn, can depend on other constraints working on those in the procurement system, such as a shared sense of purpose which discourages corruption (OECD, 2020a; OECD, 2020b). Arguably, of course, there may be an abuse of the ‘emergency powers’ whenever the urgency is not really an emergency and instead stems from the public administration’s behaviour. Public administrations’ claimed emergencies have sometimes been used, in the pandemic as before, to justify botched procedures and to conceal public agencies’ organizational inefficiencies.

In the past, many of the most notorious examples of these failed practices arose in the management of large events – for example, Olympic games, sports events, international meetings, concerts, and so on. Procurement rules (many of which have since been repealed) sometimes explicitly allowed agencies to apply emergency rules for these types of events (Racca, 2013). Events of this kind are not truly emergencies, as they are not generally ‘unpredictable’, and in such

cases, better planning of the contracting activities could be enough to meet the public’s needs. In the European experience, large events have sometimes been declared an emergency – which may really have been a simple failure to plan – and the decision to lend ‘extraordinary’ procurement powers to public authorities has been justified based on the stated need to ensure the ‘regular’ development of the relevant event.

Recently, global approaches to ‘emergency’ contracting shifted as the world responded to the COVID-19 pandemic and continues to respond to the climate crisis and ongoing economic uncertainties. In the face of these very different threats, corruption in emergency procurement needs to be addressed and better understood. Like the COVID-19 crisis and climate change, corruption is a transnational and multisectoral problem that requires solutions of the same scope and breadth (Mellman and Eisen, 2020). COVID-19 was peculiar as it affected all countries and led to breakdowns of established systems (Arrowsmith et al., 2021). Governments around the world enacted legislation in response to the pandemic to ensure their health systems reacted promptly. While emergency procurement legislation can appear time-efficient in terms of procuring needed medical supplies, such legislation can also blunt the necessary checks and balances needed to ensure accountability in government spending (Bandiera, Prat, and Valletti, 2009). Nor are the pressures only a matter of speed in contracting: to remedy domestic shortages of masks, many countries placed restrictions on exports or equivalent measures, such as the compulsory purchase by governments of all available stocks (Evenett, 2020). These government interventions contributed to severe market distortions such as sharply increased prices for masks or other personal protective equipment (PPE) (Albano and La Chimia, 2021) – arguably yet another sort of systemic breakdown (OECD, 2020c).

In the context of the pandemic, although any number of different theoretical approaches might be used to understand corruption – for example, principal/agent theory, collective action, institutionalism, and game theory – there was time for only the most practical of approaches, and the systems that were most structurally sound seemed to experience the least failure. Different countries experienced different types of failure, which, though cited as ‘corruption,’ also highlighted structural weaknesses (and potential points for reinforcement in future emergencies).

The COVID-19 crisis showed, for example, that corruption can undermine the effective functioning of health systems, as it cripples the efficiency of hospitals and other medical facilities engaged in tackling the crisis as they face staff and equipment shortages. Suppliers and intermediaries took advantage of the surging demand from governments competing with one another for the same products not only by setting prices above the norm (Quinot, Williams-Elegbe, and Tochi Udeh, 2021), but also by demanding conditions normally prohibited under ordinary procurement rules – for example, advanced payments to shift payment risk to the government (Folliot Lalliot and Yukins, 2020). This was not ‘corruption’ in the classic sense – not bribes or collusion, for example – but they nonetheless showed that emergencies, unique in form, also bring unique failures (Fuqua, 2022).

These aberrations – failures in systems and their accountability – occurred against a strong tradition of fighting corruption in the public health system. The Council of Europe Criminal Law Convention on Corruption, for example, requires State Parties to criminalize active and passive corruption in the private sector, referring also to private healthcare providers. Similarly, the Council of Europe calls on Member States to ‘introduce measures to combat corruption in the health sector’ (Council of Europe, 2013). European and international stakeholders, including the Group of States against Corruption (GRECO), the Council of Europe’s anti-corruption monitoring body, have emphasized the need for a more systematic analysis of areas most prone to corruption, including public procurement in the health sector (GRECO, 2020).



Corruption during the pandemic also revealed gaps in the existing enforcement regime. At the international level, for example, there are still several countries that have not implemented provisions of the United Nations Convention against Corruption (UNCAC). The problems left by gaps in the anti-corruption framework are even more glaring when examined in light of the pandemic experience. For example, although UNCAC's Article 9 calls for such measures, only 26 per cent of signatory states have adopted screening procedures for the recruitment of personnel responsible for procurement, legislation, or rules on accountability, codes of conduct, conflicts of interest declaration systems, and periodic training policies (UNODC, 2021b) – a gap which left open the type of cronyism that undermined governments' response to the emergency, both practically and politically. In October 2020, the United Nations Office of Drugs and Crime (UNODC), which coordinates the implementation of UNCAC, launched the COVID-19 Anti-Corruption Response and Recovery project, designed to map the risks of corruption and strengthen transparency in public procurement. UNODC also launched several initiatives around the world to mitigate corruption risks in emergency procurement.

In meeting the COVID-19 emergency, countries commonly used two approaches: (1) rely upon existing oversight institutions which help ensure transparency and accountability in the allocation, distribution, and management of emergency funds; and (2) look to newly established bodies, such as taskforces or special committees, comprising government representatives from various institutions, including anti-corruption bodies and audit institutions, to undertake oversight functions (United Nations Office on Drugs and Crime, 2021).

In the context of a crisis, anti-corruption authorities can provide substantive guidance on proposed response measures to safeguard funds and help mitigate opportunities for corruption and fraud. They can highlight existing transparency and accountability mechanisms that may be used to help track and audit disbursed funds, reiterate underlying obligations to act with integrity, and support the supervision of funding allocations (Cerrillo-Martinez and Ponce, 2017). Supreme audit institutions can undertake real-time audits, advise parliaments on how to mitigate exposure to corruption risks, and verify processes and procedures (World Bank, 2020).

International institutions also played a role, and actors, such as Interpol and the Financial Action Task Force (FATF) and national bodies (such as the Financial Crimes Enforcement Network (FinCen) in the United States; the National Anti-Corruption Authority (ANAC) in Italy; Agence Française Anticorruption, the French Anti-corruption Agency) issued warnings related to COVID-19 management, including warnings related to fake medical products and illicit tenders.

This chapter takes a different approach from the chapter by Quinot in this *Handbook* and tries to discern patterns in the national and international responses to emergencies, regarding both more traditional forms of procurement corruption (bribery and fraud, for example) and corruption in the broader sense of institutional failures (maladministration). This is a controversial approach – it means looking beyond *personal* corruption to *structural* failures and considering those broader failures as 'corruption' as well (Yukins, 2010). While this seems counterintuitive – corruption is often defined, for example, much more narrowly as the misuse of public power for private gain – differentiating between 'personal' and 'institutional' failures in a crisis may be a dangerous distraction because the mechanisms used to contain *individual* forms of corruption in a procurement system (prosecution and debarment, for example) are also used to reinforce the integrity of the procurement system as a whole (and ultimately to drive that system towards purchasing the best value). The discussion below therefore approaches procurement corruption in an emergency holistically to show how different systems respond to different kinds of corruption in divergent forms of crisis.

### Different kinds of emergencies and corruption

To make sense of the different kinds of corruption which have emerged during emergencies, it is important to recognize the varying causes of corruption. The pandemic confirmed that problems of corruption must be considered differently, depending on the actual source and the kind of urgency, and on whether the emergency is localized or generalized. The pandemic, as it disrupted procurement systems and their related supply chains, also showed that 'corruption' in procurement can sometimes best be understood as a system breakdown, not a normative concept.

The pandemic demanded immediate emergency supplies, and procurement systems were generally unprepared. The problems that triggered shortages were often not ones of isolated or 'personal' corruption but rather ones of structural failure – of official bureaucracies that had grown slow and complacent behind government monopsonies. In the emergency presented by the pandemic, monopsonistic assumptions collapsed and corruption seeped through the gaps forced open by the crisis due to a failure in planning, a lack of experience, and inadequate stockpiles of emergency protective equipment (Finkenstadt, Handfield, and Guinto, 2020) and other essential devices (Folliot Lalliot, and Yukins, 2020; WHO, 2020; WHO, 2021). While these failures may not have qualified as 'classic' corruption (they were not the products of bribes or gratuities, for example), the mechanisms used to remedy these failures (investigation and transparency, for example) were much the same and are another example of structural protections, which reinforce the integrity of the system, as much as they deter and unearth individual instances of corruption, and which are even more acutely important in an emergency.

One kind of corruption arises because of failures in normal competitive processes and norms, as the pandemic showed. For example, in both the United States (U.S. Department of Justice, 2022) and China (Wang and Ren, 2021), there were recurring concerns regarding bidder collusion. In the European Union (EU), under the EU's procurement directives, compliance with national and EU principles is required even in emergency situations. At the European level, public procurement contracts with cross-border relevance must guarantee free movement of goods, freedom of establishment, and free movement of services and respect the principles connected with the fundamental rules of equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. Open competition in public contracting reduces the risks of corruption and ensures that goods or services are procured at a fair market price.

However, the emergency forced generalized waivers of the public procurement rules, which disrupted publicity and transparency in award procedures (ANAC, 2020). The urgency to respond to the crisis and the speed at which measures were adopted often led to inadequate accountability and oversight. As a result, corruption and fraud risks increased and threatened the efficiency and effectiveness of crisis response measures. The lack of publication of award notices, the misuse of exceptions for procurements without prior publication (far beyond the notion of 'urgency' allowed by EU legislation), and the unjustified use of direct awards were some of the most frequent infringements. Each of these behaviours threatened the principles of non-discrimination, equal treatment, and transparency and frustrated the principle of competitive tendering.

During the pandemic, normal competition between economic *sellers* was often overshadowed by competition among public *purchasers*, which led to inefficiencies and abuses (Bowsher, 2021; Albano, 2020). The global emergency turned traditional public procurement processes – notoriously slow and dependent on vendors bending to governments' will – upside-down. Procuring agencies suddenly found themselves competing *among themselves* for supplies, while vendors, with new market power, pressed their advantage. This increased the risks of corruption in affected sectors, such as healthcare, due to the immediate need for medical supplies (which led to a



weakening of traditional procurement rules) and overburdened medical facilities and staff. The end of the pandemic left open the question of when these supply chain problems would end and how shifting public procurement models might ease them in future emergencies (Condon, Kim, and Kim, 2022; Harput, 2022; Carpenito, and Grippo, 2020).

Another type of failure in emergencies may be caused by forms of inefficiency. Due to urgency, procurement personnel unfamiliar with the relevant market may accept inflated bids out of ignorance or indifference or because of a shortage of established suppliers (Albano and La Chimia, 2021). This is not necessarily corruption in the classic sense, but it does generate less optimal results in terms of price and quality, to the detriment of users/citizens. The ‘VIP Lane’ scandal in the UK, discussed by Quinot in Chapter 5, showed that vendors with ties to the Conservative Party were treated more favourably in sourcing emergency supplies. This is a good example of the ‘bridge’ between classic corruption and systemic failures. While the practice was originally described in the international press as corrupt ‘cronyism’ (Bradley, Gebrekidan, and McCann, 2020), the High Court ultimately concluded that procurement officials, overwhelmed by the pandemic, had simply broken rules of competition (specifically, rules of equal treatment) by favouring known suppliers in the rush to identify reliable sources of emergency supplies (Good Law Project, 2022).

Public officials’ lack of capacity (or indifference to outcomes) undercuts best value, not only in the immediate crisis, but also potentially during the long-term reconstruction (Schultz and Søreide, 2008). Conversely, professionalization in public procurement (OECD, 2023) is a key factor and can positively influence public officials to refrain from corruption (Ferwerda and Deleanu, 2013). The damage done by officials’ inefficiency in a crisis can be doubly harmful, for it hurts users and can violate human rights (Racca and Cavallo Perin, 2014).

To address the risk of unprofessionalism in an emergency, governments can put into place long-term supply agreements before an emergency arises (Arrowsmith, 2021). These agreements are often structured as catalogue contracts, sometimes known as ‘indefinite-delivery/indefinite-quantity’ contracts in the United States and as ‘framework agreements’ elsewhere (Yukins, 2008). It is possible to define framework agreements in advance, with multiple economic operators, to secure the supply of reasonably priced and high-quality goods and services normally required during emergencies (Racca, 2013). The EU Directives, for instance, provide contractual tools for addressing emergencies and encourage organizational models that allow governments to centralize the personnel needed to address an emergency. The EU’s legal framework also incentivizes public administrations to cooperate across borders, both through framework agreements (and other contractual structures) and using autonomous legal entities, which serve as consolidated purchasers on behalf of multiple governments (Racca and Yukins, 2019).

Globally, best practices are emerging, which suggest how best to avoid waste and corruption during an emergency and how to ensure a swift, professional response by the officials involved (Yukins, 2021). Experience has shown the benefits of cooperation and joint purchasing, for example, of essential medical devices, through contracting vehicles which can both protect the health of citizens and ensure transparency and freedom of competition. Not all experiences have been positive. European efforts at joint purchasing implemented with the Joint Procurement Agreement and the European Civil Protection reported uneven success (Georgopoulos, 2021).

Many requirements, however, cannot be anticipated, and rapid procurements will often be necessary. In such cases, preventive measures may fill the gaps left by a lack of capacity in public authorities – lest public officials emerge as the most obvious weaknesses in a supply chain. Officials’ failures in an emergency often give rise to popular suspicions of corruption (Kanno-Youngs and Nicas, 2020).

Other issues may arise due to ineffective systems of bid challenges; inadequate selection, screening, or training for procurement officials; a failure to require public officials to declare their

assets and interests; a deficient e-procurement system; or stunted systems of risk management and internal control in the management of public finances (UNODC, 2021b).

### Emergency experiences – lessons in systemic failure

The normative construct of ‘corruption as evil’ remains relevant as a constraint on corruption in emergencies when collective action and social cohesion are particularly important.

For example, in the aftermath of Hurricane Katrina in the United States, numerous examples of failed emergency procurement emerged that pointed to potential corruption within the procurement system (Yukins, 2005). The lack of clear federal procurement rules allowed unscrupulous contractors to exploit the disaster for personal gain, resulting in substandard work and services being provided to affected communities. Inadequate oversight and monitoring of the procurement process made it easier for fraudulent activities such as bid rigging and kickbacks to occur, undermining the integrity of the procurement process and diverting valuable resources away from critical relief efforts. Clear rules, oversight, and transparency in the procurement system are essential to prevent abuse and ensure effective relief. The reforms advanced in the wake of Hurricane Katrina were, in many cases, propelled by popular outrage at the human and material costs of corruption (U.S. Government Accountability Office, 2008).

An example from the United States, from an earlier emergency – the Civil War of the 1860s – also illustrates the interplay between popular outrage, structural protections, and reform. During the Civil War, contractors regularly delivered defective goods and weapons to the Union Army. As is discussed in Chapter 15 of this *Handbook*, the U.S. Congress passed the False Claims Act (Nagle, 2012), which rewards ‘whistleblowers’ (individuals who come forward with claims of fraud) by allowing them to share in the government’s recovery for fraud (U.S. Department of Justice, 2023). This law addresses a gap in contract administration – contracting officials’ inability or failure to identify contract fraud by incentivizing whistleblowers (typically insiders) to follow their normative impulse to reveal fraud. In essence, the False Claims Act harnesses whistleblowers’ outrage and, in practice, serves as a vitally important protection against fraud and corruption in U.S. government procurement.

The EU directive on whistleblowers (Directive, 2019/1937) recognizes the need for an instrument to detect corruption and provide protection (including in emergencies, as per Article 15), but as Recital (30) makes clear, it does not call for a whistleblower’s reward. While this leaves unanswered the need to *incentivize* whistleblowing, the directive’s approach confirms the motivating importance of personal outrage in exposing corruption.

The pandemic provided a poignant example of the detrimental consequences of mismanaged procurement, as highlighted above. Due to the immense pressure on supply chains, it became clear that a practical approach based on accountability and effective public management was essential to manage the emergency. This required domestic efforts to manage public procurement and also represented a ‘stress test’ for cooperation in the management of supply chains, especially in the European context (Van Hecke, Fuhr, and Wolfs, 2021). As the discussion below reflects, national and transnational efforts to address supply shortages, through centralized purchasing and otherwise, often met with uneven success.

The pandemic exposed vulnerabilities in global supply chains and highlighted insufficient oversight of research and manufacturing capacity. These failures were also due to poor coordination and administration among officials and the abrupt reversal of market roles in competition among suppliers and public buyers in critical public procurement markets (Folliot Lalliot and Yukins, 2020; Albano, 2020; Bowsher, 2021). To ease these failures so that contracting authorities could rapidly procure



essential supplies and services, the European Commission issued guidelines outlining possible procurement strategies in response to the pandemic, explaining which options and flexibilities were available under the EU public procurement framework (EU Commission, 2020a).

Thus, public buyers in the EU had several options they could consider. In cases of urgency, they could substantially shorten bidding deadlines, and if that proved insufficient, they could use negotiated procurement procedures without publication – or a direct award to a preselected supplier, if that supplier was the only one available to deliver within the technical and time constraints imposed by the urgency. In addition, public buyers could use alternative means of engaging with the market: by negotiating directly with potential contractors without any publication requirements, time limits, or minimum number of candidates. Buyers could act ‘as quickly as is technically/physically feasible’ and the procedures they chose could ‘constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery’ (EU Commission, 2020a). In other words, an emergency procurement could be exempted from normal competition and transparency requirements. This could open the door to favouritism and conflicts of interest if an effective monitoring or digital traceability were not in place.

Public buyers could also consider contacting potential contractors inside and outside the EU directly or through agents, and public buyers could send representatives directly to countries that could ensure immediate delivery. Justification for the choice of a specific contractor and form of agreement were to be duly documented, as they could be relevant for assessments and potential bid challenges once the emergency ended, particularly where there were doubts as to the contracting authority’s use of procurement modalities reserved for emergencies. The emergency called for solutions that challenged normal means of democratic accountability (Rose-Ackerman, 2021), raising new issues of compliance with established national rules and principles.

During the pandemic, there was an inadequate evaluation of the need for critical countermeasures, as exemplified by the failure (Smith, 2020; Mcevoy and Ferri, 2020; Sdanganelli, 2020) to procure an adequate quantity of PPEs and medicines under the Joint Procurement Agreement (JPA) (Azzopardi-Muscat, 2016; Goldhill, Fureaux, and Davies, 2021). Although the JPA was adopted by all 27 Member States, this joint model and emergency procurement in general have come under scrutiny (Georgopoulos, 2021). An amendment to the JPA has been proposed to possibly introduce an ‘exclusivity clause’ against the risk of internal competition between the EU and participating countries for the purchase of countermeasures through parallel procedures or negotiations.<sup>1</sup>

Another initiative within the EU was the Emergency Support Instrument (ESI) to provide direct support to the healthcare systems of EU countries in their fight against the coronavirus pandemic.<sup>2</sup> The ESI provides financial support to the Commission for the purchase of vaccines on behalf of Member States by signing Advanced Purchase Agreements (APAs) with vaccine manufacturers, giving Member States the right to purchase a certain number of vaccine doses within a specified timeframe and at a fixed price (EU Commission, 2020b). For the EU vaccine strategy, the primary instrument for strengthening European access to vaccines apparently was not public funding of research, which could yield control over the products that flowed from the research and, possibly, public ownership of the vaccines (Bonadio and Baldini, 2020). Instead, it appeared that equity of access and affordable vaccines were not the subject of public policy and regulation but rather the object of negotiations and agreements with the private sector.

As the foregoing discussion shows, the question of how best to address supply chain shortfalls in an emergency remains an open issue, one that is especially acute in the EU, both because healthcare is primarily a public function in the EU and because of the critical importance of EU institutional structures (intended in part to check corruption) that must accommodate any procurement solution.

While countries elsewhere around the world faced similar challenges during the emergency, including challenges of corruption (UN, 2020), their responses varied greatly because national politics and institutions differed from those in the EU (OECD, 2020c). Thus, for example, to address hoarding and price profiteering in the pandemic, the U.S. government used its authority under the Defense Production Act (a Cold War-era law which vests the federal government with sweeping powers to control economic production in a time of crisis) to prosecute vendors. At the same time, perceptions that the administration steered critical supplies to states that favoured President Trump politically were deeply disruptive in the heat of the pandemic (Yukins, 2021). In the UK, the government reportedly gave preferential treatment to politically connected vendors to address shortages of critical supplies. While this originally spawned claims of corruption and investigations (including investigations surrounding specially favoured members of the UK political elite (Mason, 2023; UK National Audit Office, 2021), as noted, the main legal question confronting the UK government ultimately devolved into one of procurement preferences (failed competition) – not political corruption.

As these examples show, in Europe and the United States, the procurement breakdowns caused by the pandemic (and their cures) could often be traced to *institutional* problems and not the product of individual corruption. While there were of course instances of fraud and bribery as buyers scrambled for scarce supplies and some unscrupulous vendors engaged in profiteering or offered defective products, retrospective studies (including detailed interviews of chief procurement officers across the United States) found much broader evidence of institutional failures than personal corruption (Handfield et al., 2021). It is unclear why, but the experience in the United States suggests that this may have been due to an underlying sense of shared public responsibility, despite the political vitriol in the U.S. presidential campaign in 2020. It has been held that a sense of public responsibility is a cornerstone of integrity by authors who argue that a purely technical understanding of corruption in procurement misses the social and moral forces that play a critical part in curbing corruption (Williams-Elegbe, 2012). In both the United States (Delanian and Strickler, 2022) and the United Kingdom (Arrowsmith, 2021; Butler, 2021), although there were only scattered reports of fraud in the procurement of life-saving supplies, there *were* pervasive reports of fraud in pandemic-related emergency funding – private fraud, outside public procurement, which fell outside the shared sense of public responsibility created by the death and suffering of the pandemic.

Governments’ responses also seem to confirm that it was primarily institutional failures, not private corruption, which left the deepest wounds in emergency procurement during the pandemic. In the EU and the United States, governments have taken extensive measures to strengthen institutions and public supply chains, and (at the federal level in the United States and in the European Union) there is comparatively little evidence of new efforts to thwart more traditional forms of personal corruption (such as bribery) in future emergencies.<sup>3</sup>

Within the EU, efforts have been made to extend the ‘rescEU’ mechanism and move towards a ‘European Health Union’ (Georgopoulos, 2021), integrating disaster management as a response to natural disasters caused by climate change. The EU’s Civil Protection Mechanism facilitates cooperation in civil protection assistance, with the rescEU reserve complementing this mechanism with additional resources such as personal protective equipment and countermeasures for existing and future risks, such as nuclear contamination. These actions could reduce deployment time in future emergencies but will also require the coordination of rescEU operations, with national civil protection authorities trying to avoid favouritism and corruption.

Recognizing the need to address current and future emergencies, the European Commission established the Health Emergency Preparedness and Response Authority (HERA) to strengthen the European Health Union and improve health procurement (EU Commission, 2021). HERA’s



main objective is to address market challenges and improve the EU's strategy for the procurement and distribution of medical countermeasures such as vaccines, medicines, medical devices, and diagnostics, similar to the United States' Biomedical Advanced Research and Development Authority (BARDA). To achieve this, HERA will act as a central purchasing body, promoting joint and cross-border procurement to complement national procurement by Member States while working alongside existing EU agencies such as the European Centre for Disease Prevention and Control (ECDC) and the European Medicines Agency (EMA). Recently, HERA has been developing a strategic rescEU stockpile for chemical, biological, radiological, and nuclear emergencies, which will include protective personal equipment, items, and medicines that may suddenly be required in a crisis (EU Commission, 2022).

Part of the measures to improve the EU's ability to deal with emergencies is an initiative to tackle corruption by ensuring that, in the event of irregularities, the funds unduly paid will be recovered and, if necessary, penalized. EU policymakers have noted that the EU's anti-fraud strategy must be updated to cover preventative and corrective measures, and the powers of EU institutions must be enlarged to verify the integrity of beneficiaries, contractors, and subcontractors who have received EU funds (EU Commission, 2019).

The gradual development of a European Health Union aims to overcome the limited role of the EU in the protection of health, a function still centred in Member States (EU Parliament, 2020; Beaussier and Cabane, 2020; Dobbs, 2020). The pandemic represented a first test of strengthened cooperation: the agreements under the JPA, the rescEU resources, and the APAs concluded for the purchase of vaccines, while they faced significant challenges, are evidence of this. There is no doubt that enhancing health cooperation in Europe will require addressing growing challenges and especially corruption risks: the larger the health market in Europe becomes, the greater the risks to be faced.

The experience in the EU confirms that the first responses to supply chain failures in the emergency were directed at institutional reform, not individual corruption. While corruption concerns remain, those concerns flow from the strengthening of institutions and not from an abiding sense that personal corruption caused the procurement failures.

#### The need to digitalize public contracts – for emergency procurement and beyond

The focus on *institutional* reform to address procurement failures that emerged in the latest emergency extends to electronic procurement as well – the 'digitalization' of public contracts, as it is more commonly known in the EU. As discussed in Chapters 3 and 4 of this *Handbook*, digitalization can play an important role in mitigating corruption risks by improving control and transparency of procurement processes and data, even in emergency situations (Fazekas and Hernandez Sanchez, 2021).

The EU Commission recently highlighted the potential of digitalization and new technological tools in the procurement sector by proposing the creation of a data space to improve public spending, enable data-driven policymaking, and provide easier access to tenders for SMEs (EU Commission, 2023). Using artificial intelligence (AI) and machine learning techniques, a vast amount of procurement data can be analysed to detect potential collusion, such as bid-rigging, and other behaviours that may pose a risk of corruption. This emerging technology can identify patterns indicative of mismanagement and flag them for further investigation, helping reduce the waste of public funds. This will improve the ability to detect and prevent corruption, collusion, and fraud and enable the aggregation of public demand, which central purchasing bodies can use to improve

the efficiency and integrity of public procurement markets (Racca and Yukins, 2014; Gordon and Racca, 2014).

The emergency highlighted the need for horizontal administrative cooperation through digitalized networks among centralized purchasing agencies and other institutions to address the critical issues that arise from emergency procurement (Fazekas and Hernandez Sanchez, 2021). When established suppliers failed to deliver needed goods, procurement officials looked to other previously qualified suppliers, even if they lacked direct, relevant experience. The pandemic (and its aftermath) showed that a network of trust (i.e., of trustworthy suppliers) is a predictable response to a crisis. Broad knowledge of potential suppliers then becomes strategic (Yukins and Kania, 2019). Widespread digitalization, which could deter fraud and corruption, would also make it easier for officials to identify qualified vendors in a crisis. Databases of suppliers should be fully digitalized, both to facilitate broader participation in award procedures and to close supply gaps in future emergencies.

In the EU, the reputation of suppliers should be assessed through the online and interoperable Virtual Company Dossier, both to identify reliable suppliers and to exclude unreliable ones. The evidence in the database may constitute the 'appropriate means' to objectively justify an exclusion, reducing the administrative burdens and uncertainties for contracting authorities considering the mandatory exclusion grounds and the discretionary ones, such as 'grave professional misconduct'.

In the United States and the EU, the global emergency exposed weaknesses in public procurement's approach to supply chain management and the need to elaborate a 'maturity model' to assess supplier risks in preparation for future emergencies (Aulia and Isvara, 2021). Large-scale and multifaceted supply chains, some originated by private firms and organizations, are playing broader roles in public procurement, often through digitized platforms (Yukins et al., 2020). Such digital supply chains can be understood as a 'network of stockpiles' – a bulwark against emergencies – and should be characterized by transparency, flexibility, independence, and equality of treatment and should not advance monopolistic private stockpiles (Finkenstadt, Handfield, and Guinto, 2020). Done right, digitalization should provide a favourable environment for innovation, sustainability, and integrity – the key goals of sound contracting – to improve the welfare of the citizens, who are the ultimate beneficiaries of public procurement.

#### A bottom-up approach: public engagement for integrity in emergency procurement

Digitalization, driven by the lessons of past emergencies, would broaden the battle against corruption because the publication and sharing of data on public procurement could allow greater involvement by civil society – by citizens – in the fight against fraud and corruption (EU Commission, 2017). As discussed by Poltoratskaia and Fazekas in Chapter 4 of this *Handbook*, public databases and open data platforms have proved to be primary tools for institutions and citizens to monitor public spending. There are, however, still many challenges in affording public access to government information. For instance, during emergencies, some countries suspended the right to access information without justifiable grounds (Eurosocietal, 2020). In the future, as better and more accessible data on public procurement will become readily available, intergovernmental coordination will be needed to strengthen transparency, interoperability, and monitoring. This could include publishing all contract information and ensuring open and machine-readable data through all stages of procurement, from planning to payments, to reduce waste and inefficiencies.

In Italy, the National Database of Public Contracts held by ANAC has been useful for highlighting deviations and anomalies in award procedures (ANAC, 2020). The European Single



Procurement Document (ESPD) implemented in the fully digital Virtual Company Dossier of each supplier will also become a strategic tool for emergency procurement. Default interoperability among databases with information on the absence of exclusion grounds and relevant qualification requirements will permit the immediate exclusion of suppliers from award procedures, unless the suppliers can prove they have engaged in 'self-cleaning' (remedial compliance efforts). Moreover, the reusability principle permits the use of evaluations of a supplier in any subsequent award procedure for 120 days (ANAC, 2022). Only digitalization will allow the implementation of an effective e-procurement system, through data integration among platforms and databases, both nationally and across different Member States (EU Commission, 2020c).

In France, the new *Code de la commande publique* (1 April 2019) allows economic operators to provide the *Document Unique De Marché Européen* (DUME), directly connected to ESPD interoperable platforms (e.g., in tax requirements). Suppliers can already re-use the ESPD submitted in a previous tender, if they confirm that the information contained and verified therein is still valid. The *Direction des Affaires Juridiques* (DAJ), part of the Ministry of Economy and Finance, cooperates with the *Observatoire économique de l'Achat public* (OEAP) in the monitoring activity (OECD, 2013). A fully integrated online monitoring system for public procurement has yet to come, though open data is already published on the platform for state purchases (PLACE).<sup>4</sup>

An OECD survey showed that, in Germany, many contracting authorities, at the Länder and municipal levels, have not yet implemented e-procurement platforms to carry out tenders (OECD, 2019). Except for federal procurement, German contracting authorities have the autonomy to manage all post-tender activities (i.e., contract execution, ordering, ongoing contract management, and invoicing) and still conduct paper-based processes whenever not using the KdB (federal e-procurement platform). As a result, there are limited digital monitoring systems, at least at the local level.

In Portugal, the Shared Services of the Ministry of Health (SPMS) uses platforms for joint procurement, which also enable business intelligence tools to develop the best procurement strategies and monitor the outcomes.<sup>5</sup>

In Spain, the Junta Consultiva de Contratación Administrativa, part of the Ministry of Finance and Public Administration (Ministerio de Hacienda y Administraciones Públicas), manages the state public procurement platform (Plataforma de Contratación del Sector Público) (Gobierno De España, 2023) and the database of public contracts (Registro Público de Contratos) but leaves the monitoring of the contract execution phase to individual contracting authorities, which can leave gaps in the transparency of public procurement (García-Álvarez García, Gimeno Feliu, and Tejedor Bielsa, 2022; Valcárcel Fernández, 2018; Gimeno Feliu, 2016).

In the UK, the Infrastructure and Projects Authority (IPA) is a unit of the Cabinet Office and Treasury and is responsible for monitoring the Government Major Projects Portfolio (GMPP). Each year, the IPA produces a Report to Government, which lists major projects and the results of their progress, including more detailed reports from individual government departments (UK Infrastructure and Projects Authority, 2021).

As these examples from across Europe show, countries are developing more transparent and interoperable procurement systems. The connected databases collecting the Virtual Company Dossier of any supplier might effectively open the single market, allow cross-debarment, and provide a tool for emergency procurement and monitoring. Transparency to counter corruption and improve efficiency, spurred in part by the failures of the emergency, will mean making public systems truly open and accessible to allow civil society and other stakeholders (including other governments) to leverage data on public procurement. While emergencies have laid bare the need for improved transparency through digitalization, the shift to truly public information systems will take time, resources, and support from politicians and administrators.

### Conclusion: accountability and effectiveness in emergency procurement

Over the centuries, emergencies have exposed serious weaknesses in public procurement systems around the world, weaknesses born more from institutional failures than private corruption. While those failures could be couched as 'corruption' in a broader sense of a systemic failure to achieve best value, the experience of the pandemic also suggested that, where a collective sense of moral responsibility curbs individual corruption, institutional failures and private corruption need not go hand-in-hand. Because the failures which emerged in the pandemic were largely institutional in nature, governments' responses have focused on strengthening the institutions of procurement, whether directly (through coordinated procurement, for example) or indirectly (by putting funding mechanisms in place for future crises). Although this emergency also made clear the benefits of open data to reinforce governments' legitimacy and citizen monitoring against corruption, governments have not yet fully opened their procurement systems – a hesitant reluctance to embrace digitalization, which could prove costly in a crisis and which risks masking corruption even in normal times.

### Notes

- 1 Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU.
- 2 Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369 and amending its provisions considering the COVID-19 outbreak, Brussels, L 117/3, 15.4.2020.
- 3 In the United States, for example, although the Justice Department's primary tool for combating price gouging is the Defence Production Act – a cumbersome statutory tool which focuses on hoarding rather than unreasonable pricing, see Craig Carpenito & Nicholas Grippo, *supra*, there has been little effort by Congress to address price-gouging through new legislation, cf., e.g., H.R. 675, *COVID – 19 Price Gouging Prevention Act*, 117th Cong., 2d Sess. (referred to subcommittee in February 2021, no further action or related bills).
- 4 Article R2143–4, *Code de la commande publique*. For the drafting of the DUME and its re-use, see the portal 'CHORUS'. Available at: <https://dume.chorus-pro.gouv.fr/#/accueil> [<https://perma.cc/G6ET-MK4N>] (Accessed: 1 December 2022). Comité d'harmonisation de l'audit interne (2016) *Guide d'audit d'un marché public* [online]. Available at: [www.economie.gouv.fr/files/files/directions\\_services/chaie/guide-marche-public-janvier2016.pdf](http://www.economie.gouv.fr/files/files/directions_services/chaie/guide-marche-public-janvier2016.pdf) [<https://perma.cc/S8MA-58MD>] (Accessed: 31 March 2023); Ministry of Economy and Finance (2020) *Guides très pratiques de la dématérialisation de la commande publique pour les acheteurs* [online]. Available at: [www.economie.gouv.fr/files/files/directions\\_services/daj/marches-publics/dematérialisation/Guide\\_A\\_DEF28052020.pdf](http://www.economie.gouv.fr/files/files/directions_services/daj/marches-publics/dematérialisation/Guide_A_DEF28052020.pdf) [<https://perma.cc/GA2B-7GRX>] (Accessed: 31 March 2023). The platform for the State purchase (PLACE) is available at: [www.data.gouv.fr/fr/datasets/marches-publics-conclus-recenses-sur-la-plateforme-des-achats-de-letat/](http://www.data.gouv.fr/fr/datasets/marches-publics-conclus-recenses-sur-la-plateforme-des-achats-de-letat/) [<https://perma.cc/DR33-GZUX>] (Accessed: 31 March 2023).
- 5 SNS (2023) *Serviços Partilhados do Ministério da Saúde* [Online]. Available at: [www.spms.min-saude.pt/](http://www.spms.min-saude.pt/) [<https://perma.cc/5PP8-6LMF>] (Accessed: 1 December 2022). The Portuguese model has been awarded the 'European Healthcare Procurement Awards 2022' in the 'Digitalisation & Transparency' category at the 1st Pan-European Hospital & Healthcare Procurement Summit hosted by the European Health Public Procurement Alliance (EHPPA) and the Health Proc Europe Association on 20–21 September 2022 in Brussels. [www.healthprocsummit.com/](http://www.healthprocsummit.com/) [<https://perma.cc/6W9S-65ZP>] (Accessed: 31 March 2023).

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