Expert Report for the UK Covid-19 Public Inquiry

Module 5: Procurement

Public Procurement During Emergencies

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Author statement

"I confirm that this is my own work and that the facts stated in the report are within my own knowledge. I understand my duty to provide independent evidence and have complied with that duty. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

Albert Sanchez-Graells

24 January 2025

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Preamble

1. The Covid-19 Inquiry has instructed me to provide an expert report on the key principles, important legal frameworks and relevant guidance with respect to public procurement by the UK government and devolved administrations and how this may be improved in the future.

2. I have written this initial report independently. The Inquiry has given me access to some statements and exhibits provided by participants to the Inquiry. Where I rely on those, it is clearly indicated by referring to the relevant document. Otherwise, this report relies on my own knowledge and on publicly available information and scholarly works published up to 15 November 2024. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Professional Background and Expertise

3. I am a Professor of Economic Law at the University of Bristol Law School. The University of Bristol Law School is committed to ensuring the relevance of our research in responding to pressing local, national, and global challenges, furthering social justice agendas in innovative and responsive ways. The Law School ranked third for legal research in the UK in the most recent evaluation (REF 2021).

4. I was promoted to Professor in August 2019. Before that, I had been a Reader (2017 to 2019) and a Senior Lecturer (2015 to 2017) at Bristol. I had previously held academic positions at the University of Leicester (Senior Lecturer 2013 to 2015), the University of Hull (Lecturer 2012 to 2013), and ICADE (Madrid, Spain) (Lecturer 2009 to 2012). In 2010, I was awarded a European Doctorate (PhD Eur, *summa cum laude*) in Law for my thesis on the interaction between procurement and competition law, which I completed at the Autonomous University of Madrid (Spain), with research periods at the Library of Congress (USA), the Copenhagen Business School (Denmark) and the University of Oxford.

5. My research and expertise concentrate on the way the public sector interacts with the market and how it organises the delivery of public services, especially healthcare. I am globally recognised as a leading scholar in the regulation and governance of public procurement, which I started actively researching in 2008 for my doctoral thesis. Since then, I have authored two major research monographs and edited or co-edited leading legislative and case law commentaries, as well as collections of academic analysis. I have also authored or co-authored more than 100 articles on the subject. I am the author of the leading blog on public procurement regulation and governance (howtocrackanut.com). The quality and originality of my research were recognised by the British Academy with a prestigious Mid-Career Fellowship in 2022. I am a member of the European Procurement Law Group, which carries out comparative procurement law research across Europe.

6. My research has informed debates in the UK Parliament on a range of issues concerning procurement regulation (such as Brexit, procurement chapters in free trade agreements, or the legislative passage of the Procurement Act 2023). My research has also informed judicial decision-making at the Court of Justice of the European Union, where it has been cited on six separate occasions by the Court's Advocates General. I am regularly approached for advice by policy- and law-making bodies, both in the UK and abroad. I have been appointed as a

senior expert by the World Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the Eurosystem Procurement Coordination Office. I have acted as an ad-hoc academic expert for the European Court of Auditors, the European Innovation Council, the European Commission, and the US Department of Commerce. I have delivered training for the EFTA Surveillance Authority, the Organisation for Economic Cooperation and Development, and for NATO's Procurement Agency, and delivered more general training at the Academy of European Law and the European Institute of Public Administration. I am also regularly approached by law firms to deliver expert opinions on the interpretation of procurement law.

7. I hold or have held membership of advisory bodies on public procurement, including:

- European Commission Stakeholder Expert Group on Public Procurement (E02807) (2015 to 2018);
- Cabinet Office Open Contracting Advisory Group (since September 2022); or
- NHS Independent Patient Choice and Procurement Panel (since March 2024).

Articles and Comments Published about Covid-19 Procurement

8. I have published the following academic articles on procurement related to Covid-19:

- Sanchez-Graells, A. (2020) 'Procurement in the time of COVID-19', *Northern Ireland Legal Quarterly*, 71(1), pp. 81–87;
- Sanchez-Graells, A. (2020) 'Procurement and Commissioning during COVID-19: reflections and (early) lessons', *Northern Ireland Legal Quarterly*, 71(3), 507-514; and
- Sanchez-Graells, A. (2021) 'COVID-19 PPE Extremely Urgent Procurement in England. A Cautionary Tale for an Overheating Public Governance' in Cowan, D. and Mumford, A., *Pandemic Legalities. Legal Responses to COVID-19 – Justice and Social Responsibility*. Bristol: Bristol University Press, pp. 93–103.

9. I have also published relevant comment pieces / blogs on procurement related to Covid-19:

- Sanchez-Graells, A. (2020) 'Extreme Emergency Procurement and Covid-19 – Re Today's UK Guidance', *How to Crack a Nut Blog* (18 March 2020). Available at: https://www.howtocrackanut.com/blog/2020/3/18/extreme-emergency-procurement-and-covid-19-re-todays-uk-guidance;
- Sanchez-Graells, A. (2020) 'European Commission's Guidance on Extreme Emergency Procurement and Covid-19 – Some Thoughts and A Word on the Dyson Contract', *How to Crack a Nut Blog* (1 April 2020). Available at: https://www.howtocrackanut.com/blog/2020/4/1/european-commissions-guidance-on-extreme-emergency-procurement-and-covid-19-some-thoughts;
- Sanchez-Graells, A. (2020) 'The EU's Joint Procurement Agreement: How does it work and why did the UK not participate?', *How to Crack a Nut Blog* (4 April 2020). Available at: https://www.howtocrackanut.com/blog/2020/4/4/the-eus-joint-procurement-agreement-how-does-it-work-and-why-did-the-uk-not-participate-procurement-pill-with-recording;

- Sanchez-Graells, A. (2020) 'More on Covid-19 Procurement in the UK and Implications for Statutory Interpretation', *How to Crack a Nut Blog* (6 April 2020). Available at: https://www.howtocrackanut.com/blog/2020/4/6/more-on-covid-19-procurement-in-the-uk-and-implications-for-statutory-interpretation;
- Sanchez-Graells, A. (2020) 'Procurement in the time of Covid-19', *University of Bristol Law School Blog* (6 April 2020). Available at: https://legalresearch.blogs.bris.ac.uk/2020/04/procurement-in-the-time-of-covid-19/;
- Sanchez-Graells, A. (2020) 'Drilling Down on the Statutory Interpretation of the Extreme Urgency Procurement Exemption in the Context of Covid-19', *How to Crack a Nut Blog* (16 April 2020). Available at: https://www.howtocrackanut.com/blog/2020/4/16/drilling-down-on-the-statutory-interpretation-of-the-extreme-urgency-procurement-exemption-in-the-context-of-covid-19;
- Sanchez-Graells, A. (2020) 'How Does the UK Government's Ventilator Procurement Strategy Fit with the Commission's Guidance on Covid-19 Procurement', *How to Crack a Nut Blog* (20 April 2020). Available at: https://www.howtocrackanut.com/blog/2020/4/20/how-does-the-uk-governments-ventilator-procurement-strategy-fit-with-the-commissions-guidance-on-covid-19-procurement;
- Sanchez-Graells, A. (2020) 'UK Government (NHSX) Modified Existing Contracts to Buy Additional Data Services to React to Covid-19—"The great includes the lesser" when it comes to extreme urgency procurement?', *How to Crack a Nut Blog* (26 April 2020). Available at: https://www.howtocrackanut.com/blog/2020/4/26/the-greater-includes-the-lesser-do-extremely-urgent-contract-modifications-make-any-sense;
- Sanchez-Graells, A. (2020) '1 Billion Problems In Using Extremely urgent Public Procurement to Evade Accountability?', *How to Crack a Nut Blog* (17 May 2020). Available at: https://www.howtocrackanut.com/blog/2020/5/18/1-billion-problems-in-using-extremely-urgent-public-procurement-to-evade-accountability;
- Sanchez-Graells, A. (2020) 'Healthcare procurement and commissioning during Covid-19: reflections and (early) lessons – some thoughts after a very interesting webinar', *University of Bristol Law School Blog* (5 October 2020). Available at: https://legalresearch.blogs.bris.ac.uk/2020/10/healthcare-procurement-and-commissioning-during-covid-19-reflections-and-early-lessons-some-thoughts-after-a-very-interesting-webinar/; and
- Sanchez-Graells, A. (2020) 'The PPE scandal shines a light on the worrying future of UK procurement law', *LSE British Politics and Policy Blog* (24 November 2020). Available at: https://blogs.lse.ac.uk/politicsandpolicy/ppe-scandal-procurement-law/.

This list is not exclusive of all the blog posts where I have considered some aspects of Covid-19 procurement, but I believe it includes all instances where the issue was directly and centrally discussed.

Background to Public Procurement

10. This section provides a general description of public procurement, its aims, regulatory choices, key principles, and basic elements. It is not meant as a comprehensive introduction to public procurement regulation. It rather provides a focused description of elements of public procurement regulation and practice that will be relevant in discussing the more specific issues of public procurement during emergencies and systemic emergencies at the core of this report. To assist readers without prior knowledge of public procurement, Annex 1 contains a list of abbreviations and a Glossary with definitions of the procurement terms most frequently used in the report.

Temporal Scope and Brexit

11. The Inquiry has instructed me to address all matters as they relate to public procurement:

    - before the pandemic: defined as prior to 1 January 2020;
    - during the pandemic: defined as 1 January 2020 to 28 June 2022; and
    - after the pandemic: defined as 29 June 2022 onwards.

12. I have also been instructed to consider some issues related to the Procurement Act 2023 (2023 c. 54) and, in that regard, the report addresses developments up to 15 November 2024.

Brexit and Procurement Legislation

13. The time period covered by this report significantly overlaps with the UK's exit from the European Union (EU) (Brexit). The UK exited the EU on 31 January 2020. This was followed by an 11-month transition period in which the UK was no longer a Member State of the EU but remained a member of the single market and customs union. This extended to 31 December 2020 the operation of EU public procurement law, as transposed in the UK (see paras 82 to 89 and 128 to 133), with minimal technical changes. The Government confirmed this (Cabinet Office, 2019). During the first year of the pandemic, the UK was thus bound by EU public procurement law.

14. Brexit could have resulted in an entire deregulation of public procurement if the UK's transposition of EU law had been repealed, explicitly or implicitly, without new legislation being put in place. A complete repeal of procurement law would have created significant problems and prevented compliance with the UK's post-Brexit international law obligations. To avoid this, at the end of the transition period, EU-derived domestic legislation which would otherwise have lapsed as a result of the repeal of the European Communities Act 1972 (1972 c. 68) was preserved and became retained EU law. The Government had previously fuelled speculation on its intent to promote an immediate legislative reform and divergence from the EU benchmark following Brexit (a 'bonfire of procurement red tape'). However, the

Government eventually decided that the UK's retained version of EU public procurement law[1] should remain in operation until a wholesale review of the system could be underpinned by fresh primary legislation. Although it was not explicitly acknowledged, this was largely a result of the UK's accession to the World Trade Organisation Government Procurement Agreement and the EU-UK Trade and Cooperation Agreement (as explained below paras 58, 59 and 61), both of which had effects from 1 January 2021.

15. The reform of UK public procurement legislation was initiated by the Green Paper *Transforming Public Procurement* in December 2020 (Cabinet Office, 2020b), and followed by a period of public consultation and response (Cabinet Office, 2021a). The UK Government then introduced the Procurement Bill in the House of Lords on 11 May 2022. After a lengthy legislative process, the Procurement Act received Royal Assent in October 2023. However, most of its provisions will only enter into force on 24 February 2025 (Statement UIN HCWS90, Statement UIN HLWS87). The post-Brexit reform of UK public procurement law will not be complete until then. It is worth stressing that, following Brexit, procurement in Scotland became a reserved matter. Scotland has not taken forward any changes to procurement legislation post-Brexit other than technical changes to reference UK rather than EU institutions. This will introduce legislative divergence between Scotland and the rest of the UK upon the entry into force of the Procurement Act 2023 in England, Wales and Northern Ireland (below para 133).

16. Brexit, thus, had no bearing on the legislative framework applicable to public procurement in the period covered by this report. Therefore, for simplicity, this report presumes full continuity in the legal framework and does not address the minor technical legislative and policy changes arising from Brexit. The report limits the consideration of post-Brexit rules to the rollout of the Procurement Act 2023 for the purposes of assessing the changes it will introduce.

Brexit, 'No Deal' Planning, and Procurement

17. The 2016 Brexit referendum triggered an escalating process of 'no deal' Brexit planning. 'No deal' planning was particularly intense from the summer of 2018, and all levels of government were focused on putting arrangements in place to mitigate the fallout from a potential sudden stop to trade with the EU. Despite intense negotiations, the UK and the EU were only able to agree a framework for their future relationship on 30 December 2020, when they concluded the EU-UK Trade and Cooperation Agreement (see para 61). Therefore, in the lead up to the pandemic and during its first year, 'no deal' planning was a top policy priority and governments across the UK were intensely involved in contingency planning for an event unrelated to the pandemic. The scale of 'no deal planning' was immense. For example, more than 10,000 civil servants had been working on Brexit across central government by the end of 2018, and the UK Government announced that there were a further 5,000 in the pipeline (Department for Exiting the European Union, 2018). The

[1] 'UK public procurement law' or 'UK law' is used as a simpler shorthand to refer to the two sets of legislation that transposed EU law and that are respectively applicable, on the one hand, in England, Northern Ireland and Wales and, on the other, in Scotland. See para 107 for further details. It should be noted that, throughout the report, the expressions above solely comprise legislation applicable to procurement covered in the report. No reference is made to rules applicable in special sectors, such as utilities or defence and security, or to specific types of contracts, such as concessions, as those are not relevant to the analysis.

devolved governments undertook significant additional 'no deal' planning work. Although there are no reliable statistics available, it is safe to assume that the overall resources dedicated to 'no deal' planning across the UK clearly exceeded the numbers reported for central government.

18. 'No deal' planning had major implications for the UK's healthcare system and NHS organisations. For example, it required putting alternative procurement arrangements in place and the centralised stockpiling of health care equipment and consumables, as well as through negotiated voluntary commitments by drug companies to keep 6-week stockpiles dedicated to the UK. This had an impact on procurement by NHS organisations, which were advised not to locally stockpile medicines, vaccines, or medical devices and clinical consumables, and that "over-ordering would be investigated" (NHS Confederation, 2019). In my opinion, this made the system directly reliant on centralised supply-chains and emergency stockpiles, in the event of disruption, as discussed throughout this report. There were also stringent expectations on frequent communication and liaison with regional and national NHS EU Exit Coordination Centres and with the Operational Response Centre within DHSC (NHS Confederation, 2019). 'No deal' planning thus had a clear operational impact on the NHS. It required creating coordination structures and dedicating resources to 'no deal' planning, despite being subject to long term reductions in funding in real terms. This approach was heavily criticised at the time, especially because "NHS and social care bodies will have to undertake contingency planning, working largely in the dark, and there seems to be no recognition of the severe pressure these bodies are already facing after a decade of austerity" (van Schalkwyk *et al*, 2019).

19. In the lead up to the pandemic and during its first year, 'no deal' Brexit preparation imposed a significant burden on NHS organisations and put increased pressures on centralised procurement mechanisms, such as the NHS Supply Chain. The extent to which 'no deal' Brexit preparations detracted from the healthcare system's ability to respond to the pandemic, or could have been helpful at the outset of the pandemic by e.g. having put in place mitigation mechanisms (such as stockpiles), may require further investigation. However, this issue is not covered in detail here, as the report does not address issues concerning the 'EU Exit' stockpile.

Brexit and Participation in the European Joint Procurement Agreement

20. A final issue relating to Brexit is the UK Government's decision not to participate in joint efforts to procure medical consumables and equipment with EU Member States. This would have been possible under the EU's Joint Procurement Agreement for medical countermeasures (JPA). The JPA is an international agreement to facilitate the joint procurement of medical countermeasures (that is, not only medication) required to respond to a serious cross-border health threat. The UK first joined the JPA in June 2014. Participation in the JPA is not limited to EU Member States. JPA participation was open to the UK throughout the pandemic, even post-Brexit. Domestically, decisions on JPA participation are reserved to the central government, which decisions will have effects across the whole of the UK. DHSC represents the UK, including devolved administrations, on the EU's Joint Procurement Steering Group where joint procurements are discussed. JPA participation is excluded from the scope of coverage of the provisionally confirmed Common Framework for Public Procurement. Therefore, the UK Government can take decisions

without an explicit obligation to consult with the devolved governments, and the latter cannot separately join JPA procurements. It is however possible for DHSC to informally consult with the devolved administrations as part of the decision-making process concerning JPA participation.

21. The JPA is a mechanism of international collaboration that seeks to avoid duplication of procurement procedures at national level and competition between buyers. The JPA is primarily a mechanism of coordination of the procurement and, more importantly, of the execution of the supply contracts through specific case-by-case agreements on how to distribute the quantities jointly procured across participating countries, allowing for a concentration of supplies on those in acute need, as well as donation of quotas by countries that have excess access to supplies. The JPA is also a mechanism that can aggregate buying power and improve the participating countries' collective bargaining position, although that is highly dependent on the supply-side structure of the relevant markets.

22. Despite UK officials participating in meetings of the EU Health Security Committee where possible EU joint procurement schemes were discussed (DHSC PPE Statement, INQ000528391, para 570), the UK Government unilaterally decided not to participate in JPA procurements and, remarkably, in the procurement competitions to purchase medical supplies and equipment launched between February and end of June 2020. DHSC has explained that the UK's non-participation was due to the European Commission using incorrect contact details for UK representatives when sending JPA meeting invitations (id, para 569). However, in my view, this explanation is not convincing because UK officials were aware of the mentioned discussions and could thus have easily followed up with the Commission. There are open questions on the motivations behind the UK Government's initial decision not to participate in the JPA at the onset of the pandemic, with many commentators stressing the political background due to Brexit. This will not be explored in detail in this report. Although the functioning of the JPA was imperfect and there were initial problems—with the first PPE procurement requiring a relaunch—it is widely recognised that it helped participating countries improve access to needed supplies from relatively early on in the pandemic and, more importantly, that it reduced the need for participating countries to put their own procurement arrangements in place. It should be highlighted that the UK's JPA non-participation restricted the options available to those making decisions on how to respond to the pandemic in its early stages. The fact that the UK declined to place orders for surplus JPA PPE procurement at a later stage in June 2020, due to it having already independently procured vast stocks, and that in DHSC's view, "the EU's Joint Procurement activity would not have provided PPE in the volumes necessary in the time required to meet demand for the health and social care system in the UK and could not have replaced the need to activate the Parallel Supply Chain" (id, para 581), in my opinion, is beside the point. Not knowing how JPA procurement would operate, that assessment could not have been made at the relevant time. Moreover, JPA participation could have created a failsafe position on PPE procurement, as well as potentially impacting the functioning of the Parallel Supply Chain, or its purchasing targets (below para 286). More generally, with full information on how procurement eventually developed under the JPA, in particular for vaccines, there may be a diversity of opinion on whether the UK ended up better off than if it had participated in the JPA. In my view, it is very difficult to establish whether the UK ended up in a better or worse position because it is almost impossible to establish with certainty what would have happened if the UK joined JPA efforts from the beginning of the pandemic. That question

exceeds the possibilities and focus of this report. However, it should be stressed that, at the point of deciding not to participate at the very early stages of the pandemic, UK Government decision-makers were criticised for passing up on a promising source of required consumables and equipment (e.g. Flear, 2020). It should also be stressed that, as discussed below (see para 378), the JPA provided significant flexibility to participating countries through putting in place very large framework agreements—and this flexibility is not undermined by the fact that some of the EU frameworks ended up recording limited use due to reduced demand compared to initial estimates. In my view, not having had access to such a route to procurement may partially explain why the UK had to independently secure much larger volumes of PPE than other countries—with the associated risk of overbuying.

Summary Box 1 – Temporal Scope and Brexit

- Brexit had no bearing on the legislative framework applicable to public procurement in the period covered by this report.
- 'No deal' Brexit preparations imposed a significant burden on NHS organisations and put increased pressures on centralised procurement mechanisms, such as the NHS Supply Chain. The extent to which they detracted from the healthcare system's ability to respond to the pandemic may require investigation.
- JPA participation was open to the UK throughout the pandemic, even post-Brexit. However, the UK Government unilaterally decided not to participate. This was at the time criticised as passing up on a promising source of required consumables and equipment. It may also have increased risks of overbuying for the UK in its solo attempt to secure large supply volumes.

Public Procurement

23. 'Public procurement' refers to the activities a public authority carries out to purchase in the market, from an external provider, goods, construction or other services. Public procurement encompasses a wide array of purchasing and contracting activities, ranging from acquiring regular supplies of fully standardised consumables (such as paper for printers), to setting up public-private partnerships for the financing, construction, and operation of complex infrastructure (such as hospitals or bridges). Given the focus of Module 5 of the Inquiry as set out in the Provisional Outline of Scope, this report focuses on public procurement of goods in the healthcare context; in particular, key healthcare-related equipment and supplies, such as protective personal equipment (PPE), ventilators and oxygen.

24. Public procurement expenditure as a share of the UK's gross domestic product (GDP) increased from 13.1% in 2019 to 15.7% in 2021 (OECD, 2023a). Public procurement from the private sector usually accounts for about a third of public sector spending in the UK, and it is estimated to exceed £300bn a year (Cabinet Office, 2021a). Health procurement is the largest area of spending and has seen a significant increase since 2020/21. In 2022, total healthcare expenditure was estimated at £283bn, which represented an increase in nominal terms of 0.7% on spending in 2021 (ONS, 2023). The NHS is currently estimated to manage around £35bn of spend with over 80,000 suppliers (NHSE, 2023). UK Government expenditure on health increased significantly during the pandemic, amounting to an

additional £50bn for Covid-19 response in 2020/21 (Coyle *et al*, 2021), of which nearly £20bn were assigned to NHS England (NHS England's Second Module 3 Statement, INQ000409251, para 628). In the same period, the Scottish Government dedicated £2.9bn of the additional Covid-19 related funding to support health and social care (Audit Scotland, 2024, at 8). Similarly, Wales dedicated to its health services an additional £1.8bn in 2020/21 (Audit Wales, 2022). Northern Ireland also received additional Covid-19 related funding and dedicated £1.1bn to its health service (Keyes, 2022). In this context of increased expenditure, the public procurement of healthcare consumables acquired particular relevance and immense volume during the pandemic, across the four nations.

25. Public procurement involves the award of contracts for the supply of goods to the public sector. Public procurement thus governs the expenditure of public funds and, ultimately, should ensure that such expenditure is in the public interest. Given the vast amount of taxpayers' money involved, procurement requires careful governance and oversight. 'Public procurement law' sets out rules that constrain public authorities' discretion in the choice of supplier. This is to avoid favouritism and to create a level playing field for potentially interested suppliers. For example, public procurement law requires that, save in exceptional cases, the award of a public contract follows a formal competition. 'Public procurement policy' sets out criteria and guidance on how to exercise the permitted discretion, among other things, to ensure that the public sector obtains value for money and achieves other political goals. For example, public procurement policy can require contracting authorities to embed environmental or social criteria in the evaluation of tenders. Simply put, public procurement law is concerned with 'how' to buy, while public procurement policy is concerned with 'what' to buy and 'for what' purpose.

26. Public procurement law comprises a set of public and administrative law requirements concerned with the design and advertisement of public tenders, the due diligence and decision-making processes leading to the award of public contracts, and the documentation, disclosure, and potential challenge of such decisions. Although there are some rules applicable in the early phases of planning and market engagement, the bulk of procurement law requirements are triggered by the decision to launch a competitive procurement—or to forego competition and directly approach potential providers where that is permissible, such as in the case of an emergency. Most public procurement rules and constraints control the decision-making process from the launch of the competition and up to the award of the public contract. To a limited extent, there are also some rules applicable to the modification or termination of public contracts. Public procurement law is thus closely linked to the series of decisions and steps leading to the award of a public contract.

27. Public procurement policy is more difficult to delineate. Its primary focus is the articulation of what expenditure is in the public interest and which considerations should be taken into account by public authorities in their decisions on what to buy and for what purpose. There is also a role for public policy in setting out practical guidance and promoting best practice in relation to discretionary aspects of procurement, or in relation to issues not covered by applicable legislation or where policymakers consider it appropriate to go beyond the applicable minimum legal requirements. Public procurement policy can also refer to broader goals, such as industrial policy goals related to a preference for British or local goods (which is, however, mostly banned), or goals of digital regulation, such as the increasingly relevant use of procurement to regulate public sector use of artificial intelligence.

28. The interaction between public procurement 'law' and 'policy' varies depending on the relevant issue. However, as a general approach, in making procurement decisions and awarding public contracts, contracting authorities are bound by both legal and policy requirements. Together, then, law and policy form 'public procurement regulation'. This report will use 'regulation' to refer to the broad articulation of the procurement system—reserving the use of 'law' and 'policy' for contexts where the distinction is relevant.

Summary Box 2 – Public Procurement

- A contracting authority carries out public procurement when it purchases on the market, from an external provider, goods, construction or other services.
- By exceeding £300bn per year, public procurement represents around 16% of the UK's GDP and a third of public sector expenditure.
- Healthcare is the largest area of spend. NHS England is currently estimated to manage around £35bn of spend with over 80,000 suppliers.
- Public procurement is governed by a detailed set of rules and policies seeking to constrain and guide public buyers' discretion in the expenditure of such vast amounts of money.

Aims of Public Procurement Regulation

29. As mentioned above (para 25), public procurement needs to ensure that the expenditure of vast amounts of public funds is in the public interest. Operationally, public procurement needs to be an effective mechanism for the acquisition of the goods needed by contracting authorities to satisfy their public mission (such as equipment for the provision of health care) or to cover direct citizens' needs (such as the use of health consumables). If procurement does not work effectively, frontline public services will face significant operational challenges. Financially, public procurement needs to ensure that 'public money is well spent' and value for money. Obtaining value for money contributes to keeping public services' costs low and provision with adequate levels of quality. When procurement does not foster value for money, there can be a reduction in public service quality, an increase in costs, or both. Raising costs for one public service can also generate knock-on effects, such as a reduction in service availability (for example, through growing waiting lists to access health care), or a reduction of the funds that could have been allocated to the provision of other public services.

30. Ensuring that public procurement generates value for money requires guarding against the two main risks of corruption and maladministration in the award of public contracts. This applies both to ordinary times and to emergency situations, although the extent to which these aims can be achieved in these different contexts varies significantly, as discussed below (see paras 43 and 80). This can perhaps be best understood as public procurement regulation having a constant aim to prevent corruption and a variable aim to prevent maladministration, consisting in a goal to maximise value for money in ordinary times and a goal to minimise the loss of public value and funds in emergency procurement.

31. **Corruption** involves dishonesty and illegal behaviour by people in positions of authority or power; or, in other words, the abuse of entrusted power for private gain. It can take place when politicians misuse public money or grant public contacts to their sponsors, friends and families, or corporations bribe officials to get lucrative deals. Corruption not only is a criminal offence in most cases, but it always damages taxpayers through the loss or misappropriation of public funds. In the context of public procurement, there are easily recognisable instances of corruption—all of which are covered in the United Nations Convention Against Corruption (UNCAC) (see para 57)—such as:

- the bribery of national or foreign public officials involved in the award of public contracts or the issue of documents relevant to those awards (such as certificates of previous experience, or import/export permits);
- embezzlement and misappropriation of funds or public assets, trading in influence, or abuse of functions by a public official; or
- various acts of corruption in the private sector (for example to obtain false bank references to cover up an illegal contract award).

32. **Maladministration** can be defined as the "inefficient or improper management of (especially public) affairs" (Oxford English Dictionary, 2000). Generally, maladministration means poor administration or the wrong application of rules. It is generally accepted that there is maladministration when a public body does something it ought not to have done due to "bias, neglect, inattention, delay, incompetence, ineptitude, turpitude, arbitrariness and so on" (Government Legal Department, undated). For the purposes of this report, maladministration is taken not to involve dishonesty (as that is classified as corruption), but rather a lack of care or judgement. In the context of public procurement, maladministration can take very many different forms. For example, it can consist of:

- the procurement of goods of such low quality that they go unused because users reject them;
- the improper specification of the goods to be supplied, which can result in deliveries that are incompatible with existing equipment due to the contracting authority's error;
- discoordination, such as when two or more authorities or decision-makers with shared responsibilities carry out duplicative procurement; or
- different forms of waste, such as in the procurement of outdated technology with very high energy consumption, or the procurement of expensive supplies from incumbent providers that go unchallenged by more efficient market entrants that cannot meet excessive prior experience requirements imposed by the contracting authority due to risk aversion.

33. Procurement maladministration directly impacts the quality and cost of public services. Avoiding maladministration altogether is nigh impossible, not least because it can arise accidentally. Maladministration is thus not a criminal offence. However, it is clearly undesirable. Public procurement systems seek to minimise maladministration through indirect approaches such as training and professional development, the design of robust processes, oversight and checks and balances, the dissemination of best practice, and the prevention of malpractice.

34. The extent of corruption and maladministration in UK procurement is hard to estimate. However, given that the UK spends over £300bn or close to 16% of GDP through public

procurement every year, including approximately £35bn on spend managed by NHS England (NHSE, 2023), there are non-negligible risks of corruption and maladministration. It is estimated that the NHS in England is vulnerable to approximately £1.2bn of fraud each year, and the UK Government has developed a strategy aiming to generate £500mn in counter-fraud savings in 2023-2026 (DHSC, 2023). The importance of preventing procurement maladministration has also been consistently stressed by HM Treasury, highlighting the need to secure "the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought" (HM Treasury, 2023, p. 115).

35. Preventing corruption and maladministration are thus core aims of public procurement regulation in the UK, and there is broad consensus that competition for public contracts is the most suitable mechanism to foster those aims (see eg Trepte, 2004; Arrowsmith, 2014; Sanchez-Graells, 2015a; Jones, 2021; Anderson, Jones and Kovacic, 2024). **Competitive procurement** is meant to be the norm and HM Treasury has clearly stated that "Public sector organisations should normally acquire goods and services through fair and open competition", and that "Works, goods and services should be acquired through competition unless there are convincing reasons to the contrary" (HM Treasury, 2023, pp. 115–116). It is generally accepted that "Effective competition and transparency are key enablers of the procurement objectives of delivering value for money and being seen to act with integrity" (GCF, 2024).

36. While there are other aims, and social and political priorities, that can be pursued through procurement (such as net zero, the prevention of modern slavery, or the promotion of social value), those tend to have reduced relevance in the context of emergency procurement. The regulation and practice of emergency procurement primarily seek to strike the best possible balance between the effectiveness of procurement carried out under stress, on the one hand, and mitigating the increased risks of corruption and maladministration that stem from the use of non-competitive procurement methods, on the other. No other aims of procurement regulation will thus be discussed, as they are not of direct relevance to this report.

Summary Box 3 – Aims of Public Procurement Regulation

- Protecting the public interest requires probity and value for money in procurement.
- Public procurement regulation focuses on preventing corruption and maladministration, as they have significant negative impacts on taxpayers' funds.
- Corruption involves dishonesty and is generally criminalised.
- Maladministration can be the result of poor judgement, incompetence or inadequate decisions. Avoiding maladministration entirely is impossible, but procurement regulation seeks to minimise it through a mix of mechanisms.
- There is a broad consensus that using competitive procurement fosters probity and value for money, and that it should be the default procurement method in ordinary times.
- The regulation and practice of emergency procurement primarily seek to strike the best possible balance between the effectiveness of procurement and the increased risks of corruption and maladministration that stem from the use of non-competitive procurement.

Choices in Public Procurement Regulation

37. Establishing safeguards against corruption and maladministration in public procurement requires a series of unavoidable trade-offs between the prescriptiveness, rigidity, and transparency of the system to promote its integrity, on the one hand, and its ability to generate flexible and commercially advantageous outcomes, on the other. Broadly speaking, discretion and flexibility trigger corruption risks and can have mixed effects on maladministration. While discretion can enable commercial judgement and innovation, risky contracting can result in the waste of public funds. Discretion and flexibility can also be costly if innovative procurement procedures become unnecessarily complex, cumbersome, or unforeseeable. Conversely, rigid and prescriptive rules can reduce the risk of corruption and provide a certain level of assurance against maladministration (for example, through the layering of control mechanisms prior to contract award). However, they can stifle commercial acumen and innovation, significantly raising the cost and duration of procurement procedures. It is also possible that rigid rules and procedures are not practicable in certain circumstances—and, in particular, in situations of urgency or emergency. Transparency is essential to foster accountability. However, excessive transparency can have anti-competitive effects by facilitating collusion between economic operators, as well as jeopardising commercial secrecy and putting off companies from engaging with the public sector. A balance must be struck. The choice is not one between discretion or no discretion, transparency or opacity, but about tolerated levels of discretion and risk, and safeguards around them, potentially involving tiered levels of transparency.

38. Models of public procurement regulation need to establish the sphere of discretion left to contracting authorities through a mix of rules and guidelines. Depending on that mix, there will be varying degrees of rigidity in the operation of the system. There are also additional factors that determine the extent to which contracting authorities will exercise the discretion permitted within the rules and guidelines, such as the level of transparency given to their decisions, existing oversight and challenge mechanisms, or the level of professionalisation and technical capability of those working in procurement. Discretion-based systems will require high levels of professionalisation and skill, while rules-based systems may be easier to administer—or, in future, automate. Entirely discretionary, unregulated procurement is not an option for most jurisdictions, including the UK, given commitments under international law (paras 54 to 61).

39. Importantly, a single system of public procurement regulation can allow for varying levels of discretion in different circumstances, or in relation to different types of contracts. Of particular relevance to this report, most public procurement systems include special rules for urgent and extremely urgent procurement, when the permitted levels of discretion significantly exceed those acceptable in ordinary times (see para 88). In these contexts, the design of the relevant procurement system requires a consideration of how far to go towards 'lightly regulated, discretionary procurement'. While procurement systems tend to minimise the requirements applicable in such circumstances, they do not entirely deregulate the award of public contracts. They rather subject such awards to minimal procedures, attenuated substantive constraints, and post-award transparency. A core focus of this report will be an assessment of the UK's regulatory choices, focusing on the extent to which UK rules and guidelines on emergency procurement struck an adequate balance between discretion and regulatory requirements, given the aims to safeguard public expenditure from corruption and

to minimise the loss of public value and funds (see above paras 29 and 30).

Summary Box 4 – Choices in Public Procurement Regulation

- Jurisdictions need to design their procurement regulation systems to strike an adequate balance between discretion and rigidity.
- Systems affording more discretion require high levels of procurement professionalisation.
- Different levels of discretion can be created within a single system. Most systems afford high levels of discretion in the regulation of emergency procurement.
- This report will assess the UK's regulatory choices, focusing on the extent to which UK rules and guidelines on emergency procurement struck an adequate balance.

Basics of Public Procurement Regulation

40. Systems of public procurement regulation are built upon international legal frameworks and guidance, precedent, and recognised best practice. There is an increasing degree of convergence around a set of key principles of public procurement regulation that are globally recognised. This sub-section introduces those principles before summarising the international legal frameworks and guidance of relevance to the UK and its comparator jurisdictions.

Key Principles of Public Procurement Regulation

41. There is broad global consensus on these key principles of public procurement regulation (see eg Schooner, 2002; Arrowsmith, 2011a; Bovis, 2016):

    - predictability;
    - effectiveness;
    - economy, or value for money, usually attained through competitive procurement;
    - transparency, including related obligations on record-keeping and disclosure;
    - integrity, which requires preventing corruption, conflicts of interest, and collusion;
    - access, or non-discrimination;
    - procedural fairness, or proportionality;
    - accountability and reviewability; and
    - capacity, or professionalisation.

42. There is also growing consensus that, as part of the broader digitalisation of the public sector, procurement systems should be based on digital platforms and supported by adequate digital data infrastructures; and that procurement systems need to comply with a principle of sustainability—although there are complex debates on what that means and on the appropriate balance between sustainability and other considerations (eg Janssen and Caranta, 2023). After the pandemic, there is also consensus that public procurement systems need to be resilient and ensure security of supply (see eg Trepte, 2021; Tuominen *et al*, 2022).

43. The following paragraphs provide an outline of the main aspects or implications of these key principles of procurement. The discussion is necessarily limited and focuses on issues that will be relevant for the rest of the report. Like in relation to the aims of procurement (para 30), this set of key principles applies both to ordinary times and to emergency situations, although the extent to which it is possible to comply with all of them in these different contexts varies significantly. As discussed in more detail below (see paras 80 and ff), in emergency procurement, there is a prioritisation of the key principle of effectiveness. However, the other key principles are still of relevance in shaping the discretion available to contracting authorities and decision-makers. They also provide a benchmark against which to assess the approaches to emergency procurement and their outcomes. A good understanding of these key principles is thus necessary before proceeding to more detailed assessments in the rest of the report.

44. Procurement systems need to be **predictable** in two senses:

    44.1 The general legal framework needs to be clear and publicly accessible.

    44.2 For each procurement exercise, the specific procedure, rules, and criteria used to assess tenderers and tenders must be set and disclosed at the outset.

45. Procurement systems need to be **effective** to allow buyers to obtain the goods and supplies they need in adequate conditions, including in terms of quality and timely availability. Ineffective procurement could disrupt public services and waste public funds.

46. Procurement systems need to operate under a principle of **economy or value for money**. Procurement need not always opt for the lowest price and procurement systems need not constantly strive to generate savings. Economy means allocating contracts to the suppliers that can provide the best value, defined as the relevant cost-quality ratio by the buyer. This allocation is generally carried out through **competitive procurement** as the mechanism most likely to promote efficiency, quality, and innovation. There is also consensus that procurement need not focus on only short-term costs but instead, where appropriate, should focus on the full lifecycle cost, including maintenance or disposal/recycling costs (see eg Andhov, Caranta and Wiesbrock, 2020). It should be stressed, however, that control of the economy or value for money in the award of public contracts is not solely regulated under procurement rules, but also (or primarily, depending on the system) by budgetary and fiscal rules that apply prior to or jointly with procurement.

47. Public procurement systems need to meet high levels of **transparency** to the public and to potentially interested tenderers. This requires contracting authorities to comply with record-keeping and information disclosure. **Record-keeping** needs to be complete, accurate, and cover the entire cycle of decision-making. Those records are then subject to **disclosure**. Some information must be proactively published; other information is only disclosed on request to parties with a sufficient interest, such as disappointed tenderers that seek to understand the reasons for the award of the contract to a competing tenderer. However, excessive transparency of procurement information can be problematic and undermine competition, and most systems foresee mechanisms to withhold competition-sensitive information. Such information may, for example, only be disclosed within judicial proceedings. Transparency thus serves different purposes and different systems require different levels of disclosure.

48. Public procurement systems need to ensure **integrity** in decision-making processes and in the award of public contracts. Most of the other key principles contribute to the promotion of integrity (OECD, 2009a). In particular, however, promoting integrity in public procurement requires preventing corruption, conflicts of interest, and collusion.

48.1 **Corruption** is one of the key risks for any procurement system (see above para 31). Procurement systems thus need to pay significant attention to building mechanisms to mitigate that risk and to actively monitor for, and respond to, potentially corrupt activity. Compliance with other key principles, such as transparency and accountability, can support anti-corruption efforts, but procurement systems need to embed specific anti-corruption mechanisms. These can include specific codes of conduct for those making procurement decisions, as well as separate criminal law measures targeted at corruption in procurement. Given the close link that can exist between procurement corruption and illegal funding of political parties, this is an area that also requires close attention in the design of a procurement system. Most procurement systems will also include measures to exclude economic operators that have been involved in corrupt practices, and in particular bribery.

48.2 A key challenge for procurement systems is to address issues of covert corruption and, in particular, **conflicts of interest**. Procurement systems must include mechanisms to identify, record, and mitigate conflicts of interest. Potential conflicts of interest of **politically exposed persons (PEPs)** are a source of particular concern. For example, in the UK, the Financial Conduct Authority (FCA) has stressed in guidance that PEPs pose a high-risk of money laundering where they have "responsibility for, or [are] able to influence, large public procurement exercises, particularly where procurement is not subject to competitive tender, or otherwise lacks transparency" (FCA, 2017, p.11). This requires tailoring anti-corruption and conflict of interest measures, in particular, to PEPs.

48.3 **Collusion** (or bid rigging) is a violation of competition law that takes place where economic operators manipulate competitive tendering processes. Collusion is another crucial risk for procurement integrity. Given the high levels of transparency associated with procurement, public tenders are particularly vulnerable to collusion. Procurement systems need to embed effective mechanisms to dissuade, detect, and sanction collusion and there is international guidance on how to do so (OECD, 2023b).

49. Public procurement systems need to be **accessible** and ensure **non-discrimination** between economic operators. Procurement markets need to be open to economic operators covered by international agreements and to domestic economic operators on a non-discriminatory basis (see below paras 54 to 61). The accessibility of procurement systems also refers to a principle of **minimisation of barriers to participation in public tenders**, in particular for micro-, small-, and medium-sized enterprises (SMEs), as well as for voluntary, community and social enterprises (VCSEs).

50. Public procurement systems need to ensure **procedural fairness**. In addition to elements of predictability discussed above (para 44), procedural fairness requires:

50.1 **Equal treatment**: economic actors must be afforded equal or equivalent opportunities. For example: the provision of equal information, the setting of time limits and deadlines that do not unduly advantage or disadvantage specific tenderers, granting equivalent opportunities to engage in negotiations or provide clarifications to submitted tenders.

50.2 **Objective and reasoned decision-making**: objective procedures and criteria minimise risks of favouritism or unequal treatment. This is not to say unquantifiable or subjective criteria cannot be used, but procurement systems tend to prioritise objective or objectified assessments. There is a related requirement for the reasons given for specific decisions to be open to contestation, although that is primarily covered by the accountability and reviewability of decisions.

50.3 Procurement systems need to comply with a **principle of proportionality** to ensure that public tenders remain accessible, and that participation and administration is not excessively burdensome for economic operators or the contracting authority. The proportionality of requirements can be dependent on e.g. the size of the public contract, and most systems create tiered levels of regulation (see paras 65 to 68).

51. Public procurement systems need to ensure accountability and reviewability. **Accountability** requires exposing procurement decisions to scrutiny and challenge. This will generally require the creation of specific channels and mechanisms, and will be facilitated by compliance with transparency and disclosure obligations as above (para 47). **Reviewability** refers in particular to the legal enforceability of procurement rules and policies, usually through a system of administrative or judicial review, and appeal, of procurement decisions. One of the challenges for procurement systems is to reach a workable balance between the reviewability of procurement decisions and their effectiveness. Ideally, systems of review would reach a final decision before a contract is awarded and implemented. However, operational needs may trump such an approach and this will usually be the case of emergency procurement.

52. Finally, procurement systems require a procurement workforce with **adequate capacity and levels of professionalisation**. Given that procurement can be complex and unavoidably requires the exercise of professional judgement, there is broad recognition that procurement systems need to be adequately staffed and that procurement professionals need to be adequately trained, remunerated, and supported. However, all procurement systems tend to face significant challenges in this area.

53. Procurement systems based on the key principles above will be conducive to ensuring that 'public money is well spent'. However, procurement systems cannot properly operate only on the basis of such high-level principles and systems of public procurement regulation require much more developed legal and policy frameworks.

Primary International Legal Frameworks of Public Procurement

54. The design of a system of public procurement regulation is constrained by existing international legal frameworks. Prior to Brexit, the UK's international obligations were largely mediated by its membership of the EU and directly effective in the UK through the conduit of the European Communities Act 1972 (see above para 14). Post-Brexit, the UK has kept its

previous international obligations unchanged by directly acceding relevant agreements, and also entered into new international agreements covering procurement. Although the UK is a dualist system, it has put mechanisms in place to give domestic effect to those agreements, including amending domestic legislation where necessary. However, given that this has not resulted in any relevant changes in relation to healthcare procurement, the analysis of those issues is outside the scope of this report.

55. The international legal frameworks currently binding the UK include:

- The United Nations Convention Against Corruption (UNCAC);
- The World Trade Organisation Government Procurement Agreement (GPA);
- Procurement chapters in Free Trade Agreements with third countries (FTAs); and
- The UK-EU Trade and Cooperation Agreement (UK-EU TCA).

56. The relationship between these international legal frameworks is not hierarchical and they impose overlapping sets of obligations on the UK. UNCAC only imposes high level obligations, whereas the GPA is much more detailed and prescriptive. Both the UK's FTAs and the UK-EU TCA are based on the GPA and impose most of the same obligations, although some are modified or add to the GPA baseline (GPA+). Annex 4 provides the text of key provisions of these international legal frameworks, and Annex 7 provides a comparison of their provisions on extremely urgent procurement with UK legislation (see also below paras 106 to 110).

57. The **United Nations Convention Against Corruption (UNCAC)** is the only universal anti-corruption instrument legally binding in international law. The UK ratified it on 9 February 2006. UNCAC requires establishing appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective in preventing corruption. UNCAC contains other general requirements on: the advertisement of procurement opportunities and conditions for participation; the use of objective and predefined criteria for the award of public contracts; the setting up of an effective system of review that ensures effective remedies; and requirements on workforce-related matters such as declarations of interest, screening procedures and training requirements. UNCAC also contains broader obligations for signatory parties to put in place effective anti-corruption policies; to task specific bodies with their implementation and oversight; to have adequate procedures for the selection and training of civil servants, and adequate codes of conduct; or to engage in a periodic evaluation of their adequacy. A detailed analysis of these broader issues exceeds the possibilities of this report.

58. The **World Trade Organisation Government Procurement Agreement (GPA)** is a multi-party agreement within the framework of the World Trade Organisation.[2] The UK acceded the GPA in its own right on 1 January 2021, having previously been bound by it as an EU Member State (above para 14). GPA parties are under an explicit obligation to ensure that their procurement is conducted in a transparent and impartial manner, using competitive procedures as the default approach, avoiding conflicts of interest, and preventing corrupt

[2] The GPA has 22 parties, covering 49 WTO members (counting the European Union and its 27 member states as one party). In addition to the EU, most other major UK trading partners are GPA members, including the United States, Canada, Australia, New Zealand, Switzerland, Japan, and Singapore. Another 35 WTO members/observers and several international organisations participate in the Committee on Government Procurement as observers.

practices. As Table 1 shows, the primary obligations under UNCAC and the GPA are entirely aligned and require the UK to establish a system of procurement regulation based on transparency, competition, impartiality and objective criteria in decision-making, and which is effective in preventing corruption and conflicts of interest.

Table 1: Comparison of primary obligations under UNCAC and GPA

UNCAC (Art 9(1))	**GPA (Art IV:4) – which FTAs and UK-EU TCA replicate or refer to**
Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.	A procuring entity shall conduct covered procurement in a transparent and impartial manner that: a. is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering; b. avoids conflicts of interest; and c. prevents corrupt practices.

59. The GPA also establishes requirements that are more detailed and prescriptive than UNCAC. GPA provisions are rather comprehensive and concern a host of issues surrounding the organisation of procurement systems, such as transparency and publication mechanisms or the use of electronic platforms, as well as procedural and substantive requirements in the conduct of public tenders, such as in relation to technical specifications, qualitative selection criteria, time-limits, negotiations, or the use of direct awards in limited circumstances.

60. The UK has also entered into **Free Trade Agreements with Third Countries (FTAs)** that contain chapters on public procurement—for example, this is the case for Australia and New Zealand. These chapters can create additional constraints in the design of the domestic system of public procurement regulation where the FTAs contain specific rules, or impose more demanding minimum requirements than the GPA (GPA+). While this creates legal issues, they are of no direct relevance to this report and will thus not be explored in detail.

61. The **UK-EU Trade and Cooperation Agreement (UK-EU TCA)** governs post-Brexit relationships between the UK and the EU and contains a rather detailed GPA-based set of requirements for the design of domestic public procurement regulation (Title VI of Heading One of Part Two). The UK-EU TCA incorporates by reference most, but not all, GPA provisions. The core regulation under the UK-EU TCA is thus identical to the GPA. The UK-EU TCA also sets varying and additional rules in relation to the use of electronic means in procurement; electronic publication of notices; documentary requirements for participation in procurement; conditions for participation; registration systems and qualification procedures; the use of selective tendering; control of abnormally low prices in tenders; environmental, social and labour considerations; and domestic review procedures. However, given that they are of no direct relevance to this report, these additional or varied rules will not be explored in detail.

62. The **UNCITRAL Model Law on Public Procurement** is not a binding international treaty. Together with its accompanying Guide to Enactment, it provides a blueprint for the design of domestic systems of public procurement regulation. It is an influential regulatory benchmark. The UNCITRAL Model Law contains procedures and principles aimed at achieving value for money and avoiding abuses in the procurement process. The UNICTRAL Model Law was designed as a complement to the GPA and it reflects accepted best practices whose implementation would be aligned with the obligations under the GPA and UNCAC.

63. There are several other sources of guidance and advice on the design and implementation of public procurement systems. The Organisation for Economic Cooperation and Development (OECD) has developed a **Methodology for Assessing Procurement Systems (MAPS)** (OECD, 2018), which provides specific tools to evaluate the design and operation of procurement systems and identify areas for improvement.

Summary Box 5 – Basics of Public Procurement Regulation

- There is broad global consensus on the following key principles of public procurement regulation: predictability; effectiveness; economy, or value for money (usually attained through competitive procurement); transparency (including related obligations on record-keeping and disclosure); integrity (which requires preventing corruption, conflicts of interest, and collusion); access, or non-discrimination; procedural fairness, or proportionality; accountability and reviewability; and capacity or professionalisation.
- In emergency procurement, there is a prioritisation of the key principle of effectiveness. However, the other key principles are still of relevance in shaping the discretion available to contracting authorities and decision-makers, and provide a benchmark against which to assess the approaches to emergency procurement and their outcomes.
- The UK is bound by several international legal frameworks.
- UNCAC and the GPA require the UK to establish a system of procurement regulation based on transparency, competition, impartiality and objective criteria in decision-making, and which is effective in preventing corruption and conflicts of interest.
- The GPA, UK FTAs, and UK-EU TCA strengthen those general obligations imposing a broad range of more detailed procedural and substantive obligations.
- The UNCITRAL Model Law and the OECD's MAPS provide benchmarks to evaluate the UK's regulatory choices.

Scope and Modes of Application of Public Procurement Regulation

64. The design of a system of public procurement regulation requires additional decisions on its scope and modes of application—or, in other words, on what is covered by the rules and how these are applied. These issues are briefly described here and a fuller account is provided in relation to the UK system below (paras 127 and ff).

Scope

65. Public procurement regulation needs to determine the scope of application of the relevant legal and policy frameworks. Procurement rules rarely apply to the award of any type of public contract by any entity. Following the model set out by the GPA (above paras 58 and 59), procurement systems tend to establish specific rules to determine which entities, types, and size of contracts are covered. The award of a public contract will be covered if the three criteria are met.

66. Regarding **covered entities**, procurement law usually applies to 'public authorities', which can also be referred to as 'contracting authorities' or 'contracting entities'. Contracting authorities usually comprise central, regional, and local government entities as well as other entities under their control or funded by them (such as hospitals or universities). In the UK, central authorities not only comprise central government, but also the devolved governments. Covered entities also tend to include central purchasing bodies, including those in the healthcare sector. This report will presume that procurement rules apply because the award of public contracts during emergencies and systemic emergencies tends to be carried out by public authorities, such as central, regional or local government, as well as other entities within the healthcare sector.

67. The scope of procurement law is also modulated in relation to the award of **different types of public contracts**. Public contracts can be distinguished by some of their characteristics, for example, establishing different rules for straightforward transactional supply contracts, 'commercial vehicles' such as framework agreements, or more complex public-private partnerships arrangements with varying levels of risk-sharing. There can also be differences depending on the object of the contract and a distinction between contracts for the supply of goods, the provision of services, and works contracts is widely used. Such differentiations can aim to exclude some contracts from the scope of procurement law altogether or, more frequently, to subject them to varying value thresholds that determine the need to comply with tiered levels of formalities (see next para). These distinctions can be set aside in this report because most public procurement during emergencies and systemic emergencies tends to involve strictly transactional contracts for the supply of goods or the provision of services.

68. A final consideration concerns the **value of the relevant contract**. Most procurement systems tend to set different value thresholds exceeding which will trigger specific obligations. Some systems foresee different tiers of obligations for contracts of different values. The value threshold for contracts for the supply of goods at which GPA obligations are triggered currently stands at just under £140,000 for central government authorities and bodies, and just under £215,000 for regional and local government authorities and bodies, inclusive of VAT in both cases (The Public Procurement (Agreement on Government Procurement) (Thresholds) (Amendment) Regulations 2023 (SI 2023/1117); Public Procurement (Agreement on Government Procurement) (Thresholds) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/300)). Similar values were in place during the pandemic. Given the values of the contracts usually entered into in case of emergency or systemic emergency, and certainly during the pandemic, this report will presume that value thresholds were always exceeded.

Modes of Application

69. Most systems of public procurement regulation are meant to be 'self-executing' in the sense that contracting authorities are simply expected to comply with the relevant rules and policies. Contracting authorities are primarily tasked with knowing, interpreting, and applying public procurement law and policy. There are, however, mechanisms to enforce public procurement law and policy when contracting authorities do not 'automatically' comply with applicable rules and requirements. However, there is an initial difficulty in cases of severe non-compliance, and non-compliance with transparency obligations in particular. If a contracting authority does not follow procurement law at all, or if it does not proactively publish the prescribed notices and relevant information, such infringements will be hard to detect and challenge. This brings the relevance of transparency obligations into focus, as well as the need for oversight and challenge mechanisms to ensure public procurement regulation is being adhered to.

70. Systems of public procurement regulation thus need to include oversight and review mechanisms. Usually, oversight mechanisms tend to focus on the public interest. By contrast, mechanisms for the private enforcement of public procurement regulation tend to be premised on the existence of an individual (economic) interest by an economic operator that seeks to review a contract award decision. These review mechanisms can be administrative or judicial, and can be subject to administrative or civil law, depending on the jurisdiction.

Summary Box 6 – Scope and Modes of Application of Public Procurement Regulation

- Public procurement law applies to the award of contracts for the supply of goods, such as healthcare consumables and equipment, by central (which in the UK includes devolved government), regional, and local public authorities, as well as by publicly-funded entities within the healthcare systems (such as hospitals), if they exceed £140,000 for central, or £215,000 for regional and local government.
- This report will presume that all emergency procurement during the pandemic was covered by UK public procurement law and by the UK's international obligations that are triggered at those value thresholds.
- Contracting authorities are expected to comply with procurement regulation as a matter of course. Their transparency obligations are particularly important in facilitating oversight and challenge of their procurement decisions.
- If contracting authorities do not comply with their transparency obligations, it will be very difficult to detect and investigate breaches of procurement law and policy.
- The effectiveness of a system of procurement regulation rests, in good measure, in its mechanisms of oversight and judicial review of procurement decisions.

Procurement During Emergencies and Systemic Emergencies

71. This section describes public procurement regulation during emergencies and systemic emergencies. It focuses on the adaptation of rules that usually apply in 'ordinary times' to address variable levels of time pressure. It also highlights the increased risks that arise from such adaptation, in particular in the context of systemic emergencies such as pandemics, and discusses approaches to mitigating risk in urgent and emergency procurement, including in relation to direct negotiations. This section also provides a first approach to urgent and extremely urgent procurement in the UK, which is however explored in detail in a later section.

Baseline Procurement Processes for 'Ordinary Times'

72. There is no such thing as a 'red tape free' system of public procurement regulation because *any level* of transparency and control of procurement spend will have associated costs for both the public and private sectors. Moreover, compliance with such requirements and controls will take time, both for the contracting authority and economic operators. Ensuring sufficient time to facilitate compliance is a key element in fostering competition for public contracts. Unduly short advertisement or decision-making periods and deadlines are recognised as bad practice, and can be a corruption red flag. In that regard, UNCAC explicitly imposes the obligation to structure procurement processes and disclosures of information to allow "potential tenderers sufficient time to prepare and submit their tenders" (Article 9(1)(a) UNCAC).

73. Indeed, most public procurement regulatory systems foresee minimum timescales and deadlines to ensure tenderers have such opportunity. Table 2 below summarises the minimum timescales imposed by the GPA for procurement processes. Annex 5 provides further details.

Table 2: Minimum Default Time Limits under the GPA

	Procedure		
	Open tendering	**Selective tendering**	**Limited tendering (Direct award)**
Default timescale	40 days	65 days	n/a
e-Procurement reduction	25 days	50 days	
Notice published at least 40 days earlier	50 days	75 days	
Urgent requirement	10 days	20 days	
Extremely urgent requirement	n/a		No minimum

74. As shown in Table 2, the GPA prescribes certain minimum deadlines that must be allowed for the preparation, submission and receipt of tenders to enable responsive tendering (Article XI:2-8 GPA). These must be set long enough to allow all suppliers, domestic and foreign, to prepare and submit tenders. As shown in Table 2, the standard minimum timescales for well-planned and organised one-off competitive procedures using electronic means of communication and tender submission (e-Procurement) under the GPA is of 25 days for single-stage procedures and 50 days for two-stage procedures.

75. Table 3 below summarises minimum time limits under EU law and the UK's transposition. Annex 5 provides further details.

Table 3: Minimum Default Time Limits under EU/UK Law, inclusive of mandatory standstill period

	Procedure		
	Open procedure	**Restricted procedure and Competitive procedure with negotiations**	**Negotiated procedure without prior publication (Direct award)**
Default timescale	45 days	70 days	n/a
e-Procurement reduction	40 days	65 days	
Notice published at least 35 days earlier	60 days	85 days	
Urgent requirements	25 days	35 days	
Extremely urgent requirements	n/a	n/a	No minimum
Regional and local authorities	n/a	50 days (potentially down to 41 days by agreement with tenderers)	n/a

76. Table 3 shows that EU and UK public procurement law set minimum timescales that exceed those of the GPA, in part due to the mandatory 10-day standstill period required to facilitate a potential challenge of award decisions (see Annex 5, Table A5.2). Contracting authorities are also under a duty to take into account the complexity of the contract and the time required for drawing up tenders when fixing time limits at or above the minimum duration. There is also an obligation to extend the initial time limits where additional information is provided or there are significant changes to the initial tender documents. With e-Procurement, this sets the minimum effective duration of single-stage procedures at 40 days and two-stage procedures at 65 days.

77. Overall, regardless of the specific choice of competitive procurement procedure, applicable default minimum timescales require over a month between the start of a procurement process and the effectiveness of the award of the public contract. In practice, this translates into the length of competitive procurement averaging in excess of three months. The more

complex the decision-making process and the broader the set of considerations contracting authorities need to take into account, the more likely that procurement processes will take longer to complete because interim decisions (e.g. on invitation to tender) and final award decisions will require more complex assessments. The average length of procurement procedures carried out in the EU single market (including the UK up to Brexit) increased from 62.5 days in 2011 to 96.4 days in 2021 (ECA, 2023, p. 26). This is in addition to the time required to design the specific requirements and characteristics of the procurement and to compile the relevant documentation, as the above timescales are calculated from the launch of the procedure.

78. Despite the minimum duration of procurement procedures set out above, there are ways of creating flexibility and reducing the effective lead time for public procurement—especially of standardised consumables—through the creation of 'commercial vehicles'. These can provide quick routes to award in case the contracting authority has a need that cannot wait for a full procurement process to take its course. 'Framework agreements' are the most common. While framework agreements are awarded following lengthy competitive procedures subject to the above timescales, they are set up for several years (usually up to four years) and allow for the award of multiple contracts up to a maximum total value, which must be set out in the contract award notice. Once a framework agreement is in place, qualifying contracting authorities can use it to procure their individual needs awarding contracts under the framework, either through the direct award of call-off contracts to a specified provider, or through mini-competitions between providers appointed to the framework. This happens with much shorter time frames than standard tendering procedures. This possibility is open to contracting authorities for as long as the aggregate value of the contracts awarded under the framework by all user contracting authorities do not exceed its total maximum value. When the framework agreement reaches its maximum value or its maximum duration (whichever comes first), it is necessary to run a competitive procurement for a new framework agreement. In the UK, framework agreements are used extensively, including in the healthcare sector (para 102).

Summary Box 7 – Baseline Procurement Processes for 'Ordinary Times'

- In compliance with the GPA, UK law imposes minimum timescales for competitive procurement of 40 days for single-stage and 65 days for two-stage procedures.
- In practice, competitive procurement takes longer the more complex it gets, and the average duration can easily exceed three months.
- However, 'commercial vehicles' such as framework agreements create quicker routes to award for contracting authorities. This flexibility is extensively used in the UK.

Adaptability to Varying Degrees of Urgency

79. The default minimum timescales discussed above are designed for 'ordinary times' when the procurement function has the possibility to operate on the basis of adequate planning and thus not subject to significant time pressures. As that will not always be the case, all systems of procurement regulation feature varying degrees of adaptability where procurement is urgent or extremely urgent.

80. As a first step, in cases of **urgent procurement**, most systems allow for a shortening of the minimum timescales and deadlines that would otherwise apply in competitive procedures. As a second step, in cases of **extremely urgent or emergency procurement**, most systems reduce competitive requirements, even allowing the direct award of contracts, as far as that is strictly necessary to satisfy the extremely urgent need arising from an emergency or catastrophic event. These adaptations ultimately stem from a prioritisation of the key principle of effectiveness over other considerations and a recognition that, when facing an extremely urgent need, the priority is to 'get the job done' by securing the supply of what is required. Otherwise, there would be disruption in the provision of public services and the functioning of the public administration and, ultimately, citizens' interests would not be adequately satisfied or safeguarded. In many cases there can be risks that trigger heightened duties for the State to act to preserve life under relevant human rights frameworks—and this can provide additional justification for prioritising procurement effectiveness over other considerations, to the extent that is necessary and proportionate. This issue is, however, not explored in this report.

81. As shown in Tables 2 and 3 above, and in more detail in Annex 5, both the GPA and EU/UK law foresee adaptations for urgent and extremely urgent procurement.

Urgent Procurement

82. Under the GPA, where the contracting authority can demonstrate that there is a state of urgency that means that it is not practical to comply with the default time limits, those timescales can be shortened to facilitate accelerated procurement. This significantly reduces the total minimum duration to 10 days for single-stage procedures and 20 days for two-stage procedures, effectively more than halving their default minimum duration (see Table 2 above).

83. Similarly, under EU/UK law it is also possible to reduce the minimum timescales where urgency makes compliance with default times impracticable, bringing the minimum duration down to 25 days for single-stage and 35 days for two-stage procedures—which approximates half the default duration for 'ordinary times' (see Table 3 above).

84. Under both systems, engaging in urgent procurement is not a matter of simple convenience for the contracting authority but the level of justification required is relatively modest. It will suffice for the contracting authority to demonstrate the objective urgency of the requirement to trigger the shortened deadlines and time periods. However, the urgency of the need must not be imminent, in the sense that urgent procurement will not secure the supply of the relevant goods in under a month or so. Even under urgent procedures, competitive procurement still requires a significant amount of time and procurement systems embed further measures for situations where the contracting authorities' needs cannot wait that long.

Extremely Urgent or Emergency Procurement

85. In my professional opinion, under the GPA, it is permissible for a contracting authority to contact a supplier or suppliers of its choice and proceed to the direct award of contracts where unforeseeable events have generated extreme urgency, such that the goods or services could not be obtained in time using open tendering or selective tendering (Article XIII:1(d) GPA). In those cases, the contracting authority does not need to comply with most of

the prescriptive rules and minimum requirements set by the GPA, but contracting authorities can decide to comply with them partially or in a modified manner if the situation allows.

86. Similarly, under EU/UK law, it is possible for a contracting authority to directly award contracts through a negotiated procedure without prior publication in equivalent situations of extreme urgency that make it impossible to comply with minimum timescales, including those for accelerated procurement. In that case, the direct award of contracts through a negotiated procedure without prior publication can also be exempted from any minimum standstill period (Article 2b(a) Directive 89/665/EEC, as amended) and the UK included this exemption in its transposition (regs.86(5)(a) and 87 PCR2015; reg.86(2)(a) PCSR2015). The direct award of contracts through negotiated procedures without prior publication is thus ultimately exempted from most procedural and formal requirements (as discussed in paras 106 to 110 and 161 to 166).

87. Crucially, and in line with the GPA, under EU/UK law, resorting to extremely urgent procurement is considered exceptional and this is clearly reflected in the requirement that the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority (Article 32(2)(c) PPD; reg.32(4) PCR2015; reg.33(3) PCSR2015). It is thus not legally permissible for a contracting authority to engage in a negotiated procedure without prior publication where it could have foreseen the need and/or the circumstances under which the extreme urgency arises are attributable to it. This can generate practical difficulties where the extreme urgency of the need arises from inadequate planning, which has delayed the procurement to such an extent that it is no longer possible to *both* secure the required supply when needed, and comply with the reduced time limits for urgent competitive procedures. In such cases, in my opinion, contracting authorities face an unavoidable choice between breaching public procurement rules and delaying the satisfaction of the extremely urgent need.

88. In my opinion, extremely urgent or emergency procurement is exceptional not only because it is meant to be a last resort mechanism for contracting authorities facing extraordinary circumstances, but also because it is significantly de-regulated under both the GPA and EU/UK law. While the general approach to procurement law is to establish positive obligations and minimum requirements for the conduct of competitive procurement procedures, this is not the approach in cases of extreme urgency. Emergency procurement is simply authorised under the relevant rules, but it remains unregulated. The rules solely establish the limits within which the authorisation applies (for example by requiring that the scope of the emergency contract is limited to what is strictly necessary to satisfy the short-term need), but leave it to the discretion of the contracting authority to proceed as it sees fit. However, that is not necessarily the case in all systems of procurement regulation. For example, the UNCITRAL Model Law retains attenuated competitive obligations (to request quotations from a minimum number of economic operators) save for the most extreme cases of urgency arising from a catastrophic event (see Annex 4). Similar approaches can be identified in several jurisdictions, although they do not always show their practicability in the face of a systemic emergency (below paras 348 to 355).

89. Subjecting extremely urgent or emergency procurement to minimal or no positive regulation seems, in my view, to be premised on an implicitly recognised need to create maximum flexibility for emergency responses. And on the implicit understanding that, given the

stringency of the conditions that control the legal use of direct awards and the expected rarity of situations generating extreme urgency, there is no need for a more developed regulatory framework. In many ways, the minimalist regime applicable to emergency procurement seems to be premised on the assumption that it will be triggered in relation to discrete, contained, and rare events. Therefore, although the possibility to resort to emergency procurement is an embedded feature of most systems of procurement regulation, in my opinion, it is not meant to be applied on a systemic scale and is not designed for general and sustained use at that scale. This creates challenges when emergencies reach systemic scale that require sustained crisis management through extremely urgent procurement.

Procurement in Systemic Emergencies

90. While systems of procurement regulation embed authorisations and streamlined mechanisms for emergency procurement, these are not designed to be operated on a systemic scale. Emergency procurement regulation does not provide an alternative regulatory framework. It simply deactivates some or most of the standard requirements and minimum timescales applicable to procurement in 'ordinary times', including those for accelerated procurement. Emergency procurement operates on a sort of regulatory vacuum, which can be particularly problematic when it exceeds the small or targeted scale presumed in discrete emergencies.

91. Due to the relaxation of rules and requirements, emergency procurement is always bound to generate risks of corruption and maladministration. However, the magnitude of those risks, the ability of existing checks and balances to mitigate them, and the likelihood that oversight mechanisms identify abuses, will vary with the scale of the emergency procurement. This will be particularly challenging in major or systemic emergencies. When governments need to procure goods and services very quickly to respond to an emergency, the procurement system becomes even more vulnerable to fraud and corruption, and this is only exacerbated by the huge sums of money that governments spend to respond to crises. This is compounded by the fact that corruption risks are rarely on the agenda when a crisis erupts, and so the risk of corruption rises unchecked at the worst possible times. This was unfortunately clearly borne out in the Covid-19 pandemic, on a global scale.

92. In part, abuses take place because the rules on emergency procurement are generally not adapted to scale, but solely to urgency. The same rules can apply in relation to extremely urgent needs of very different value and complexity—for example, ranging from the need to secure a damaged wall in a school following severe weather, to the need to acquire and distribute large amounts of goods and secure large extensions of infrastructure where an entire region is affected by severe flooding. In all cases, the implicit assumption seems to be that the standard mechanisms of checks and balances and oversight within the system will suffice to guard against corruption and maladministration also in emergencies.

93. This assumption is somewhat justifiable in relation to *ad hoc* and limited use of extremely urgent procurement for discrete emergencies. The reasons that could be adduced for accepting a trade-off between the flexibility and (expected) effectiveness of mostly unregulated procurement and its heightened risks seem to me to be twofold.

    - First, in situations where emergency procurement is exceptional, it should be easy to identify such procurement and to subject it to close scrutiny. A single or small group of contracting authorities can be presumed to be involved in the emergency

procurement, and they can also be presumed to establish contacts with, and award contracts to, a small number of providers. This can be expected to take place within established organisational and work processes, and all deviations from the 'standard procedure' are likely to be identifiable and visible, and relatively easy to document following also (close to) standard procedures. It is also more likely to involve an approach to the award of the contract that is only marginally different from a competitive award—e.g. through the (otherwise impermissible) modification of existing contracts to obtain the required additional supplies, or by directly instructing a known contractor to supply goods they have already supplied in the past, or that they have readily available. This limits, for example, the scope for the need to carry out due diligence and conflict of interest checks, and should also facilitate the identification of any existing relationships between the contracting authority and the chosen contractors. In itself, the exceptionality of the measures is bound to attract interest and its limited scope should facilitate scrutiny—provided transparency and record-keeping obligations are complied with.

- Second, if emergency procurement results in a small set of directly-awarded short-term contracts and their value is proportionate to the immediate and most pressing needs arising from the catastrophic event—as required by the limits on the authorisation for direct awards on these grounds—the magnitude of any maladministration or even corruption in their award is bound to be limited. Moreover, the short time scales for emergency procurement also work to limit the possibilities for the creation of new corrupt or fraudulent schemes. None of this applies when an emergency acquires systemic scale.

94. Indeed, a systemic emergency such as a pandemic generates particular challenges due to its scale and associated uncertainty. The standard mechanisms of checks and balances are bound to be overwhelmed when a large number of contracting authorities (and agents within each of the contracting authorities) are establishing contacts with, and awarding contracts to, a large number of contractors. And this will be further complicated where new organisational arrangements and work processes are put in place, as they will be harder to map against a 'pre-crisis' benchmark. It is also likely that, given the scale of the challenge, there will be shortages of skilled procurement professionals that can be deployed to the task, which will also increase the risk of errors. The shortages of skilled professionals will be more acute in health-related emergencies such as a pandemic, where procurement staff will also be susceptible to illness. It is also possible and likely that the direct award of contracts follows approaches that are not incremental compared to procurement in ordinary times (such as the modification of existing contracts or resorting to known previous contractors), but rather follow from a radically different way of engaging the market, including as a result of active purchasing or market-making activities that are unusual or prohibited in ordinary times. When extremely urgent procurement (transiently) becomes the 'new normal', the systemic emergency flips the situation in ordinary times on its head and makes it hard to identify procurement exercises that would otherwise be highly visible as exceptional or anomalous. Even if record-keeping and transparency obligations are complied with—which experience shows is not always necessarily the case—the proliferation, for example, of direct award notices will make it hard to spot the problematic ones. This creates difficulties in identifying procurement exercises that require close scrutiny, and in carrying out such scrutiny.

95. Moreover, systemic emergencies are not only of a different scale, but also involve different corruption and maladministration risks compared to discrete emergencies.

- First, the mobilisation of vast amounts of emergency funding is likely to trigger the creation of new corrupt or fraudulent schemes by those seeking to profit from them. This risk can be heightened when funding is subjected to limited controls that are much reduced compared with the budgetary rules applicable in 'ordinary times'.

- Second, there are maladministration risks arising from the pace at which procurement is conducted, which creates situations where acquisitions happen very quickly, and often before those in charge can have a full overview of the true needs. Contracts can be awarded in mass without a clear view or timely updates on the aggregate progress of procurement efforts. In a systemic emergency, there is a risk of over-buying if mechanisms are not put in place to track contracting in real time, or if contractual commitments are firmed up before there is a sufficiently clear view of the reasonably estimated need for the relevant goods or services. There are also maladministration risks in potential discoordination across parallel efforts to secure extremely urgently needed supplies. Where many buyers are trying to source the same goods or services, they can also end up over-buying through acting at the same time without information on the progress of parallel efforts.

96. These are not risks that can be left to the ordinary checks and balances and oversight mechanisms. It would be necessary to:

- Create additional layers of coordination and control to manage the risks associated with a systemic emergency during which extremely urgent procurement (transiently) becomes the 'new normal';

- Ensure access to as accurate and timely data updates as possible, and to iterate forecasts and assessments frequently to ensure that the contractual position is aligned with expected needs;

- Strengthen those mechanisms that will allow for review of procurement activity at a later time—not only because this will facilitate (delayed) accountability, but also because those mechanisms have been shown to promote self-constraint by public buyers during the emergency.

97. Several legal scholars have proposed the creation of a system of prior approvals for emergency procurement, so that contracting authorities cannot directly award contracts during a systemic emergency without explicit permission or without flagging that permission was not sought or obtained. It has also been proposed for that information to be disclosed by means of prior notice requirements for direct solicitations and extensive obligations to promptly publish detailed information on all emergency awards after the fact. However, as things currently stand and within the regulatory framework in place during the pandemic, emergency procurement is generally not conceived to be applied in this manner. As mentioned above, the current approach to emergency procurement does not provide an alternative regulatory framework to that applicable in 'ordinary times' (above para 88). This can, to some extent, explain (but not necessarily justify, or condone, all) shortcomings in the administration of public procurement during the pandemic.

Summary Box 8 – Adaptability to Varying Degrees of Urgency

- All systems of procurement regulation feature varying degrees of adaptability to time pressures where procurement is urgent or extremely urgent.
- UK law allows for accelerated procurement in case of urgency, bringing the minimum duration down to 25 days for single-stage and 35 days for two-stage procedures. This is available to contracting authorities that can show that a situation of objective urgency means it is not practical to comply with the longer timescales that would usually apply.
- UK law also allows for emergency procurement where the contracting authority faces an unforeseeable extremely urgent need. In that case, there is no minimum timescale and contracting authorities can resort to the direct award of contracts with reduced obligations.
- Emergency procurement is available where the extreme urgency makes it impracticable to comply with longer timescales, including those for accelerated procurement, as long as the circumstances of the extreme urgency are not attributable to the contracting authority.
- Extremely urgent procurement is not regulated in detail under UK law. This can be justified on an assumption that it will only be triggered in discrete emergencies. However, this creates challenges when emergencies reach systemic scale.
- Procurement regulation embeds authorisations and streamlined mechanisms for emergency procurement, but these are not designed to be operated on a systemic scale.
- Systemic emergencies such as a pandemic generate particular challenges due to their scale and associated uncertainty. Standard checks and balances are bound to be overwhelmed, and there will be serious difficulties in ensuring adequate oversight.
- Not only the scale but also the nature of the corruption and maladministration risks arising from a systemic emergency are different compared to more discrete emergencies.
- It may be necessary to impose heightened transparency requirements and to create dedicated oversight mechanisms to address the increased risks of corruption and maladministration in systemic emergencies.

First Approach to Urgent and Extremely Urgent Procurement in the UK

98. This sub-section draws from the general description above and provides a first approach to the practice, law, and policy on urgent and extremely urgent procurement in the UK. It provides a basis for the more detailed assessment of its operation during the pandemic in a later section.

Urgent and Extremely Urgent Procurement in UK Practice

99. Understanding the practice of urgent and extremely urgent procurement in the UK requires considering the institutions, systems, structures, and processes involved. It is worth noting

from the outset that, before the pandemic, there was limited use and practically no shift of organisational arrangements and processes in cases of urgent and extremely urgent procurement, compared to procurement in 'ordinary times'. The major changes that took place during the pandemic are discussed below (*see section 'Procurement During the Pandemic'*).

100. **Urgent procurement** primarily consists in the acceleration of competitive procedures through the setting of shorter timescales, as permitted by EU/UK law (above paras 83 and 85, and below para 147). All contracting authorities—including public authorities at all levels of government—can engage in accelerated procurement without the need for any additional or alternative arrangements. This implies that the same institutions, systems, structures, and processes involved in procurement in 'ordinary times' are engaged in urgent and emergency procurement.

101. Based on published notices, accelerated procurement does not seem to be significantly used. A search in TED, where contract opportunities had to be published by UK contracting authorities prior to Brexit, only returns 14 results for 'accelerated procurement' between 1 January 2015 and 31 December 2020. This roughly matches an equivalent search in Contracts Finder, which returns 17 'accelerated procurement' notices for the same period.

102. An explanation for the limited use of accelerated procurement can be that 'ordinary times' procurement of commonly used equipment, consumables and services has been increasingly centralised in the UK and that the setting up of 'commercial vehicles' (primarily framework agreements)—mainly by the Crown Commercial Service (CCS), but also in the devolved administrations, by eg the Welsh Government Commercial Delivery (WGCD) team (formerly the National Procurement Service), the Scottish Procurement and Property Directorate, or the Supplies & Services Division of the Construction and Procurement Delivery Service in Northern Ireland—has likely created significant flexibility for the speedy award of contracts through call-offs and mini-competitions with short lead times (see above para 78). It has been estimated that more than £35bn of contracts were awarded via framework agreements in 2023, up from £10bn in 2019 (FT, 2024). A similar trend has emerged in relation to the procurement of goods in the healthcare context following a drive to centralise the NHS Supply Chain in England, and equivalent efforts in the devolved administrations—which each have their own procurement systems: NHS National Services Scotland, NHS Wales Shared Services Partnership, and the Procurement and Logistics Service in Northern Ireland (see paras 169 and ff below). This trend towards centralisation and the availability of framework agreements for healthcare equipment and consumables is relevant because, as well as, pragmatically, offering a quicker pathway to supply for the contracting authority, the availability of healthcare consumables through an existing framework agreement would bar an acceptable justification for the carrying out of an urgent procurement for those same supplies.

103. Similarly, all contracting authorities can in principle engage in **emergency or extremely urgent procurement** where the relevant conditions are met (above paras 82 to 89, and below paras 109 and 110). Emergency procurement primarily consists in the award of contracts through direct approaches and negotiations with potential suppliers carried out by the same institutions ordinarily tasked with procurement. While the processes differ, in particular concerning the exemption from prior publication of contract opportunities and the

ways in which negotiations are likely to be conducted, there is no other major organisational change and extremely urgent procurement is not, for example, reserved to specific authorities or organisations.

104. There is also an indication that emergency procurement was also rarely used in the UK prior to the pandemic. A TED search only returns seven notices for direct awards referring to an 'extremely urgent' need between 1 January 2015 and 1 January 2019. Similarly, a search on Contracts Finder returns four award notices justified on 'extreme urgency' between 1 January 2015 and 1 January 2019. The same search on TED returns 26 notices during the pandemic—although TED advertisement stopped being mandatory for new UK procurements launched after 23:00 on 31 December 2020. In the Contracts Finder database, emergency awards were the object of 272 notices during the pandemic. This indicates that, prior to the pandemic, direct awards based on extremely urgent need were rare and represented a small proportion of the contracts directly awarded by UK contracting authorities. Direct awards have been estimated at 7% of total contract awards in the UK for 2019, and at 13% for 2020 (Spend Network, 2020, p. 9). This also indicates that, as could be expected, emergency procurement justified the largest part of the significant increase in direct awards seen during the pandemic.

105. These figures are by no means exhaustive and need to be taken with some caution due to significant problems with the quality of procurement data. However, they are indicative of the likely trends in urgent and emergency procurement in the UK before and during the pandemic. As could be expected, in 'ordinary times' both urgent and emergency procurement are very limited. Operationally, this can justify subjecting those types of procurement to the same institutions, systems, structures, and processes ordinarily tasked with procurement, as their incidence will be marginal and it can be expected that the relevant contracting authority will be able to implement the required accelerated or alternative procurement procedures. However, the situation clearly changed during the pandemic, when those organisational arrangements became overwhelmed by the demand for specific types of consumables and equipment, as discussed below (see paras 275 and ff).

Urgent and Extremely Urgent Procurement in UK Law

106. As mentioned above, the UK's legislation on urgent and extremely urgent procurement follows very closely the GPA model as further developed under EU law. In fact, given the 'copy-out' approach to the transposition of EU law, the UK's approach is indistinguishable from the EU's. This sub-section briefly describes this situation, which is further explored later (para 128).

107. For the purposes of this report, UK legislation comprises two sets of public procurement law. *The Public Contracts Regulations 2015* (SI 2015 No. 102, PCR2015) are applicable in England, Wales, and Northern Ireland. *The Public Contracts (Scotland) Regulations 2015* (SSI 2015 No. 446, PCSR2015) are applicable in Scotland. On urgent and extremely urgent procurement, both sets of legislation are identical to EU law. Neither of them creates any additional rules or requirements for urgent or extremely urgent procurement, or in relation to systemic emergencies. In view of this, the report uses the expression 'UK law' to refer to the PCR2015 and the PCSR2015. Where these separate sets of legislation diverge, this is made explicit.

108. Under both the PCR2015 and the PCSR2015, **urgent procurement** allows for reduced minimum timescales where the contracting authority can prove a state of urgency that means it is not practical to comply with default time limits (see above para 83).

109. Both sets of rules also foresee the possibility for contracting authorities to resort to the direct award of contracts following a negotiated procedure without prior publication in cases of **extreme urgency or emergency** (see above para 86). Direct awards are permissible "insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with", and always provided that "the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority".[3] UK law thus authorises emergency direct awards conditional upon meeting stringent cumulative conditions: strict necessity of the award; extreme emergency meaning it is not possible to comply with the usual timescales for competitive procurement (including those for accelerated procurement); unforeseeable cause for the emergency; and diligence on the part of the contracting authority (discussed in detail below paras 163 to 166).

110. Contracting authorities must self-assess and document the applicability of the grounds for urgent and extremely urgent procurement. For urgent procurement, their written report needs to include a justification of the need to conduct the procurement under reduced time limits (reg.84(8) PCR2015, reg.83(8) PCSR2015), and the reasons for the use of an accelerated procedure need to be proactively disclosed in the relevant contract notice (reg.49(a) PCR2015, reg.50(1) PCSR2015). For extremely urgent procurement, the written report needs to include an explicit account of the circumstances which justify the use of this procedure (reg.84(1)(f) PCR2015, reg.83(1)(g) PCSR2015), and this justification has to be proactively disclosed in the relevant contract award notice (reg.50(2)(a) PCR2015, reg.51(2)(a) PCSR2015). Reports must also reflect "where applicable, conflicts of interests detected and subsequent measures taken" (reg.84(1)(i) PCR2015, reg.83(1)(j) PCSR2015), which presupposes compliance with conflict of interest checks in accordance with the general rules (reg.24 PCR2015, reg.25 PCSR2015) (see paras 148 to 152).

Urgent and Extremely Urgent Procurement in UK Policy

111. To the best of my knowledge, before the pandemic, there was no discernible policy or guidance on urgent and extremely urgent procurement in the UK. The existing case law did not contain examples of a systemic emergency on the scale of the pandemic, and case law on the use of urgent and extremely urgent procedures provided little guidance.

112. The situation quickly changed during the pandemic and several sets of guidance on urgent and extremely urgent procurement emerged. Those of direct relevance to the UK included:

[3] This is the wording of reg.32(2)(c) and 32(4) PCR2015. The wording in reg.33(1)(c) and 33(3) PCSR2015 is almost identical: direct awards are permissible "where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open procedure, restricted procedure or competitive procedure with negotiation cannot be complied with", and also always provided that "the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority".

- PPN 01/20: Responding to COVID-19 (18 March 2020);
- SPPN 04/2020 Coronavirus (COVID-19): procurement regulations for public bodies (20 March 2020);
- European Commission's Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (1 April 2020);
- SPPN 06/2020 Coronavirus (COVID-19): making best use of procurement resources during COVID-19 outbreak (14 April 2020);
- PPN 04/20: Recovery and Transition from COVID-19 (9 June 2020);
- SPPN 08/2020 Coronavirus (COVID-19): recovery and transition from COVID-19 (12 June 2020); and
- PPN 01/21: Procurement in an Emergency (4 February 2021).

The Welsh Government explicitly adopted PPN 01/20, PPN 02/20, PPN 03/20 and a modified version of PPN 04/20 (see INQ000081245), and PPN 01/21. There are no publicly available Northern Ireland notices for this period.

This guidance will be discussed below (paras 196 and ff).

Summary Box 9 – First Approach to Urgent and Extremely Urgent Procurement in UK

- In the UK, the same institutions, systems, structures, and processes involved in procurement in 'ordinary times' are engaged in urgent and emergency procurement.
- All contracting authorities have access to urgent and extremely urgent procedures when the relevant circumstances arise.
- Before the pandemic, there was limited use of accelerated procurement in the UK.
- Increased procurement centralisation and the wide availability of 'commercial vehicles' can provide an explanation for low levels of accelerated procurement.
- Emergency procurement was also rarely used in the UK prior to the pandemic.
- UK law foresees the possibility for contracting authorities to use accelerated and emergency procurement in the same terms as the GPA and EU law.
- Direct awards are permitted where stringent conditions are met: strict necessity, impossibility to comply with usual timescales (including those for accelerated procurement), unforeseeable emergency, and diligence by the contracting authority.
- Direct awards require contracting authorities to discharge their general obligations of record-keeping, publication of post-award notices, and conflict of interest checks.
- Before the pandemic there was no discernible policy or guidance on urgent and extremely urgent procurement in the UK. A body of guidance emerged during the pandemic.

Mitigating Risks in Systemic Emergency Procurement

Risk Mitigation Before the Pandemic

113. So far, this report has shown how systems of public procurement regulation can (and tend to) take a minimalistic approach to emergency procurement. This is the case of the UK, which follows the GPA and EU approaches. Emergency procurement is simply authorised under the relevant rules, but it remains unregulated (para 88). Prior to the pandemic, there were no alternative practical, legal or policy arrangements for the conduct of emergency procurement.

114. However, it should be stressed that in 2011 the UK put in place an influenza pandemic preparedness strategy that contained elements of readiness planning through stockpiles, amongst other, of facemasks and respirators for health and social care workers but not for general use in the community (Department of Health, 2011, p. 37). While it did entail some implicit procurement elements in relation to building and maintaining the relevant stockpiles, the strategy did not consider emergency procurement more generally. In the context of the strategy, this would be justified by the assumption that the existence of the relevant stockpiles should mitigate against the need for emergency procurement, especially if the stockpiles were of a size that could absorb initial extremely urgent demand while additional supplies were secured through ordinary or accelerated procurement at the relevant time. Given the importance of such assumption, it would have been desirable to evaluate it in light of the mentioned absence of practical, legal or policy arrangements for the conduct of emergency procurement (see above para 113 and below paras 191 to 194).

115. Systemic emergencies carry increased corruption and maladministration risks (above paras 90 to 97). It is thus worth exploring how those increased risks could be mitigated. However, it should be noted that the knowledge on risk mitigation strategies for emergency procurement, and generalised acceptability, have mostly developed after the pandemic. There is some earlier guidance on how to approach procurement in the context of an emergency (e.g. by putting framework agreements in place in readiness) but that had been developed mainly in the context of international support to emergency relief and, to a large extent, referred to 'planned emergencies' in relation to the work of agencies tasked with emergency relief operations that can be expected to be prepared for an emergency because they are sure that they will be required to intervene, even if they do not know where or when (World Bank, 2015).

116. Before the pandemic, only a few countries, such as Finland, had a public procurement strategy in place as part of crisis preparedness (OECD, 2021a, p.168). Some countries had recently developed extensive preparedness after facing a healthcare crisis similar to the pandemic, such as South Korea after its experience with the Middle East respiratory syndrome (MERS) (Kwon *et al*, 2020). Most countries, however, had insufficient preparedness plans in place and had paid little attention to risk mitigation in relation to extremely urgent procurement. This has now changed as the pandemic forced countries to rethink their risk management strategies and put measures in place that can be activated in the event of a shock, such as the ones discussed below (see next para and ff). These mitigations can serve as a basis for an assessment of the UK's preparedness efforts and the extent to which pre-pandemic practices and organisational arrangements were aligned with generalised risk-mitigation practices, but their applicability should be assessed with caution. Most of these approaches were largely non-existent or not followed pre-pandemic in most

jurisdictions, which should be taken into account in international comparisons (below paras 346 and ff).

Risk Mitigation Based on Early Responses to the Pandemic

117. The early adaptations implemented in several countries at the start of the pandemic suggest that it is possible to mitigate heightened corruption and maladministration risks in systemic emergencies through: procurement centralisation; improved procurement data availability; risk-management; contextualised legal and policy reform; and targeted enhancements in procurement oversight (OECD, 2021a).

Centralisation of Procurement

118. As mentioned above (para 95) systemic emergencies carry increased maladministration risks due to the disproportionality and/or discoordination of procurement responses. The disproportionality can arise from the need to secure supplies against uncertain or evolving demand and supply for the consumables or equipment. Moreover, the discoordination of procurement responses can be exacerbated by multiple levels of procurement governance, as well as by the inexistence of effective communication mechanisms and centralised databases. It is thus crucial to have accurate and timely information on available stocks of key equipment and consumables, current and predicted demand, evolution of available offer, and (tentatively) secured supplies through emergency procurement. Seeing how emergency direct awards contribute to closing the gap between available and needed supplies will help adjust the volume of emergency procurement being carried out, and will inform the approach towards the (re)activation of (more) competitive procedures for other urgent but not so pressing supplies. Having information on the details of awarded contracts, and of offers received from the market that were unacceptable or did not trigger an award, will facilitate price and conditions benchmarking, as well as reducing the wasted effort and risks implicit in different contracting authorities or agents establishing contacts with the same potential suppliers.

119. Although imperfectly, procurement centralisation can mitigate both the risks of disproportionate emergency awards and discoordination in emergency procurement. A centralised procurement function for emergencies *should* facilitate the management and visibility of data, help piece together a better understanding of market conditions, and support the (internal) coordination of emergency procurement efforts. This is because the data would be kept and used by a single organisation, and because internal coordination within a single organisation with clear reporting and line management structures should be more effective than cross-organisation coordination. In that regard, it is not surprising that soon after the start of the pandemic, most surveyed OECD countries increased the co-ordination or centralisation of the procurement of essential goods, including not just health products but also IT equipment (OECD, 2021a, p.168). Procurement centralisation during the pandemic is further discussed in a comparative manner below (paras 356 to 362). It should also be noted that procurement centralisation carries its own operational and integrity challenges. However, those are not discussed in detail in this report, as the focus is on responses to the pandemic.

Improved Procurement Data Availability

120. Some of the difficulties in the implementation of early responses to the pandemic were caused by a lack of quality procurement data. The importance of having accurate and updated data to inform the response to an emergency, including through procurement, can hardly be overstated. Even in the absence of centralisation, improvements in procurement data capture and availability can support emergency procurement in different ways. As well as facilitating a comprehensive view of the evolution of emergency procurement (where e.g. open data is published in near real time), having access to a comprehensive repository of contract awards could also help e.g. identify potential providers based on the historical data on who had held contracts for the delivery of the same or similar supplies, which can direct approaches to plausible suppliers. Accessing data on e.g. beneficial ownership can also facilitate due diligence and risk management in relation specifically with potential conflicts of interest. Additionally, improved procurement data availability can strengthen oversight, both by institutions specifically tasked to do so, and by civil society and stakeholder groups. Therefore, improvements in data quality, accessibility, and visibility of procurement and related data throughout the acquisition, use, and disposal cycle, has clearly become a top priority, including in relation to fostering preparedness for future emergencies.

Structured Approaches to Risk Identification and Management

121. Uncertainty and scale are two other sources for the distinctly heightened risks involved in systemic emergencies (above para 95). While there is little that can be done to address empirical uncertainty in the face of new and unknown risks and dynamics until the necessary data is captured and analysed, it seems that having a structured approach to risk identification and management can help develop effective mitigation strategies as the emergency evolves. The OECD has stressed the need for risk assessment methodologies, risk assessments, and risk registers focused on procurement (OECD, 2021a, p.169). This could be supported through the inclusion of standard clauses on risk allocation and mitigation in directly awarded emergency contracts—which could be developed, for example, through an extension of similar approaches for 'ordinary times' (GCF, 2021).

Changes in Law and Policy

122. It is also generally accepted that the scale of the risks of integrity and maladministration will also depend on the capability and training of the procurement workforce, which will be in charge of operationalising the flexibility and discretion allowed under the relevant rules and guidance. It has also emerged that responses to systemic emergencies can be improved through legal and policy reform—which are, however, highly contextual. Issuing guidance to clarify the acceptable paths of decision-making and the approaches that can be taken to the direct award of contracts for extremely urgent supplies was a common response to the pandemic. OECD countries developed specific guidance on a range of issues, from detailed emergency procedures to implementing changes in ongoing contracts or using specific payments terms. Having such guidance updated and embedded in the training of the procurement workforce should play a risk-mitigation role in (future) systemic emergencies. Similarly, many countries introduced temporary regulations, or developed additional Covid-19 legislation with specific public procurement provisions. Legal adaptations will be discussed in some more detail in a comparative manner (see below paras 348 to 355).

Enhanced Targeted Oversight

123. It is also generally recognised that the higher levels of flexibility, discretion and speed involved in (and required for) emergency procurement should trigger a change in oversight and audit mechanisms, with recommendations pointing to the need to strengthen after-the-fact controls on the direct award of contracts, even by setting up specialised (temporary) oversight bodies to ensure timely review of emergency procurement decision-making.

Summary Box 10 – Mitigating Risks in Systemic Emergency Procurement

- Before the pandemic, few countries had contingency plans for systemic emergencies.
- The UK had put in place an influenza pandemic preparedness strategy that contained stockpiling measures but did not address emergency procurement, perhaps based on the assumption that stockpiles would be sufficient for an initial extremely urgent response.
- Early responses to the pandemic in OECD countries show that the heightened risks of corruption and maladministration in systemic emergencies can be mitigated through: procurement centralisation; improved procurement data availability; risk-management; contextualised legal and policy reform; and targeted enhancements in oversight.

Negotiating Contracts during Emergencies and Systemic Emergencies

124. The primary operational implication of authorising the direct award of contracts in cases of extreme urgency is that the contracting authority is then free to approach the negotiation of those contracts with barely any constraints—other than conflict of interest checks, record-keeping obligations, and the publication of award details (above para 110). Under EU/UK law, negotiations within the negotiated procedure without prior publication are unregulated. The European Commission made this particularly clear in its Guidance on Covid-19 procurement. This is generally accepted given the need to ensure the operational effectiveness of procurement in the face of the emergency (para 88). Where the relevant set of rules imposes some constraints on the conduct of negotiations, such as under the UNCITRAL Model Law (below paras 348 and ff), there have been proposals to relax the residual requirements because it is generally accepted that there is a need for maximum flexibility in negotiations. The consensus is that control over the exercise of such broad discretion needs to focus on the obligation for contracting authorities to create adequate records of the approaches used, and to comply with proactive transparency requirements.

125. From the perspective of mitigating risks in systemic emergencies, the downside of the absence of minimum requirements and specific checks applicable to the conduct of the relevant direct negotiations is that it deactivates the ordinary benchmarks against which the effectiveness of those negotiations could be assessed. The undesirability of this situation is reflected in existing guidance on emergency preparedness, which seeks to create pre-emergency mechanisms that would minimise the need to engage in unconstrained negotiations. However, the reality is that extreme emergencies will require conducting a certain amount of direct negotiations where it has not been possible to foresee all eventualities or there have been gaps in planning and preparedness. And there is no detailed

guidance for such scenarios because it is hard to establish general requirements that could be adequate in most extremely urgent circumstances. Even explicit recommendations to enact guidelines for emergency procurement procedures leave negotiations unaddressed (OECD, 2009b, p. 33).

126. In those contexts, existing guidance is limited to reminding contracting authorities of the need to operate in accordance with key principles of procurement to the extent this is possible in the circumstances. Even detailed guidance for emergency acquisitions does not include any specific checklist for the conduct of negotiations under extreme urgency, and contracting authorities are left to exercise their professional judgement. To the best of my knowledge, there is no available checklist against which to judge the negotiation of procurement contracts during emergencies and systemic emergencies.

Summary Box 11 – Negotiating Contracts in Emergencies and Systemic Emergencies

- Negotiations carried out during emergencies are unregulated.
- Contracting authorities seeking to directly award contracts have maximum discretion and are subject to limited but important obligations to carry out conflict of interest checks, create adequate records of the approaches taken, and publish contract award details.
- There is no detailed guidance for such scenarios because it is hard to establish general requirements that could be adequate in most extremely urgent circumstances.
- There is no available checklist against which to judge the negotiation of procurement contracts during emergencies and systemic emergencies.

Procurement Before the Pandemic

127. This section provides an overview of the regulation and operation of public procurement in the UK before the pandemic. It serves as a benchmark to assess how far procurement during the pandemic deviated from procurement in 'ordinary times'. This section also provides a high-level description of the centralised procurement of goods in the healthcare context. This will be used in a later section to benchmark the alternative organisational arrangements put in place during the pandemic.

Public Procurement Legislation in the UK

128. This sub-section provides details of UK public procurement law in relation to the procurement of goods in the healthcare context. As mentioned above, UK procurement law is constrained by commitments under international law. In particular, it must comply with the requirements arising from UNCAC, the GPA, FTAs, and the UK-EU TCA (paras 54 to 61).

129. Current UK procurement legislation derives from EU law (para 106) and, in particular, the PPD. Given the UK's 'copy-out' approach to transposing EU law, the EU and UK rules were entirely aligned, with minimal regulation of extremely urgent procurement in EU/UK law. This is in line with the approach taken by most systems of public procurement regulation, including the GPA, as discussed above (see also Annexes 4 and 7).

130. The UK has the long-standing practice of regulating procurement as a devolved matter, currently subject to the Provisional Common Framework last updated in January 2022 (Cabinet Office, 2022). UK procurement legislation comprises two sets of public procurement law. One set applies in England, Wales, and Northern Ireland, and the other one in Scotland. This arises from the treatment of procurement as a devolved matter, as well as from the broader differences between the legal systems of England, Wales, and Northern Ireland, and the separate and distinct Scottish legal system. However, until now, the rules across the four nations have been substantially the same.

131. The UK comprises three separate legal jurisdictions, respectively for England and Wales, Northern Ireland, and Scotland. This is relevant in the context of the enforcement of public procurement legislation across the UK. However, for the purposes of this report and to keep the overview as simple as possible, a distinction will only be made between England, Wales and Northern Ireland, on the one hand, and Scotland, on the other, save where jurisdictional issues pertaining to Northern Ireland merit specific consideration and differential treatment considered to those pertaining to England and Wales.

Procurement Legislation in England, Wales, and Northern Ireland

132. *The Public Contracts Regulations 2015* (SI 2015 No. 102, PCR2015) regulate the procurement of goods in the healthcare context in England, Wales and Northern Ireland and will continue to apply until they are replaced by the Procurement Act 2023. The PCR2015 apply to procurement at all levels of government, including central, regional and local, as well as procurement by the devolved nations, and other government bodies in those jurisdictions, including those buying goods within the healthcare system. Annex 6 contains key provisions in the PCR2015.

Procurement Legislation in Scotland

133. In Scotland, *The Public Contracts (Scotland) Regulations 2015* (SSI 2015 No. 446, PCSR2015) provide separate procurement legislation. This is complemented by the *Procurement Reform (Scotland) Act 2014* (2014 ASP 12) and *The Procurement (Scotland) Regulations 2016* (SSI 2016 No. 145). This legislation makes public contracts for supplies and services regulated from a lower threshold of £50,000, with principles similar to the PCSR2015. The PCSR2015 apply in Scotland, to procurement at all levels of government and procurement by other government bodies, including those buying goods within the healthcare system. In general and with few exceptions, Scottish procurement law has so far only deviated moderately from the equivalent legislation for England, Wales, and Northern Ireland. Differences between both sets of rules will be highlighted. Annex 6 contains key provisions in the PCSR2015. To the best of my knowledge, there are no current plans to amend the PCSR2015. This will introduce divergence between the two UK procurement regimes in the future, as Scottish law remains aligned with EU law while the Procurement Act 2023 deviates from it. However, this is not explored in this report.

Public Procurement Guidance across the Four Nations

134. The Crown Commercial Service (CCS), an executive agency sponsored by the Cabinet Office, is responsible for leading on procurement policy on behalf of the UK Government, including in relation to the publication of Procurement Policy Notes (PPNs). PPNs provide guidance on best procurement practice for public sector organisations.

135. Most PPNs are binding on all Central Government Departments, their Executive Agencies and Non-Departmental Public Bodies ('In-Scope Organisations') and advisory for other contracting authorities (such as local authorities), although this can vary depending on the content of each PPN because some PPNs embed statutory guidance with a broader scope.

136. In addition to the PPNs specifically related to the pandemic (see above para 112 and below paras 196 and ff), the following PPNs are particularly relevant for the purposes of this report:

- PPN 12/15: Availability of Procurement Procedures (Decision Tree) (30 July 2015);
- PPN 01/17: Update to Transparency Principles (16 February 2017) and related CCS Guidance on transparency requirements (November 2017)—modified by PPN 07/21 (24 June 2021): Update on requirements to publish procurement information on Contracts Finder, and through a revision of PPN 01/17 itself (29 March 2023); and
- PPN 01/19: Applying Exclusions in Public Procurement, Managing Conflicts of Interest and Whistleblowing (22 February 2019)—later replaced by PPN 04/21: Applying Exclusions in Public Procurement, Managing Conflicts of Interest and Whistleblowing (20 May 2021).

137. The devolved nations tend to adopt or endorse the guidance issued through PPNs, as well as issuing additional or parallel procurement guidance on different issues. In Scotland, this is done by the Scottish Procurement and Property Directorate, which issues Scottish Procurement Policy Notes (SPPNs). In Wales, the Welsh Government issues Welsh Procurement Policy Notes (WPPNs). In Northern Ireland, the Department of Finance issues Procurement Policy Notes (NIPPNs), although it had limited activity over the past few years.

138. There is a common law duty to comply with published policies absent good reason to depart from them (*R (Good Law Project & others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) paras [132] & [135]). This underpins the importance given to procurement guidance throughout this report.

Summary Box 12 – Public Procurement Legislation and Guidance in the UK

- The UK has the long-standing practice of regulating procurement as a devolved matter.
- *The Public Contracts Regulations 2015* regulated the procurement of goods in the healthcare context in England, Wales and Northern Ireland before the pandemic.
- *The Public Contracts (Scotland) Regulations 2015* provided separate legislation for Scotland. However, the rules across the four nations were substantially the same.
- The UK Government issues procurement guidance through PPNs, which tend to be explicitly adopted or minimally adapted by the entities in charge of procurement guidance across the devolved administrations.
- A distinction between guidance and legislation is unnecessary given the duty for contracting authorities to comply with published policies absent good reason to depart from them. This underpins the importance given to procurement guidance in this report.

Competitive Procurement in UK Law and Policy

139. During 'ordinary times', and unless there are exceptional grounds to engage in negotiations without a prior call for competition (above para 86, and below para 163), contracting authorities are under a duty to carry out competitive procurement for the award of public contracts. Contracting authorities need to choose from a pre-determined set of competitive procedures. That choice should be driven by the specific circumstances of the relevant procurement. The choice of procedure is not entirely free (reg.26 PCR2015, reg.27 PCSR2015). To aid understanding of these choices, the glossary in Annex 1 provides simplified descriptions of the procurement procedures discussed in this section. Annex 8 provides a more detailed technical summary of the main competitive procurement procedures.

140. Contracting authorities have a general free choice between **open and restricted procedures**. Contracting authorities should choose between them depending on whether the circumstances of the relevant procurement make a single-stage (open) or two-stage (restricted) procedure preferable. A genuine need for pre-qualification of candidates, or facing a large marketplace with potential for a high number of tenderers, are good reasons to use a restricted procedure.

141. Contracting authorities can opt to use a **competitive procedure with negotiation** where there is an objective need to carry out negotiations and/or technical dialogue with potential providers, such as where there is a need: to adapt 'off-the-shelf' solutions; include design or innovative solutions; negotiate complex issues related to the legal or financial structure of the contract; or where there is difficulty in establishing sufficiently precise technical specifications without engaging in technical dialogue with potential providers.

142. Table 3 above contains details of the minimum timescales applicable to these procurement procedures. Table 4 below provides a summary of minimum timescales in the usual cases, as well as in cases of urgency justifying recourse to accelerated procurement.

Table 4 Recapitulation of minimum timescales under UK law, inclusive of mandatory standstill period

Procedure	e-Procurement timescales	Accelerated procurement timescales
Open procedure	40 days	25 days
Restricted procedure	65 days[4]	35 days
Competitive procedure with negotiations total	65 days[5]	35 days

143. Open and restricted procedures, which do not allow for negotiation with bidders during the process, are the most commonly used, and the open procedure is the most popular (Cabinet Office, 2020b, paras 60 and 71). Procedures permitting negotiations are used in less than 10% of procurement carried out in the UK, including procurement not covered by the PCR2015 and PCSR2015 (id, para 60). This suggests that, in line with PPN 12/15, contracting authorities treat the open procedure as the default procedure, and use either restricted procedures or competitive procedures with negotiation in most cases where a two-stage procedure is required, with very limited use of competitive procedures with negotiations.

144. However, as mentioned above (para 78) this does not mean that most procurement expenditure is channelled through rigid one-stage open procedures, or that awarding public contracts always takes longer than one month as suggested by Table 4. Contracting authorities can also resort to 'commercial vehicles', such as **framework agreements and dynamic purchasing systems**. Framework agreements can be awarded following any of the above procurement procedures, although they tend to be awarded following open or restricted procedures. Dynamic purchasing systems can be set up through restricted procedures. PPN 12/15 indicates that dynamic purchasing systems should be used in preference to an open procedure where "the requirement is likely to be recurring and is for commonly used off-the-shelf products, works or services which are generally available on the market".

145. Contracting authorities can use framework agreements and dynamic purchasing systems set up by other contracting authorities—and notably by central purchasing bodies—as long as they are covered by the scope of the relevant 'commercial vehicle'. In those cases, the procuring contracting authority will be in charge of the award of contracts by means of 'call-offs' within framework agreements or invited tenders under dynamic purchasing systems.

[4] It is possible for regional and local authorities to shorten this procedure, as detailed in Annex 8.
[5] It is possible for regional and local authorities to shorten this procedure, as detailed in Annex 8.

146. Contracting authorities increasingly rely on such 'commercial vehicles', and in particular on call-offs under framework agreements (para 102). This implies that very large volumes, if not the major part of procurement, is conducted within shorter timeframes and with reduced red tape 'per award', compared to the default requirements for open, restricted and competitive procedures with negotiations.

Accelerated Procedures

147. As mentioned above (paras 82 to 84), it is possible to use accelerated procedures where the contracting authority can prove an objective urgency that means it is not possible to comply with default timescales. Table 4 above shows the reduced timescales for accelerated procurement. Accelerated minimum timescales are relevant because the authorisation to use negotiated procedures without prior publication in the case of extremely urgent or emergency procurement is conditional on not being possible to comply with them. As discussed above, accelerated procurement was not widely used in the UK before the pandemic (para 101).

Conflicts of Interest

148. It is a general requirement across all procurement procedures for contracting authorities to take appropriate and effective measures to prevent, identify, and remedy conflicts of interest. At a minimum, conflicts of interest need to be investigated in any situation where staff members of the contracting authority, or a service provider conducting the procurement on the authority's behalf, have a direct or indirect financial, economic or other personal interest that might be perceived to compromise their impartiality and independence (reg.24 PCR2015, reg.25 PCSR2015). There are additional rules applicable where an economic operator has been involved in the pre-procurement stages of a procedure, for example as an advisor, to the contracting authority which poses a very specific risk of conflict of interest (reg. 41 PCR2015, reg.42 PCSR2015). Where a conflict of interest or the prior involvement of the economic operator in the preparation of the procurement procedure cannot be effectively remedied by less intrusive measures, the contracting authority may exclude the relevant economic operator from participation (reg.57(8)(c) and (d) PCR2015, reg.58(8)(e) and (f) PCSR2015).

149. The obligations relating to conflicts of interest checks were clear before the pandemic. PPN 01/19 stressed that contracting authorities "should refer to internal guidance and/or procedures on identifying, reporting and managing conflicts of interest. The National Audit Office report "Conflicts of Interest", is also a good source of information." (Annex A, para 27, with reference to (NAO, 2015)). It also provided some examples of good practice, such as asking members of staff to complete a declaration of interest form annually, at the start of a market engagement or procurement, or when a new interest arises and to ensure appropriate safeguards are in place once declarations have been made (Annex B, p. 5). It also stressed that, under the Supplier Code of Conduct, "suppliers should mitigate appropriately against any real or perceived conflict of interest through their work with government" (id, p. 6). PPN 01/19 also provided some practical guidance for members of a contracting authority to escalate their concerns to their line managers, or considering whistleblowing—for example, where they thought that insufficient measures were being taken in relation to a specific conflict of interest.

150. Although not directly mentioned in PPN 01/19 and developed under a set of rules different from the PCR2015, procurement practitioners in the context of the healthcare system should also have been aware of guidance for staff and organisations on Managing Conflicts of Interest in the NHS (NHSE, 2017). This document provided additional information on conflicts of interest and practical mitigation measures.

Record-keeping

151. Contracting authorities are under a general record-keeping obligation (reg.84 PCR2015, reg. 83 PCSR215). Contracting authorities must draw up a written report for every contract or framework agreement they award, and every time a dynamic purchasing system is established. That individual report must have a minimum prescribed content, which includes, among other details, information on the choice of procurement procedure, a justification for the use of accelerated or emergency procurement, and details of the conflicts of interests detected and subsequent measures taken, where relevant (reg.84 PCR2015, reg. 83 PCSR2015).

152. Moreover, contracting authorities must document the progress of all procurement procedures, and ensure that they keep sufficient documentation to justify decisions taken in all stages. Such records must be kept for a minimum of three years following the award of the contract (reg.84(7) to (9) PCR2015, reg.83(7) to (9) PCSR2015). PPN 01/19 stressed that any measures taken in relation to a conflict of interest or the exclusion of tenderers that had acted in an advisory capacity to the contracting authority, should be documented in the procurement report (Annex A, paras 24 and 26).

Transparency

153. Contracting authorities are also under general transparency duties. These include both duties of 'proactive' transparency in relation to the mandatory publication of procurement notices, and 'reactive' transparency duties in relation to the provision of information on request.

154. 'Proactive' transparency concerns the mandatory publication of notices. At a minimum, for competitive procurement, there has to be a contract notice and a contract award notice. Direct awards require contract award notices only. Table 5 provides a summary of these obligations.

155. Contract notices are used to launch a competitive procurement procedure. They are required, as a default, in open procedures, restricted procedures, and competitive procedures with negotiation. They must follow standardised forms and include prescribed contents.[6]

156. Contract award notices proactively disclose the results of the procurement procedure and the primary details of the award of a public contract, including direct awards. Contracting

[6] The minimum prescribed content includes a description of the "Type of award procedure; where appropriate, reasons for use of an accelerated procedure (in open and restricted procedures and competitive procedures with negotiation)." (PPD, Annex V, Part C, para 12).

authorities must submit them for publication not later than 30 days after the award. They are required to follow standardised forms and to include prescribed contents.[7]

Table 5 – Proactive Transparency Obligations

	Contract Notice	Contract Award Notice
Open procedures	Mandatory; 30 Days Prior to Tender Submission Deadline[8]	Mandatory; Within 30 Days of Award
Accelerated open procedures	Mandatory; 15 Days Prior to Tender Submission Deadline Must provide justification for shorter time limits	Mandatory; Within 30 Days of Award
Restricted procedures and competitive procedures with negotiation	Mandatory; 30 Days Prior to Deadline for Expressions of Interest	Mandatory; Within 30 Days of Award
Accelerated Restricted procedures and competitive procedures with negotiation	Mandatory; 15 Days Prior to Deadline for Expressions of Interest Must provide justification for shorter time limits	Mandatory; Within 30 Days of Award
Negotiated procedure without prior publication (direct award)	Not applicable	Mandatory; Within 30 Days of Award Must provide justification for direct award under extreme urgency

157. Guidance related to PPN 01/17 on the 'Publication of Central Government Tenders and Contracts' indicated that contracting authorities should go further than the minimal proactive transparency required by the applicable rules in two main respects. First, that they should publish details of contract awards within 20 days, which is quicker than the applicable rules would require. Second, that contracting authorities should publish more detailed information than the prescribed minimum, including a redacted copy of the relevant contracts (CCS, 2017, para 9.1). This guidance featured prominently in litigation related to procurement during the pandemic. It was withdrawn on 24 June 2021. However, it should be stressed that PPN 01/17 was in place when most emergency procurement took place, especially during the first year of the pandemic (see below paras 262 and 263).

158. On 24 June 2021, PPN 07/21 provided a new version of Cabinet Office's Guidance on the transparency requirements for publishing on Contracts Finder (Cabinet Office, 2021b). It modified the position under PPN 01/17 by indicating that a reasonable time for central government authorities to publish information means 30 calendar days after the contract award date. This effectively set aside the shorter time period arising from the 2017 Guidance and aligned with the legislative requirement to publish contract award notices within 30 days. It still established, however, that "The guiding principle is that contracts should be published in full, subject to any applicable exemptions and redactions being made [...] The

[7] The minimum prescribed content includes a description of the "Type of award procedure; in the case of negotiated procedure without prior publication, justification." (PPD, Annex V, Part D, para 7).

[8] Assuming e-Procurement. Applies to all Contract Notices in the table.

Transparency Principles require departments to proactively release information during the life of the contract" (id at 7). The issue of redactions is addressed below (para 160).

159. 'Reactive' transparency duties require contracting authorities to disclose more detailed information, on demand, to tenderers and candidates. This is subject to specific time limits and has as its main purpose to allow disappointed tenderers and candidates to ascertain the reasons for the award decision, with a view to facilitating its potential challenge. However, given the focus of this report, this will not be explored in detail.

160. Both in the case of proactive and reactive transparency obligations, contracting authorities are under a duty to withhold certain types of information where: its release would impede law enforcement or be contrary to the public interest; would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or might prejudice fair competition between economic operators. There is guidance linked to PPN 01/17, as updated on 29 March 2023, on the approach to be taken to withholding commercially sensitive information such as pricing or business plans. There is additional guidance on the preparation of redacted versions of documents (Cabinet Office, 2021b).

Summary Box 13 – Competitive Procurement in UK Law and Policy

- During 'ordinary times', contracting authorities have a minimally constrained choice of procurement procedures. Open and restricted procedures are always available and competitive procedures with negotiation are generally available where there is an objective justification for the negotiations.
- Before the pandemic, the open procedure was the most used. Restricted procedures were less used and competitive procedures with negotiations were used to a minimal extent.
- However, contracting authorities could award public contracts much more quickly than the default timescales for those procedures suggest, thanks to the widespread use of 'commercial vehicles' and, in particular, framework agreements.
- Accelerated procedures were widely available, but not broadly used.
- Legislation and guidance are clear that contracting authorities have a general duty to prevent, identify, and remedy conflicts of interest, and that the concept of conflict of interest needs to be interpreted broadly.
- Contracting authorities are under a duty to remedy conflicts of interest to avoid distortions of competition and to ensure equal treatment.
- Legislation and guidance were clear that contracting authorities have a general duty to create adequate records of their decisions and their justification throughout the procurement procedure.
- The obligation to document measures to identify and remedy conflicts of interest is explicit.
- Contracting authorities must proactively publish details of contract opportunities and contract awards. Contract notices serve the purpose of launching a competitive

procurement. Contract award notices provide details of the award of a public contract, including when this results from a non-competitive direct award. In that case, they must contain an explicit justification for the use of direct awards.

- Until 24 June 2021, UK Government guidance was more exacting than legal requirements in promoting the publication of award details and redacted contracts within 20 days. This was changed in June 2021 to align with the obligation to disclose award details through the publication of a contract award notice within 30 days.
- Contracting authorities must withhold some types of information, in particular through contract redactions.

Urgent and Extremely Urgent Procurement in UK Law and Policy Before the Pandemic

161. Before the pandemic, there was limited legislation and guidance on the conduct of urgent and extremely urgent procurement.

162. Contracting authorities could carry out **urgent procurement** through accelerated procedures, subject to reduced minimum timescales (above para 83). The bar was set relatively low for the justification of a choice of accelerated procedures and contracting authorities needed only demonstrate that urgency did not allow compliance with the usual time limits (above para 84). The justification had to be duly documented and proactively disclosed in the contract notice that launched the relevant accelerated procedure (above para 110).

163. Contracting authorities could also carry out **extremely urgent or emergency procurement** through the direct award of contracts following a negotiated procedure without publication. In this case, the justification bar was set high and contracting authorities had to show that the situation met four cumulative conditions: strict necessity of the award; extreme emergency meaning it is not possible to comply with the usual timescales for competitive procurement (including those for accelerated procurement); unforeseeable cause for the emergency; and diligence on the part of the contracting authority (above paras 86, 87 and 109).

164. Although there was very limited guidance on emergency procurement prior to the pandemic, the relevant legal tests were clearly outlined in case law of the Court of Justice of the European Union (CJEU). The CJEU had consistently held that the authorisation for the use of negotiated procedures without prior publication had to be interpreted strictly, that it "presupposes the existence of an unforeseeable event, an extreme urgency incompatible with the time-limits required by other procedures and a causal link between the unforeseeable event and the imperative urgency resulting therefrom", and that "it is only 'to the extent strictly necessary' that contracting authorities may, in cases of extreme urgency, conclude a supply contract by a negotiated procedure without publication of a prior notice" (*Commission v Germany*, C-275/08, ECLI:EU:C:2009:632, paras 55, 69 and 73, own translation from French) (see also *Consiglio Nazionale degli Ingegneri*, C-352/12, ECLI:EU:C:2013:416, paras 50-53).

165. The interpretation and assessment of those conditions must be carried out by the contracting authority and, in doing so, the authority is expected to act diligently and only proceed with

emergency procurement where it can legitimately hold that the conditions for recourse to this procedure are satisfied (by analogy, *Fastweb*, C-19/13, ECLI:EU:C:2014:2194, para 50).

166. The relevance of this pre-existing approach was recognised in training materials disseminated in relation to the adoption of the PCR2015 (and PCSR2015), which stressed that "the situations where contracts may be negotiated without competition [...] are deliberately very limited" (CCS, 2014, at 44, emphasis in the original).

Summary Box 14 – Urgent & Extremely Urgent Procurement in UK Before the Pandemic

- Before the pandemic, contracting authorities could resort to accelerated procurement on grounds of urgency and this was subjected to a low justification threshold.
- Contracting authorities could also resort to emergency procurement on grounds of extreme urgency, but it was clear that the direct award of contracts was meant to be exceptional and subject to a stringent legal test.

Procurement Oversight and Judicial Review

167. The UK has a system of limited oversight of procurement decisions. In general, contracting authorities independently interpret, assess, and apply procurement law and guidance in their decision-making processes. The resulting decisions can only be challenged through the courts and, exceptionally, can be the object of investigations by the National Audit Office and its equivalents in the devolved administrations: Audit Scotland, the Wales Audit Office, and the Northern Ireland Audit Office.

168. There is a long standing consensus that the system of procurement oversight in the UK requires significant review with the main goal of boosting its effectiveness (see eg Arrowsmith and Craven, 2016; Kotsonis, 2024). This issue will only be discussed in relation to the Procurement Act 2023 and current attempts to improve procurement oversight in the UK (below paras 388 and ff), but underpins my views on the weakness of regulatory mechanisms based on self-assessment by contracting authorities, as those decisions are unlikely to be challenged in a timely and effective manner.

Centralised Procurement of Goods in the Healthcare Context in the UK

169. The conduct of procurement before the pandemic showed a clear trend towards increasing centralisation. This was particularly evident in relation to the procurement of consumable goods and some types of equipment in the healthcare context across the four nations. All nations had mechanisms for the centralised procurement of goods, primarily through the setting up of framework agreements by central purchasing bodies or designated departments. This was done by NHS Supply Chain in England, NHS National Services Scotland, NHS Wales Shared Services Partnership, and the Procurement and Logistics Service in Northern Ireland. The activities of NHS Supply Chain are particularly relevant because its framework agreements are in principle open to contracting authorities across the UK, as well as any private sector entity active in the UK healthcare sector. However, in its statement, NHS Supply Chain stresses that, before the pandemic, it had limited activity in

Wales and Scotland, and that it did not provide services in Northern Ireland (INQ000492085, para 3.11).

170. The centralised arrangements for the procurement of goods through NHS Supply Chain in England are thus the most relevant, and offer a clear example of how, but for their failings, those arrangements could have generated systemic preparedness and supported the immediate response to the pandemic. However, this section also provides details on the approach to centralised procurement of healthcare goods in Wales, Scotland and Northern Ireland.

Centralised Procurement for the NHS in England

171. Until relatively recently, each NHS organisation (notably, NHS Trusts) was carrying out its own procurement independently. In that context, the procurement function was very close to the frontline. However, since 2012, a series of reports stressed advantages to be had through collaborative procurement, such as reducing administrative burdens or securing better value for money. In 2016, the Carter Review estimated potential savings of at least £700mn (Lord Carter, 2016). The drive towards centralisation thus became a constant in the reform of NHS procurement over the last decade or so.

172. Two main mechanisms for procurement centralisation emerged: regional collaboration through networks or 'hubs' for collaborative procurement across a number of NHS Trusts; as well as nationwide centralised procurement frameworks for common use goods (or consumables) managed by NHS Supply Chain. This led to a situation where, in 2017, NHS procurement expenditure was roughly split across three procurement routes:

- 20% direct expenditure by NHS Trusts,
- 40% expenditure through collaborative procurement in NHS hubs, and
- 40% through 'consolidated procurement' by NHS Supply Chain (DH/NHS, 2017, p 8).

173. In 2018, the UK Government decided to significantly accelerate nationwide procurement centralisation through a so-called New Operating Model ('NOM') for NHS Supply Chain. The NOM sought to accumulate 80% or more of total NHS procurement expenditure through a single, renewed NHS Supply Chain. In practical terms, the system sought to create savings in NHS procurement to redirect funds to the frontline. In its statement, SCCL stresses that the NOM "was intended to encourage a more centralised procurement by, for example, leveraging greater purchasing power in order to generate savings for the NHS as a whole" (INQ000492085, para 3.8). This was part of a broader strategy seeking to minimise the additional funding required by the NHS to prevent its collapse. This strategy was targeted at the healthcare sector and the centralisation of procurement through the NOM NHS Supply Chain ran in parallel to the broader efforts to centralise non-healthcare procurement by the Crown Commercial Service (CCS), although CCS does carry out centralised procurement focused on the health sector, including digital transformation, estates, fleet, building and other areas of works, goods and services (CCS, undated).

174. Implementing the NOM required a retendering of contracts under a revised and significantly more complex legal structure than the one in place prior to 2018. The legal structure for the (NOM) NHS Supply Chain was based on a 'category tower' approach, comprising:

- six medical categories,
- two capital categories,
- three non-medical categories, and
- two support services categories.

175. This is shown in Graph 1 below, which provides details of the "Category Tower Service Providers" (CTSPs). Nine CTSPs were charged with managing the service for an initial period of three years, with potential contract extensions based on meeting performance targets. The management function and the coordination of the system was entrusted to Supply Chain Coordination Limited (SCCL), a company initially indirectly owned by DHSC—and later on transferred to NHS England in 2021. In its statement, SCCL stresses that it "provides oversight and operational management for NHS Supply Chain and its service providers and is the legal entity through which NHS Supply Chain undertakes its procurement services and transacts with customers and suppliers" (INQ000492085, para 3.3).

Graph 1 – New NHS Supply Chain Operating Model

Source: (NHS Supply Chain, 2018, para 3).

176. SCCL's role was designed to be:

- the central service delivery management function for the NOM;
- the focal point, co-ordinator and main driver of the commercial objectives for the NOM;
- a key enabler for delivering better service, quality and savings under the NOM;
- the overseer of clinical evaluation within the category towers through a Clinical and Product Assurance (CAPA) function;

- responsible for ensuring a consistent approach across all category towers; and
- a central co-ordination point for customer and supplier interface (NHS Supply Chain, 2018, para 4).

177. Under NOM, the NHS Supply Chain seeks to externally operate as a single entity. However, although tasked with the coordination and management of the system, SCCL is not the only relevant actor in the operating structure. Crucially, as mentioned above, the NOM consists of a complex network of outsourcing contracts scoped around the category towers of products and services. SCCL coordinates a series of CTSPs, each of which is given an active role in developing category management strategies (that is, the 'go to market approach' at product level) and heavily influence the procurement strategy for the relevant category, subject to SCCL approval. The role of the CTSPs was described as being "category specialist procurement providers [...] They undertake the clinical evaluation of products and run procurement processes on-behalf of the NHS. CTSPs will use category management techniques to create strategies that sustainably provide the NHS with clinically assured products at the best value." (NHS Supply Chain, 2018, para 6).

178. Any given class of standardised NHS supplies—e.g. PPE, or ventilators—was placed under a category tower managed by a CTSP. For the purposes of this report, the following category towers are of particular interest.

178.1. Category tower 2 "Sterile Interventions Equipment and Associated Consumables" included most PPE, but some PPE items were included in towers 8 and 11. Category 2 was managed by the Collaborative Procurement Partnership LLP (CPP). CPP is the culmination of collaboration between four NHS procurement organisations: NHS Commercial Solutions (NHS CS), East of England NHS Collaborative Procurement Hub (EOE CPH), NHS North of England Commercial Procurement Collaborative (NOE CPC), and NHS London Procurement Partnership (LPP). CPP is wholly owned equally by 4 NHS Foundation Trusts: Guy's and St Thomas', Leeds and York Partnership, Surrey and Borders Partnership, and West Suffolk.

178.2. Category tower 7 "Large Diagnostic Capital Equipment Including Mobile and Services" included ventilators, managed by DHL Life Sciences and Healthcare UK (DHL).

179. Under NOM, each category tower is further divided into sub-categories and, for each of them and following the category management strategy developed by each CTSP, framework agreements are put in place. Typically, these are multi-provider framework agreements. The ultimate provider of the relevant consumables or equipment, is therefore not the CTSP.

180. Once the NOM was embedded, thus, NHS Trusts and other buyers in organisations within the healthcare system were given access to framework agreements for most of their standard consumable needs, which they could procure through streamlined call-offs. NHS Trusts were, in principle, free to use the services of NHS Supply Chain or to carry on with their own procurement. However, in 2019, DHSC decided to change the funding model for the NOM and to withhold close to £250mn from Trust funding to direct it to SCCL (under a so-called 'top slicing model') (DHSC PPE Statement, INQ000528391, para 130). This created a significant disincentive for NHS Trusts to procure independently and left NHS

Trusts largely locked in the system as they had to use NHS Supply Chain to try to recover via lower prices the upfront contribution to SCCL funding.

181. As I stressed in my early analysis, from a governance perspective, the NOM and the strategic role SCCL developed within it were potentially troublesome. They rested on a "complex network of contracts resulting in a layer of contractualised governance that obscures its architecture and decision-making processes" (Sanchez-Graells, 2019b, p. 53). CTSPs were in charge of designing a 'market strategy' seeking to create framework agreements with a small number of providers (sometimes only one). The distribution of the centrally-procured supplies to the frontline was also outsourced to a private operator. In this setting, the procurement function was three or four times removed from the frontline; and the NOM created very problematic institutional barriers and dynamics that jeopardised the necessary alignment between the procurement function and operational needs. NOM created a 'many hands' problem. If a product ordered by an NHS Trust through the NHS Supply Chain platform did not reach the frontline, it would have been difficult to establish whether the problem (and responsibility) lied with the logistics operator, the manufacturer, the CTSP, NHS Supply Chain, or any combination of them. This would also have made fixing the problem rather difficult, not only because of the multiplicity of points of failure, but also because none of those organisations would have wanted to bear the cost. There are indications of such problems in SCCL's statement, for example in relation to training and guidance on procurement best practice, compliance with the applicable legislation, or business continuity policies, in relation to which SCCL indicates that the responsibility for these issues lied with the CTSPs rather than SCCL itself (INQ000492085, paras 4.4 and 4.5, 4.15 and 9.3).

182. Before the pandemic, then, the procurement of goods within the English healthcare sector had been in a long process of increased centralisation and the NOM version of NHS Supply Chain was put in place to act as a central purchasing body for standard goods and equipment. NHS Supply Chain had framework agreements in place for most consumables used by the NHS. However, there were governance and operational issues undermining their functioning and NHS buyers tended to conduct varying amounts of procurement outside those frameworks.

Centralised Procurement for the NHS in Wales

183. The NHS Wales Shared Services Partnership ('Shared Services') is an independent mutual organisation, owned and directed by the NHS in Wales, and hosted by an NHS Trust (Velindre University NHS Trust). Shared Services is tasked with the procurement of healthcare equipment for the Welsh NHS. Its creation reflected a recognition of the need to deliver economies of scale, efficiencies and consistency of quality and processes across all Health Boards and Trusts in Wales (Welsh Government Statement, INQ000506956, para 36). Shared Services provides a complete 'Procurement to Payments' system for all of the Health Boards and Trusts across Wales, which include audit and assurance, counter-fraud, employment, health courier, legal and risk, medical examiner and procurement services (id, para 39). It also provides a supply chain service operated out of three main sites in Bridgend and Newport in South Wales and Denbigh in North Wales. Shared Services puts framework agreements in place to aggregate volume across Wales. It also carries out mini-competitions based on framework agreements put in place by other organisations, such as the Crown

Commercial Service. In 2019/20, Shared Services had a turnover of just under £300mn and reported influenced savings of £129mn for the Welsh NHS (NWSSP, 2022).

184. Shared Services thus managed a separate system for the centralised procurement of healthcare goods that, before the pandemic, operated in parallel to the centralised procurement system for the broader Welsh public sector run by the Welsh Government Commercial Delivery (WGCD) team (formerly the National Procurement Service).

185. Its description in the 'Sell2Wales' procurement portal, indicates that 'NHS Wales Procurement Services is a Division of the NHS Wales Shared Services Partnership. It is THE professional procurement organisation for all NHS Local Health Boards and Trusts within Wales' (Sell2Wales Buyer Id AA0221). Shared Services thus directly provides advice on category management and strategic approaches to procurement. It stresses how its collaboration with local procurement teams across the Welsh NHS "effectively provides a 'one stop shop' for customers and suppliers as we work with 'one voice' across Wales" (NWSSP, undated).

Centralised Procurement for the NHS in Scotland

186. NHS National Services Scotland (NHS NSS) is a non-departmental public body accountable to the Scottish Ministers. It was created as the Common Services Agency under The National Health Service (Functions of the Common Services Agency) (Scotland) Order 1974. NHS NSS has been tasked with providing national strategic support services and expert advice to the Scottish NHS (NHS NSS statement, INQ000521969, para 4). This includes the provision of a 'Once for Scotland Procurement Service' that comprises setting up framework agreements available throughout Scotland and managing the Scottish national distribution centre, as well as hosting one of the four Scottish sectoral centres of procurement expertise (id, paras 21 and 22). NHS NSS can also organise call-offs under framework agreements put in place by other organisations, such as the Crown Commercial Service. NHS NSS' strategic goals before the pandemic explicitly stated that NSS would "focus its efforts on achieving best value in procurement and supply chain services for NHSScotland" (NHS NSS, 2019). In 2019-20, NHS NSS had a budget of £797.8mn and reported £60mn savings in the procurement of goods and services for the Scottish NHS (NHS NSS, 2020).

187. NHS NSS thus managed a separate system for the centralised procurement of healthcare goods that, before the pandemic, operated in parallel to the centralised procurement system for the broader Scottish public sector run by the Scottish Procurement and Property Directorate (INQ000502043, para 7).

188. Before the pandemic, NHS NSS' procurement services were offered to all NHS Scotland Territorial Health Boards and Special Boards. NHS NSS' services were predominantly used by acute settings across the NHS in Scotland (NHS NSS statement, INQ000521969, para 41). NHS NSS' procurement services comprised the following four core functions: strategic sourcing; supply chain management and operational logistics; contract management; and quality assurance (id, para 23). NHS NSS thus directly provided strategic sourcing and category management services, and directly organised procurement activities for medical products, pharmaceuticals and non-medical consumables.

Centralised Procurement for the NHS in Northern Ireland

189. Within the Directorate of Operations of the Northern Irish Health and Social Care Business Services Organisation, Procurement and Logistics Service ('PaLS') provides professional procurement and logistics services to all public Health and Social Care (HSC) organisations in Northern Ireland. It is a recognised Centre of Procurement Expertise established under the Northern Ireland Public Procurement Policy as approved by the Northern Ireland Assembly. PaLS influences approximately £1.4bn of goods and services spend per annum. PaLS puts framework agreements and dynamic purchasing systems in place to manage the procurement of clinical and non-clinical goods and services, ICT goods and services and social care services. PaLS Logistics provides a stock service to all HSC Trusts throughout Northern Ireland. There is limited publicly accessible information, but the suggestion is that these activities are provided directly by PaLS (HSC BSO, undated). Prior to the pandemic, PaLS procured almost the entirety of PPE used in the Northern Irish Health and Social Care sector, and annual expenditure was just under £3mn (NIAO, 2022, para 3).

Centralised Procurement of Healthcare Goods across the Four Nations

190. Before the pandemic, all UK nations had put in place institutional and contractual mechanisms to facilitate the centralisation of healthcare goods procurement, which were separate from parallel mechanisms for non-health procurement centralisation. There was a clearly identifiable institution tasked with providing centralised procurement services in each nation. All of them arranged framework agreements for a wide range of consumables and equipment. All of them were considered specialist healthcare procurement organisations, and some were explicitly labelled as centres of procurement expertise or excellence. All of them managed large budgets and influenced even larger volumes of procurement spend. However, the organisational arrangements of these specialist centralised healthcare procurement institutions had marked differences. NHS Supply Chain in England stands out for relying on a significantly more complex set of outsourcing and contractualised arrangements than its counterparts in Wales, Scotland and Northern Ireland. Points of difference and comparison across these centralised procurement systems will be further discussed later on (paras 343 to 345).

Summary Box 15 – Centralised Procurement of Goods in UK Healthcare Context

- Before the pandemic, all UK nations had created a specialist centralised procurement body for the NHS in its territory: NHS Supply Chain in England, NHS NSS in Scotland, NHS Wales Shared Services Partnership in Wales, and PaLS in Northern Ireland.
- They were all considered specialist bodies, they all arranged frameworks for a wide range of healthcare equipment and consumables, and all of them influenced very large volumes of procurement spend.
- However, their organisational arrangements had marked differences. NHS Supply Chain in England stands out for relying on a significantly more complex set of arrangements than its counterparts in Wales, Scotland and Northern Ireland.

Procurement Preparedness Before the Pandemic

191. A procurement system's approach to crisis risk mitigation can involve elements of contingency planning and preparedness (above para 116). Therefore, it is worth considering the efforts made in the UK before the pandemic, which were later shown to have an impact on the extremely urgent need for some supplies at the start of the pandemic. In 2011 the UK put in place an influenza pandemic preparedness strategy containing elements of readiness planning through stockpiles (the Pandemic Influenza Programme (PIPP) stockpile), amongst other PPE, of facemasks and respirators for health and social care workers but not for general use in the community (Department of Health, 2011, p. 37) (above para 114). The stockpile held stocks ready for use in the first 15 weeks (DHSC PPE Statement, INQ000528391, para 198) of a pandemic estimated to last 26 weeks (SCCL statement, INQ000492085, para 17.7). At the last check prior to the pandemic, in October 2019, the PIPP stockpile was calculated to contain approximately 323 million PPE items, including IIR and FFP3 masks, aprons, gloves, eyewear, gowns and clinical waste bags (DHSC PPE Statement, INQ000528391, para 900).

192. The PIPP stockpile was formally managed by Public Health England (PHE, now UK Health Security Agency, UKHSA) but this was under contract with NHS Supply Chain immediately before the pandemic, which was in turn outsourced to a logistics operator. In its statement (INQ000492085, paras 17.1 and ff), NHS Supply Chain clarified that the origin of the stockpile dated back to 2009 as a result of earlier preparations for a swine flu outbreak. Under those historic arrangements, the stockpile had been controlled and managed by a private operator, DHL, on behalf of the NHS Business Services Authority (NHSBSA), a special health authority and an arm's length body of DHSC. These arrangements continued until 2018, when a new contract was awarded to a different private operator, Movianto. SCCL took over from NHSBSA the contract with Movianto in November 2018. This contract was separate from the one SCCL held with Unipart for the logistics underpinning the NOM (above Graph 1). According to SCCL, "[w]hilst Movianto held stock for each of the devolved nations, neither Movianto nor SCCL had visibility of the total stock pile across all items for the whole of the UK" (INQ000492085, para 17.5). DHSC, however, has stated that "[e]ach section of the stockpile was held separately within the owning nation with logistics also coordinated by the owning nation" (DHSC PPE Statement, INQ000528391, paras 280-281). This raises questions on the way the stockpiles were actually stored, and on how information concerning the PIPP stockpile was structured and shared. It also shows that the control and management of the PIPP stockpile had consistently been under a complex chain of contracts or equivalent relationships, and that this contractual complexity created operational difficulties. This also affected the related procurement of the goods required to replenish the stockpile in case of eg the items running out of date.

193. Among other exercises, in 2016, PHE carried out an assessment of the 2011 preparedness strategy, known as 'Exercise Cygnus' (DHSC, 2020a) (DHSC PPE Statement, INQ000528391, paras 176 ff). From a procurement perspective, 'Exercise Cygnus' did not consider crucial aspects of preparedness in relation to the procurement of PPE and other consumables because it was assumed that, in addition to the strategic PIPP stockpile, arrangements were already in place for procuring these items, including through the NHS Supply Chain (then DHL), from the very early stages of an influenza pandemic outbreak. Therefore, given that assumption, the management of the stockpiles and any subsequent

additional need for (top-up) emergency procurement, and the likelihood that those arrangements could cope with a significant increase in demand, did not feature in the Exercise Cygnus Final Report (DHSC, 2020a, Annexes A and B).

194. The strategy of mixing stockpiles and 'just-in-time' (JIT) framework agreements to top-up the PIPP stockpile after it started being used had been developed by DHSC in collaboration with PHE, NHS Business Services Authority, and expert commercial specialists in SCCL (DHSC PPE Statement, INQ000528391, para 200). It was a central plank of the strategy to manage the PIPP stockpile within budgetary and environmental impact limits (id, para 201), and steps had been taken to assure supplier capacity and resilience on a 6-monthly basis (id, para 203). However, there are conflicting accounts of the importance of JIT frameworks, as SCCL has indicated that just in time contracts were generally not used in relation to the PIPP stockpile (INQ000492085, para 8.3). This conflicts with UKHSA's (then, PHE) account, which stresses the importance of JIT contracts and confirms that they were 'activated' on 31 January 2020 in relation to specific types of PPE (UKHSA M5 Commercial Witness Statement, INQ000521972, para 3.12). Given the potential importance of these arrangements and their centrality to the resilience of the supply chain feeding into the PIPP stockpile, and the chain of subcontracting arrangements related to the management of the PIPP stockpile itself (see para 192 above), in my opinion, Exercise Cygnus was a missed opportunity to clarify and stress test centralised procurement mechanisms and the resilience of the outsourced supply chain.

Procurement During the Pandemic

195. This section provides focused analysis of procurement during the pandemic across the UK.

Legal and Policy Framework, with a Focus on Evolving Guidance

196. The UK did not modify its public procurement legislation during the pandemic. The key principles and legal framework applicable before the pandemic remained stable and applicable throughout the pandemic (see above, paras 98 and ff and 128 to 133). There were, however, significant developments in procurement guidance (above para 112). These included the adoption of the following sets of guidance:

    1. PPN 01/20: Responding to COVID-19 (18 March 2020);
    2. SPPN 04/2020 Coronavirus (COVID-19): procurement regulations for public bodies (20 March 2020);
    3. European Commission's Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (1 April 2020);
    4. SPPN 06/2020 Coronavirus (COVID-19): making best use of procurement resources during COVID-19 outbreak (14 April 2020);
    5. PPN 04/20: Recovery and Transition from COVID-19 (9 June 2020);
    6. SPPN 8/2020 Coronavirus (COVID-19): recovery and transition from COVID-19 (12 June 2020); and
    7. PPN 01/21: Procurement in an Emergency (4 February 2021).

    Other guidance instruments were adopted in relation to supplier relief or the use of procurement cards during the pandemic. These will only be discussed to a limited extent.

197. In some cases, the devolved administrations issued guidance that only contained minor deviations from the centrally-issued PPNs (for example, INQ000081245, as explained in the Welsh Government Statement, INQ000506956, para 89). This reflects a collaborative approach to the development of procurement policy during the pandemic, (id, paras 86 and 359), whereby procurement policy-makers in the devolved nations collaborated with the UK Cabinet Office to develop policy notes that could be adopted by the whole of the UK.

198. There were also instances where circulated technical documents could have been construed as guidance. For example, a buyer's guide on how to identify non-compliant procurement prepared by the Welsh National Procurement Service and entitled 'PPE Buying: A Quick Guide for Procurement' (INQ000198576) could have been construed as technical guidance. Although the Welsh Government is clear in its statement that the document was not intended for NHS Trusts, the NHS Wales Shared Services Partnership or Local Health Boards (INQ000506956, para 101), it is understandable that confusion could arise from the circulation of this type of documentation in a context of fast-moving policy adaptations. It is not possible to cover all potential instances of this type of 'informal' guidance that may have emerged during the pandemic. However, it is worth noting this issue in relation to a potential review of policy-making processes and the required labelling of guidance, in particular if it is explicitly not expected to apply in specific contexts. The rest of this section will solely focus on guidance officially adopted and published as such during the pandemic.

199. The above official guidance can be grouped in three waves. A first wave of initial guidance at the start of the pandemic (between March and April 2020), a second wave of guidance focusing on transitioning from Covid-19 emergency procurement (June 2020), and a third wave of review of the initial guidance following lessons learning exercises (February 2021). Table 6 provides an overview of the key areas of focus in the guidance.

Table 6: Overview of Guidance on Covid-19 Procurement

Focus areas	PPN 01/20	SPPN 04/2020	ECGuidance	SPPN 06/2020	PPN 04/20	SPPN 08/2020	PPN 01/21
Options available to contracting authorities	X	X	X	X			X
Proactive procurement approaches			X	X			X
General emergency procurement authorisation	X	X	X				X
Legal tests for emergency procurement	X	X	X				X
Limits of general authorisation	X	X	X				X
Risks of emergency procurement							X
Transition out of emergency procurement	X	X	X	X	X	X	X
Value for money	X	X	X				X
Record-keeping	X	X	X				X
Transparency duties	X	X					X
Conflicts of interest							X

First Wave: Initial Guidance on Covid-19 Emergency Procurement

200. Within a couple of weeks in the relatively early stages of the pandemic, the Cabinet Office, the Scottish Procurement and Property Directorate, and the European Commission issued guidance for contracting authorities tasked with implementing emergency procurement.

201. **PPN 01/20 on "Responding to COVID-19"** was issued by the Cabinet Office on 18 March 2020. The PPN was applicable to all contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector (para 2). PPN 01/20 was explicitly adopted by the Welsh Government. SPPN 04/2020 implicitly endorsed it by replicating its content (below para 207).

202. PPN 01/20 foresaw a range of options that contracting authorities could consider, including:

- "direct award due to extreme urgency (regulation 32(2)(c) [PCR2015]);

- direct award due to absence of competition or protection of exclusive rights;
- call off from an existing framework agreement or dynamic purchasing system[;]
- call for competition using a standard procedure with accelerated timescales;
- extending or modifying a contract during its term." (para 6).

203. In relation to choosing between these options, the guidance made it clear to contracting authorities that they had to keep proper records of decisions and actions on individual contracts, and that the direct award of contracts required publishing contract award notices (p. 3). The obligation to keep adequate written justification was reiterated throughout PPN 01/20, regarding different approaches contracting authorities could follow to secure urgent supplies.

204. Although PPN 01/20 recognised that the response to the pandemic would need to be tailored to the nature, scale and location of the threat in the UK, it clearly recognised that "it [was then] already clear that in these exceptional circumstances, authorities may need to procure goods, services and works with extreme urgency. Authorities are permitted to do this using regulation 32(2)(c) under the Public Contract Regulations 2015" (para 1). The guidance on the **use of direct awards under negotiated procedures without prior publication** was thus salient in PPN 01/20, and reiterated that it was conditional on meeting the four cumulative stringent conditions foreseen in applicable legislation (see above paras 109 and 163 to 166). The guidance suggested that most of the conditions would be easily met, as it stated that:

- Covid-19 was so novel that contracting authorities could not have predicted it (unforeseeability);
- the need "to respond to the Covid-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc" sufficed to demonstrate a genuine emergency (extreme emergency); and
- contracting authorities had not done anything to contribute to the emergency, so long as they were not "delaying or failing to do something in time" (no attribution).

205. However, PPN 01/20 also stressed the need to demonstrate that there was no time for accelerated procurement or for the placement of a call-off under an existing 'commercial vehicle', and that contracting authorities should limit requirements to only what was absolutely necessary both in terms of what they were procuring and length of emergency contracts (strict necessity). The guidance was also clear that contracting authorities had to "carry out a separate assessment of the tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable now, may not do so in future". It explicitly reiterated the need to keep written records of this (p.4).

206. PPN 01/20 also stressed that contracting authorities had to continue trying to achieve value for money, and use good commercial judgement during any direct award. It stressed the need for explicit approvals for abnormally high prices by an appropriate commercial director. Contracting authorities were also encouraged to consider contractual mechanisms to retain the ability to secure pricing reductions through the life of the contract, and to keep a record and reasoning for future auditing where that was not possible (p. 4).

207. **SPPN 04/2020 on "Coronavirus (COVID-19): procurement regulations for public bodies"** was issued by the Scottish Procurement and Property Directorate two days later, on 20 March 2020. SPPN 04/2020 covered very similar issues as those addressed in PPN 01/20. It was only applicable in relation to Scottish devolved procurement.

208. SPPN 04/2020 converged with PPN 01/20 in stressing contracting authorities record-keeping and transparency duties (para 10). SPPN 04/2020's advice on direct awards, including the relevant tests, limits of the authorisation and the importance to continue to achieve value for money (paras 23 to 27 and Annex E) was also entirely convergent with, and on most issues identical to, the advice contained in PPN 01/20.

209. However, SPPN 04/2020 also deviated from PPN 01/20 in some respects, such as by focusing on the flexibility afforded to the award of contracts below relevant value thresholds, or in raising some issues not covered in PPN 01/20, such as the possibility that overpayments constituted unlawful state aid (para 9). None of these issues seem to be particularly relevant in relation to the focus of this report.

210. The **European Commission's Guidance** on using the public procurement framework in the emergency situation related to the Covid-19 crisis was published on 1 April 2020 (the 'EC Guidance'). It clearly conveyed the message that procurement professionals should do all they could to obtain the urgently required supplies, as well as aim to transition to a more sustainable (and planned, and hopefully less expensive and more innovative) approach in the medium term. The EC Guidance explained the options and flexibilities available under the EU public procurement framework for the purchase of the supplies, services, and works needed to address the crisis (p. 1). It advised public buyers to pursue a multi-stage strategy that would follow different approaches to short-term needs, suggesting that they could be satisfied through emergency procurement, and needs in the medium term, which should be addressed through accelerated procurement. The EC Guidance also encouraged joint procurement and taking advantage of the European Commission's joint procurement initiatives (p. 3) (although it should be noted that the UK Government decided not to participate; above para 22).

211. The EC Guidance took the same extremely flexible and pragmatic approach as PPN 01/20. The EC Guidance stressed that it focused "especially on procurements in cases of extreme urgency, which enable public buyers to buy within a matter of days, even hours, if necessary. Precisely for a situation such as the current COVID-19 crisis which presents an extreme and unforeseeable urgency, the EU directives do not contain procedural constraints" (p. 2).

212. The EC Guidance confirmed the view that the negotiated procedure without prior publication did not require any specific minimum level of competition between potential contractors and that contracting authorities could negotiate directly with potential contractors, without the need to comply with prior publication requirements, time limits, a minimum number of candidates to be consulted, or other procedural requirements. In practice, contracting authorities could act as quickly as was "technically/physically feasible – and the procedure may constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery" (p. 2).

213. The EC Guidance also endorsed 'active buying' techniques, which would have provided reassurance to contracting authorities taking abnormal steps to try and secure emergency

supplies of PPE, ventilators and any other needed equipment and consumables. It explicitly mentioned that it was permissible to contact potential contractors by phone, e-mail or in person, hire agents with contacts in the market, send representatives directly to the countries that had the necessary stocks and could ensure immediate delivery, or contact potential suppliers to agree to increases, the start or renewal of production. It stressed that contracting authorities were fully empowered to engage with the market and in matchmaking activities, and that "[t]here are various ways to interact with the market to stimulate the supply and for the medium term needs, the application of urgent procedures could prove a more reliable means of getting better value for money and wider access to available supplies." (p. 2).

214. It is worth stressing that the EC Guidance offered specific analysis of the conditions for using the **negotiated procedure without publication on grounds of extreme emergency**. It built on the existing CJEU case law (above paras 164 and 165) and offered useful interpretation on the main conditions under the relevant legal tests: unforeseeability, impossibility of an alternative approach, and causal link or direct relation between the extremely urgent need and the scope of the procurement.

215. The EC Guidance took a similar approach to that of PPN 01/20 also stated that the situation created by Covid-19 had to be considered unforeseeable for any contracting authority. The Guidance stressed that, while it could not be doubted that the immediate needs of hospitals and health institutions had to be met with all possible speed, the extent to which it would be impossible to respect even the very short deadlines of the accelerated open or restricted procedure would have to be assessed on a case-by-case basis. However, the Guidance stated that, at that initial stage of the pandemic, this was likely in view of the significantly increased short-term needs. On this point, the EC Guidance was thus also aligned with PPN 01/20. The EC Guidance provided additional clarification by stating that invoking extreme urgency implied that the procurement need had to be satisfied without delay, and that the exception could not be invoked to award contracts that took longer than they would have taken if accelerated procedures had been used. The Guidance also stressed that while negotiated procedures without prior publication could offer the possibility to meet immediate needs, they were only meant to cover the gap until more stable solutions could be found.

216. The EC Guidance also stressed the obligation for contracting authorities to keep records of the evaluation of the conditions for using a negotiated procedure without prior publication, and to justify their choice of such a procedure in an individual report.

217. **SPPN 06/2020 on "Coronavirus (COVID-19): making best use of procurement resources during COVID-19 outbreak"** was issued by the Scottish Procurement and Property Directorate on 14 April 2020. It was only applicable in relation to Scottish devolved procurement. This SPPN seemed to have the triple purpose of:

- providing practical examples of how activity might be prioritised by contracting authorities including taking account of then current factors and evolving supplier capacity and capability as the public sector moved from an initial response to the pandemic and into recovery;
- emphasising some aspects of the EC Guidance discussed above (paras 210 ff); and
- ensuring that contracting authorities' staff and suppliers were using their resources as efficiently as possible and making best use possible of the procurement procedures available.

218. SPPN 06/2020 did not alter the guidance on the use of direct awards under negotiated procedures without prior publication, but it did highlight alternative ways of utilising procurement flexibility through, among other, "appropriate national and sectoral framework agreements and dynamic purchasing systems" (para 10).

219. Overall, the first wave of initial guidance at the start of the pandemic was convergent and provided actionable guidance on the general availability of and limits applicable to the use of direct awards as an initial response to the emergency. UK guidance in PPN 01/20 and SPPN 4/2020 was also particularly clear on record-keeping and transparency obligations.

Second Wave: Guidance on Transitioning from Covid-19 Emergency Procurement

220. A second wave of guidance was published in June 2020 with a focus on transitioning away from Covid-19 emergency procurement. This included:

- PPN 04/20: Recovery and Transition from COVID-19 (9 June 2020); and
- SPPN 08/2020 Coronavirus (COVID-19): recovery and transition from COVID-19 (12 June 2020).

221. Both PPN 04/20 and SPPN 08/2020 were primarily concerned with the review in the mid- and longer-term of supplier relief measures previously covered, respectively, by PPN 02/20 ("supplier relief due to coronavirus (COVID-19)", 20 March 2020) and SPPN 05/2020 ("Coronavirus (COVID-19): supplier relief", 26 March 2020). This set of guidance largely related to supplier relief due to coronavirus and therefore did not address issues of direct relevance to this report. However, some of the guidance or at least its principles, in this 'second wave' could have been helpful in the context of the continued implementation of emergency procurement. It is from this limited perspective that this guidance is discussed here.

222. **PPN 04/20 on "Recovery and Transition from COVID-19"** was published by the Cabinet Office on 9 June 2020. It was meant to be effective from 1 July to 31 October 2020 (para 5). It applied to all contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector, but explicitly excluded the devolved administrations (para 3.) However, PPN 04/20 and PPN 02/20 to which it refers, were explicitly adopted by the Welsh Government. For discussion of the Scottish approach, see below para 227.

223. PPN 04/20 provided guidance on the review of arrangements put in place at the start of the pandemic once it became clear that the socio-economic disruption would have long lasting effects. The guidance included recommendations for contracting authorities to:

- Review their contract portfolio in collaboration with suppliers "openly and pragmatically, during this transition to ensure contracts are still relevant and sustainable and deliver value for money over the medium to long term" (para 2); and
- "Work in partnership with their suppliers and develop transition plans to exit from" emergency arrangements put in place at the start of the pandemic (para 2).

224. In more detail, PPN 04/20 stressed that contracting authorities and suppliers would need to work collaboratively to plan an eventual exit from any relief and transition to a new,

sustainable, operating model and to ensure that contracts were still sustainable (para 8). Where that was not the case, the guidance stressed that the parties would need to discuss contract variation or termination, and that contracting authorities that viewed contracts as no longer relevant or viable should pursue termination based on the existing contractual remedies (para 9 and p. 6).

225. PPN 04/20 set a high standard of transparency and collaboration between contracting authorities and suppliers. It stressed that suppliers in receipt of public funds had to agree to operate on an 'open book' basis and make available to contracting authorities any requested data. Contracting authorities were advised to keep records of decisions and agreements, and to ensure suppliers maintained records to enable future reconciliation if necessary (p. 5). The guidance also stressed that suppliers should not expect to make profits on undelivered elements of a contract and that all suppliers were expected to operate with integrity. It stressed that suppliers found to be taking undue advantage, or failing in their duty to act transparently and with integrity, would face action to recover payments made. It reiterated the need to keep a comprehensive record of all decisions, reasoning behind key decisions and actions taken to support transparency and future scrutiny. (p. 5).

226. PPN 04/20 also referred to the earlier **non-statutory guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency** issued by Cabinet Office on 7 May 2020, stressing that responsible contractual behaviour "includes being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other parties, the availability of financial resources, the protection of public health and the national interest." (p. 6).

227. **SPPN 08/2020 on "Coronavirus (COVID-19): recovery and transition from COVID-19"** was issued by the Scottish Procurement and Property Directorate on 12 June 2020. It was only applicable in relation to Scottish devolved procurement. It largely mirrored the content of PPN 04/20 and included explicit guidance for contracting authorities, including recommending that "Public bodies should take steps now to review their contract portfolio [...], taking into account strategic and reprioritisation needs" (para 5) and considerations on transition and exit planning (para 6), or transparency and open dialogue. It highlighted the importance of maintaining open and transparent dialogue on the sustainability and viability of existing contracts (para 14).

228. While PPN 04/20 and SPPN 08/2020 referred in particular to supplier relief measures and compliance with pre-existing contracts impacted by the pandemic, there is no reason why the same principles of transparency, collaboration, or active reconsideration of existing contracts, exit planning and potential termination of arrangements that show themselves unnecessary or inadequate could not, or ought not, be applied to contracts awarded in the phase of first emergency response to the pandemic. Overall, the guidance that emerged in this second wave contained important principles and approaches for how emergency procurement should operate, as well as for how to engage in transition and exit planning with a view to a return to more competitive procurement.

229. **PPN 01/21 on "Procurement in an Emergency"** was issued by the Cabinet Office on 4 February 2021, and was applicable to all contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector (para 2). It was explicitly adopted by the Welsh Government.

230. PPN 01/21 was adopted to implement some of the recommendations arising from the National Audit Office's Investigation into government procurement during the COVID-19 pandemic. NAO had recommended issuing further guidance on the risks associated to the direct award of emergency contracts, building on the lessons learned during the first stages of the pandemic. NAO advised paying particular attention to the levels of transparency and documentation required for key decisions, such as choice of procurement route. NAO also advised encouraging greater use of competitive procedures in extremely urgent procurements.

231. PPN 01/21 built on the guidance in PPN 01/20 and included further information on the commercial risks inherent in direct awards without competition (para 1). PPN 01/21 highlighted how "there are inherent commercial risks which authorities should take into account" in making direct awards, and "manage these in the context of the broader risk of not being able to secure the required goods or services in a timely manner. Potential risks include:

- poor value for money such as abnormally high pricing;
- unequal treatment of suppliers in the procurement process;
- poor practice due to procuring at speed, such as retrospective contract awards or retrospective due diligence checks;
- lack of documentation around key procurement decisions including how conflicts of interest are identified and managed." (para 8).

232. PPN 01/21 reiterated the advice in PPN 01/20 that contracting authorities should use contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract, or document why it is not possible (p. 3).

233. PPN 01/21 also reordered the options that contracting authorities can consider when facing urgency, and implicitly de-emphasised reliance on direct awards. Table 7 compares the order in which PPN 01/20 and PPN 01/21 presented the options available to contracting authorities.

Table 7: Comparison of options available under PPN 01/20 and PPN 01/21

PPN 01/20 (para 6, numbering added)	PPN 01/21 (para 6, numbering added)
1. direct award due to extreme urgency (regulation 32(2)(c) [PCR2015]); 2. direct award due to absence of competition or protection of exclusive rights; 3. call off from an existing framework agreement or dynamic purchasing system[;] 4. call for competition using a standard procedure with accelerated timescales; 5. extending or modifying a contract during its term.	1. call off from an existing framework agreement or dynamic purchasing system; 2. call for competition using a standard procedure with accelerated timescales; 3. extending or modifying a contract during its term; 4. direct award due to absence of competition or protection of exclusive rights; [and] **5. direct award due to extreme urgency under regulation 32(2)(c) [PCR2015].**

234. Table 7 shows an implicit de-emphasis of direct awards. While PPN 01/20 seemed to have ordered the options available to contracting authorities by reference to the (presumed) speed with which contracts could be awarded, from fastest to slowest,[9] PPN 01/21 ordered them by reference to how much they deviate from procurement in 'ordinary times' and, implicitly, by the level of risk they carry. In relation to (de-prioritised) direct awards, PPN 01/21 stressed that "Contracting authorities should consider whether these tests [allowing for the use of negotiated procedures without prior publication] are met prior to making a contract award" (p. 7). It also reiterated that "Where required contracting authorities should publish a contract award notice on the Find a Tender service (FTS) [...] This includes emergency procurements under regulation 32(2)(c) [PCR2015]." (para 7).

235. PPN 01/21 also included two major developments in guidance compared to PPN 01/20. These related to record-keeping and the use of limited competition wherever possible.

236. On **record-keeping**, PPN 01/21 reiterated that contracting authorities had to keep proper records of their decisions, document the progress of all procurement procedures, and keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, including in emergency procurements (p. 4, also para 9). PPN 01/21 also included additional guidance on record-keeping by stressing that it should cover documentation on any additional processes or criteria used in selecting suppliers for direct award of contracts, and that contracting authorities needed to ensure that the criteria were relevant, documented and applied consistently. The guidance stressed the importance of using evidence-based criteria to mitigate the risk of any perception that a supplier was being treated more favourably than others, and that records should also be kept to avoid perceptions of unfair treatment (p. 4).

237. Although PPN 01/21 did not explicitly refer to the obligation to prevent conflicts of interest under reg.24 PCR2015, it stressed the need to have effective record-keeping related to the **prevention and mitigation of conflicts of interest** and, in particular, documentation on how contracting authorities had considered and managed potential conflicts of interest in the procurement process, for example by reference to the Ministerial Code and Civil Service Management Code. The guidance highlighted that the goal was to ensure award decisions were being made on the basis of relevant considerations and not personal recommendations.

[9] However, this does not explain placing contract modification in the last place, as a contract modification can be achieved as quickly as a direct award, if not faster.

This had to be done through proactive steps to identify conflicts of interest upfront and action to remove anyone with a conflict of interest from the decision-making process (p. 4).

238. On **use of competition wherever possible**, PPN 01/21 stressed that even if it is not a legal requirement, "contracting authorities should consider some form of advertisement, running an informal competition and/or undertaking due diligence on the supplier market before making a direct award. This approach can have the benefit of allowing the authority to hold discussions with more than one supplier and potentially secure better value for money." (para 10).

239. Overall, PPN 01/21 provided clear additional guidance on some of the issues that had proven problematic in the emergency procurement carried out during the first stages of the pandemic. However, it should be stressed that it shared the general approach and most basic elements with PPN 01/20, and that the revised guidance only provided incremental clarifications.

Use of Competition Where Possible

240. PPN 01/21 indicated that contracting authorities should consider some form of advertising and informal competition even if this is not required by the rules on emergency procurement authorising the direct award of extremely urgent contracts. However, this position is more permissive and, thus, at odds with the one taken by O'Farrell J in *R (Good Law Project and EveryDoctor) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC) (known as the 'Pestfix' PPE challenge).

241. This case concerned, among other things, the interpretation of the authorisation to use a negotiated procedure without prior publication on grounds of extreme urgency, and its limits, under reg.32(2)(c) and 32(4) PCR 2015. In her judgment, O'Farrell J decided that:

241.1 in its early stages, the pandemic was in and of itself sufficient justification to resort to the direct award of public contracts (at [329]–[331]);

241.2 under certain circumstances, extremely urgent procurement is still bound to respect equal treatment as "an irreducible minimum standard of objective fairness that applies to such procurements, even in the absence of open competition" (at [334]);

241.3. reg.18 PCR2015 requires contracting authorities to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner; and

241.4. "Regulation 32 does not expressly disapply the obligations set out in regulation 18. […] the question that arises is whether there is any implicit exclusion, or modification, of this provision arising from operation of the negotiated procedure without notice" (at [340]).

242. Within this framework, and taking into account the peculiar circumstances of the case —that is, the fact that the UK Government operated a 'High Priority Lane' (also referred to as 'VIP Lane'), whereby offers from suppliers who had been referred by Ministers, Members of Parliament and senior officials were prioritised (on which see paras 277 to 295 below)— O'Farrell J established that "It is reasonably clear that […] where the contracting authority

considers bids from more than one economic operator, whether at the same or at different times, there is no obvious rationale for disregarding the principle of equal treatment in terms of the criteria used to decide which bidders should be awarded a contract. Dispensing with a competition does not justify arbitrary or unfair selection criteria where more than one economic operator could satisfy the demand" (at [341]).

243. The implications of the judgment in terms of minimum requirements for the comparison of tenders or the irreducible minimum standard of objective fairness in the direct award of contracts under extreme urgency are not entirely clear. In my view, this decision is incorrect on points of law and it would, in any case, be wrong to extrapolate that there are minimum obligations to use competition where reg.32(2)(c) PCR2015 applies (see paras 266 to 269).

Procurement Oversight During the Pandemic

244. To the best of my knowledge, the UK did not implement any changes to procurement oversight institutions and mechanisms during the pandemic. The mechanisms and procedures in place before the pandemic (above para 167 and 168) remained in principle available, although their effectiveness was significantly further reduced due to the limited transparency given to direct awards, and their volume.

Summary Box 16 – Legal and Policy Framework, with a Focus on Evolving Guidance

- **First wave guidance** on Covid-19 procurement focused on emergency procurement.
- UK and EU guidance provided a general authorisation for emergency procurement and the direct award of contracts, although EU guidance was clearer than the UK's on the need to distinguish between short- and medium-term needs.
- First wave guidance placed significant emphasis on the legal tests and limits of the authorisation for emergency procurement, including the need to limit direct awards to what was strictly necessary.
- First wave guidance placed emphasis on record-keeping and transparency obligations, as well as on the need to continue to achieve value for money to the extent possible.
- **Second wave guidance** focused on collaborative and transparent approaches to be followed by contracting authorities and contractors in reassessing the viability of existing contractual arrangements. It stressed the need for integrity and responsibility.
- There is no reason why principles of responsible behaviour, transparency, collaboration, or active reconsideration of existing contracts, exit planning and potential termination of arrangements that show themselves unnecessary or inadequate could not, or ought not, be applied to contracts awarded in the phase of first emergency response to the pandemic.
- In a **third wave**, PPN 01/21 revised the guidance issued at the beginning of the pandemic.
- It implemented recommendations to clarify the risks involved in emergency procurement and the extent of record-keeping and transparency obligations.

- It also de-prioritised direct awards, provided additional guidance on conflicts of interest and recommended using competition where possible.
- The encouragement to use competition where possible in PPN 01/21 falls short of the demanding standards set by the High Court in the 'Pestfix' PPE challenge. However, that authority is contested.
- The UK did not implement any changes to procurement oversight institutions and mechanisms during the pandemic.

Applicability of Key Requirements

245. The applicability of key requirements to procurement carried out during the pandemic has been controversial and, in some cases, led to litigation—for example in relation to the duties of proactive transparency. Where requirements were not explicitly or sufficiently covered in the new guidance discussed above, their applicability could generate some doubts. Similarly, where requirements were relaxed rather than disapplied, the extent to which they still applied can also generate doubts. This sub-section clarifies the applicability of such key requirements.

Value for Money Requirements and the Prevention of Maladministration

246. PPN 01/20 explicitly stressed that "It is important that contracting authorities continue to achieve value for money and use good commercial judgement during any direct award. Whilst prices may be higher than would be expected in a regular market, any abnormally high pricing should be approved by the appropriate commercial director. Additionally, contracting authorities are encouraged to consider contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract. Where this is not possible, it is recommended a log should be kept and reasoning provided for future auditing." (p. 4). This was also reflected in SPPN 04/20, which specified that "Whilst prices may be higher than would be expected in a regular market, public bodies should exercise caution if they consider any prices to be abnormally high and may wish to have internal processes in place to review any such pricing" (para 27). The requirement to achieve value for money was further clarified in PPN 01/21, which explicitly flagged to contracting authorities engaging in direct awards that "there are inherent commercial risks which authorities should take into account" (para 5), and that these include "poor value for money such as abnormally high pricing" (para 8).

247. In my opinion, it is uncontroversial that contracting authorities carrying out emergency procurement were under a requirement to secure value for money to the extent permitted by market conditions, and to take active steps to avoid or mitigate abnormally high prices as far as possible. This was made clear in guidance from the very early stages of the pandemic. This is also aligned with broader regulatory frameworks, including the then applicable *Managing Public Money* (HM Treasury 2012).

248. In my opinion, the requirement for contracting authorities to continue to achieve value for money and use good commercial judgement in carrying out emergency procurement also implied a broader requirement to prevent maladministration by focusing not only on each contract as a discrete transaction, but also keeping a broader view on the stock of contracts

and indicatively secured supplies as they evolved. This would be implicit, for example, in the analysis and authorisation of contracts with abnormally high prices, which would require the authorising officer to seek to minimise the impact of such high prices by prioritising the authorisation of contracts that deviated the least from market conditions prior to the pandemic, or those contracts that embedded mechanisms to ensure that contracting authorities had the ability to secure pricing reductions through the life of the contract. Adequately managing risks of poor value for money and the related maladministration thus required taking into account the overall contractual position arising from emergency procurement.

249. Contracting authorities also had a duty to consider risks of maladministration and poor value for money related to potential excessive (aggregate) purchasing, including the costs of keeping the acquired stocks and potential costs of disposal of excessive purchases. This duty, however, would have to a large extent been overridden by the more explicit duty to minimise emergency procurement to what was strictly necessary to cover immediate needs and to transition to more competitive—and thus planned and adequately considered—procurement exercises for needs beyond those immediately arising from the onset of the emergency. The requirement to minimise recourse to direct awards and other forms of emergency procurement thus embeds a safeguard against maladministration in that regard. However, it is a weak safeguard to the extent that contracting authorities can exceed the limits of the legal authorisation for the direct award of contracts because they are subject to self-assessment (see above, paras 167 and 168; this is further discussed below at paras 388 to 390).

Requirements to Ensure Quality and Suitability

250. The guidance discussed above did not explicitly refer to the contracting authority's obligation to ensure the quality and suitability of supplies procured under extreme urgency. However, this is a core requirement of the key principle of effectiveness, which requires contracting authorities to obtain the goods and supplies they need in adequate conditions, including in terms of quality and timely availability (above para 45). Given that the legislative framework applicable to emergency procurement prioritises effectiveness over other key principles (above paras 43 and 80), ensuring the quality, suitability, and availability of supplies should be the primary focus for contracting authorities and they should deploy their utmost diligence in trying to ensure quality and suitability to the maximum extent under the circumstances.

251. This was implicitly reflected in the EC Guidance, which stressed, in relation to the possibility to engage in direct awards, that "In practice, this means that authorities can act as quickly as is technically/physically feasible – and the procedure may constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery" (p. 2, emphasis added). It is in my opinion clear that the only constraint referred to is the availability of adequate and suitable supplies that can be delivered within the timeframe required to satisfy the immediate and extremely urgent needs that the contracting authority is seeking to cover through the direct award of the contract. This is in line with PPN 01/21, which stressed that the need to achieve value for money needed to be managed "in the context of the broader risk of not being able to secure the required goods or services in a timely manner." (p. 3). This stresses that the primary focus had to be kept on securing

adequate supplies in a timely manner, which implicitly required ensuring the quality and suitability of those supplies.

252. More generally, contracting authorities' obligation to ensure quality and suitability of the supplies they receive is also implicit in the applicable legislation. It is such a basic element of due diligence that it hardly requires being made explicit. This duty also relates to the obligation for contracting authorities to act in accordance with the principles of equal treatment and proportionality. A contracting authority that did not ensure the quality and suitability of procured supplies would be in breach of its duties. In ordinary times, contracting authorities need to take steps to ensure quality and suitability as part of the assessment of the tenders they receive, and in particular in relation to their compliance with technical specifications and award criteria. In emergency situations, it may not be possible to carry out detailed assessments (such as, for example, through the examination of certificates or samples of the goods to be supplied) before awarding the contract, and contracting authorities may need to accept risks by delaying quality and conformity assessments. The undesirability of this approach, which can be a necessity in some cases, was highlighted as a key risk in PPN 01/21, by stressing that value for money can be at risk when contracting authorities engage in "poor practice due to procuring at speed, such as retrospective contract awards or retrospective due diligence checks" (p. 3) and the same applies to technical verification. In my opinion, even where justified, the practical impossibility of carrying out quality and suitability checks before entering the contract does not deactivate, but rather reinforces, the requirement for quality and suitability to be assessed at the earliest opportunity and, at the latest, at the point of reception of the supplies.

253. Accepting faulty or unsuitable supplies and/or not exercising contractual remedies arising from such poor or non-performance would be a breach of the duties incumbent upon the contracting authority and could amount to an illegal contractual modification due to the unjustified change in the economic balance of the contract in favour of the contractor (reg.72(8)(c) PCR2015, reg.72(8)(c) PCSR2015).

254. Moreover, it should be stressed that the importance of quality and suitability assurance at this stage is not limited to ensuring the propriety and legality of the awarded contracts and the adequate expenditure of public funds, but it is also fundamental to modulating the intensity of the response to the emergency. The receipt of faulty or unsuitable supplies negates the effectiveness of the (initial) emergency procurement and keeps the needs of the contracting authority unsatisfied, potentially triggering the need for further emergency procurement to cover the gap left by the faulty or unsuitable supply received. Given that contracting authorities are under a constant duty to check that the grounds to resort to emergency procurement apply in relation to each of the procurement exercises they engage in, this implies a duty to check the quality and suitability of supplies already received as part of the ongoing evaluation of the extent to which there are remaining extremely urgent needs.

Requirements to Ensure Contractual Performance by Suppliers

255. Along the same lines as in relation to quality and suitability assurance, contracting authorities' obligations to ensure contractual compliance by suppliers are largely implicit in existing legislation and in the guidance issued during the pandemic. In my opinion, it is uncontroversial that contracting authorities have a duty to ensure contractual performance and, where it falls short, to use the contractual remedies at their disposal. Not doing so can

imply an illegal contract modification. It can also be in breach of broader duties, including those related to the elimination of fraud. Moreover, as mentioned in relation to the 'second wave' of guidance, contracting authorities were reminded of their duties to carry out ongoing assessments of performance by suppliers and to engage, as appropriate, in contract review, renegotiation and eventual termination (above paras 220 and ff). And there is no reason why the same principles of responsible behaviour, transparency, collaboration, or active reconsideration of existing contracts, exit planning and potential termination of arrangements that show themselves unnecessary or inadequate could not, or ought not, be applied to contracts awarded in the phase of first emergency response to the pandemic.

Steps to Eliminate Fraud and the Prevalence of Fraud

256. Procurement regulation does not explicitly refer to the need to take steps in relation to the prevention of fraud, other than through compliance with applicable requirements—which are geared towards embedding checks and balances that can minimise the risk of fraud. Compliance with procurement processes and guidance has a clear effect in reducing the risk of fraud (see e.g. NHSCFA, 2022b). Moreover, procurement regulation also does not alter obligations incumbent upon contracting authorities arising from other regulatory frameworks and, in particular, those concerning the administration of public funds. However, my expertise does not extend to those requirements in detail.

Requirements to Guard Against Conflicts of Interest

257. The record-keeping duties applicable to the award of all public contracts, including those awarded under extreme urgency, extend to the requirement to document "where applicable, conflicts of interests detected and subsequent measures taken" (Article 84(1)(i) PPD, reg.84(1)(i) PCR2015; reg.83(1)(j) PCSR2015 PCSR), which presupposes compliance with conflict of interest checks in accordance with the general rules (Article 24 PPD, reg.24 PCR2015; reg.25 PCSR2015). There was also more detailed guidance issued before the pandemic on how to approach risks of conflict of interest and PPN 01/19 also stressed that any measures taken in relation to a conflict of interest "should be documented in a procurement report, as required by Regulation 84(1)(i)" (Annex A, para 24). In my opinion, it is uncontroversial that the standard requirements to guard against conflicts of interest and to document any measures taken were applicable without modification to emergency procurement carried out during the pandemic. Those standard requirements would include proactively undertaking and documenting conflict of interest checks specific to the procurement at hand, including fresh disclosures of interests (or confirmation of previous disclosures) by all individuals involved in the procurement, by all offerors (with specific information on their relationship with any referrers and PEPs), and by any relevant third parties (eg in case of intermediaries or sub-contractors). These disclosures should lead to an assessment of whether any actual, potential or perceived conflict of interest required mitigation measures (eg such as a change of role or responsibilities by the conflicted member of staff of the contracting authority or third party acting on its behalf) or, as a last resort, the exclusion of the conflicted offeror. This had to be done on the basis of a low threshold for the identification of a conflict of interest, as reg.24 PCR2015 and reg.25 PCSR2015 explicitly refer to "any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure"

(above para 148). This low threshold approach was clear in PPN 01/19 and the documents to which it referred for further illustration. It is worth stressing that this contrasts with the understanding shown by the Government Chief Commercial Officer, which seeks to make a distinction between potential and actual conflicts based on the time at which they are knowable or susceptible of declaration (GCCO Fourth Statement, INQ000535017, paras 74 and 75). In any case, as GCCO stresses, the baseline approach must be that, once a conflict becomes apparent, they must be declared and, "once declared, would normally be resolved by taking such people out of the decision-making team" (id, para 75). These disclosures and any subsequent measures had to be recorded and kept as part of the individual report (Article 84(1)(i) PPD, reg.84(1)(i) PCR2015; reg.83(1)(j) PCSR2015 PCSR). While the reports themselves did not have to be proactively published, they would potentially be susceptible of disclosure under general freedom of information rules.

258. PPN 01/21 implicitly confirmed this by stressing, by way of incremental clarification on contracting authorities' record-keeping duties, that they "should maintain documentation on how they have considered and managed potential conflicts of interest in the procurement process. Steps to manage actual and perceived conflicts of interest, for example those set out in the Ministerial Code and Civil Service Management Code, or other actions taken by awarding bodies should be documented. Particular attention should be taken to ensure award decisions are being made on the basis of relevant considerations and not personal recommendations. Proactive steps should be taken to identify conflicts of interest upfront and action should be taken to remove anyone with a conflict of interest from the decision-making process and to validate those decisions by reference to the relevant considerations." (p. 4).

Record-keeping and Transparency Requirements

259. It was clearly stressed in guidance, both in the first and third waves, that contracting authorities engaging in emergency procurement are subject to clear record-keeping and transparency obligations. The obligations arise from standard and well understood requirements under the applicable legislation. Under both the PCR2015 and the PCSR2015, contracting authorities are tasked with self-assessing and documenting the applicability of the grounds for extremely urgent procurement, in which case the written report needs to include an explicit account of the circumstances which justify the use of this procedure (reg.84(1)(f) PCR2015, reg.83(1)(g) PCSR2015), and this justification has to be proactively disclosed in the relevant contract award notice (reg.50(2)(a) PCR2015, reg.51(2)(a) PCSR2015). In my opinion, there is no question that contracting authorities were bound by these formal requirements of record-keeping and proactive transparency throughout the pandemic. However, it should be noted that, in relation to record-keeping not related to the specific details of contract notices, there is judicial authority willing to show some deference in relation to poor or incomplete record-keeping given the context in which contracts were being awarded (*Good Law Project Limited v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) at [141])).

260. PPN 01/20 clearly reminded contracting authorities that "You should ensure you keep proper records of decisions and actions on individual contracts, as this could mitigate against the risk of a successful legal challenge. If you make a direct award, you should publish a contract award notice (regulation 50 [PCR2015]) within 30 days of awarding the contract" (p. 3). This was mirrored in SPPN 04/2020 (para 10).

261. Along the same lines, PPN 01/21 further stressed that "Contracting authorities should ensure they keep proper records of decisions. This could assist in demonstrating sound decision-making in the event of a future challenge. Regulation 84 [PCR2015] states that authorities should document the progress of all procurement procedures, ensuring that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure. This includes emergency procurements under regulation 32(2)(c) [PCR2015]." (p. 4, see also para 9). It also reiterated that "Where required contracting authorities should publish a contract award notice on the Find a Tender service (FTS) [...] This includes emergency procurements under regulation 32(2)(c) [PCR2015]." (para 7).

262. Although it was litigated, it is also clear that contracting authorities were under an obligation to publish non-confidential versions of the contracts awarded under emergency procurement, in accordance with existing guidance. PPN 01/17 stated that "Following any permitted redactions as set out in this guidance, it is advised that contracts are published with the award notice within 20 days following the end of the standstill period, where applicable. Where the standstill period applies, the contract should not be published before the standstill period expires. Where no standstill period applies, it is advised that departments publish contracts within 20 days from the award of the contract" (CCS, 2017, para 9.1). This implied that contracting authorities were required to go further than the minimal proactive transparency mandated by the applicable rules on record-keeping and the publication of notices, in two main respects. First, that they should publish details of contract awards much more quickly than the applicable rules would require, as the guidance shortened the publication period to 20 days, down from the 30 days foreseen in relation to the contract award notice. Second, that contracting authorities should publish more detailed information, including a redacted copy of the relevant contracts. The requirement to publish details of contract awards within 20 days thus applied to emergency procurement during the pandemic, up to the point at which PPN 01/17 was withdrawn on 24 June 2021.

263. The applicability of these requirements was confirmed in *R (Good Law Project & others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) at [127]-[135].

Requirements to Ensure Compliance with Public Procurement Principles and Regulations, Including Requirements to Ensure Openness and Fairness

264. Contracting authorities engaging in emergency procurement operate under mitigated obligations to comply with general principles of procurement. Such mitigation or softening of the intensity of the requirements arising from general principles vary in relation to different key principles and, in particular, in relation to openness and fairness. The boundaries of the general obligations to ensure openness and fairness have been the subject of litigation.

265. Fairness in the direct award of contracts under emergency procurement was at the core of the dispute adjudicated in *The Good Law Project, R (on the application of) v Minister for the Cabinet Office & Anor [2021] EWHC 1569 (TCC)* (the 'Public First' case). In that case, O'Farrell J found that the direct award of a contract in compliance with reg.32(2)(c) PCR2015 was however unlawful because, "in the absence of a tender competition, it was incumbent on [the contracting authority] to ensure that it could demonstrate that the procurement was nonetheless fair and impartial, namely, by producing evidence that objective criteria were used to select [the service provider] over other [potential providers]" (at [153]). Given that the case involved an allegation of apparent bias in awarding the contract, the Court found that

"failure to consider any other [potential provider], by reference to experience, expertise, availability or capacity, would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, that the decision-maker was biased." (at [168]). This would have set a high bar of compliance with the principle of fairness in the context of direct awards.

266. This judgment was quashed on appeal in *The Good Law Project, R (On the Application Of) v Minister for the Cabinet Office* [2022] EWCA Civ 21. The Court of Appeal found that "[t]here is a tension between the judge's finding on the one hand […] that the Minister was entitled to rely on Regulation 32 in awarding the contract, and on the other hand the conclusion […] that the Minister was nevertheless required (i) to consider other [potential suppliers] by reference to experience, expertise, availability and capacity and (ii) to keep a clear record of the objective criteria used to select [the service provider] over other [potential suppliers] as part of the process in order to avoid an appearance of bias" (at [72]). The Court of Appeal highlighted that "The effect of the judge's conclusions was to find breach on the part of the Minister of an unspecified obligation to carry out a process that involved a formally documented consideration of other [potential suppliers] (by reference to experience, expertise, availability and capacity) which gave rise to apparent bias. This conclusion is, we suggest, at odds with the finding that the Minister was at the same time justified in using a negotiated procedure without prior publication, something which did not require consideration of any [potential suppliers]. The question of identifying and evaluating the capacity and suitability of other tenderers in these circumstances did not arise at all. We are unable to accept that in these circumstances the impartial and informed observer would, in effect, require the creation of a common law "procurement regime-light" in the absence of which he would think there was a real possibility of bias." (at [75]-[76]).

267. Relatedly, and as mentioned above (para 242), there is further judicial authority addressing the issues of fairness and openness in emergency procurement in *Good Law Project and EveryDoctor) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC) (the 'Pestfix' PPE challenge), where O'Farrell J found that there is an "irreducible minimum standard of objective fairness that applies to such procurements, even in the absence of open competition" (at [334]). This judgment sets the bar high in relation to residual duties to use competitive comparisons even in an asynchronous manner, which would go beyond the recommendations included in PPN 01/21.

268. This judgment could not be appealed. However, in my view, most of the reasoning followed by the Court of Appeal in quashing O'Farrell J's findings in the 'Public First' case would also run against the findings in the 'Pestfix' PPE challenge. The Court of Appeal clearly concluded that, in circumstances where direct awards are justified on grounds of extreme urgency, the question of identifying and evaluating the capacity and suitability of other tenderers does not arise. In my view, the findings in the 'Pestfix' PPE challenge are wrong on the law.

269. Ultimately, the broader implications of the judgment in the 'Pestfix' PPE challenge in terms of minimum requirements for the comparison of tenders or the irreducible minimum standard of objective fairness in the direct award of contracts under extreme urgency are not entirely clear. In my opinion, no such minimum requirements apply where resort to direct awards is justified in accordance to reg.32(2)(c) PCR2015.

Summary Box 17 – Applicability of Key Requirements

- Contracting authorities carrying out emergency procurement were under a requirement to secure value for money to the extent permitted by market conditions, and to take active steps to avoid or mitigate abnormally high prices as far as possible. This was made clear in guidance from the very early stages of the pandemic.
- Contracting authorities were under a duty to minimise emergency procurement to what was strictly necessary to cover immediate needs and to transition to more competitive—and thus planned and adequately considered—procurement exercises for needs beyond those immediately arising from the onset of the emergency.
- Adequately managing risks of poor value for money and the related maladministration required tracking the overall contractual position arising from emergency procurement.
- Contracting authorities had a duty to consider risks of maladministration and poor value for money related to potential excessive (aggregate) purchasing, including the costs of keeping the acquired stocks and potential costs of disposal of excessive purchases.
- Ensuring the quality and suitability of supplies procured under extreme urgency is a core requirement of the key principle of effectiveness.
- A contracting authority that did not ensure the quality and suitability of procured supplies would be in breach of its duties.
- Given that contracting authorities are under a constant duty to check that the grounds to resort to emergency procurement apply in relation to each of the procurement exercises they engage in, this implies a duty to check the quality and suitability of supplies already received as part of the ongoing evaluation of the extent to which there are remaining extremely urgent needs.
- Contracting authorities have a duty to ensure contractual performance and, where it falls short, to use the contractual remedies at their disposal. Not doing so can imply an illegal contract modification.
- The standard requirements to guard against conflicts of interest and to document any remedial measures were applicable without modification to emergency procurement carried out during the pandemic.
- Contracting authorities were bound by formal requirements of record-keeping and proactive transparency throughout the pandemic.
- Contracting authorities were required to go further than the minimal proactive transparency mandated by the applicable rules on record-keeping and the publication of notices, in two respects: they should publish details of contract awards within 20 days; and they should publish more detailed information, including a redacted copy of the relevant contracts.
- Although there is judicial authority indicating that there is an irreducible minimum standard of objective fairness in the direct award of contracts under extreme urgency, its implications are not entirely clear and, in my view, this authority is wrong on the law.

Assessment of the Applicable Legal and Policy Framework, including New Guidance

270. In my opinion, from a legal and policy perspective, and in view of the information and knowledge then available, the UK's emergency procurement regime entering the pandemic was mostly adequate. To the best of my knowledge, and without prejudice to proposals for improvement based on the lessons learned from the pandemic (below paras 391 and ff), there has been limited criticism of the legislative and policy framework. Only the permissiveness of PPN 01/20 and the EC Guidance in relation to the pandemic providing a blanket authorisation for direct awards has been challenged. However, this challenge reflects a minoritarian view, which has also been rejected in case law (*Good Law Project and EveryDoctor) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC) at [327]-[331]).

271. Before the pandemic, UK law already included a specific provision allowing for recourse to direct awards of contracts for extremely urgent supplies that was in line with EU and international law, and also aligned with the UNCITRAL Model Law in relation to extreme urgency arising from catastrophic events. At the outset of the pandemic, the first wave of guidance issued in the UK was also broadly adequate in stressing the limits of the legal authorisation for resorting to emergency procurement, and in highlighting the basic record-keeping and proactive transparency obligations incumbent on contracting authorities awarding such contracts, as well as the balancing exercise contracting authorities had to carry out between effectiveness and value for money considerations under the circumstances. UK guidance was substantively aligned with guidance issued by the European Commission and, while it was incrementally clarified in PPN 01/21 following recommendations by the National Audit Office, the initial guidance in PPN 01/20 covered the most relevant issues. Arguably PPN 01/20 could have been clearer in relation to the management of conflicts of interest, but the pre-existence of specific guidance in PPN 01/19 could have reasonably been expected to provide sufficient and up to date guidance. PPN 01/20 could perhaps also been clearer on the prioritisation of different approaches that contracting authorities could pursue, rating them from less to more restrictive of competition and from closer to more distant from standard operating practice—which PPN 01/21 implicitly did later on in 're-ranking' the approaches it covered. However, such issues are embedded in the relevant rules and it could be reasonably expected of procurement professionals to be able to prioritise in accordance. The adoption of the first wave of emergency procurement UK guidance was also relatively quick. While it would have been preferable to have guidance on emergency procurement and decision-making pathways in place ahead of the pandemic, the UK made guidance available at a very early stage.

272. In my view, the issues, shortcomings, and controversies arising from procurement during the pandemic are not related to the legislation, policy, and guidance applicable at the time, but rather related to organisational and operational capability and decision-making procedures, including significant limitations in procurement data, and to extensive non-compliance with applicable requirements—most notably in relation to due diligence and transparency (see eg below paras 300 304.8 in relation to non-compliance, and 291.7 ff in relation to data management). Some of these shortcomings would have been somewhat surprising, given the high level of professionalisation presumed, in particular, in relation to the centralised procurement of goods within the healthcare system. Remarkably, one of the generally accepted mitigations for the risks arising from the need to engage in extensive emergency

procurement concerns the centralisation of the procurement of goods likely to be urgently needed in the case of an emergency (above paras 118 and 119). In that regard, it should be highlighted that the UK already had such a centralised system in place. NHS Supply Chain and equivalent organisations in the devolved administrations had arranged 'commercial vehicles' for supplies such as PPE and ventilators, and were presumed to have advanced market intelligence in those areas (see above paras 169 and ff). However, when faced with increased demand, those centralised arrangements were unable to scale up as required and, in the case of NHS Supply Chain, the broader organisation was also unable to introduce changes and adaptations to lead on the emergency response – thus prompting the creation of new organisational structures under the PPE Buy Cell. Therefore, in my opinion, the failure of the system of centralised healthcare procurement, especially through NHS Supply Chain, to cope with, and adapt to, the increased demand of supplies at the onset of the pandemic is particularly problematic.

273. There were also areas of structural weakness in the UK procurement system, such as the limited effectiveness of oversight and challenge mechanisms (above paras 167 and 168), or the limited attention that decision-makers could have paid to the pandemic while they were focused on other pressing systemic issues, such as Brexit 'no deal' planning (above paras 17 to 19). There were also areas of structural weakness arising from a long period of under-investment in commercial capability and other cost-saving measures lingering from the long period of austerity subsequent to the 2008 financial crisis. While these issues do not concern legal and policy treatment of emergency procurement, they are important contextual aspects that probably had a bearing on the response to the pandemic and which could lead to lessons learned to be implemented in the future.

274. Overall, while it is possible to extract lessons from the pandemic to improve some aspects of the legislative and policy framework (below paras 391 and ff), and the Procurement Act 2023 includes a specific attempt to do so (below paras 380 and ff), it is important to acknowledge that the challenges posed by systemic emergencies can hardly be resolved solely (or even primarily) through detailed rules and requirements. As mentioned above, it is generally accepted that the effectiveness and probity of procurement in a systemic emergency will significantly hinge on its being run by a procurement workforce with adequate capacity and levels of professionalisation. That is perhaps the area where more lessons can be learned, but where improvements will necessitate significant additional investment.

Summary Box 18 – Assessment of the Applicable Legal and Policy Framework, including New Guidance

- The UK's emergency procurement regime entering the pandemic was mostly adequate.
- Before the pandemic, UK law already included a specific provision authorising direct awards for extremely urgent supplies in line with international and EU law.
- The UK adopted additional guidance relatively early on. Even if some aspects of that guidance could have been clearer, the crucial issues are embedded in the relevant rules and it could have been reasonably expected of procurement professionals to be able to act in accordance with those rules and with guidance issued before the pandemic.

- In my view, the issues, shortcomings, and controversies arising from procurement during the pandemic are not related to the legislation, policy, and guidance applicable at the time, but rather to organisational and operational capability and decision-making procedures, including significant limitations in procurement data, and to extensive non-compliance with applicable requirements—most notably in relation to due diligence and transparency.
- The UK had already significantly centralised healthcare procurement before the pandemic. This could have mitigated some of the operational challenges at the start of the pandemic.
- NHS Supply Chain and equivalent organisations in the devolved administrations had arranged 'commercial vehicles' for supplies such as PPE and ventilators, and were presumed to have advanced market intelligence in those areas.
- The failure of the system of centralised healthcare procurement, especially through NHS Supply Chain, to cope with the increased demand of supplies at the onset of the pandemic is particularly problematic.
- There are structural weaknesses in the UK procurement system and further contextual factors, such as erosion of capabilities due to sustained under-funding and Brexit 'no deal' planning that probably had a bearing on the response to the pandemic and which could lead to lessons learned to be implemented in the future.
- It is generally accepted that the challenges posed by systemic emergencies can hardly be resolved solely (or even primarily) through detailed rules and requirements. Building up a procurement workforce with adequate capacity and levels of professionalisation will be crucial in improving future procurement responses to emergencies.

Changes to Operational Arrangements at the Start of the Pandemic

275. At the start of the pandemic, the UK Government introduced three major operational changes or programmes to tackle the need for PPE, ventilators and Covid-19 tests. This sub-section provides targeted analysis of the High-Priority or 'VIP' Lane for PPE procurement, and the 'Ventilator Challenge', from the perspective of compliance with the requirements for emergency procurement detailed above (see Summary Box 17 and related text). The programme for tests and testing capacity is discussed in less detail. The UK Government ran the three programmes and there was no direct equivalent in the devolved nations. However, it should be noted that these programmes were intended for the whole of the UK.

Covid-19 Tests and Testing Services

276. The procurement of Covid-19 tests was significant, both in terms of volume of expenditure and operational challenges. However, from the perspective of compliance with applicable legal and policy requirements, on the evidence I have been able to review, the procurement of tests and testing services seems to have raised less notable, or more targeted issues. It is, however, worth stressing that some assessments are limited due to the level of detail on procurement approaches provided in the relevant statements.

276.1. UKHSA has estimated that the total spend on tests and testing services during the pandemic reached £26.65bn (UKHSA M5 Commercial Witness Statement, INQ000521972, para 4.50). It has also described how procurement had to develop a flexible approach because some of the tests did not exist or had not undergone technical validation at the time of need, which was particularly problematic at the start of the pandemic (id, paras 4.44 and 4.67 ff), and required balancing needs with a sceptical approach to offers that seemed unrealistic or lacked substance (id, paras 4.58 and 4.84). UKHSA has also described significant challenges in implementing reactive procurement decisions at speed to seek to deliver the ambitious testing goals set by the UK Government, sometimes at very short notice, as the scientific understanding of the pandemic and policy-making evolved (id, paras 4.133 ff). The evidence shows that direct awards of high value contracts followed from policy decisions and targets (eg on mass testing). In my view, however, that does not affect their legal analysis.

276.2. Despite those challenges, there seems to have been a clear concern with minimising the use of direct awards (UKHSA M5 Commercial Witness Statement, INQ000521972, para 4.37) and with the development of framework agreements and dynamic purchasing systems to return to competitive procurement once the technical specifications of the required tests were settled and the testing market was more stable (id, paras 4.41 ff).

276.3. There also seemed to have been efforts to carry out price benchmarking and to negotiate reductions where initial asks were excessively high (UKHSA M5 Commercial Witness Statement, INQ000521972, para 4.87).

276.4. It is notable that, early on, it was decided that some of the existing framework agreements could not be used because, in view of the new required volume, a single award would have exceeded their maximum aggregated value and thus resulted in a violation of the applicable rules 'in ordinary times' (UKHSA M5 Commercial Witness Statement, INQ000521972,4.35.1). This is a questionable interpretation of the applicable rules, as reg.72(1)(c) PCR2015 allows for the modification of framework agreements due to unforeseen circumstances. Regardless, however, it appears that the procurement team used the framework to identify potential suppliers that had already been verified (id, para 4.34), and "sought to mirror the framework terms when contracting directly with a supplier that was on the framework, in order to speed up contracting and ensure terms and conditions were tailored to the supply" (Cabinet Office Statement, INQ000497031, para 4.204; also at UKHSA M5 Commercial Witness Statement, INQ000521972, para 4.38). This would have contributed to minimising the extent of deviations between pre-pandemic terms and conditions set in the framework agreement, and the specific terms and conditions of the direct awards. However, given lack of detail in the available statements, it is not possible to assess the extent to which specific variations may have been favourable to suppliers.

276.5. More generally, there seemed to be a clear preference to use standard DHSC terms and conditions, and to use the standard process for contracting with suppliers new

to DHSC, which required completing forms that included a declaration of conflicts of interest (Cabinet Office Statement, INQ000497031, para 4.204).

276.6. There also seems to have been a different approach to triaging from the one used for PPE. Despite the creation of a dedicated channel for offers referred by politically exposed persons relatively similar, on its face, to the 'VIP Lane' (below paras 291 ff); UKHSA has stressed that, for tests and testing services, "[t]here was no separate 'High Priority Lane' through which contracts were awarded [...] Being tagged as 'VIP', 'Fast track' or 'Priority' did not route a supplier to a different/separate procurement process" (UKHSA M5 Commercial Witness Statement, INQ000521972, para 4.100).

276.7. However, the procurement of tests and testing services also showed some common shortcomings with the programmes for PPE and ventilators, as discussed in more detail below. It is clear that there were difficulties recruiting commercial staff (see also below para 285.2), and that compliance with eg transparency requirements was deprioritised between March and Summer of 2020 (UKHSA M5 Commercial Witness Statement, INQ000521972, para 4.66). There were also changes to procurement approval limits and spend controls that significantly raised the value thresholds for different levels of delegation (sometimes increasing them to ten times the limit in 'ordinary times') (Cabinet Office Statement, INQ000497031, paras 4.241 ff), and this could have created a significant concentration of financial risks in any given contract.

The PPE Parallel Supply Chain

277. This sub-section describes and critically assesses the changes to operational arrangements for the procurement of PPE put in place by the UK Government from March 2020. These changes ended up in a completely new set of centralised arrangements for PPE procurement and distribution, and significantly changed operating practices and processes for procurement. The focus of this section is on assessing compliance in the award of contracts for PPE under these new arrangements with the requirements for emergency procurement detailed above (see Summary Box 17 and related text). Before engaging in that assessment, it is necessary to provide some focused description of the creation of that new Parallel Supply Chain and, within it, the organisation tasked with PPE procurement (the PPE Buy Cell) and, in particular, its 'VIP Lane' for the processing of PPE offers referred by Ministers, MPs and senior officials. The description will not be exhaustive, but rather concentrate on issues of particular importance for that compliance assessment.

278. The Parallel Supply Chain was created in view of the insufficiency of pre-pandemic arrangements for the centralised procurement of PPE to satisfy massively increased demand. In its submission, the Government Chief Commercial Officer (GCCO) states that, in the run up to the first national lockdown, "[a] team was being created from scratch that in the end bought approximately 20 times the normal supply of PPE [...] There was no template process and decisions were necessarily being taken rapidly, and processes, structures and tools were being improvised and refined 'at pace'" (GCCO Third Statement, INQ000536362, para 26). In my view, this fails to adequately recognise that, prior to the pandemic, there were clear processes, structures and tools for PPE procurement, in particular by NHS Supply Chain. The root problem was not that these did not exist and needed to be put in place as the

pandemic progressed, but rather that those structures failed to scale up to respond to increased demand and became overwhelmed. Acknowledging the insufficiency and shortcomings of existing organisational and commercial structures is in my view important.

278.1. CO estimates that, in 2019, the NHS procured around £146mn of PPE, of which £61mn was procured through NHS Supply Chain (or SCCL, see above paras 171 and ff), and the rest through other central buying organisations and directly from suppliers (INQ000497031, paras 4.281 and 4.282). NHS Supply Chain has stated that its PPE spend in 2019/20 was £103.5mn (INQ000492085, para 6.4). According to DHSC, about 50% of the NHS PPE market was supplied by SCCL prior to the pandemic (DHSC PPE Statement, INQ000528391, para 128). From the early stages of the pandemic, however, it was clear that demand for PPE would outstrip pre-pandemic levels by several orders of magnitude. CO figures for March 2020 suggest that, at the time, demand was ten times the 2019 monthly average. It was also clear that there was significant disruption in global PPE markets due to increased global demand (INQ000497031, paras 4.288 and 4.289).

278.2. In February 2020, DHSC instructed SCCL to increase PPE purchasing, especially in relation to six specific areas of PPE (DHSC PPE Statement, INQ000528391, para 263). However, SCCL became unable to fully meet demand from the NHS and other health and social care bodies, as procuring and distributing the required volume of PPE would exceed the capacity of its buying team, its warehouses and distribution channels (INQ000497031, para 4.292). This is despite SCCL having put in place, with DHSC agreement, a rationing process for PPE since early February 2020 (INQ000492085, paras 7.27 and ff).

278.3. Given SCCL's inability to sufficiently increase PPE procurement on its own, DHSC decided to establish a 'Parallel Supply Chain' for key items of PPE (DHSC PPE Statement, INQ000528391, paras 225 and 295 ff). The SCCL team that bought PPE before the pandemic (the 'SCCL PPE team') was brought into the Parallel Supply Chain (INQ000497031, para 4.297). This decision was part of the broader 'Covid-19 PPE Plan' produced by DHSC in consultation and cooperation with the devolved administrations (id, para 4.299). The Parallel Supply Chain was from then on responsible for sourcing PPE and its goal was to obtain as much PPE as possible to supply the entirety of the health and social care sector throughout the UK (id, paras 4.298, 4.300 and 4.339).

279. The Parallel Supply Chain was organised in several sub-cells, which functioned as separate organisations with separate reporting lines. For the purpose of this report, the most relevant was the 'PPE Buy Cell', which was responsible for PPE procurement, including development of a sourcing strategy (INQ000497031, paras 4.301 and 4.302). The authority for procurement carried out by the PPE Buy Cell remained with DHSC (id, para 4.305).

The PPE Buy Cell, SCCL PPE Team and the Broader Role of SCCL in new Logistics

280. Although the PPE Buy Cell was set up from scratch by DHSC and CO officials, the SCCL PPE team was included in the PPE Buy Cell (INQ000497031, para 4.306.3). The SCCL PPE team would have consisted of 32 members of staff (GCCO Third Statement, INQ000536362, para 27). According to DHSC, the PPE Buy Cell built on expertise within SCCL transferred to

the team (DHSC PPE Statement, INQ000528391, para 225). Moreover, the suggestion for the SCCL PPE team to focus on working with current suppliers to maximise product availability, while additional staff brought into the PPE Buy Cell explored other procurement routes, would have originated from SCCL's Chief Executive Officer (id, para 299). According to CO, the SCCL PPE team was "integrated 'as-is' into the PPE Buy Cell", the team was led by an SCCL member of staff, reporting to another SCCL member of staff, and while "[t]he SCCL team came within the management structure of the PPE Buy Cell [...] it largely operated independently from the rest of the PPE Buy Cell. It followed its own procurement processes, and used SCCL systems. The rest of the PPE Buy Cell could not use the SCCL systems as it was impossible to add so many new users" (INQ000497031, para 4.342). This aligns with DHSC's account that the PPE Buy Cell would "effectively be a 'new buying cell', separate to that of SCCL to source from new suppliers" (DHSC PPE Statement, INQ000528391, para 308). It also aligns with references in other statements to SCCL conducting work independently, or 'owning' specific relationships with existing NHS suppliers (eg in the PPE Buy Cell Lead Statement, **INQ000540488** para 11.4).

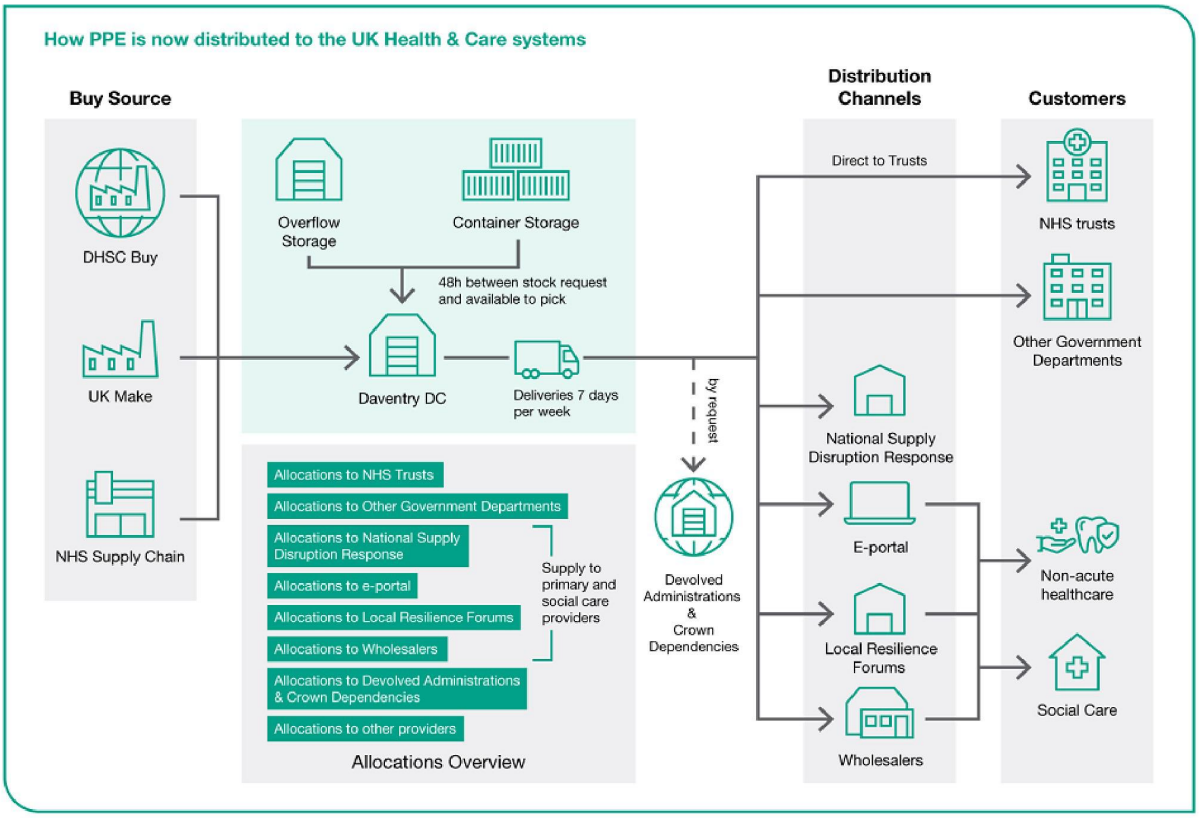
281. In SCCL's view, "[e]arly in the pandemic some of the CTSPs (Towers 2, 8 and 10) 'loaned' some staff to the PPE Cell set up by Cabinet Office/DHSC" (INQ000492085, para 4.12); "the purchasing by these teams was at the direction of DHSC but SCCL facilitated the purchase of items by using its existing framework agreements to enable orders to be placed with existing suppliers" (id, para 11.4); and, as of 1 April 2020, "PPE buying decisions were no longer in the hands of SCCL by that time" (id, para 11.13). In my view, this creates a partially conflicting account—between SCCL, on the one hand, and CO and DHSC, on the other—on the extent to which the SCCL PPE team continued operating largely independently or not, and reflects a distancing by SCCL from PPE procurement that was, however, carried out by its staff, using its pre-existing commercial vehicles, and its systems and operational arrangements. It also raises some questions on the level of effective coordination between the procurement activities of the SCCL PPE procurement team and the rest of the PPE Buy Cell. It also raises questions on the extent to which SCCL took direct responsibility for the activities that sought to maximise deliveries from suppliers appointed to its frameworks before the pandemic.

282. According to CO, the SCCL PPE team focused its efforts on procuring from existing suppliers of PPE to SCCL, and to seek to develop their suppliers' capacity and explore broader supply chains with the benefit of their suppliers' knowledge (INQ000497031, para 4.343). Despite considering that it operated independently, CO stresses that figures for orders secured by the SCCL PPE team were reported as part of the PPE Buy Cell daily dashboard (id, para 4.344.5). Between April and June 2020, the SCCL PPE team ordered £4.22bn of PPE from existing NHS suppliers (DHSC PPE Statement, INQ000528391, para 334), and its total PPE spend reached £5.2bn (id, para 729). This is in addition to the £7.2bn of PPE bought via the rest of the PPE Buy Cell according to CO (INQ000497031, para 4.490), or £8.6bn according to DHSC (DHSC PPE Statement, INQ000528391, para 729).

283. SCCL retained overall management responsibility for the distribution of PPE, which was subcontracted to a logistics operator (Clipper, now GXO Logistics) by SCCL's primary logistics provider (Unipart) (INQ000492085, para 5.17). As a result of these arrangements, "Unipart were responsible for managing Clipper with support and direction from SCCL" (id, para 14.3). According to SCCL, it also was "part of the team which worked on a daily basis to

try to determine need and to prioritise distribution of PPE" (id, para 11.9). According to SCCL, "[o]n 1 May 2020 a letter was sent to all Trusts from DHSC […] directing that procurement of PPE should take place on a national basis and not by individual NHS organisations competing with one another for the same (limited) supplies" (INQ000492085, para 7.43). In September 2020, DHSC's "Personal protective equipment (PPE) strategy: stabilise and build resilience" confirmed this requirement (DHSC, 2020b). Graph 2 below shows the structure of the new arrangements for PPE distribution to the UK health and care systems.

Graph 2 – New PPE Distribution Arrangements



Source: (DHSC, 2020b).

Organisation of the PPE Buy Cell

284. Apart from the SCCL PPE Team, the rest of the PPE Buy Cell was staffed by a mix of volunteers from commercial teams across government departments—including DHSC, the Ministry of Defence, Ministry of Justice and the Department for Education— NHS England and NHS Improvement, and external procurement consultants, such as the caseworkers made available under a capped cost arrangement with Baringa Management Consulting. Other consultancies, such as Deloitte, Efficio Consulting, or 4C Associates, were also involved. Reporting lines were created so that procurement consultants "did not have the authority to enter into contracts or make procurement decisions, except under the direction of team leaders who were either civil/crown servants or contractors directly employed by the Cabinet Office or DHSC" (INQ000497031, paras 4.313 to 4.318).

285. The PPE Buy Cell grew very quickly. It started with a staff of 20 members in March 2020, it grew to approximately 150 people by 1 April 2020, to 508 people by 19 May 2020, and still had 450 people by 2 June 2020.

285.1. It is notable that, of the 508 people working in the PPE Buy Cell by 19 May 2020, only 52 were from CO. As mentioned above, the SCCL PPE team comprised 32 members of staff (para 280). The rest would have been a mix of volunteers recruited from other central government departments and external consultants, but no breakdown of the PPE Buy Cell staff by pre-pandemic role or employer has been made available. Around 400 of those staff were working primarily remotely in virtual teams with colleagues they did not know and with whom they had rarely, if ever worked before (INQ000497031, paras 4.320 and 4.321).

285.2. This reflects a broader context of competition across the civil service for skilled commercial staff, which UKHSA has described as "fierce" and leading to challenges in recruitment, especially for senior civil servants with commercial expertise. The situation was exacerbated by uncertainty on the likely duration of the response to the pandemic (UKHSA M5 Commercial Witness Statement, INQ000521972, para 4.27).

285.3. CO staff "had commercial experience but very few had bought medical supplies or PPE before" (INQ000497031, para 4.313.1). There is no description of the profile of volunteers from other central government departments or recruited consultants. However, CO acknowledged that the PPE Buy Cell involved a large "number of new purchasers with limited experience of NHS procurement" (id, para 4.495).

285.4. This approach thus raises serious questions as to why a different strategy to staffing the PPE Buy Cell was not followed, in particular through a more specific or continued call targeting public sector professionals with experience of healthcare procurement as a priority, and public sector professionals with general procurement experience from across all levels of government, including local government, as a second target. Given that it is estimated that there are over 4,000 procurement professionals working within the NHS (HFMA, 2022), and that there are NHS organisations specialising in the provision of procurement services (such as NHS Shared Business Services), there are questions as to whether enough was done to tap into the existing cohort of healthcare procurement specialists, or broader cohorts of procurement specialists in levels of government other than central. The Lead for the PPE Buy Cell stated that he "was not made aware of extra NHS commercial resources who were experts in healthcare procurement who might be available [...], but I would have expected them to be offered by the NHS if they existed. We were supplied by DHSC with some people who had healthcare experience" such as two named individuals (PPE Buy Cell Lead Statement, **INQ000540488** para 3.24). On the evidence I have been able to review, it is not clear whether the possibility of reallocating or 'loaning' procurement staff from NHS organisations to the PPE Buy Cell was explored, either by the NHS or any other organisation, either at the initial stage of creation of the Parallel Supply Chain, or at any later point, in relation to decisions on increasing its staff.

285.5. Staffing of the PPE Buy Cell should have been a crucial consideration in relation to compliance with procurement law, policy and processes, as it would be extremely difficult to adequately train staff without prior experience of healthcare sector procurement at speed. In that regard, it is unclear on what basis CO considers that "[t]hose who had volunteered for the PPE Buy Cell from other departments (and did not have PPE buying experience) could be taught their role in a few hours and be productive quickly" (INQ000497031, para 4.362), whether similar training would have been provided to Baringa consultants and, if so, whether there was a similar level of confidence that they could also be adequately trained in a few hours, especially if they did not have prior experience in public procurement. The Government Chief Commercial Officer (GCCO) accepted that "[G]enerally, private sector procurement people brought into the public sector to support us were professional, but they did not instinctively understand civil service procedures or, as a consequence, the value for money controls or reporting requirements and we did not have sufficient time to train them fully", and that "non-procurement consultants were used widely during the pandemic" (GCCO Fourth Statement, INQ000535017, para 32). As mentioned above, it would seem that such not fully trained consultants could have represented a significant proportion of the staff working in the PPE Buy Cell (para 285.1).

285.6. Additionally, GCCO's submission suggests that the lack of experience and prior knowledge of the newly recruited staff was a determinant factor in the design of work processes around siloed, isolated tasks. GCCO stressed that integrated structures were not initially deployed "because it needs team members who really understand their roles and are trained in the subject matter. At the start of the pandemic that was not the case, and it was better to group people by the task they were working on" (GCCO Third Statement, INQ000536362, para 37).

Mission and Processes of the PPE Buy Cell

286. The PPE Buy Cell started its buying operations on 21 March 2020 (INQ000497031, para 4.307). It was tasked with buying as much PPE as possible (PPE Buy Cell Lead Statement, **INQ000540488** para 3.11). At that point, according to DHSC, it was exceptionally difficult to determine how much PPE was needed (DHSC PPE Statement, INQ000528391, para 227). According to Cabinet Office, initially, the PPE Buy Cell took the view that "the demand was so great and immediate that all available items needed to be purchased (subject to meeting the specification, price, due diligence, etc)" (INQ000497031, para 4.323), and its buying targets "were based on informal numbers it was provided with [...] based on anticipated (not actual) usage" (id, para 4.334). This approach was in line with the view of the Prime Minister, who supported "a 'whatever it takes' approach on PPE, including purchasing at risk, longer term contracts" (DHSC PPE Statement, INQ000528391, para 320).

286.1. According to CO, work with Efficio towards producing a buying plan started on 26 April 2020 (INQ000497031, para 4.322). From late April 2020, a model to estimate PPE demand developed by McKinsey would have started being used, and figures produced by this model were provided to the PPE Buy Cell so that it could develop its buying plan (id, paras 4.327 and 4.328). A PPE Buying Target spreadsheet based on such figures would have been first issued on 3 May 2020. However, this account

partially conflicts with DHSC's statement, which has explained that the 'McKinsey model' started being developed from 23 March 2020 and produced full estimates of 90-day PPE demand that were used from 29 March 2020 (DHSC PPE Statement, INQ000528391, paras 430 and 431). DHSC further explained that the model continued being refined throughout April 2020 (id, para 436). The PPE Buy Cell Lead suggests that work on building a buying plan would have started from about 18 April 2020 (PPE Buy Cell Lead Statement, **INQ000540488** para 3.35). From the accounts, it is unclear at what stage the PPE Buy Cell had direct access to the McKinsey model, and from which stage such estimates fully informed buying targets. In my view, it seems clear that, at least for its first few weeks of operations, the PPE Buy Cell was seeking to procure as much PPE as could be obtained, while not having a joined up understanding of projected demand or a consistent use of projections.

286.2. It is important to stress that there was difficulty in establishing not only the predicted levels of demand, but also the baseline of stocks in the system. DHSC did not have access to information on stocks held by individual NHS organisations (DHSC PPE Statement, INQ000528391, para 276). According to SCCL, at the beginning of the pandemic, there was no centralised record of PPE stocks held at the NHS frontline (INQ000492085, para 7.39). Only in May/June 2020 was Palantir commissioned "to develop a dashboard to attempt to gather the information to show what inventory was where and what the actual need was" (id, para 7.42). Only from mid-May onwards did DHSC start to receive information on stock positions from NHS Trusts, initially from the London area (DHSC PPE Statement, INQ000528391, para 437). It is unclear why this information was not compiled from an earlier stage. It is also worth pointing out that the situation seemed to be different in Wales and in Scotland, where NHS Wales Shared Services Partnership and NHS NSS had better access to stock information (respectively, INQ000506956, para 115, and INQ000493484, para 25).

286.3. It is also relevant to highlight that, according to DHSC, "the bespoke model from McKinsey factored in the SAGE RWCS [reasonable worst case scenario] for the virus (cases admissions, intensive care cases, deaths), together with modelling based on core standard NHS data on the size of the system and likely number of staff-patient interactions obtained from clinicians" (DHSC PPE Statement, INQ000528391, para 432). However, according to CO, in addition to planning for that severity of the pandemic and not taking into account policy options such as lockdowns, the buying plan accounted for significant delays in the manufacture and delivery of PPE orders, and for uncertainty on the evolution of the pandemic in the period between contracting and receiving supplies (INQ000497031, paras 4.327.1 and 4.331). GCCO has explained that the PPE Buy Cell's "original planning assumptions were that only 80% of all products would be delivered and of that, only 80% would pass quality checks" (GCCO Third Statement, INQ000536362, para 70). This means that RWCS-related demand was twice increased in such a way that the PPE Buy Cell would be aiming to buy almost 50% more than would be required without those buffers. Ultimately, this would have resulted in the use of very high buying targets and seems to have continued the approach to buying as much PPE as possible. According to DHSC, based on the modelling, the "overall message in

March 2020 and April 2020 was clear: there was a significant shortage of PPE and the Department needed to procure more, in all categories" (DHSC PPE Statement, INQ000528391, para 439). This is also in line with the recollection of the PPE Buy Cell Lead, who stated that "[i]t remained the case throughout April and May 2020 that we were being told to buy as much as we could of products (save a few, such as body bags, which dropped off the priority list)" (PPE Buy Cell Lead Statement, **INQ000540488**, para 8.21).

286.4. This is important because the terms under which PPE was being procured involved firm commitments (see below, para 332.10). As stressed by GCCO, "the almost immediate shortages [...] caused such a risk averse reaction that led to over-ordering, which then generated the [...] problem of having to commit to longer term orders, (which in a seller's market was very expensive) which compounded the over-buying" (GCCO Fourth Statement, INQ000535017, para 35). Consequently, as a result of those long-term firm commitments, the total volumes of PPE bought and received would not be adjustable in view of deviations between the estimates used to set buying targets and the actual need for PPE at the relevant time, should the estimates prove excessive. Although CO explains that it was never aware of a policy or approach to deliberately buy too much PPE (INQ000497031, para 4.497), on the evidence I have been able to examine, there seemed to be no consideration of the risk of over-buying, or thought put into procurement models that could allow for a reduction in the quantities ordered or received in view of the evolution of PPE demand. DHSC has described efforts to resell or donate PPE once it became clear that the procured PPE was excessive, as well as to curtail contracts that would have resulted in a total cost saving of £466mn (DHSC PPE Statement, INQ000528391, paras 837 and 838). However, these efforts were limited because, at the time, most contracts had progressed to manufacture and delivery (id, para 837). GCCO has described an attempt to prompt more decided consideration of contract cancellations. However, as GCCO stresses, approaches to contract cancellation that carried additional costs and write-downs of previously incurred costs would have been "very countercultural for government, probably counter to 'Managing Public Money' and would raise concerns as to how to approve and communicate such a decision" (GCCO Fourth Statement, INQ000535017, para 38). This would have further compounded the effects of an approach that resulted in over-buying, as the initial procurement decisions would become unreviewable once made. If this is an accurate reflection of the current approach under budgetary rules, in my view, this would merit revision as part of the lessons learned (see also GCCO Fourth Statement, INQ000535017, para 123).

287. The PPE Buy Cell pursued procurement through four routes (INQ000497031, paras 4.341 ff):

- Route 1: procurement carried out by the SCCL PPE team, as above (para 282);
- Route 2: an "open source" approach based on offers for PPE supply. From 30 March 2020, those offers were channelled through a webform hosted in gov.uk;
- Route 3: a 'High Priority Lane' (the 'VIP Lane') for offers referred by Ministers, MPs, or Senior Officials via a dedicated mailbox; and

- Route 4: a 'China Buy' lane focused on Chinese factories and local intermediaries.

The 'VIP Lane' (route 3) and its comparison with the "open source" route (route 2) are the most relevant for the purposes of this report. The 'VIP Lane' was operational until 24 June 2020 (id, para 4.416), while the "open source" route closed on 2 July 2020 (INQ000497031, para 4.517). It is worth stressing that DHSC's account of the organisation of the PPE Buy Cell's procurement routes diverges from CO's, both in the names it uses and some detail (see DHSC PPE Statement, INQ000528391, paras 328 ff, and paras 373 ff in relation to the 'VIP Lane'). The analysis below relies on the account provided by CO, while integrating aspects of DHSC's. Where relevant potential contradictions are identified across both accounts, these are explicitly highlighted.

288. The PPE Buy Cell organised its procurement process for routes 2 and 3 in three main stages, led by separate teams. An 'Opportunities Team' (of which at some point there were eight) reviewed offers received through the web portal or referrals through the dedicated mailbox for the 'VIP Lane'. A 'Technical Assurance Team' reviewed compliance with technical specifications and standards. A 'Closing Team' negotiated and concluded the contract terms for PPE supplies. These were contained in a 'closing pack' sent to DHSC's finance team for final scrutiny and approval. The final contracting and publishing of contracts was done by DHSC (INQ000497031, paras 4.359, 4.360 and 4.458). The 'VIP Lane' was one of the opportunities teams (INQ000497031, para 4.359.1; DHSC PPE Statement, INQ000528391, para 373).

289. As the general approach, each team would assess an offer of PPE in sequence (first opportunities, then technical assurance, then closing). However, as this created multiple handoffs and work queues, a number of 'Rapid Response Teams' were created; the first one on 24 April 2020, and with four of them running in parallel in late May 2020. Each of these teams comprised one person from each of the specialist teams and was assigned to a single deal at a time. Rapid Response Teams would try to conclude a deal in one or two days. If they considered that it would take longer, they would return the offer to the normal process. Rapid Response Teams took 96 cases that led to 21 contracts. The cases included both route 2 and 'VIP Lane' cases. I was not able to access information on how many of the 21 contracts related to 'VIP' offers (INQ000497031, paras 4.470 to 4.475).

290. A further organisational change was introduced on 5 May 2020 with the creation of a Clearance Board. From then on, the Clearance Board received a 'deal form' summarising contracts over £5mn for review and endorsement before the 'closing packs' being sent to the DHSC's finance team for final approval (INQ000497031, para 4.459). CO has further clarified that the 'closing packs' were often being prepared afterwards. According to DHSC, the Clearance Board met daily and reviewed "a one- or two-page synopsis of the submission pack usually prepared by the Closing Team", and "its role was to provide additional challenge, supplementary to the existing processes, and to endorse or reject deals prior to [final] consideration" (DHSC PPE Statement, INQ000528391, para 500). I was not able to review documentation put to the Clearance Board, or information on how many contracts were awarded prior to and after the creation of the Clearance Board. I am thus unable to offer a definite view on the effectiveness of this approach, or the sufficiency of the documentation put to either the Clearance Board, or DHSC.

The PPE High Priority or 'VIP Lane'

291. The 'VIP Lane' was one of the (up to) eight Opportunities Teams (above para 288) and it was tasked with initiating the award of contracts under route 3 of the PPE Buy Cell.

291.1. From mid-March 2020, unsolicited offers of assistance with PPE started being forwarded by Ministers, MPs and senior officials directly to the Health Ministers, DHSC or officials working in the Parallel Supply Chain. These offers were initially forwarded to the NHS and SCCL to examine if they were viable. These were being logged and initially progressed by SCCL, and then by a Baringa consultant working with CO. As the number of offers increased, so did the backlog of those waiting to be progressed (DHSC PPE Statement, INQ000528391, paras 374 and 375).

291.2. The creation of the 'VIP Lane' is in principle explained against the background of the need to determine a way to triage the large number of offers received by the PPE Buy Cell. According to Cabinet Office, such triage sought to prioritise offers by volume, lead time, credibility, and demand for the products (INQ000497031, para 4.376). However, the reasons provided for the creation of the 'VIP Lane' also include the management of expectations of those responsible for referring companies. The evidence shows that, from an early stage, there were concerns other than the credibility of offers driving triaging and decision-making. The account by the Government Chief Commercial Officer (GCCO) shows that decisions on how to capture and progress offers were influenced by the consideration of the "reputational risk for our ministers in not responding quickly enough / appropriately [to offers of help from CEOs/high profile individuals]" (GCCO Third Statement, INQ000536362, para 28). It is also clear that, at that time, there was "significant publicity about offers of help being made to the government, and ministerial pressure to ensure that all were seen to be followed up" (id, para 32), that "PPE remained [...] a hot political issue", and that Ministers were concerned about "the negative media attention relating to the failure to progress business offers of help" (id, para 38). This had a direct effect on the approach to triaging through the 'VIP Lane', which is further assessed below (paras 292 and 295).

291.3. Triage was complicated by the high volume of "open source" offers received—which exceeded 3,000 in the first week of operation of the web portal, and grew by as much as 400-500 new daily offers at peak (INQ000497031, para 4.383). It was also complicated by the way in which information was captured and organised for further processing, which did not result in a structured dataset that could be easily queried, filtered or analysed. In that regard, it is noticeable that the problems that would arise from inadequate and insufficiently structured data collection were highlighted at an early stage. According to the GCCO, on 23 March 2020, specific recommendations were made on how to approach the collection of offers and on how to seek to minimise both the submission of non-viable offers and the email traffic related to them (GCCO Third Statement, INQ000536362, para 31). These included:

- Using a webform to collect offers, including specifically requesting information on detailed product specification, country of origin, estimated delivery date and volume;

- Prior to the collection of offers, "the exact specifications of the items that DHSC wanted to receive should be sent out" so that suppliers limited their offers to those immediately useful;
- Avoiding a situation where offerors chased for updates or escalated the issue to MPs and others;
- Including a method of communication to automatically acknowledge the offer and ask offerors to "please be patient as we categorise your offer and others and assign to a team to respond";
- Having a dedicated person, and a deputy, within DHSC to handle relationships with CEOs from major companies.

291.4. "Route 2" offers were initially captured through a Survey Monkey site created by Deloitte on or before 23 March 2020, but this was transitioned to a custom webform on 30 March 2020. The webform produced a spreadsheet of opportunities, but there were problems maintaining data integrity and control. On 4 and 5 April 2020, the Cabinet Office Data and Insights Team developed a "simple database application to contain details of offers and potential vendors [...] using Mendix". This allowed for the webforms filled out by suppliers to automatically feed into the database, but its "workflow arrangements were rudimentary". Although it is seen as an improvement over the use of spreadsheets, CO recognised that "the quality of data for individual cases depended on the diligence and the time taken to input the details by individual case workers". The 'Mendix database' was rolled out to the PPE Buy Cell teams over the last two weeks of April and was used until July 2020, when it was ported to an alternative platform (Atamis) being developed for DHSC before the pandemic (INQ000497031, paras 4.482 to 4.488). Cabinet Office has also acknowledged that "The workflow system (Mendix, something that was put together rapidly to track the inflow of PPE offers following the 'call to arms'), while it did collect many details on each offer, did not contain all the data needed" to establish compliance with the controls framework (id, para 1.73).

291.5. CO has acknowledged as a lesson learned that it would be prudent to have a suitable IT system ready for emergency situations. However, CO has focused on it being a customer relationship management solution primarily designed to collect and record information on the process of procurement (INQ000497031, para 4.489). While this is in my view an adequate lesson learned, it does not cover all aspects of learning that can be extracted from this approach to the collection and processing of PPE offers and, in particular, it omits a much-needed reflection on the role of structured data, as an issue separate from the platform over which it is recorded. In particular, it is important to acknowledge that the processing of offers in an emergency situation will not only require recording interactions with the specific offeror and offer-specific details, but will also require data-based comparisons amongst all, or within subsets of, the offers received to inform decisions on eg prioritisation or progression of different offers at different points in time. This is different from procurement in ordinary times because, in that context, offers are received simultaneously and their evaluation is therefore a 'one shot' exercise where the contracting entity has all relevant information available at once and can thus carry out all comparisons and relative evaluations. By contrast, in emergency situations where the initial response is based on direct awards, the comparison of

relevant offers is an iterative process that requires structured data enabling comparisons (and revisions of comparisons) of offers received at different points in time. It is also important for the structured data to allow nuanced filtering in accordance with different key characteristics of the offers, such as precise and detailed technical specifications (rather than eg references to categories of products), volumes or prices, but also in relation to the likelihood of offers resulting in contracts at any specific point in time. For example, it would be helpful for the structured data to show detail on the precise progress status, rather than solely the stage at which the offer finds itself at any given point in time—eg details on whether there are significant questions on technical compliance, or whether documentation has been received and is under consideration, rather than simply stating the offer is with the technical team for compliance assessment—as it could be that, at a given point in time, those considerations are relevant to pause or accelerate the processing of specific offers. In this context, it is also possible that the receipt (or identification) of later offers in better terms leads to abandoning negotiations or evaluations of prior, less balanced or advantageous offers. This requires an approach to the collection and use of data that is much less linear than in ordinary times, and thus makes a process-based or workflow-based approach less suitable. Moreover, accessing the data relevant for this type of comparison should not require intensive tasks (such as reading unstructured text in comment boxes), but rather be available through simple queries of the structured database. Having such structured data would also significantly reduce the effort required to publish contract award details and, depending on the specific solution adopted, this task to comply with proactive transparency duties could be automated.

291.6. From the accounts I have been able to review, it would appear that, especially in the weeks leading to the full embedding of the Mendix database by the end of April 2020, there were different and potentially overlapping spreadsheets/databases being used within the PPE Buy Cell. In itself, this would have posed organisational challenges, and the absence of a single source of truth would also have been problematic. It is also unclear how information was uploaded onto the Mendix database and how the phased out use of earlier versions of the spreadsheets created by the Survey Monkey site or the initial stages of use of the webform was managed.

291.7. In that initial stage, incomplete information and the growing backlog of offers required dedicating significant resources to manually sift through them to identify those worth pursuing. This task was all the more difficult due to those responsible for this initial stage operating in silos, unaware of what decisions (and upon which bases) were being taken elsewhere. From 23 April 2020, Arvato CRM Solutions was engaged to provide an outbound call centre service to validate data submitted via the portal and carry out an initial triage with a focus on identifying obviously irrelevant offers. Where the call centre was able to contact offerors and confirm that their offers were potentially viable, those offers were referred to an opportunities team. It is notable that the call centre processed close to 3,000 offers in the first four days, of which close to 1,700 were rejected (INQ000497031, para 4.384). In practice, this created an additional triage phase (zero) prior to the engagement of the opportunities teams. Given the speed of processing of the offers and the very

likely lack of training and specialist expertise of those involved in the call centre, this raises questions on which basis the offers would have been deemed progressable, or whether this triage would have improved the quality of the information concerning the offers deemed progressable. DHSC has stated that triage in this initial stage "was on the basis of company size (as a proxy of the likelihood of the company being able to deliver and be well established), and/or size of opportunity", and that later guidance "provided additional clarity that offers containing high priority items [...] of a high volume should be marked as high priority and progressed" (DHSC PPE Statement, INQ000528391, paras 456 and 457). This still does not clarify what criteria were being used to check the credibility of the offers, or what additional information was being sought prior to progression to an opportunity or rapid response team. It seems more likely that this approach would have reduced the number of offers to be checked in more detail by the opportunities teams, but that this process would probably not have improved the information on progressed offers.

291.8. Generally, in my view, this approach to the collection and verification of data was very resource intensive and led to a suboptimal triaging of high-level information on potential PPE offers. It evidences that, from the outset, there was insufficient planning and assessment of the approach to processing what could be expected to amount to a large volume of PPE offers from a data management and operational perspective. It is notable that, according to CO, a "call to arms" for PPE offers to be made via the portal (then the Survey Monkey form) was stopped at short notice both on 20 and 25 March 2020, and that one of the reasons for this was that "many unsolicited offers were arriving, and that encouraging even more would further swamp the ability of the newly formed PPE Buy Cell to deal with them" (INQ000497031, para 4.349). The revised webform and portal were put in place by 30 March 2020 (id, para 4.346), which suggests that this was considered an adequate approach to mitigating the risk of overwhelming the PPE Buy Cell, and that it would have been developed over at least 10 days of considering how to manage that expected large volume of offers. This raises significant questions as to the expertise and experience that informed the design of this measure from a data management perspective. It is also unclear to me why—even having put the webform and portal in place, and given the volume of offers already being received through the portal (above para 291.3)—it was still decided to launch a "call to arms" on 10 April 2020 (INQ000497031, para 4.349), as it seemed clear that it would be very difficult to process an even larger volume of offers. Even with better information systems in place and an ability to process larger volumes of information, given that all tasks following the collection of offers and leading to the award of a contract are resource intensive, it is unlikely that a general "call to arms" would have been desirable or preferable to a more targeted approach, eg through direct approaches to companies, either directly or through business organisations. This is also stressed by the Government Chief Commercial Officer (GCCO Third Statement, INQ000536362, paras 98 and 105). Ultimately, the goal of the initial emergency response must not be to collect information on all potentially available offers, but rather on a sufficient number of suitable offers that allow for the direct award of contracts that are 'just enough' to cover the immediate needs arising from the emergency. In the specific context of PPE procurement, this would have been

disregarded or heavily influenced by the approach to 'buying as much PPE as possible' (above para 286), but this does not mean that it would not have been crucially important to balance the targeted goal of the initial emergency response through direct awards, with a more structured call for offers within a competitive procedure that could have ran almost in parallel. This would have taken pressure off the teams tasked with quickly putting contracts in place to cover for immediate needs. It is also unclear to me why standard mechanisms to advertise contract opportunities would not have been used in relation to the extremely urgent needs, as most serious offerors would have been reached through eg standard prior information notices or contract notices published in the usual manner, even if those notices were only used to alert them to the mechanism to get in touch with their offers with a view to potential direct awards. An approach seeking to 'attract as many offers as possible' from the general public is not necessarily the most likely to be effective and it seems that the decision to launch a "call to arms" for PPE would have been driven by senior politicians, rather than by those senior civil servants involved in PPE procurement (GCCO Third Statement, INQ000536362, para 31). The PPE Buy Cell Lead has indeed stated that "[t]he approach of asking the wider public to help created a big problem. It is not something we would have supported and I do not know who decided to do it" (PPE Buy Cell Lead Statement, **INQ000540488** para 4.1; see also para 12.7). This raises questions on the ultimate reasons behind this approach, which do not seem to have been operational or commercial.

291.9. The development of the 'Mendix database' seemed to be dominated by workflow considerations, but it did not seem to prompt a reassessment of the way information was being collected or the extent to which offerors of PPE should have been asked to improve the information provided in relation to their offers by submitting a reviewed and much more structured form once the new process was in place—to facilitate automated filtering and comparisons and, ultimately, to better support prioritisation.

- Building on pre-pandemic knowledge of alternative approaches to structuring large volumes of procurement data, such as electronic catalogues or the collection of information related to dynamic purchasing systems, it should not have been too difficult to realise that it would have been preferable to create a webform that required the submission of highly structured and constrained information about the offers, with a significant number of mandatory fields, rather than a form solely seeking to record expressions of interest and basic details for potential follow-up. This more structured approach could have been based on existing models supporting the comparison of large volumes of offers, such as those used in qualitative selection or evaluation of offers in open procedures with large volumes of participation, and could have included pre-specified sets of criteria on key considerations for the assessment of the offers, such as specific types of PPE (not solely references to generic categories such as 'gloves' or 'aprons', but reference to particular specifications, sizes, etc), references to relevant certifications, volume, price, availability, deliverability, etc. DHSC has indicated that, over time, the PPE Buy Cell imposed restrictions "to the survey [in the webform] to ensure the offers being made would continue to improve the

Department's provision of stock. For example, a minimum value of PPE being offered, specifically set for each product type" (DHSC PPE Statement, INQ000528391, para 453). The PPE Buy Cell Lead has also explained that "[t]he webform was updated to allow for compliance documents to be uploaded on around 24 April 2020 – this was because as we learned what we needed we were able to ask for the webform to be redesigned"; and that, as a result of learning what information was required from suppliers throughout April and May 2020, "the survey monkey, then the webform, then the data which we were inputting into Mendix [...] all reflected how we sought narrower and more targeted data from suppliers over time, as we were working out how to identify the good offers" (PPE Buy Cell Lead Statement, **INQ000540488** paras 3.28 and 8.20). In my view, this suggests that the ability to constrain the information demanded from offerors and to use the form as a preliminary filter of offers was understood, but that an initial decision was made not to use it in that way, or that insufficient expertise on the products to be procured and their associated documentation informed the design of the initial forms.

- The collection of some of the relevant information could have been done on the basis of purely factual and targeted yes/no questions, with some limited space for restricted additional explanations where some of the information could not be provided or some of the pre-set requirements could not be met.

- Those criteria and any related considerations on ways to allow for some flexibility (eg in relation to technical certification against standards not usually used in the UK, or by reference to alternative means of proving technical compliance) could have been developed by specialist PPE procurers, who should have had this knowledge as part of their category management and market strategy work—notably, within NHS Supply Chain. This should have been facilitated by the fact that, as stressed by DHSC, "the technical standards of PPE are internationally standardised" (DHSC PPE Statement, INQ000528391, para 29). In that regard, the disclaimers offered by SCCL in relation to its role in sharing knowledge with the broader PPE Buy Cell about the technical standards for PPE, and statements such as knowledge of those specifications not including sizing requirements because "this was not an issue prior to the pandemic" (INQ000492085, para 11.14) are surprising and questionable. They also seem to be in contradiction with the fact that, as explained by DHSC in relation to pre-pandemic preparedness, those contracts for PPE included requirements related to assessing that the selection of products included sizes and shapes seeking to cover the maximum number of employee face shapes, and specific fit training requirements (DHSC PPE Statement, INQ000528391, para 195)—which questions any approaches to separating an understanding of technical specifications from fit tests as part of the subject-matter expertise needed for the effective procurement of PPE. In my view, this type of defensive statements are particularly problematic, from a governance perspective, coming from an organisation that was supposed to be tasked with developing market intelligence and sourcing strategies for clinically compliant products on a sustained basis, such as SCCL (above para 176).

- The webform could also have embedded standard data quality and integrity checks, such as those requiring re-typing of information in separate fields to verify its accuracy (eg for email addresses, phone numbers, or identifiers, as is routinely done in eg commercial websites).

291.10. It would also have been preferable to record that structured data in a format that allowed for its filtering in accordance to each of the different fields and criteria with a high level of granularity, as it would have significantly reduced the amount of time and resource required to triage and prioritise PPE offers. In my view, such approach to the collection and processing of large volume data should form part of the business as usual of organisations that regularly deal with large volumes of interactions and it should not have been difficult to consider these issues before launching the webform and portal for PPE offers—or, at the very least, once the difficulties with sifting through the offers and collecting additional details became apparent. Such expertise could have been reasonably expected from procurement professionals and consultants with experience of centralised procurement or, more generally, experience with the use of dynamic purchasing systems and electronic catalogues. Even if CO and DHSC did not have direct experience of procurement as business as usual, commercial experts and, in particular staff of NHS Supply Chain or Crown Commercial Service, would have had that expertise. If the relevant expertise was not available at the time due to staffing decisions, this would be an issue to consider as part of the lessons learned.

291.11. A structured data approach would also have had the advantage of not making data quality on a PPE offer dependent on the level of effort of the specific caseworker assigned to progressing it, but rather on the suppliers' effort to adequately complete the form. While it is understandable that the design of the webform should not create such a burden on offerors as to put them off, in the context of a business to government transaction and especially in relation to the amounts of PPE being offered, it would not be unreasonable to expect a properly staffed, serious and experienced potential supplier to be able to complete a relatively complex form. In the end, if the triaging process and verification by the opportunities teams had to obtain all this information, the offerors had to have it ready in any case.

292. Against this background of difficult and initially ineffective triaging of a large volume of offers, which created a significant backlog, the 'VIP Lane' was created as a mechanism to expedite triage. This focused on offers referred by Ministers, MPs and senior officials directly to the Health Ministers, DHSC or officials working in the Parallel Supply Chain (para 291.1 above). As referrers were contacted by those who had made offers to check if their offers were being progressed, they sent chasers to the PPE Buy Cell. According to the CO, "[g]iven the number of offers and referrals, handling these chasers was a significant drain on the PPE Buy Cell's time and resources and the repeated chasing risked duplication of offers" (INQ000497031, para 4.392). GCCO has stressed that the team was "receiving too many ad hoc requests on which they are being chased which often are for products that don't meet the technical specifications or are bogus" (GCCO Third Statement, INQ000536362, para 34). The 'VIP Lane' team lead also stressed that some of the offers were risky and, on probing them, it became clear that offerors did not have the supplies ready to go but were rather connections that did not really pan out (HPL and Donations Lead Statement, INQ000536351, para 6.1).

The 'VIP Lane' was created "to remove the disruption which these referrals were causing to the general open source system and the opportunities teams" (INQ000497031, para 4.396), and was solely "dedicated to handling these referred opportunities that required greater stakeholder engagement" (id, para 4.395). The 'VIP Lane' took the form of a dedicated mailbox that was established on 2 April 2020 (id, para 4.397) and a dedicated 'Opportunities Team' (id, para 4.359.1). The 'VIP Lane' would have initially comprised three or four members of staff when the PPE Buy Cell had a total of 50 staff. Although it remained a small team of 12 staff working on 'VIP' cases with administrative support until mid-April 2020 (HPL and Donations Lead Statement, INQ000536351, para 7.31), it would have grown to include 38 out of 508 staff in the PPE Buy Cell at its peak (GCCO Third Statement, INQ000536362, para 42). Supplier-facing individuals within the 'VIP Lane' would have been experienced civil servants or consultants, although the team lead was not necessarily aware of their civil service grade (HPL and Donations Lead Statement, INQ000536351, para 3.5). According to DHSC, the existence of the 'VIP Lane' and details on how to access it were shared with the offices of those who could make a senior referral, but the information "was not more widely published as it was an internal handling mechanism within the Parallel Supply Chain" (DHSC PPE Statement, INQ000528391, para 384). This seems to contrast with earlier mechanisms to collect non-ventilator offers through other email addresses linked to the Government Commercial Function, which had been disclosed more broadly (GCCO Third Statement, INQ000536362, para 30). In my view, and based on the evidence I was able to review, the reasons given for the creation of the 'VIP Lane' are not persuasive because there was no genuine legitimate need for different processing of referred offers simply on the basis of the referral.

292.1. It has been stated that 'VIP Lane' offers were at the same time 'route 2' offers, in the sense that, according to CO, all companies referred by Ministers, MPs or senior officials "had already applied via Route 2 or were told to complete the webform for Route 2 as part of processing their offers" (INQ000497031, para 4.347). They would thus have been processed by the PPE Buy Cell under its standard procedures. This would have included prioritisation on the basis of objective criteria (see above 291.2). As the GCCO submission stresses, prioritisation of the most 'useful' offers "(where 'usefulness' included considerations of availability, provable quality standards, conformance to specifications, appropriate price, volume, time to deliver, etc) [...] was already happening in each of the opportunities teams based on some minimum volumes set [...] and depending also on the particular needs of that day" (GCCO Third Statement, INQ000536362, para 45). In further statements, it has been explained that "a number of ['VIP'] potential suppliers [...] were unlikely to use the [webform], perhaps because of the size of their company [...] It remained the case as time went on that not all suppliers filled out the webform, such as some of those coming though the ['VIP Lane']" (PPE Buy Cell Lead Statement, **INQ000540488** para 5.9). On the evidence I have been able to review, it is unclear whether this applied to a large or small number of potential suppliers and, in any case, it is unclear why it would not have been possible for the 'VIP Lane' caseworkers to complete the webform on behalf of potential offerors and then leave the further processing of those offers to prioritisation across opportunities teams. Although in relation to conflict of interest declarations, there is evidence of forms being filled on behalf of suppliers by staff in the PPE Buy Cell (DHSC PPE Statement, INQ000528391, para 516).

292.2. Therefore, in my view, to the extent there was a problem that required addressing separately, the problem concerned the repeated communications and chasers from 'VIP referrers' and offerors, as well as the importance given to reputational risks and negative press coverage by political actors and Ministers. However, this was not recognised at the time and is still rejected by CO and DHSC.

- The reasons why 'VIP Lane' offers would have merited greater stakeholder engagement are unclear, though there is significant evidence to the effect that this was considered to be the case because, as an individual put it, "MPs [...] can make life painful and shout loudly" (as reported in HPL and Donations Lead Statement, INQ000536351, para 7.15). DHSC has stressed that the 'VIP Lane' "arose from the legitimate need to assure Ministers and others that offers they had passed onto the PPE Cell were being properly followed up" (DHSC PPE Statement, INQ000528391, para 15). In my view, however, there is a clear difference between providing assurance that offers were being considered and progressed by communicating the organisational arrangements of the PPE Buy Cell, on the one hand, and providing specific updates on the progress of specific offers to the specific referrer/s, on the other.

- Rather than dedicating resources to answering these requests for updates, the PPE Buy Cell, DHSC or CO could have sent general communications to referrers explaining those organisational arrangements and asking them to refrain from chasing, as well as setting up an automated response from the dedicated mailbox making clear that the offers were being processed and asking offerors and referrers to wait for a follow-up as part of the standard operating procedures. There is evidence of the use of such automated replies in relation to the closure of the 'VIP Lane' (INQ000497031, para 4.416), and any other 'route 2' offerors were not given the opportunity to ask for updates. The Lead of the PPE Buy Cell has submitted that "[g]iven the urgency at the time, it was [...] impracticable to answer emails with an automatic response suggesting that suppliers should await contact", as this would not have been acceptable to referrers and would have triggered escalation within the PPE Buy Cell (PPE Buy Cell Lead Statement, **INQ000540488** para 5.10). In my view, this does not detract from the operational preferability of an approach based on automatic replies and does not explain why, on escalation, it would not have been possible for senior leadership of the PPE Buy Cell to support it. Members of the PPE Buy Cell could also have been instructed not to provide updates other than once PPE offers were being actively considered.

- The 'VIP Lane' team lead has also suggested that 'VIP' referrers were largely well-meaning and eager to support the UK-wide procurement effort, but they may not have been aware of the scale of the task or the diversion caused by their multiple enquiries (HPL and Donations Lead Statement, INQ000536351, para 4.3). This could have been communicated to them and the message that letting the opportunities teams progress offers undisturbed would be the most effective course of action could have been clearly presented.

- It is unclear to me why, as submitted by the GCCO, it was considered that "it would have been nigh on impossible to decline to answer [...] referrers' questions about how the deals were progressing" (GCCO Third Statement, INQ000536362, para 90). More generally, it is also unclear why there would be a perception that, in a crisis, "a handling team which is able to absorb the inevitable pressure and persistent questions from seniors will always be necessary to prevent the whole buying process from being overwhelmed" (id, para 92), and that it is unrealistic to expect politicians, Ministers and their offices to refrain from exercising pressure and to be able to communicate a message of calm to offerors and third parties (id, para 96). In many other contexts, it is well understood that Ministers, MPs and other parties cannot interfere with specific regulatory or decision-making processes and cannot obtain 'informal updates' on progress of relevant procedures. It is unclear to me why the same would not apply to procurement.

- In my view, a general willingness to accept and accommodate outside pressure on the procurement function is in itself problematic and can undermine its independence and effectiveness. If anything, it seems to me that lessons learned should point in the opposite direction and seek to create an environment where procurement teams are not put under such unnecessary pressure and where politicians and senior officials accept a culture of responsible deference and seek accountability through structured channels compatible with operational requirements.

- Moreover, and more importantly, it seems clear that the 'VIP Lane' was not merely a mechanism to create additional communication with referrers, but an organisational approach that created clear advantages and, therefore, unequal treatment (see below para 294).

292.3. Related to the possibility of reducing communications traffic through general messages rather than detailed engagement, to the extent that delays in completing checks and preliminary clarifications with PPE offerors required multiple communications and iteration of similar requests for information or evidence, the PPE Buy Cell could have developed a toolkit or set of templates that opportunities teams could use with minimal amendments to reduce workload and increase productivity. This could have included follow-on forms requesting PPE offerors to provide structured data to be managed and processed in a manner similar to the process that could have been facilitated from the beginning through a more developed webform (above para 291), but could also have comprised simpler template communications. On the evidence I have been able to review, it seems that only a template rejection letter was eventually developed by the 'VIP Lane' (HPL and Donations Lead Statement, INQ000536351, para 7.29). At any point in time, it should have been possible to contact all PPE offerors with pending offers with such forms or template communications asking them to provide an update on their offer in the relevant format, so that further processing could be carried out more effectively and with much less demand on the opportunities teams. On the evidence I have been able to review, no focused attempt to create such a toolkit or consider ways of streamlining processes and communications seems to have been undertaken.

292.4. It is worth highlighting that the initial expectation of some of those directly involved was that the 'VIP Lane' would not be acting as a quality filter and that it would not be necessarily receiving good quality or particularly credible offers—or, as the 'VIP Lane' team lead put it, "I had almost expected us to be akin to sewage workers, clearing noise out of the system" (HPL and Donations Lead Statement, INQ000536351, para 6.2). If this is representative of the more general understanding of the 'VIP Lane' and its expected contribution at the time of its creation, significant questions follow on whether this would have been the most productive use of limited resources at the time. There were alternative ways to approach the increased communications originating from referrers without creating preferential treatment at triage stage. Moreover, the reasons for the creation of this separate route are unpersuasive in relation to the risks of unequal treatment and favouritism, and the clearly foreseeable effects of the triaging as 'VIP' of certain offers.

293. 'VIP Lane' offers were processed by the dedicated opportunities team.

293.1. According to DHSC, the 'VIP Lane' "was not a separate route for suppliers to obtain a contract with the Government or to obtain any advantage"; and "the same guidance, criteria to assess suitability, process maps, due diligence, technical assurance and financial controls were used, regardless of which team handled the potential contract [...] the same process and due diligence applied to those offers handled in the ['VIP Lane'] as did any other offer that the Parallel Supply Chain handled" (DHSC PPE Statement, INQ000528391, paras 381 and 382).

293.2. Moreover, according to the CO, 'VIP' and "open source" offers would have been treated in largely the same way. CO stresses that "[t]here was no policy or instruction for caseworkers on the ['VIP Lane'] to contact suppliers more often or to provide greater support to suppliers than in other Opportunities Teams" (INQ000497031, para 4.399). Further, it claims that "[s]ave that the point of entry of the offers it was reviewing was different, and there was more internal reporting, the ['VIP Lane'] operated in the same way as the other Opportunities Teams" (id, para 4.402). Offers deemed to be worthwhile by the 'VIP Lane' team were "passed to the Technical Assurance Team for validation, in the same way as by the other Opportunities Teams for offers made via the portal" (id, para 4.408).

294. In my view, however, such limitative descriptions of the differential treatment downplay the advantages given to 'VIP' offers.

294.1. It is clear that, although it was not always possible to attain this due to workload pressures (HPL and Donations Lead Statement, INQ000536351, para 7.13), the 'VIP Lane' sought to make initial contact with the offeror within 24 hours of a referral, "as referrals from Ministers, NHS managers and senior officials were treated as a priority task" (INQ000497031, para 4.403). Even if a backlog accumulated within the 'VIP Lane' as time went on, in the early stages, it would have contacted suppliers within the hour, though this reaction time increased with the number of offers received (HPL and Donations Lead Statement, INQ000536351, paras 7.13 and 7.15). In my opinion, this is very important because, in the context of a turbulent market, older offers were taken to be less credible than more recent offers. This is

clear from the guidance that eventually emerged on the progression of offers, which advised all teams that "[o]ffers more than two weeks old are generally not credible in the current market". The opportunities team was advised that, in relation to offers more than two weeks old "where you believe there is a credible reason that an offer may remain valid then expressly confirm this with the supplier and then submit to technical assurance as a new offer"; while the technical assurance team was advised that, where an offer was more than two weeks old, it "should be returned to opportunities for revalidation or rejection" (INQ000477274). This would have created a clear disincentive for the opportunities teams to engage with offers approaching two weeks, and therefore an advantage for offers that could be processed swiftly after submission to the 'VIP Lane'. Moreover, involvement of the 'VIP Lane' also resulted in lower fallout of offers at the initial stages. As the GCCO explained, issues such as the incorrect completion of the webform, or a failure to respond to the first three contact attempts were common failings for "open source" offers. However, "[t]hose failings were less likely on the HPL offers, where a team member was tasked to collect the data before forming a view as to whether the goods were worthy of follow up and as part of being referred, offerors had provided contact details which they were then unlikely to fail to respond to" (GCCO Third Statement, INQ000536362, para 74).

294.2. Although the 'VIP Lane' team lead has submitted that his understanding was that progressing 'VIP' offers would not have led to prioritisation by the Technical Assurance team (HPL and Donations Lead Statement, INQ000536351, paras 6.4 and 7.5), he held the view that "all other factors being equal, an HPL case with merit should be given priority over a case of equal merit which came from another route", and he thus asked for a number of offers to be prioritised, which "were a mix of 'noisy' deals and ones which had particular promise (though the 'noisy' ones were likely thought to be credible too)" (id, para 7.16). Although this was received with pushback from the Technical Assurance team, it is also clear from Cabinet Office's account that the Technical Assurance team created a dedicated point of contact that 'VIP Lane' caseworkers would refer offers to (INQ000497031, para 4.408), and that the 'VIP Lane' team could obtain updates from the relevant person in other teams within the PPE Buy Cell to pass them on to referrers (id, para 4.413.1). More importantly, it is also clear that 'VIP Lane' offers were marked and visible as such throughout the process leading to the eventual award of a contract. Indeed, "Opportunities were marked as 'HPL' (or 'VIP' as it was sometimes called) to make [the] process of seeking updates work more efficiently" (id, para 4.413.1). This casts doubt on the statement that all steps following the 'VIP Lane' determination that an offer was worthwhile "were carried out in the same way for HPL offers as for non-HPL offers" (id, para 4.409). In my view, the reasons given for marking offers as 'VIP' or 'HPL' are unpersuasive, as it would have been possible to track all offers in relation to other types of referencing, labelling or numbering.

294.3. Moreover, on the evidence I have been able to examine, there seemed to be no consideration given to the risk of *de facto* differential treatment that the pressure stemming from regular requests for updates and the labelling of offers as 'VIP' could have on those carrying out complex processes with limited and imperfect information and under significant pressure. Such a risk has been explicitly rejected

in some statements. For example, the 'VIP Lane' team lead has stated that "even if the caseworker did open up the case to review it as a result of some extra pressure, the impact on the overall progress of the case would likely be minimal", on the basis that "key decision makers (in technical assurance and closing, as opposed to the front end process such as my team [the 'VIP Lane']) [were insulated] from political pressure" (HPL and Donations Lead Statement, INQ000536351, paras 9.5 and 9.6). The 'VIP Lane' team lead has also stated that he and other more senior/core members of the team were able to absorb pressure that was being directed against the 'VIP Lane' team, although he has acknowledged that the team was facing immense pressure; "we were in a crisis and of course it was a high-pressure situation. There was pressure from ministers and others to ensure that the process was working properly. This was however not, in my understanding, pressure to get a particular outcome for any individual supplier" (HPL and Donations Lead Statement, INQ000536351, paras 1.4, 3.5 and 4.2). However, it is not clear to me whether this distinction between the purpose of the pressure being exercised would have made a difference in practical terms. Especially because it is not clear to me that everyone within the PPE Buy Cell would have necessarily known what 'HPL' or 'VIP' referred to—not least in view of the different ways in which priority seems to have been considered. For example, there is evidence that there was prioritisation based on specific demands or gaps in stocks as evidenced in daily read-outs of data, as well as prioritisation for referred ('VIP') offers. Caseworkers could thus easily have been confused as to whether the origin of 'VIP' treatment was the initial referral or any subsequent operational consideration related to need. This has also been stressed as a clear concern by the GCCO (GCCO Third Statement, INQ000536362, para 45). It is also unclear to me that other parts of the PPE Buy Cell would have been able to identify that, within the 'VIP Lane' there was also prioritisation (HPL and Donations Lead Statement, INQ000536351, paras 5.3 and 6.4) and, therefore, some offers could have been 'low priority' but come from the 'High Priority Lane'. The team lead has explained that there were "route 2" offers that would be processed "on the normal route but with a priority tag to ensure that it was picked up", and that the 'VIP Lane' would on occasion process offers that other members within the PPE Buy Cell thought should be treated as a priority (id, para 5.6). The 'VIP Lane' team lead has acknowledged that there was a lack of clarity on the remit of the 'VIP Lane' and that, for example, an NHSE&I presentation dated 5 April 2020 indicated that VIP meant "processing of high priority and high volume opportunities – the VIP process has been expanded to enable urgent orders to be processed if the opportunity is significant and the right quality" (id, para 5.11), which it was not.

294.4. This seeming conflation between 'VIP' and high priority offers is visible in DHSC's statement. DHSC describes the initial triaging as being carried out on the basis of company size and/or size of opportunity. "Donation/'VIP offer' flagged offers were also marked to be checked whether they were viable so this could be fed back to those referring these offers. Of the circa 50,000 category offers logged on the database from 15,000 suppliers, 7,396 were marked as being of the highest priority" (DHSC PPE Statement, INQ000528391, para 456). However, only 430 out of 15,624 suppliers were 'VIP suppliers' (id, para 730 and Table 11), which suggests that there would have been high priority category offers both from 'VIP' and "open source" offerors, whereas 'VIP' offers were marked as such (above para 294.2). It is also

unclear how the approach to treating 'VIP' or 'HPL' offers evolved over time and, in particular, how those were progressed in the early weeks of operation of the 'VIP Lane', which preceded prioritisation based on offers including multiple elements of PPE, or high volumes of high priority items, which emerged towards end April 2020 (DHSC PPE Statement, INQ000528391, para 457).

294.5. This potential conflation would also have mirrored the situation arising from a parallel approach implemented in relation to the procurement of tests. According to UKHSA (then, PHE), DHSC also used dedicated mailboxes to triage offers for Covid-19 testing, and this also included a dedicated "COVID Testing Priority Contacts". Such mailboxes could be used both for referrals from public sector bodies (such as MHRA, NHS or PHE) and referrals by senior individuals in the UK Government (e.g. Ministers, their special advisers, other parliamentarians, or other public figures). UKHSA explains that, according to a review carried out in 2022, "some offers received through these inboxes were designated 'VIP', 'Fast Track' or 'Priority', sometimes appearing to refer to a referral from a senior individual in the UK Government and/or where there was an immediate shortage of a particular product or service. The use of these terms and/or the intention of the tagging was not clear or consistent" (UKHSA M5 Commercial Witness Statement, INQ000521972, paras 4.96 to 4.99). If the same happened in relation to PPE procurement, as seems to me likely, this would have created uncertainty and could have resulted in material preference to offers in the 'VIP Lane' on the assumption that they were operationally high-priority, rather than simply forwarded by a 'VIP referrer'.

295. There is no question that the 'VIP Lane' was unlawful, as declared in *Good Law Project and EveryDoctor) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC).

295.1. However, even after the 'VIP Lane' was found to have breached the obligation of equal treatment, CO's statement does not seem to acknowledge that this approach was profoundly problematic, or to have investigated the true impacts of this approach on outcomes in a meaningful manner. Data provided by CO shows that 6% of 'VIP' offers led to orders, compared to around 1.4% of non-'VIP' offers (INQ000497031, para 4.492.1). This would imply a 4:1 success rate for 'VIP' offers. However, as further detailed by GCCO, "in terms of suppliers, around 10% on the ['VIP Lane'] obtained a[t] least one contract compared to around 1% of non-HPL suppliers" (GCCO Third Statement, INQ000536362, para 73). This would imply a 10:1 success rate for 'VIP' suppliers. Moreover, CO data also shows that 'VIP' contracts accumulated £3.747bn of the £7.207bn purchased through the PPE Buy Cell (excluding the PPE Make Cell and SCCL purchases) (id, paras 4.420 and 4.490). According to CO figures, 'VIP' contracts thus represented more than half (52%) of the total procurement by the PPE Buy Cell. Figures provided by DHSC are slightly different. According to DHSC, 11.86% of suppliers with offers progressed through the 'VIP Lane' were awarded contracts, whereas the equivalent percentage for non-VIP suppliers was 1.13%. This would also show a 10:1 success rate for 'VIP' suppliers. In terms of value, DHSC indicates that 'VIP' contracts would have reached £4.19bn of the £8.62bn initially spent on PPE contracts by the Parallel

Supply Chain on its behalf, that is just under (48%) of procurement by value (DHSC PPE Statement, INQ000528391, para 730 Table 11).

295.2. In my view, there should be a much broader recognition of the points of principle at the basis of the finding of unlawfulness of the 'VIP Lane' by the High Court, which not only confirmed that the 'VIP Lane' resulted in unequal treatment because "such offers received earlier consideration at the initial offer review stage, and [...] that 'speed in getting an offer to Technical Assurance improved the chances of securing a contract'" (INQ000497031, para 4.492.1). The High Court also found that:

- "there is evidence that opportunities were treated as high priority even where there were no objectively justifiable grounds for expediting the offer" ([2022] EWHC 46 (TCC), at [383] and [384]);

- "the High Priority Lane did not act as a quality filter. Therefore, it did not simply send to Technical Assurance the offers that were assessed to be of superior quality; it processed all offers in the High Priority Lane provided that they were credible", which was a flawed basis on which offers were allocated to the 'VIP Lane' (id, at [396]); and

- "the criteria used to allocate offers to the High Priority Lane did not treat comparable offers in the same way. [...] the mere fact that an offer was sent to the priority email address from a Senior Referrer did not justify preferential treatment over a similar offer that was made through the Portal. That amounted to a breach of the principle of equal treatment" (id, at [398]).

295.3. The fact that such unjustified unequal treatment drove close to 50% the value of procurement by the PPE Buy Cell, and significantly increased the likelihood of success of 'VIP' offers seems to me to be downplayed by the Cabinet Office and the Department of Health and Social Care. It is also downplayed by the Government Chief Commercial Officer in submitting that "[i]t is not straightforward to work out logically whether any specific offer or supplier would have benefitted from being dealt with more swiftly on the ['VIP Lane']" (GCCO Third Statement, INQ000536362, para 78). In my view, this type of assessment fails to recognise the structural issues that are problematic with an approach to prioritisation that is based on the identity of the offeror and its referrer/s, rather than on the objective terms of the relevant offer, and can thus prioritise inferior offers over better ones. Such an approach also fails to recognise that this unequal treatment based on expedited consideration of offers was taking place in the context of emergency procurement that, by legal requirement, must be minimal and strictly proportionate to the immediate needs of the contracting authority. This unavoidably implies that emergency direct awards must be brought to an end as soon as possible and, in any event, as soon as those immediate needs are covered. In this specific context, 'being considered first' is clearly an advantage as the contracting authority should not consider all offers received and must not award contracts to all responsive or qualifying offers, if those exceed the immediate needs. To put it plainly, emergency direct awards can stop at any moment and being considered ahead of other offers can make the difference between obtaining a direct award, or not. In the context of the 'VIP Lane', and the PPE Buy Cell more generally, these considerations and limitations were widely

disregarded due to the approach to 'buying as much PPE as possible' (above para 286). However, that does not mean there was no clear, irrefutable potential advantage in being considered as a priority. This has been recognised by others, such as the 'VIP Lane' team lead, who has acknowledged that "the fact that there were two different teams dealing with new suppliers meant that there was the possibility of different treatment between the two cohorts (those coming through the survey and those coming into the HPL) so that if my team were quicker or more responsive, then suppliers would get different treatment" (HPL and Donations Lead Statement, INQ000536351, para 9.7). It has also been raised that, ultimately, the average processing times for HPL and non-HPL offers would have been largely comparable. However, this could not have been known at the time and the specific goal of the 'VIP Lane' was to prioritise and expedite the processing of those offers.

Due Diligence, Conflicts of Interest, Record-keeping, and other Controls in the PPE Buy Cell

296. More broadly, and not only in relation to the 'VIP Lane', it is also notable that the initial capability to carry out due diligence within the PPE Buy Cell was extremely limited.

296.1. In the initial weeks of operation of the PPE Buy Cell, CO confirmed that the unit tasked with due diligence on UK companies, "which comprised only 1 or 2 people, only had capacity to do around 20 due diligence checks a day. Most due diligence was conducted at the Closing stage of an offer" (INQ000497031, para 4.434). On 16 April 2020, a specialist consultant (Contingent) was engaged and, according to CO, when Contingent did not have capacity, due diligence checks would have been carried out by the Ministry of Defence, as it was running the Closing Team (id, paras 4.436 and 4.438). DHSC confirmed that in early cases, "where the due Diligence Team were unable to produce reports due to workload or resourcing constraints, the Closing Team helped identify and mitigate the risk, often using the Cost Assurance and Analysis Service (CAAS), the [Ministry of Defence's] internal service" (DHSC PPE Statement, INQ000528391, para 477). However, this seems to only have been possible from mid-April 2020 and the situation with earlier contracts remains unclear (id, para 478). It also seems that a 'rapid' 4-hour due diligence approach was used "where required stock was in short supply, there was high demand and where payment was required within 24 hours [...] in order to secure the contract" (id, para 480). It is unclear to what extent this applied the same criteria and could be as complete as the 'standard' 24-hour turn around due diligence approach.

296.2. It is unclear to me why the capacity of the due diligence team was not increased from the very beginning, so that due diligence could be carried out at the opportunities stage in an adequate fashion. At that point in time, leaving most due diligence for the closing stage of an offer could have been problematic, as there would have been significant pressure to close contracts with providers deemed to have available and technically compliant products (or capability to produce or source them). It is also unclear to what extent proper due diligence was actually carried out at that later stage. According to the CO, "all offers should have been subject to due diligence before any contract was awarded (with the nature/extent of the due diligence developing as time went on). However [... CO] has not been able to identify records showing that due diligence was carried out on some suppliers with

whom contracts were entered in the first few weeks of the PPE Buy Cell. […] given the urgency and lack of a centralised record keeping system at this stage, no records were kept" (INQ000497031, para 4.435).

296.3. All routes directly awarded contracts based on reg.32(2)(c) PCR2015 (INQ000497031, para 4.351). As mentioned above, such awards require a written report including due diligence information and checks on potential conflicts of interest (see paras 110 and 148 to 152). On the evidence I have been able to examine, it seems clear that the procurement activities of the PPE Buy Cell breached applicable record-keeping requirements during those first few weeks of operation, and there are risks that they also fell short of substantive due diligence obligations, although this cannot be at this stage verified given the absence of records (see also para 298).

297. The way some aspects of due diligence were conducted also raises questions.

297.1 CO explained that, as part of due diligence, the directors of potential suppliers were checked using an HMRC tool that flagged whether they were Politically Exposed Persons (PEPs) (INQ000497031, para 4.442). While this is a potentially helpful check, it does not suffice to ensure that a company does not create potential conflicts of interest in relation to PEPs, as their holding a directorship is a very narrow and probably rare circumstance. Where a due diligence check concerning PEPs was concerned, especially in the context of the 'VIP Lane', a more thorough investigation may have been appropriate and there could have been ways to go beyond the HMRC tool, such as explicitly asking the company and the referrer to complete a conflict of interest declaration form. However, where conflict of interest declarations were required as part of the Closing Team's due diligence (through a new supplier form), they referred to possible conflicts of interest between the supplier and DHSC (id, para 4.456). This also left routes for potential conflicts unexplored, especially in relation to PEPs involved in the referral the 'VIP Lane' but unrelated to DHSC.

297.2. It is also worth noting that, in the initial stages, there seemed to be "no guidance or criteria used by the caseworkers as to when an offer should be progressed or not, it was a matter of exercising commercial judgement" (HPL and Donations Lead Statement, INQ000536351, para 7.2). When it emerged, the guidance on due diligence to be carried out at the early stages of considering progressing offers for PPE (INQ000477274 in relation to general due diligence and INQ000478791 in relation to technical assurance due diligence) was limited, drafted in very informal and imprecise terms, unclear, and would not have been easily applied by inexperienced members of staff with limited or no previous understanding of due diligence checks, or familiarity with PPE technical specifications. In relation to technical assurance due diligence, GCCO acknowledged that "for an inexperienced buyer of PPE the specifications of the masks […] were unclear" and that there were "issues that the PPE Buy Cell experienced where there was room for confusion as regarding packaging specifications" (GCCO Fourth Statement, INQ000535017, para 97). For example, in relation to the 'VIP Lane', it has been stressed that "[t]here were no individuals within the HPL team available that had detailed knowledge of

clinical criteria" (HPL and Donations Lead Statement, INQ000536351, para 9.13). If the same circumstances applied to other opportunities teams, this would have been a significant problem in carrying out initial checks on the 'credibility' of offers that depended on likely compliance with technical requirements. This seems to have been the case, at least initially, as the PPE Buy Cell Lead identified as one of the problems the cell faced "Lack of capacity regarding PPE technical expertise, so as to cope with the number of offers" (PPE Buy Cell Lead Statement, **INQ000540488** para 3.47b).

297.3. It is also worth noting that the approach to compliance with technical specifications also created scope for deviations, as full assurance was not necessarily required. According to DHSC, the initially strict "yes" or "no" approach to technical assessment changed from mid-April 2020, when it was possible for the Technical Assurance Team to mark offers as "maybe" technically compliant. Those offers were then forwarded to a Decision-Making Committee (DMC) that would "make rapid recommendations for the 'maybe' marked products" (DHSC PPE Statement, INQ000528391, paras 484 to 489). I have not been able to review any evidence in relation to this approach. As a point of principle, it raises some questions on whether this resulted in a relaxation of the technical assessment standards, especially if 'maybe' offers were previously treated as non-compliant, and on the extent to which the approach led to treating more offers as compliant than not, given the pressure under which such rapid decisions would have needed to be made and the likely incomplete information on which they probably had to be based.

298. There were also significant broader issues with the documentation and follow-up of potential conflicts, especially those carried out under time pressure, as well as the override of due diligence flags. In general, CO explains that "[o]nce the terms of the contract were agreed and it was ready for signing, the Closing Team would prepare a 'Closing Pack', containing evidence of the due diligence, the new supplier form (if needed), details of technical assurance and a summary of commercial terms, including a market price assessment" (INQ000497031, para 4.457). However, there were significant shortcomings in the completeness and record-keeping under this approach.

298.1. This was recognised on 3 May 2020 in a report by the Government Counter Fraud Function (GCFF), which stressed that there was a need to ensure "that there is a clear audit trail for decisions where due diligence flags have been overridden and ensuring that all content regarding the overriding of due diligence decisions are recorded" (INQ000497031, para 5.28.2). However, taking a very narrow approach to understanding this recommendation, it was not taken up. CO instead states that the minutes of the Clearance Board addressed these issues and provided records of discussions on the results of due diligence on a number of companies (id, para 5.32). However, the Clearance Board was only put in place from 5 May 2020 (id, para 4.459). This approach thus fails to acknowledge that, at least for the first six weeks of operation of the PPE Buy Cell, there were significant problems with the recording of due diligence outcomes and recommendations, and decisions whether to follow or override them.

298.2. This is also more generally highlighted by the Government Internal Audit Agency (GIAA) in its report of 1 October 2020, which according to CO, concluded that, in relation to controls, the "main weakness arose in the audit trail of due diligence checks, in that, if there was an issue as to the financial standing of a supplier, there was not always an audit trail of how such issues were resolved", and that "[t]here could have been clearer evidence of decisions that were made by the Clearance Board [...] For contracts of £5mn and above that were awarded prior to the creation of the Clearance Board, the audit trail for their endorsement was inconsistent and limited" (INQ000497031, para 6.17). This led to a clear recommendation that "A full audit trail for all contracts should be maintained. This included contracts let via the High Priority Lane and contracts let prior to the creation of the Clearance Board. The details of all conflicts of interest, new supplier forms and details on how any concerns flagged by due diligence have been mitigated should also be recorded", and a further recommendation to "keep written justifications on the award of contracts that satisfies tests required for reliance on Regulation 32(2) for direct awards and Regulation 72(1) for modifying contracts" (id, para 6.18).

298.3. A further report by GIAA on 16 February 2021 took a more focused approach to the assessment of a specific list of contracts and found that "Limited documentation was retained as to what was being done to resolve due diligence issues that had been identified. Some counterparties had due diligence checks done on them, but others did not, therefore Cabinet Office should consider being clear about what processes and checks are to be performed on the counterparties and by whom" (INQ000497031, para 6.22). The second GIAA report included recommendations "also largely focused on adequate record keeping" (id, para 6.23). It is thus clear that the PPE Buy Cell record-keeping had been significantly flawed and insufficient.

299. There are also concerns on how the PPE Buy Cell carried out price benchmarking. This is relevant because PPE procurement was excluded from the commercial controls applicable to other areas of spend (GCCO Fourth Statement, INQ000535017, paras 12 and 61).

299.1. CO states that "the fact that there was no formal competition under the 2015 Regulations did not mean that [the procurement] was uncompetitive. The PPE Buy Cell was asking 'is this a good price for today, compared to the prevailing market price for this product?'. Running averages of prices paid for PPE were [...] compiled" (INQ000497031, para 4.351, emphasis in the original). The PPE Buy Cell established a Pricing Benchmark based on the data on the average price it had paid for PPE products, which "sought to ensure value for money at that moment in time, even though, due to the time constraints, formal competitions were not viable, and due to the supply and demand factors [...], prices were multiples more than before (or after) the pandemic." (id, para 4.453). Remarkably, the guidance to the Closing Team advised "not to agree a price which was 25% more than the Pricing Benchmark (i.e. the rolling average unit price for the last two weeks)" (id, para 4.454).

299.2. On the evidence I have been able to examine, it is unclear when that guidance was put in place, whether that guidance was always adhered to (although there are indications that it was possible to award contracts with prices exceeding the

benchmark; see eg DHSC PPE Statement, INQ000528391, paras 493 and 498) and, if the guidance was not followed, whether eventual higher than 25% increases would have been taken into account by the benchmark going forward—although this seems implicit in that description. This approach to cumulative rolling price increments also implies that, even taking into account a 25% rolling average limit, over a period of 12 weeks, a 550% of the initial average price would have been tolerated. Given that it seems undisputed that the PPE Buying Cell was paying significantly increased prices from the very beginning (INQ000497031, paras 1.26 and 4.290), this approach could have easily tolerated total price increases well over ten times pre-pandemic levels.

299.3. In my view, it is also unclear whether this approach to price benchmarking was in line with the conditions for the exercise of delegated funding authority initially imposed. HMT had required that decision-makers should "make all reasonable attempt to ensure prices are <25% above the average unit price paid to date" (DHSC PPE Statement, INQ000528391, paras 558 and 562). DHSC confirmed that, to assess value for money, the approach was to use "what had been paid on each PPE deal over the previous 14-days which gave [decision-makers] a 14-day average price for each product" (id, para 498). However, HMT's condition was not limited to prices paid in the last 14 days. Interpreting the condition as requiring averaging unit prices across all procurements, not only the ones in the last fortnight, would have set a maximum at just over 200% over 12 weeks. While this is also a significant increase in unit prices in a short period, it would have set a cap more than 2.5 times lower than benchmarking on a 2-week rolling basis. Crucially, the impact of the different interpretation would have been most noticeable after the fourth week, as shown in Table 8 below. The calendar dates used for illustration purposes coincide with the 12 weeks following the creation of the Parallel Supply Chain.

Table 8. Price benchmarking on a two-week rolling basis compared to price benchmarking using all prices paid, as a permitted percentage increase

Week	Illustrative dates	Price cap using 2-week rolling basis	Price cap using all prices paid
1	21/03/2020	100%	100%
2	28/03/2020	125%	125%
3	04/04/2020	141%	141%
4	11/04/2020	166%	152%
5	18/04/2020	192%	162%
6	25/04/2020	224%	170%
7	02/05/2020	259%	177%
8	09/05/2020	302%	183%

Week	Illustrative dates	Price cap using 2-week rolling basis	Price cap using all prices paid
9	16/05/2020	351%	189%
10	23/05/2020	408%	194%
11	30/05/2020	474%	199%
12	06/06/2020	551%	204%

299.4. In that regard, the Lead for the PPE Buy Cell has submitted that "[t]o guard against inflation over time Efficio would circulate Pricing Benchmark data which showed how the price had changed over a longer period, since the beginning of the pandemic. The benchmarking charts did not show a continuing pattern of inflation. The benchmarking graphs for mid-May and for mid-June, for example, show that in general the peak price for products was in April and prices stabilised in many products after that" (PPE Buy Cell Lead Statement, **INQ000540488**, para 3.37). In that regard, it is worth highlighting that, according to the Cabinet Office, "[i]n respect of pricing analysis, the GIAA observed that, as would be expected, prices of PPE peaked in April / May of 2020. However, it also identified a number of outlier contracts with particularly high prices awarded after the peak period" (INQ000497031, para 6.21.3) It is thus not entirely clear to me when this approach to more extended price benchmarking would have started, or if it could have been before mid-May, especially as GCCO suggested that Efficio pricing data would not have been available in the early stages (GCCO Third Statement, INQ000536362, para 64). In my view, it is unclear whether this approach was significantly capable to impose constraints that did not solely track market price evolution, or sufficiently focused on the need to minimise the waste of taxpayers' funds due to overpricing, and whether the rolling approach to 14-day benchmarking could have reduced scrutiny of offered prices within the limits of the very high benchmark, especially from mid-April 2020 and, at least, until mid-May 2020.

299.5. There are also concerns on whether price benchmarking and negotiation was carried out in a consistent manner, with independent reports suggesting that "VIP lane suppliers were paid 80% more per unit than other suppliers" and that "the contracts signed through this VIP lane were inflated by at least £925m." (Good Law Project, 2023). The Lead for the PPE Buy Cell has submitted that, in addition to the 14-day rolling price benchmarking discussed above (paras 299.1 to 299.4), "teams would also be looking across different suppliers at any given time so that we could detect whether a price was appropriate or too high. We rejected a number of offers on the basis that the price was too high. It would however ultimately be a matter for the Closing Team and the Accounting Officer in DHSC whether the price was disproportionate when placed against the need for a product" (PPE Buy Cell Lead Statement, **INQ000540488** para 3.37). As noted above, GIAA identified a number of outlier contracts with particularly high prices awarded after market prices peaked (above para 299.4). On the evidence I have been able to review, it is unclear how many offers would have been rejected on price grounds. It is also unclear whether

price benchmarking and comparison between specific contracts being awarded more or less concurrently took place at the relevant time to a sufficient degree, or whether there was systematic analysis of significant disparities in conditions between contracts awarded contemporaneously or across different procurement routes while those awards were taking place. GCCO has provided details of a limited pricing review, which "while rough and ready, it showed no trend indicating that contracts initially processed by the HPL team had higher prices than the other offers for comparable products" (GCCO Third Statement, INQ000536362, para 64). That review was completed on 17 June 2020 (INQ000497031, para 6.5), and GCCO has commented that "[i]t would not have been possible to carry out this analysis at the start of the pandemic as the data would not have been there" (GCCO Third Statement, INQ000536362, para 64). Regardless whether, ultimately, there were differential prices paid for 'VIP Lane' and other contracts or not, this seems to strengthen the indication that there may not have been structured mechanisms to carry out price benchmarking and comparison between specific contracts being awarded more or less concurrently, or analysis of significant disparities in conditions between contracts awarded contemporaneously or across different procurement routes while those awards were taking place, at least in the initial stages of operation of the PPE Buy Cell, and potentially until mid-May 2020 (above para 299.4). Or, if those mechanisms were in place, the extent to which they were overridden and the reasons for any such decisions.

Proactive Publication of Contract Award Notices and Redacted Contract Details

300. The PPE Buy Cell notoriously failed to comply with the requirements to publish notices of direct award and redacted contract details within 20 days, as required by the legislation and policies applicable at the time (see above paras 259 and ff). DHSC recognised that contract award notices were published out of time for 94% of Covid-19 contracts awarded on or before 7 October 2020 (DHSC PPE Statement, INQ000528391, para 591). Although DHSC stresses that this was not the result of an explicit policy, decision, request or guidance, the fact is that there was systemic non-compliance with the obligation to publish those notices, despite a template having been prepared specifically for those purposes (id, paras 589 and 590). This was declared by the High Court in *R (Good Law Project & others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin). In my view, there is no question that there was systemic non-compliance with proactive transparency requirements to publish contract award notices and redacted versions of contracts awarded under emergency rules. However, DHSC and CO made some statements in relation to the applicability of requirements or the feasibility of complying with them that merit some comment.

301. On the applicability of requirements, CO stresses that the publication of contract details could not precede the publication of the relevant contract award notice (CAN) and that the time limit for CAN publication (30 days) was longer than the time limit for the publication of contract details (INQ000497031, para 3.26). While that is correct, it should be clear that there was no legal impediment to simultaneous compliance with both requirements because the publication of both CAN and contract details can take place any time within that time limit.

302. On feasibility of compliance, CO and DHSC raise a series of issues.

302.1. CO stresses that there was a large volume of notices and contracts to be published, that this task was assigned to a small DHSC commercial team, and that there were practical difficulties arising from limitations in IT systems that meant that "not all the information needed by the publishing team was quickly or readily available in the normal way" (INQ000497031, paras 3.30 and 3.32). DHSC has also explained that the main practical difficulty in publishing notices would have concerned the collection of the relevant information, which was not recorded on a single platform (DHSC PPE Statement, INQ000528391, para 594). However, given how quickly other parts of the PPE Buy Cell scaled up, there seems to be no good reason why additional resources could not have been dedicated to compliance with transparency requirements. The explanation that considerable effort was being made in relation to other Covid-19 related procurement (INQ000497031, para 3.33) is unconvincing and shows that compliance with accountability-related requirements was clearly deprioritised. While the issue with IT systems would have been a bottleneck, additional resources could have been targeted to the compilation and communication of the required information to ensure speedy publication.

302.2. Relatedly, some of the reasons provided by DHSC are in potential contradiction to CO's views and, in any case, are not entirely persuasive. For example, in relation to PPE, DHSC explained that over 400 buyers supported PPE procurement and that they used multiple information management systems and stored relevant information in email inboxes only (DHSC PPE Statement, INQ000528391, para 594). While it is clear that there was a large number of staff in the PPE Buy Cell, all contract awards remained within DHSC authority and control and only a very small number of officials had delegated authority to approve the contract awards (id, para 495). This would have created a clear focus point and reduced the need to collect relevant information, especially if the 'Closing Packs' had included sufficient details and, crucially and as initially planned, a complete report for the purposes of reg.84 PCR2015 (see the initial design for the end-to-end procurement process in id, para 445, Figure 9, which explicitly lists as part of step 7 "Complete Reg 84 report", prior to step 8 "Send to DHSC for approval"). The problem of incomplete record-keeping could thus have been addressed from the beginning, as recognised in the initial plans. The evidence I have been able to review does not clarify why 'reg.84 reports' were not included in the 'Closing Packs' (id, para 493).

302.3. CO also stresses that CANs required significant commercial and legal review, in particular due to the need to provide a justification for the direct award and the risk of legal challenge of the award of the PPE contracts (id, para 3.30). None of this would have justified non-compliance and, in any case, these reasons are not persuasive. CANs include very basic high-level summaries of contract details and it is hard to see what exactly would require careful legal analysis. Where the direct award of contracts was justified in material terms, the justification in the CAN would not have required more than a boilerplate two-sentence standard that could have been easily developed—the same way that equivalent boilerplate for the use of accelerated procedures was included in PPN 01/20 (at p. 6). The analysis of whether the award was indeed justified had to be made much earlier, and that is what would have required legal and commercial review, not a disclosure of the result of such analysis. Preparing redacted versions of contracts would have been a more

demanding task in terms of resources, but the risk of challenge should not be a factor in determining the care with which decisions on the protection of legitimately commercially sensitive information are made. It would have been possible to publish CANs within the prescribed time limit and then follow up with publication of redacted contract details as soon as practicable.

302.4 CO implicitly recognises this possibility but, in relation to criticism and risk of challenge, it considers that publishing partial details, such as the identities of the contracting parties and contract values, as soon as they were available would have also attracted criticism (INQ000497031, para 3.32)—which implies that CO considers that it would have been justified to delay publication until CANs and redacted contracts could be published in full. This shows a defensive approach to compliance with proactive transparency obligations that is not in line with principles of good administration. In complying with transparency obligations that are precisely put in place to foster accountability, public buyers have no discretion to vary the timing or extent of compliance to reduce criticism of their decision-making, or to stifle legal challenges. Any suggestion that those considerations can justify delayed compliance or non-compliance is simply not tenable.

Assessment of the PPE Parallel Supply Chain, including the 'VIP Lane'

303. As mentioned above, in my view, there were a number of clear requirements applicable to procurement during the pandemic (see Summary Box 17 and related text). These included:

- a requirement to secure value for money, understood as the duty to minimise the loss of public value and funds in emergency procurement, and to mitigate abnormally high prices as far as possible;
- a constant duty to check that the grounds to resort to emergency procurement applied and to minimise emergency procurement to what was strictly necessary to cover immediate needs and to transition to more competitive procurement;
- a duty to consider risks of maladministration and poor value for money related to potential excessive (aggregate) purchasing;
- a requirement to track the overall contractual position arising from emergency procurement;
- a duty to ensure the quality and suitability of supplies;
- a duty to ensure contractual performance;
- a duty to guard against conflicts of interest; and
- a duty to meet formal requirements of record-keeping and proactive transparency.

304. Although on the evidence I have been able to access it is not possible to assess some of those requirements in detail (eg in relation to quality and suitability of supplies, or contractual performance), it is in my view clear that the functioning of the overall PPE Buy Cell within the Parallel Supply Chain did not meet most of those requirements.

304.1. There were overarching organisational decisions that generated a setting and a set of work processes and practices that were not conducive to compliance. In that regard, the approach to staffing the PPE Buy Cell raises serious questions as to why an alternative strategy to target experienced public sector procurement professionals with healthcare or general procurement experience was not followed (para 285). There are also questions as to the potential lack of clarity or conflicting understandings of the extent to which different parts within the PPE Buy Cell, and the SCCL PPE Team in particular, operated independently and, consequently, on the effectiveness of those organisational arrangements (para 281).

304.2. It is unclear that the approach to price monitoring sufficiently focused on the need to minimise the waste of taxpayers' funds due to overpricing, and whether the rolling approach to benchmarking could have reduced scrutiny of offered prices within the limits of the benchmark. There are also concerns on whether price benchmarking and negotiation was carried out in a consistent manner at the time of award, in particular in relation to 'VIP Lane' contracts (above para 299).

304.3. It is unclear whether separate checks on the applicability of the emergency procurement exception were carried out prior to each direct award, although there are clear suggestions that this was not the case and, in any event, adequate records of those checks were not kept;

304.4. At least for its first weeks of operations, the PPE Buy Cell was seeking to procure as much PPE as possible, while not having a sufficiently clear view of projected demand. After a model to estimate PPE demand was introduced, very high buying targets seem to have continued the approach to buying as much PPE as possible. On the evidence I have been able to examine, there seemed to be no consideration of the risk of over-buying, or thought put into procurement models allowing for a reduction in the quantities ordered or received in view of the evolution of PPE demand. Although there were efforts to curtail contracts prior to their entering into production and distribution phases, there seemed to be a reluctance to incur cancellation costs to reduce deliveries, even when the excessive volume of procured PPE became evident, on budgetary rules grounds. If this was the case, a review of such an approach would be important (above para 286).

304.5. The PPE Buy Cell operated three main separate routes for PPE procurement. Data on orders across those routes seems to have been reported as part of the PPE Buy Cell daily dashboard, and used to set buying targets. However, on the evidence I have been able to review, it is unclear whether that aggregate data was explicitly taken into account at the point of award of each new contract, to check the currency of the need—which could have changed, especially if there had been a delay between the setting of the relevant buying target and the closing—and whether specific measures to avoid the award of parallel contracts based on the same buying targets were in place—especially in relation to procurement by the SCCL PPE team and the rest of the PPE Buy Cell, but also across the activities of the parallel opportunities teams, rapid response teams, and closing team. According to DHSC, those in charge of making final decisions on the direct award of contracts within the PPE Buy Cell would have been "provided with the latest demand and

supply positions" (DHSC PPE Statement, INQ000528391, para 496). However, it is unclear to what extent and how this was taken into account in the relevant decisions. Moreover, in the initial weeks of functioning of the PPE Buy Cell, there would not have been a joined up understanding of projected demand or a consistent use of projections (above para 286).

304.6. It is unclear whether due diligence was consistently and adequately carried out and whether conflicts of interest were sufficiently controlled for, especially in relation to PEPs involved in the referral of offers to the 'VIP Lane'. It is also worth noting that the guidance on due diligence to be carried out at the early stages of considering progressing offers for PPE (INQ000477274 in relation to general due diligence and INQ000478791 in relation to technical assurance due diligence) was very limited, drafted in informal and imprecise terms, unclear, and would not have been easily applied by inexperienced members of staff with limited or no previous understanding of due diligence checks, or familiarity with PPE technical specifications (above para 297), especially given the absence of detail on acceptable technical standards and potential equivalent mechanisms for PPE offerors to demonstrate the suitability of their products.

304.7. There were systemic shortcomings in record-keeping. It is clear that the procurement activities of the PPE Buy Cell breached applicable record-keeping requirements directly linked to the award of emergency contracts (above paras 296 and 298).

304.8 It was judicially declared in *R (Good Law Project & others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) that there was systemic non-compliance with proactive transparency requirements to publish contract award notices and redacted versions of contracts awarded under emergency rules (para 300). Moreover, in my view, the explanations given for such shortcomings show a defensive approach not in line with principles of good administration, and that compliance with accountability requirements was clearly deprioritised (para 302).

305. I have been asked to provide an opinion on the compliance of the 'VIP Lane' with the key principles, legal framework, and guidance on emergency procurement. There is no question that the 'VIP Lane' was unlawful due to the unequal treatment of 'VIP' offers, as this was judicially declared in *Good Law Project and EveryDoctor) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC). In my view, the 'VIP Lane' also fell short of several applicable requirements and is problematic from a broader perspective.

305.1. The root cause for the eventual creation of the 'VIP Lane' was the inadequate set up for the collection and processing of 'route 2' offers through a webform that did not result in a structured dataset that could be easily queried, filtered and analysed. This resulted in a cumbersome and difficult process of initial triage of offers (para 291) and, in turn, this generated a situation where the PPE Buy Cell was receiving a large number of referrals and chasers by referrers. This prompted an alternative approach to triaging that sought to speed up consideration of offers by focusing on a small subset of those received. However, instead of developing a system of focused triage based on the objective characteristics of received offers—which was difficult to implement due to shortcomings in data collection and processing—the UK

Government decided to focus on offers referred by Ministers, MPs, or Senior Officials ('VIP referrers') via a dedicated mailbox.

305.2. Even in that context, the reasons for the creation of the 'VIP Lane' are not persuasive. There were alternative ways to approach the increased communications originating from 'VIP referrers' without creating preferential treatment at triage stage. Moreover, the reasons are unpersuasive in relation to the further risks of unequal treatment and favouritism, and the clearly foreseeable effects of the triaging as 'VIP' of certain offers (para 292).

305.3. 'VIP Lane' offers were marked and visible as such throughout the process leading to the eventual award of a contract. The reasons given for marking offers as 'VIP' or 'HPL' are unpersuasive. Moreover, on the evidence I have been able to examine, there seemed to be no consideration given to the risk of *de facto* differential treatment that the pressure stemming from regular requests for updates and the labelling of offers as 'VIP' could have on those carrying out complex processes under significant pressure, or risks of confusion of the reasons triggering 'VIP' treatment (para 294).

305.4. 'VIP' contracts ultimately represented around half of the total procurement by the PPE Buy Cell by value, and could have significantly increased the likelihood of success of 'VIP' offers. In my view, there should be a much broader recognition of the fact that 'VIP' opportunities were treated as high priority even where there were no objectively justifiable grounds for expediting them, the 'VIP Lane' did not act as a quality filter, and the allocation of offers to the 'VIP Lane' was flawed because the mere fact of being referred did not justify preferential treatment over a similar "open source" offer. The CO and DHSC seem to downplay the fact that such unjustified unequal treatment drove around 50% of the PPE Buy Cell procurement by value. They also seem to downplay the fact that, in the specific context of legally-limited emergency direct awards, being considered first is a clear advantage (para 295).

Summary Box 19 – The PPE Parallel Supply Chain, including the 'VIP Lane'

- At the start of the pandemic, SCCL was unable to fully meet PPE demand from the NHS and other health and social care bodies.
- DHSC decided to establish a 'Parallel Supply Chain' for key items of PPE.
- Parallel Supply Chain was from then on responsible for sourcing PPE and its goal was to obtain as much PPE as possible to supply the entirety of the health and social care sector throughout the UK.
- The Parallel Supply Chain included the PPE Buy Cell, to which SCCL's PPE team was brought into. The PPE Buy Cell grew very quickly, reaching over 500 staff. Between April and June 2020, the SCCL PPE team ordered £4.22bn of PPE from existing suppliers, while the rest of the PPE Buy Cell ordered up to £8.6bn.
- The PPE Buy Cell started operating on 21 March 2020. It initially organised its operations following the sequence 'opportunities, technical assurance, and closing'. It then passed closed deals to DHSC for formal approval and completion. On 24 April 2020

it introduced integrated rapid response teams to try to close deals more quickly. On 5 May 2020, it created a Clearance Board tasked with endorsing closed deals for contracts over £5mn before forwarding to DHSC for formal approval. Until then, contracts of all values had been forwarded to DHSC by the PPE Buy Cell closing team, or a rapid response team. It is unclear how many contracts were awarded prior to the creation of the Clearance Board.

- The PPE Buy Cell operated four procurement routes: the SCCL route for procurement from existing providers (route 1); an "open source" route (2); a 'VIP Lane' for offers referred by Ministers, MPs, or Senior Officials (route 3); and a 'China Buy' route (4).

- The collection of data regarding the "open source" route (2) was inadequate and did not result in a structured dataset that facilitated the filtering, analysis and prioritisation of offers. Alternative approaches to sifting through large amounts of unstructured information through the engagement of a dedicated call centre proved unable to avoid the generation of a significant backlog of offers. This created the need for an alternative, speedier approach to triage. Instead of quick triage based on objective characteristics of the offers, the UK Government decided to focus on offers forwarded by 'VIP referrers'.

- The 'VIP Lane' was created to respond to large volumes of inquiries sent by 'VIP referrers'. 'VIP' offers were labelled and visible as such throughout their processing. Although there were separate teams processing PPE offers within the PPE Buy Cell, 'VIP Lane' caseworkers could internally ask for updates from relevant persons in the other teams, to pass them on to referrers. 'VIP' offers were passed on to technical assurance more quickly than "open source" offers. Overall, the chances of success for 'VIP' suppliers have been estimated at 10:1 compared with "open source suppliers. 'VIP Lane' awards represent around half of the total PPE Buy Cell procurement by value.

- The functioning of the overall PPE Buy Cell within the Parallel Supply Chain did not meet most of the requirements applicable to procurement during the pandemic.

- There were, in particular, systemic shortcomings in record-keeping and non-compliance with proactive transparency obligations. This has been explicitly recognised in subsequent internal investigations and reports, as well as in litigation. The explanations given show a defensive approach not in line with principles of good administration, and that compliance with accountability-related requirements was clearly deprioritised. In my view, it is also unclear whether requirements concerning value for money and the minimisation of direct awards were sufficiently met.

- There is no question that 'VIP Lane' was unlawful due to unequal treatment of 'VIP' offers.

- In my view, the 'VIP Lane' also fell short of several applicable requirements and is problematic from a broader perspective. The reasons for its creation are unpersuasive, as there were alternative measures that could have been put in place without creating preferential treatment at triage stage. There was no consideration given to the risk of *de facto* differential treatment that the pressure stemming from regular requests for updates and the labelling of offers as 'VIP' could have, or potential confusion as to what 'VIP' signalled. There was no consideration of the fact that a referral by Ministers, MPs, or Senior Officials was not a justification for preferential treatment.

- The CO and DHSC downplay the fact that such unjustified unequal treatment drove around 50% of the volume of procurement by the PPE Buy Cell.

The 'Ventilator Challenge'

306. Once it was clear that the treatment of hospitalised Covid-19 patients required the intensive use of ventilators, the UK Government sought to increase ventilator availability in the NHS. According to CO, the strategy to increase ventilator capacity focused on three pillars: first, procuring more devices from existing manufacturers overseas; second, scaling up production of existing ventilator suppliers, and third, working with industry to design and manufacture new devices (Cabinet Office, 2020a). The last two prongs of that strategy were pursued through the so-called 'Ventilator Challenge' launched on 16 March 2020 (PES, 2020). The 'Ventilator Challenge' was run by the UK Government, but it sought to produce ventilators for the four UK nations and for overseas territories (INQ000497031, para 4.113). The focus of this sub-section is to assess its compliance with the requirements for emergency procurement detailed above (see Summary Box 17 and related text). The following description does not intend to be exhaustive, but rather to highlight key issues of relevance for that compliance assessment.

307. According to CO, in March 2020, DHSC estimated that there was an immediate need in excess of 20,000 additional ventilators across the NHS by April 2020, and that the need would further increase by another 60,000 additional ventilators by November 2020 (INQ000497031, para 4.3). Similarly to the initial approach on PPE, CO stresses that "these numbers were so big in comparison to the estimates of existing NHS stock that there was no conception at this stage that the Ventilator Challenge could produce too many ventilators"; "therefore, the Ventilator Challenge was working to obtain and manufacture as many compliant ventilators as possible as quickly as possible" (id, paras 4.21 and 4.22).

308. DHSC focused on procuring as many ventilators as possible from UK and global suppliers (INQ000497031, para 4.9.1). According to the Government Chief Commercial Officer (GCCO), given the limited capacity of those existing suppliers, the UK Government briefly investigated the possibility of obtaining licences of their designs to scale up production capacity in the UK. Except for Breas Medical, major EU vendors refused (GCCO Third Statement, INQ000536362, para 13). In view of this, CO put in place the separate 'Ventilator Challenge' programme to work with other UK-based suppliers and manufacturers. As there were no large scale domestic producers of ventilators, or domestic companies with ventilators licensed for sale in the UK, the effort focused on adapting existing designs to increase their production, and to develop new designs to be quickly manufactured (INQ000497031, para 4.11). Given that the 'Ventilator Challenge' seems to have originated from the initial refusal by most existing vendors to grant negotiated licences for their approved ventilators, it is worth considering the context in which this decision to attempt to develop new or adapted ventilators was made.

308.1. In its submission, GCCO assumes that the refusals from vendors would have been motivated by three putative reasons. First, a concern about the availability of key components produced in house by those manufacturers or by other suppliers with limited capability. Second, that it would be distracting for existing manufacturers to train and support new producers at a time when they needed to scale up production. Third, concerns on liability in case of malfunctioning of the ventilators produced

under licence, especially in case of fatal injury (GCCO Third Statement, INQ000536362, para 13).

308.2. In my view, while these are potentially relevant concerns in theory, I have not been able to examine clear and direct evidence that those were the reasons for any initial refusal, but rather assumptions made by GCCO. Moreover, even if those were the relevant reasons, it is not clear why CO decided not to engage with existing manufacturers more intensely to try to negotiate and mitigate those issues with a view to securing licences for the production of existing approved ventilators. This seems to be at odds with the fact that CO faced those same three issues within the Ventilator Challenge.

- First, CO actively engaged in an effort to facilitate access to key components. CO asked potential suppliers of adapted or new ventilators "to identify what they considered to be the key risks and key steps, including any components which were considered higher risk (i.e. which they may not be able to obtain in time), such as precision valves and airpath components. The Cabinet Office support provided assistance in seeking to avoid or mitigate these risks, for example by ensuring that the bills of materials for the different designs did not overlap or conflict" (INQ000497031, para 4.64). GCCO himself directly engaged in negotiations with foreign manufacturers of key components (GCCO Third Statement, INQ000536362, para 14). The Deputy Director of the Sourcing Programme has also described significant efforts and expenditure related to the acquisition of components, even if those components were at risk of not being used if the designs they related to did not progress and "involved a degree of risk of 'wasted costs'" (Deputy Director of the Sourcing Programme Statement, **INQ000540487**, para 79).

- Second, with support from PA Consulting, CO engaged a large number of consultants to provide additional technical support (see below para 310 and ff). At its peak, in early April 2020, 103 individual consultants from PA Consulting were working on the 'Ventilator Challenge', although some did on a part-time basis (Director of the Sourcing Programme Statement, INQ000528389, para 36).

- Third, CO provided indemnities specifically for the risk of one of the new or adapted ventilators causing the death of a patient, as well as for broader risks of violation of third-party intellectual property (INQ000497031, paras 4.143 to 4.145).

It thus seems that CO would have been in a position to at least seek to reassure existing manufacturers in relation to each of the three presumed concerns and, crucially, on the issues of supply chain management and liability. It is thus unclear why CO decided not to engage with existing manufacturers beyond the initial brief investigation, given that obtaining licences of existing models would have clearly been a more desirable and potentially more viable approach than developing and obtaining regulatory approvals for new ones.

308.3. It is possible that, on commercial grounds, CO did not consider it likely to agree the terms of a licence with vendors initially opposed to granting access to their

technology. However, that would not have been the only option available. On the evidence I have been able to review, it is unclear why the UK Government did not consider alternative approaches, such as obtaining compulsory licences under current patent law. A detailed analysis of those options under UK patent legislation is, however, beyond my expertise.

General Overview of the Organisation of the 'Ventilator Challenge'

309. In essence, the 'Ventilator Challenge' was a programme with which CO provided support to several teams of potential ventilator manufacturers to help them develop and progress designs and prototypes of modified or new ventilators. This included financial support (INQ000497031, paras 4.55 and 4.89.5), as well as dedicated points of contact at Cabinet Office and the making available of a staff of project management and design specialists, supply chain support, manufacturing development support, legal support and cost/auditing support to provide tailored advice (id, paras 4.57 and 4.58).

310. On a day to day basis, the 'Ventilator Challenge' was led and managed by a team of CO senior civil servants supported by PA Consulting, specialist in design project management (INQ000497031, para 4.14). According to his own assessment, the GCCO dedicated most of his time to the 'Ventilator Challenge' until mid-April 2020, and a significant amount of his time until the end of June 2020 (GCCO Third Statement, INQ000536362, paras 15 and 24). At the Ministerial level, the Minister of State for the Cabinet Office, the Chancellor of the Duchy of Lancaster, and the Prime Minister were involved (INQ000497031, para 4.15). A Technical Design Authority (TDA) established for the 'Ventilator Challenge' was tasked with the technical assessment of designs and prototypes (id, para 4.42.2), and it was chaired by PA Consulting (id, para 4.44).

311. The TDA was tasked with assessing prototypes, drawings, models and animations put forward by the manufacturing teams participating in the 'Ventilator Challenge'. However, decisions on whether a specific prototype would continue being supported or would be dropped after each round of TDA assessment were made by the Cabinet Office. Upon recommendation of the senior team, final decisions were made by the Minister of State for the Cabinet Office and the Chancellor of the Duchy of Lancaster (see eg INQ000497031, paras 4.96 to 4.99 and 4.106).

312. As part of the 'Ventilator Challenge', several companies were awarded contracts for the design of new or modified ventilators. After the process of TDA evaluation and a progressive reduction in the number of prototypes being supported, based on an evolution of applicable technical specifications and regulatory requirements, forecasts on ventilator demand, and commercial considerations, three companies were awarded a total of five contracts for the supply of ventilators (INQ000497031, para 4.116). Another four companies developed prototypes that were deemed clinically-viable but received no contracts due to reduced demand projections by the time they reached that stage (id, para 4.132). Those, and companies whose prototypes were discarded along the TDA process, received varying levels of financial support. Ultimately, only companies that at the start of the pandemic had a complete but unlicensed design, or a design that could be adjusted to the specific needs of Covid-19 related care, obtained contracts for the supply of ventilators. No other entirely new ventilator models were procured as a result of the 'Ventilator Challenge' (id, para 4.128).

Direct Award of Contracts as Extremely Urgent

313. New or adapted designs had to meet standards developed by the Medicines and Healthcare products Regulatory Agency (MHRA) (INQ000497031, para 4.12). This implied significant risk because it was clear that modified or new designs would need to meet requirements and be approved (id, para 4.20). CO also stresses that it was accepted from the outset that the 'Ventilator Challenge' had "slim chances of timely success" (id, para 4.28), and that as early as 10 days after the official launch of the programme "[i]t was recognised that it would not be possible to obtain the additional ventilators required via the Ventilator Challenge by [13 April 2020]" (id, para 4.73). The existence of regulatory risk was particularly relevant in relation to manufacturers without prior experience producing medical devices. This is clear from the assessment by the MHRA. In its submission, MHRA stresses that "[m]edical devices have rigorous safety standards and requirements which need to be met, due to the intended use of the product and associated risks. These standards would have been difficult to achieve by companies that did not already produce medical devices, especially in the short timescale required by the Ventilator Challenge" (MHRA Statement, **INQ000541374** para 157).

314. The 'Ventilator Challenge' was not subject to regular scrutiny in relation to spending and it did not engage with spend controls that would have been applicable in 'ordinary times' (Deputy Director of the Sourcing Programme Statement, **INQ000540487** para 74). It has been stated that the programme sought to control costs by stopping support for projects as soon as it was clear that they would not be able to deliver (id, para 75). However, at least on one occasion, financial support for projects considered unable to deliver would have been extended for a limited period of time 'to allow the supply chain visibility of the [viable] devices to improve before a final decision was made' (INQ000497031, para 4.106). In this context of extremely limited expenditure control, it is worth highlighting that one of the conditions imposed by HM Treasury for the funding of the 'Ventilator Challenge', which obtained delegated authority to spend over £400mn, was that CO had "to ensure as robust a procurement process as possible is being followed in the time allowed" (INQ000497031, para 4.141). However, all contracts for the 'Ventilator Challenge' were direct awards based on the exception for extremely urgent procurement in reg.32(2)(c) PCR2015 (id, paras 4.119 and 4.10). In my opinion, this was not the most robust procurement possible under the timescales of deliverability of new or modified ventilators. Moreover, the existence of significant regulatory risk, the realisation that there were very limited chances of obtaining results and that, in any case, those would not be achievable within the first month of the challenge, show that the decision to directly award contracts exceeded the limits of the exception for extremely urgent procurement and, in particular, the requirement that such awards are limited to the satisfaction of immediate needs.

315. EC Guidance had made it clear that, "if extreme urgency is invoked, the procurement need has to be satisfied without delay. The exception cannot be invoked for the award of contracts that take longer than they would have taken if a transparent, open or restricted, procedure had been used, including accelerated (open or restricted) procedures" (above para 210, part 2.3.2, referring to *Consiglio Nazionale degli Ingegneri*, C-352/12, ECLI:EU:C:2013:416, paras 50-52, emphasis added). PPN 01/20 also stressed to contracting authorities using direct awards that they had to demonstrate that "[i]t is impossible to comply with the usual timescales in the PCRs, eg: there is no time to run an accelerated procurement under the

open or restricted procedures or competitive procedures with negotiation" (above para 201, at p. 4).

316. The award of 'Ventilator Challenge' contracts justified on grounds of extreme urgency was thus non-compliant with reg.32(2)(c) PCR2015 because they concerned the development of new or modified models without regulatory approval at the time of award. Developers would not be in a position to obtain such approval immediately—perhaps with the only exception of prototypes that only introduced minimal modifications to already approved ventilators. CO explicitly and publicly recognised this by stressing that the 'Ventilator Challenge' was a sort of 'hackathon', and that "[n]o one was under any illusions at the time of launching the Challenge that producing new designs for domestic production would be anything other than a significant and exacting test. Ventilators are highly complex medical devices requiring hundreds of individual components. That was precisely the point of issuing a public Challenge" (Cabinet Office, 2020a). Given that "the typical timeframe to bring new medical devices to market is measured in years, not months" and that a supplier told the 'Ventilator Challenge' that "it typically takes more than four years from conception to market" (Deputy Director of the Sourcing Programme Statement, **INQ000540487** para 79), it is hard to understand on which grounds it could have been justified to directly award contracts instead of running an accelerated or ordinary procurement exercise, as the time savings associated with each of those options would have been minimal compared to any reasonable assumption on how much more quickly new designs could have been completed with government support. It has been stated that, had the 'Ventilator Challenge' "run a more traditional procurement exercise where, for example, [it sought] to select only 3 or 4 suppliers who could meet the demand at the lowest cost, it may, in theory, have been (for example) possible to get the devices at a lower unit price but likely on an extremely extended timeline" (id, para 79). In my view, such a statement misunderstands that the procurement would not have been for pre-existing licenced ventilators, but for the innovation leading to the design, approval and eventual production of new ones. Therefore, it is not correct to state that "[t]he risk of procurement law liability arose because the ventilators were not procured using a normal competitive process. There was simply no time to do so in light of the emergency circumstances of the pandemic" (id, para 158). This is incorrect for two reasons. First, if the programme had bought ventilators immediately deliverable by existing licenced manufacturers, a direct award would have been justified and there would not have been 'procurement law liability'. The breach of procurement law originated from the fact that the 'Ventilator Challenge' was sourcing innovation and that this could have been done following procurement rules, either through ordinary or, at the very least, accelerated procedures.

317. I wrote at the time (20 April 2020) that the adequate approach would have been to follow urgent procedures (either open or restricted). With more details on how CO conducted the procedure, I now think that, at the start of the pandemic, the better approach would have been to use an accelerated competitive procedure with negotiations, which would have also required compliance with the same shortened timescales (see above Table 3), or possibly even more competitive procedures, such as a competitive dialogue or an innovation partnership. In fact, the Government Chief Commercial Officer (GCCO) has confirmed that "the 'TDA down-select' mechanisms adopted is very similar in concept to the Innovation Partnerships methodology", and that the 'Ventilator Challenge' "was an ad hoc competition based on meeting a published specification similar in concept to the formal 'Innovation Partnership' procedure" (GCCO Fourth Statement, INQ000535017, paras 51 and 95). GCCO

has explained that it was decided not to use an innovation partnership because it would have required waiting for 30 days to collect expressions of interest, it would have required a detailed specification at the outset and would mean that bidders were working at their own risk or, alternatively, a decision to cover costs under that procedure would have increased financial exposure (id, para 103). Of these reasons, only the first one is truly relevant. The innovation partnership does not require a detailed specification, but solely an identification of the need for an innovative product with sufficient detail "to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure" (reg.31(3) PCR2015). Moreover, MHRA developed a technical specification for rapidly manufactured ventilator systems that became available only two days after the formal launch of the 'Ventilator Challenge' (MHRA Statement, **INQ000541374** para 123), and this would have been an adequate basis for the purposes of launching a structured formal procedure. It is also unclear on what grounds using a formal innovation partnership would have increased financial exposure, as the terms would have been set by CO and the number of companies selected for participation would also have been under CO control. The issue of the initial 30 day period remains. However, this initially longer period for expression of interest does not apply to an accelerated competitive procedure with negotiations (see above Table 3) and, given the flexibility in the design of both sets of procedures, the approach followed in the 'Ventilator Challenge' would have been compatible with such a procedure.

318. There were different points in time when it would have been possible to consider the conduct of an accelerated procurement procedure or a standard procedure.

318.1. In my view, this would have been possible, at least, prior to issuing letters of commitment as described in the CO statement (INQ000497031, para 4.51). The justification given for the award as extremely urgent contracts of such commitment letters was that they "were issued because of the urgency of the situation, and the uncertainty as to which suppliers would be successful to develop a compliant machine that could also be manufactured at sufficient scale and speed. This meant that design work, testing, and development of relevant manufacturing processes had to be undertaken before a formalised contract with known costs and outputs could be put in place between the Cabinet Office and the eventually successful suppliers" (id, para 4.53). This is not a persuasive justification for a direct award because the same commitment would have been possible, for example, in the context of a competitive procedure with negotiations (reg.29 PCR2015), competitive dialogue procedure (reg.30 PCR2015), or an innovation partnership (reg.31 PCR2015). Moreover, CO explains that the purpose of the letters was "to enable suppliers (and their supply chains) to support the Ventilator Challenge at significant pace and to prevent those suppliers from operating entirely at risk during extremely turbulent and challenging circumstances. Under these letters, the Government agreed to pay the suppliers their reasonable costs" (INQ000497031, para 4.55). However, both a competitive dialogue and an innovation partnership would have allowed CO to specify payments to the participants in the dialogue (reg.30(21) and reg.31(11) PCR2015) and there is in my view no obstacle to payments being made in relation to a competitive procedure with negotiations. Given the importance of regulating intellectual property rights (INQ000497031, para 4.67), the innovation partnership may have been the preferable procedure because it refers to this issue explicitly.

However, in my view, there is no obstacle for similar agreements to be made in the context of the other procedures. In this regard, it is worth noting that CO sought to retain an interest in the intellectual property related to designs developed within the 'Ventilator Challenge' (Deputy Director of the Sourcing Programme Statement, **INQ000540487**, para 38).

318.2. It would also have been possible to run a competitive procedure at the point where the number of viable ventilators was sufficiently narrowed down. For example, from 14 April 2020, when the number was reduced to five devices (INQ000497031, para 4.98), or 22 April 2020, when this was further reduced to three (id, para 4.103).

319. It would also have been possible to consider providing grants rather than contracts, at least to provide early financial support to companies seeking to develop a design and prototype to then participate in a competitive and more structured procurement. In her submission, the 'Ventilator Challenge' Director of the Sourcing Programme suggests that "[s]uch research and development contracts or grants would have introduced a laxer degree of scrutiny and control of the product than under the supply contracts issued in line with PCR2015 by the Cabinet Office" (Director of the Sourcing Programme Statement, INQ000528389, para 105). In my view, this statement is not persuasive. First, the contracts awarded were not in line with the PCR2015 for the reasons provided above. And, second, even if there had been no breach of PCR2015, the degree of scrutiny and control of the product would have necessarily been the same under a grant or a contract approach, as such scrutiny was within the remit of MHRA. This is recognised by the Director herself, when her statement stresses that "[u]ltimately, letters of intent, commitment and comfort [...] stated that the Cabinet Office was committed to purchasing ventilators if they met the RMVS [rapidly manufactured ventilator system] specification and obtained regulatory approval from the MHRA. This was a matter for the MHRA" (id, para 104).

320. Generally, in my view, the unjustified use of direct awards on extreme urgency grounds is also relevant because it evidences that, even at the core of central government and in relation to a very high-value, high-risk programme that clearly could not address the most immediate needs at the start of the pandemic, the limits on the use of direct awards under the PCR2015, as detailed in the EC Guidance and in PPN 01/20, were disregarded. This is perhaps reflective of the mindset that direct awards were the 'one and only' tool to provide a procurement response to the pandemic. It also seems to reflect a willingness to use this emergency expenditure as an investment in industrial policy—or, in other words, a willingness to treat the pandemic as an opportunity to channel investment into the UK industrial base. GCCO has reported that the Prime Minister and other Cabinet ministers were "all keen to get a group of home-grown companies doing their bit to search for a solution" (GCCO Fourth Statement, INQ000535017, para 101). It is unclear to me why it would have been relevant for the companies to be "home-grown", as the identified operational priority to adapt or develop ventilator designs had no bearing on the location of engineering companies involved in the programme.

The 'Ventilator Challenge' and Industrial Policy

321. In addition to the inadequate justification for the direct award of contracts, the approach taken to the 'Ventilator Challenge' also raises concerns about its instrumental use for industrial policy purposes. Even if it can be argued that the processes used in the 'Ventilator

Challenge' were substantially equivalent to those that could have been used under the appropriate procedure, the general approach to completely sidelining procurement rules and standard approaches created opportunities for inappropriate intervention by policy-makers. In my opinion, this concerned in particular the participation of Dyson in the 'Ventilator Challenge'.

322. There are limited details on how Dyson got initially involved in the 'Ventilator Challenge'. CO solely mentions that Dyson was included in the initial list of participants prepared with the assistance of PA Consulting (INQ000497031, para 4.33). The Government Chief Commercial Officer has stated that he initially mentioned Dyson as an example of engineering companies that could be involved in what became the 'Ventilator Challenge'. He also explained that the Prime Minister would have given direct contact details of a civil servant involved in initial discussions to Sir James Dyson (GCCO Fourth Statement, INQ000535017, para 101). GCCO considers that it made sense for Dyson, and for one of its competitors, to participate in initial discussions (id, para 102). Regardless of whether this was the case, it is not entirely clear to me on which grounds Dyson was included in later stages of the 'Ventilator Challenge'.

323. More significantly, it is clear in CO's account that Dyson benefitted from preferential treatment in those later stages.

323.1. In particular, while suppliers producing new designs were generally issued a comfort letter, "[a]s an exception, Dyson received a contingent order […] following an instruction [to GCCO] from the Chancellor of the Duchy of Lancaster to place an order for 10,000 units. Ministers thought it was important to give Dyson, as a noted and successful inventor, a chance to demonstrate its product's capabilities. The order was contingent because at the time it was issued [25 March 2020], Dyson […] had not yet submitted a prototype, so the order was contingent on its design successfully passing MHRA tests by a certain date" (INQ000497031, para 4.51.3).

323.2. The Deputy Director of the Sourcing Programme has stated that "it was important to Dyson that the documentation that was issued to Dyson was described as an order, so we described it as a 'conditional order' but it was no different in substance to other letters of commitment issued to other suppliers of new designs in that the order was conditional" (Deputy Director of the Sourcing Programme Statement, **INQ000540487** para 135.c(i)). He has further stated that he "was aware at the time that there were political sensitivities around Dyson because (as [he] understood it) [Sir] James Dyson was a donor to the conservative party. [He] was also aware that the Chancellor of the Duchy of Lancaster had asked [GCCO] to proceed at pace with the Dyson order, but in fact on the Ventilator Challenge we were seeking to accelerate all the projects as quickly as possible" (id, para 135.c(i)). In my view, and contrary to the assessment by the Deputy Director of the Sourcing Programme (id, para 176), this evidences preferential treatment and would have been geared towards enabling Dyson to communicate its participation in the 'Ventilator Challenge' in specific ways.

323.3. In that regard, it is significant that GCCO has further explained that putting the contract with Dyson in place was "against commercial guidance" (GCCO Fourth Statement, INQ000535017, para 100). The account is not entirely clear on TDA's

position, but it seems that TDA was sceptical or possibly opposed to Dyson's continued participation in the 'Ventilator Challenge'. This would have been the basis for the negative commercial advice. GCCO stated that the reasons behind such commercial advice were of a clinical nature, as there were significant concerns whether Dyson had at the time a prototype ready for testing. However, Sir James Dyson would have claimed otherwise and stated that the prototype was ready for production and would have advantages over other designs, in terms of oxygen consumption. From the GCCO's account, it seems that the claim from the company would have been taken at face value at the highest political level, and that the Chancellor of the Duchy of Lancaster "was insistent that an order be placed" (id, paras 104 and 105). The compromise reached seemed to be that the contract would be awarded contingent on future performance by a due date (id, para 100). However, even if the contract was contingent and did eventually not lead to an order, this could not have been known at the time of putting the contract in place and, ultimately, the intention in overriding commercial guidance would have been to allow Dyson to obtain such an order. Moreover, participation in the 'Ventilator Challenge' implied access to dedicated support from the consulting teams engaged by the Challenge, as well as a potential recovery of design and prototyping costs.

323.3. Deviations from technical and commercial advice relating to Dyson would have continued. After being informed by GCCO that the Dyson prototype "was likely to be struck off" after a round of testing, on 11 April 2020 the Minister of State for the Cabinet Office wrote: "We are going to have to handle Dyson carefully. I accept that contractually we can walk away as he hasn't delivered by the due date. I also accept that we have an indemnity battle ahead. But just killing off his design (assuming it gets through MHRA) won't be an option. I suspect we'll have to buy a few machines, get them into hospitals so that he can then market internationally being able to say they are being used in UK hospitals. I also probably have more faith than you that he will be able [to] somehow upgrade his machines to get higher up your graph of functionality. We should not underestimate his enormous design firepower even if new to the medical devices industry. I fully accept that you are likely to disagree with me but we both need to accept it will be a bigger decision than we can both make. Remember he got a personal call from the PM. This can't be ignored." (INQ000512992). In my view, this further evidences the preferential treatment those making key decisions in the 'Ventilator Challenge' were willing to afford Dyson.

323.5. Favouring Dyson due to the political pressure Ministers were under would have been clearly problematic and, in my view, beyond being objectionable, it would have raised serious questions as to its legality. It would also have raised questions on the origin of the political pressure, given that the decision was made by a Secretary of State (id, para 106). In that regard, the Chancellor of the Duchy of Lancaster has stated that, in relation to his being under political pressure, "possibly [he] was referring to the general political pressure [he] was under to source new ventilators, or possibly [he] was alluding to the political pressure [he] knew Dyson was capable of exerting through the media [and that he] may have been referring to both" (Statement by the Chancellor of the Duchy of Lancaster, **INQ000563560**, para 56). In my view, the recognition that a Secretary of State may intervene in this manner to force the award of a public contract on grounds of the media influence of the

company that benefits from that contract is extremely worrying. Moreover, in my view, this does not seem to provide the full explanation of the origin of the political pressure, especially given references to the Prime Minister in other exchanges (see 323.3 above).

324. It is notable that the prototype being developed by Dyson (CoVent) continued to receive support until 7 May 2020, as did four other prototypes that ultimately did not receive a supply contract (INQ000497031, para 4.109). However, ultimately, Dyson asked not to be paid for its work and agreed to write off its costs (id, para 4.133), despite having earlier suggested it would claim £20mn (GCCO Fourth Statement, INQ000535017, para 108). On the evidence I have been able to review, there is no clear explanation for that write-off.

325. In my view, the inclusion of Dyson in the 'Ventilator Challenge' and, in particular, the award of a contingent contract were driven by industrial policy considerations—or, in other words, were decisions that sought to favour Dyson's position on grounds that were irrelevant to the procedure at hand. This not only was a breach of the limits on the direct award of extremely urgent contracts (above paras 314 to 316), but also an award on non-objective grounds and criteria that could not have been used to justify an award under the procurement rules (eg reg.67 PCR2015). At the very least, if implemented within a standard procurement procedure, this intervention would have been a breach of the duty of equal treatment and potentially the materialisation of an impermissible conflict of interest. The fact that this took place outside the remit of the procurement rules on the basis of a non-compliant approach to the direct award of contracts does not reduce its affront to those principles.

Summary Box 20 – The 'Ventilator Challenge'

- The Cabinet Office launched a 'Ventilator Challenge' to support the development of modified or new ventilator prototypes to help increase availability in the NHS across the four nations.
- Cabinet Office awarded 'Ventilator Challenge' contracts using the authorisation for emergency procurement.
- Given the existence of significant risks and a recognised impossibility to obtain ventilators in the short term, the award of those contracts did not comply with the conditions and limits established in reg.32(2)(c) PCR2015 and related guidance.
- The better procurement approach at the start of the 'Ventilator Challenge' would have been to use an accelerated competitive procedure with negotiations, or possibly even more competitive procedures, such as a competitive dialogue or an innovation partnership. There were different points in time throughout the 'Ventilator Challenge' when it would have been possible to consider the conduct of an accelerated procurement procedure or a standard procedure, or to consider providing grants rather than contracts.
- The non-compliant approach followed in the 'Ventilator Challenge' reflects the mindset that direct awards were the 'one and only' tool to respond to the pandemic.
- Some aspects of the 'Ventilator Challenge' also show the UK Government's willingness to use it for industrial policy purposes. This is particularly clear in relation to the award of

a contingent contract to Dyson, seemingly on grounds that "it was important to give Dyson, as a noted and successful inventor, a chance to demonstrate its product's capabilities".

- If implemented within a standard procurement procedure, this intervention would have been a breach of the duty of equal treatment and potentially the materialisation of an impermissible conflict of interest. The fact that this took place outside the remit of the procurement rules on the basis of a non-compliant approach to the direct award of contracts does not reduce its affront to those principles.

Should Standards Have Been Kept or Changed for Procurement During the Pandemic?

326. The analysis above has shown how, during the pandemic, there were challenges in adhering to the existing legislative framework and guidance. Both the examples of the Parallel Supply Chain, including the 'VIP Lane', and the 'Ventilator Challenge' highlight that there was widespread non-compliance or insufficient compliance with the legal limits for the use of emergency direct awards and the related requirements to carry out conflict of interests checks, create adequate records and provide post-award transparency.

327. In my view, however, those basic requirements and legal limitations provide a set of standards below which procurement should not fall, even in the event of a systemic emergency. There are ways to facilitate compliance with those requirements, for example through the automation of some tasks such as the publication of contract award notices. Practical challenges or the need to operate at speed do not justify, in my opinion, failing to complete basic due administration tasks that should not be particularly burdensome. In that regard, the publication of redacted contracts may be the only exception, justifying adjusting some of the requirements applicable during the pandemic. It would be acceptable, in my view, to delay publication so long as sufficient post-award information was disclosed in timely published contract award notices that could then facilitate ad hoc requests for access to contractual information.

328. In my view, there are clear objective criteria embedded in existing legislation and guidance, against which to judge decisions to award contracts even in the event of a systemic emergency. These include:

- whether there was explicit and plausible justification of the extreme urgency in the need, and a reasonable estimate of the extent of the need;
- whether there was an explicit and plausible justification that the content and length of the contract was limited to what was strictly required by the urgent need;
- whether there was explicit and plausible justification that a direct award would secure the supply quicker than an award under accelerated procurement would;
- whether there was explicit and plausible justification that the same supply could not be obtained more quickly or in better terms through 'commercial vehicles' available;
- whether there was explicit and plausible record-keeping on conflict of interest checks;

- whether there was explicit and adequate, in the circumstances, assessment of the reliability of the supplier and the likely suitability of the goods or services;
- whether there was explicit consideration of the economic and financial terms of the direct award and a documented attempt to minimise cost at the point of award, or to introduce mechanisms to minimise cost throughout contract implementation.

Summary Box 21 – Should Standards Have Been Kept or Changed for Procurement During the Pandemic?

- The basic requirements and limitations in the legislative framework and available guidance provide a set of standards below which procurement should not fall, even in the event of a systemic emergency.
- Ways to facilitate compliance, for example through automation of some tasks, could be explored. The only change that might be required concerns the publication of redacted contracts, which could be delayed so long as sufficient post-award information was disclosed in timely published contract award notices that could then facilitate ad hoc requests for access to contractual information
- There are clear objective criteria embedded in existing legislation and guidance, against which to judge decisions to award contracts even in the event of a systemic emergency.

Procurement Following the Pandemic

329. This section focuses on procurement following the pandemic.

Approach to Emergency and Systemic Emergency Procurement Following the Pandemic

330. During and after the pandemic, several reviews of the approach to emergency procurement were carried out. The second Boardman Review is of particular relevance to this report (the 'Boardman Review') (Cabinet Office, 2021c). It covered emergency procurement of, among other things, PPE and ventilators in the period March to December 2020. The Boardman Review included 28 recommendations. The UK Government accepted all of them. There is, however, limited public information on the current state of their implementation.

331. The key general themes arising from the Boardman Review included:

- Ensuring that 'emergency procurement freedoms' are only used in the most constrained and exceptional circumstances, and that procurement teams plan for an early transition to competitive procurement wherever possible;
- Ensuring that government systems are compatible and that commercial teams are structured in a flexible way that allows targeting resources where needed, including being scalable in a crisis;
- Carrying out an in-depth review of the way procurement is done in the health sector in times of crisis and, in particular, reviewing the position of SCCL—and, implicitly, ensuring that such approach is effective and robust;
- Ensuring that rules for the emergency appointment of senior leaders are fit for purpose and enable decision-making in accordance with established lines of authority and conferred executive powers; and
- Ensuring that procurement is carried out in such a way that there are no questions about probity and absence of favouritism in decision-making. In particular, a series of factors were highlighted as requiring particular attention, including: the use of fast track processes such as the 'VIP Lane'; delays in publishing details of contracts awarded in an emergency; price benchmarking and justification; failures to procure stock fit for purpose; incomplete record-keeping; and prevention and management of conflicts of interest.

332. The following specific recommendations in the Boardman Review are particularly relevant:

332.1. Recommendations 1 and 2 encompassed the need to improve preparedness for procurement by implementing a more structured approach, and by ensuring that procurement strategy is central to policy-making.

332.2. Recommendation 4 explicitly focused on the need to give appropriate consideration to the ability to flex contracts to increase volumes in an emergency, to resilience of supply as well as cost and preference for direct contracts with manufacturers.

332.3. Recommendations 5 to 7 focused on a combination of elements concerning the NHS Supply Chain and sought to promote building up resilience and reducing dependency on intermediaries and on foreign manufacturers to the extent possible.

332.4. Recommendations 9 to 12 targeted the complexity and fragmentation of procurement responsibilities across the health and social care sector.

- The Boardman Review was particularly clear that "SCCL provides a management function while subcontractors, some of which are NHS bodies, do the actual buying. This structure saved money during 'normal' times [...] but proved difficult to scale due to limited specialist resources, legacy IT and a disrupted supply chain in a crisis situation. Having a central procurement capacity in health seems unarguable; but where it reports to (NHS or DHSC), how much control it has over buying in NHS Trusts, and what procurement strategies it follows (e.g. buying from distributors or manufacturers) should be looked at". This led to Recommendation 9, which put forward the need for a review of the structure of health and social care procurement, including SCCL's role within it, and the related ability to respond to the purchasing needs of the sector in a crisis.

- The Boardman Review also targeted the issue of the parallel organisations supporting procurement across central UK government, namely the Crown Commercial Service (or CCS) and central commercial teams in the Cabinet Office (including the Complex Transactions Team, of CTT). The review was clear that "This division of labour was not well understood by those working on COVID-19 programmes. Some were aware that there was a pool of specialist resources in the Cabinet Office, including in CCS but were not sure how to access it for greatest effect. The ability of CCS to propose support was at times limited by a lack of clarity on what was needed in fast-moving and confused situations. There are lessons to be learnt regarding how to maximise support to new programmes, which may include expanding the remit of those commercial teams and organisations best placed to undertake specific activities. Systems and processes should be capable of being ramped up for broader purposes in a crisis". This led to Recommendation 11, which put forward the need for CCS to review whether and how best to broaden the scope of its products and services in a crisis situation to maximise the impact of its skilled resources.

- One of the key findings of the review was that it is easier to scale an existing operation, or to use existing structures, than it is to create something new from first principles. It was also clear that "There is a general lesson to be learnt about fragmented services failing under pressure during a crisis. As an example, PPE buying through SCCL was not scalable, for reasons including legacy IT that was in the middle of being updated and the complex 'tower' structure of the buying organisation - and this is not a sustainable position for a body with critical responsibilities in a crisis. Whilst there were a limited number of specialist buyers for PPE which was appropriate for business as usual; the significant increase in the scale of equipment to be purchased required a much larger

buying team for PPE." This led to Recommendation 12 on crisis mobilisation plans and the need for them to explicitly consider scalability.

332.5. Recommendation 13 focused on the use of specialist resources, but included three crucial findings implicit in those recommendations, stressing:

- the need to significantly increase the resources allocated to support administrative functions to ensure that the procedural aspects of contract formation are completed fully and contract information published in a timely manner to comply with legal obligations. This could include contract publication, and documentation of the conflicts of interest management process, as well other procedural and administrative tasks which ensure the transparency of the process;

- "Accurate records of course need to be kept of decisions made throughout the process in any case, but there should be an expectation of scrutiny at the outset, reflected in preparation of documentation throughout the duration of the programme. Good record keeping also assists in dealing with any subsequent litigation, which has required considerable time and resources in relation to COVID-19"; and

- "There also needs to be sufficient dedicated resources to conduct due diligence on new suppliers, especially where a political decision has been made to invite offers on a large scale. Resource planning needs to ensure that the capacity to conduct checks on suppliers is not outstripped by the volume of incoming offers. Similar capacity is needed for the technical approvals process".

332.6 Recommendation 14 stressed the importance of ensuring adequate understanding of technical specifications and that there is quick access to the needed technical information.

332.7 Although it did not extract an explicit recommendation, the Boardman Review contained important analysis of the problems arising from system incompatibility throughout the pandemic. It stressed that:

- "A repeated theme in the evidence is limited interoperability of data and systems. To note, this is not 'back office' finance or HR functional systems, but the operational office and procurement programmes being used by these teams.";

- "The health system has limited interoperability of data and systems, and no central structure or control around data. There did not appear to be a central database to provide information around product volumes and requirements."; and

- "There was a lack of cloud-based digital systems to support good procurement and logistics. The systems and data weaknesses led to negative press and undermined public trust. There was a lot of manual uploading which led to delays and further assumptions around the reason for delays and the lack of

transparency of the data. It would be helpful if the Government had access to a common system to support procurement in a crisis, including purchase to pay. This capability could be based on scaling up a pre-existing departmental system or enhancing the functionality of CCS systems."

In my view, a recommendation targeting those issues should have been included.

332.8. Recommendation 19 was formulated in relation to the management of public 'calls to arms' and, in particular, the 'VIP Lane', and solely focused on the effectiveness of the general approach, rather than its unequal treatment. In my view, some of the statements in the Boardman Review about the effects of the 'VIP Lane' are not aligned with the findings of subsequent litigation and with the content of some statements to this Inquiry (discussed above paras 291 and ff) and should thus be disregarded.

332.9. Recommendation 20 on innovation was premised on two important findings of the Boardman Review, which stressed that consideration should be given to innovation through longer term strategies, as part of the planning to move out of crisis mode and the transition to a steady state, and that this should include monitoring the continued use of direct awards and undertaking competitive tendering as and when this is possible and appropriate.

332.10 Recommendation 21 on modelling made reference to the impact of modelling on the setting of procurement targets, in particular in relation to the PPE buying targets used by the PPE Buy Cell (above para 286.4). The Review stressed the impact of those targets on the total volume of procured PPE and, in contrast with the reduction of procurement targets under the 'Ventilator Challenge", it stressed that "A similar level of agility was less feasible in the case of PPE, where buying decisions had to be made several weeks in advance of supply coming into the UK. Early modelling based on the Reasonable Worst Case Scenario indicated a high level of demand for PPE throughout 2020, not least to cater for an anticipated second wave of infections in late summer. When demand for PPE turned out to be lower (thanks to fewer hospitalisations) attention turned to rebuilding a stockpile against the winter peak. It may be that the reduction in demand could have been reflected more quickly in modelling, and in some cases orders have been cancelled even after suppliers have signed contracts, while other suppliers have been asked to delay orders to regulate the shipping of PPE into the country". It concluded that "the success in large-scale procurement and reductions in demand mean there is a risk of over-buying, particularly for PPE and testing capacity." In my view, this insight, directly related to the need to consider risks of overbuying, will require future attention.

332.11 Discussing the appropriate role for Ministerial oversight, the Boardman Review was clear that "Ministers should not of course, be involved in individual contractual processes." Although, at the time, the review did not find any evidence of such involvement, statements to this Inquiry have shown that this was the case, at least in relation to the 'Ventilator Challenge' (above para 323). In my view, this will also require future attention.

333. As mentioned above, the UK Government accepted all Boardman Review recommendations. However, as the summary above has shown, not all findings of the review resulted in an explicit recommendation and, in some cases, the implementation of the recommendations will be complex and require the investment of significant resources. There is limited public information to allow for an assessment of the current status of application.

333.1. NHS Supply Chain has told the Inquiry that it has implemented some organisational changes. In particular, according to SCCL, as part of its lessons learned from the pandemic, SCCL has recently "consolidated medical, clinical and consumables into a single category and brought procurement in-house following the expiry of those Tower contracts" (INQ000492085, para 5.12). SCCL further explained that it had "revised the operating model for the NHS Supply Chain to bring back in house the procurement of medical products. Whilst not the sole reason for this change, the ability to greater control who buys what in an emergency situation was a factor in making that decision". It is not possible for me to reach an opinion on whether such review and consequential changes fully address the issues identified in this report, or the recommendations by the Boardman Review.

333.2. The Cabinet Office has also provided some details on the implementation of the Boardman Review's recommendations. CO stated that all bar two recommendations have been implemented (INQ000497031, para 1.74) and provided a timeline of efforts made to implement the recommendations (id, paras 6.47 to 6.52). However, the statement does not provide any details of how the recommendations were implemented, or which specific changes they resulted in. It is thus not possible for me to reach an opinion on whether such review and consequential changes fully address the issues identified in this report, or the recommendations by the Boardman Review.

333.3. DHSC has also provided some details on the implementation of lessons learned (DHSC PPE Statement, INQ000528391, paras 901 and ff). However, this statement also does not provide details on how the recommendations have been implemented. It is thus not possible for me to reach an opinion on whether such review and consequential changes fully address the issues identified in this report, or the recommendations by the Boardman Review.

334. The key themes and recommendations in the Boardman Review have been echoed in lessons learned exercises in Scotland (HSCFD, 2023), although the detail varies due to the different context and findings of areas for improvement in relation to the Scottish experience. Lessons learned exercises were also recommended in Wales (Audit Wales, 2021) but I am not aware whether they were carried out, and could not locate a publicly accessible version of their outcomes. The Future Generations Commissioner for Wales included pandemic-related lessons learned in a broader report under s.20 of the *Well-being of Future Generations (Wales) Act 2015* (2015 ANAW 2) (FGCW, 2021).

335. There have also been lessons learned exercises and further analysis carried out by the House of Commons Committee of Public Accounts and the National Audit Office. However, those materials are protected by parliamentary privilege and can thus not be included in the analysis in this report (Counsel to the Inquiry's Note for the Second Preliminary Hearing in Module 1 of the UK Covid-19 Inquiry on 14 February 2023).

336. To the best of my knowledge, there has been no identifiable explicit change in approach to the regulation of emergency and systemic emergency procurement following the pandemic. Some changes implemented during the pandemic remained in place afterwards. For example, the revised guidance on emergency procurement in PPN 01/21 is still in place. To that extent, there were 'organic' or 'collateral' improvements to the UK's approach to emergency and systemic emergency procurement as a result of the direct experience of and reaction to the pandemic. However, the explicit adoption of a change of approach was deferred to the implementation of new rules under the Procurement Act 2023. This is in line with the expectations of the Boardman Review, which signalled that procurement reform should have a positive impact on the rules applicable to emergency procurement, in particular, by clarifying the circumstances in which emergency procurement can be used (para 6.5). This is discussed below (paras 380 ff).

Return to Non-Emergency Procurement Following the Pandemic

337. It is very difficult to assess when the UK Government and devolved administrations returned to non-emergency procurement. For two reasons.

338. First, it is very difficult to establish the date of the last direct award justified on grounds of Covid-19 related extreme urgency. Research by Transparency International UK has shown that "the rate of non-competitive contracts remained at around 45 percent after August 2020, before returning to above 50 per cent in the first three months of 2021. Even well into 2022, there were still quarters where the majority of awards by value were via non-competitive processes" (TIUK, 2024, at p. 39). Based on my own Contracts Finder search (for "extreme urgency"+"covid"), it seems that contracts were directly awarded on the basis of extreme urgency related to Covid-19 until at least early January 2022, and that most of those late contracts would have been for an initial 3-month duration. However, delayed or pending publication of contract award notices and inconsistencies in published details within notices make it difficult to establish a precise date or period with certainty.

339. Second, transition to non-emergency procurement was progressive and the intensity with which emergency procurement was carried out must have gradually reduced as the pandemic progressed. There is, however, no reliable source of information to track the total volumes of emergency expenditure, which makes it hard to identify when emergency procurement was sufficiently limited to state that most procurement had by then returned to 'normality'.

Guidance on Return to Non-Emergency Procedures

340. To the best of my knowledge, no explicit guidance was adopted on return to non-emergency procedures following the pandemic. The adoption of revised guidance in PPN 01/21 in February 2021 seems to have been the last time when guidance related to Covid-19 procurement was adopted. Guidance on transitioning out of Covid-19 related procurement was thus limited to the 'second wave' discussed above (paras 220 and ff), which did not explicitly address emergency procurement.

341. Most guidance published by the UK Government during 2021 was related to Brexit and to post-Brexit reorientation of procurement policy. Very limited guidance was published in 2022

(only three PPNs) and none of them addressed emergency procurement. Most guidance published since then concerns the implementation of the Procurement Act 2023.

Summary Box 22 – Procurement Following the Pandemic

- The Boardman Review contained key findings on procurement challenges during the pandemic and a large number of procurement-related recommendations.
- Statements made to this Inquiry indicate that most of the recommendations have been implemented by Cabinet Office, DHSC, and NHS Supply Chain. However, a lack of a detailed account of how the recommendations have been implemented and which changes have followed from them prevent me from reaching an opinion on whether they fully address the issues identified in this report, or the recommendations by the Boardman Review.
- There were 'organic' or 'collateral' improvements to the UK's approach to emergency and system emergency procurement as a result of the direct experience of the pandemic, such as continued applicability of revised guidance on emergency procurement in PPN 01/21.
- There has been no identifiable explicit change in approach to the regulation of emergency and systemic emergency procurement following the pandemic. The explicit adoption of a change of approach was deferred to the implementation of new rules under the Procurement Act 2023.
- It is very difficult to assess when the UK Government and devolved administrations returned to non-emergency procurement.
- There was no explicit guidance on return to non-emergency procedures after the pandemic.

Comparison of Approaches to Emergency Procurement

342. This section provides focused comparisons of the regulation and conduct of emergency procurement within the UK, and with EU and OECD countries as comparator jurisdictions.

Comparison of Approaches Within the UK

343. From a law and policy perspective, there were no material differences in the approaches to urgent and extremely urgent procurement across the UK. The analysis above has shown how the rules were almost identical across the four nations as there are no significant differences between the rules under the PCR2015 applicable in England, Wales, and Northern Ireland, and the PCSR2015 applicable in Scotland (paras 128 to 133). The analysis has also shown that the guidance provided during the pandemic was also substantially identical. Centrally-issued PPNs were developed in consultation with the devolved governments. They were directly applicable in England and explicitly endorsed in Wales; the Scottish adaptations of the PPNs did not introduce significant changes in relation to the core issues; and nothing indicates that there was separate guidance in Northern Ireland (paras 196 and ff). From this regulatory perspective, the approach was rather uniform across the UK.

344. It is hard to make direct comparison between procurement carried out by the UK Government and the devolved administrations, amongst other reasons, due to their different scale. However, from an operational perspective, there were some differences in general approaches worth highlighting.

344.1. Before the pandemic, the arrangements for the centralised procurement of goods in the healthcare context across the four nations were largely equivalent. All UK nations had put in place institutional and contractual mechanisms to facilitate the centralisation of healthcare goods procurement, which were separate from parallel mechanisms for non-health procurement centralisation. There was a clearly identifiable institution tasked with providing centralised procurement services in each nation. All of them arranged framework agreements for a wide range of consumables and equipment. All of them were considered specialist healthcare procurement organisations, and some were explicitly labelled as centres of procurement expertise or excellence. All of them managed large budgets and influenced even larger volumes of procurement spend. However, the organisational arrangements of these specialist centralised healthcare procurement institutions had marked differences. NHS Supply Chain in England stood out for relying on a significantly more complex set of outsourcing and contractualised arrangements than its counterparts in Wales, Scotland and Northern Ireland (above paras 169 to 190).

344.2. During the pandemic, there was a clear divergence in approaches, in particular in relation to PPE procurement. As discussed above, at the start of the pandemic, NHS Supply Chain was overwhelmed and the UK Government decided to create an entirely separate Parallel Supply Chain largely from scratch. This involved the creation of new organisational and line management structures, the use of different

systems, the development of new approaches to due diligence and other controls, and the creation of new decision-making boards for the adoption of contract award decisions. To put it simply, in view of difficulties to scale up the operations of NHS Supply Chain, rather than looking for alternative ways to do things within the same organisational framework, the UK Government decided to rely on an entirely new set of arrangements that were being put in place as they were needed. This report has highlighted the significant shortcomings of this approach, especially in relation to due diligence, conflicts of interest, record-keeping and proactive transparency. The approach was different in Wales, Scotland and Northern Ireland.

344.3. In Wales, NHS Wales Shared Services Partnership ('Shared Services') led on the response to increased demand for PPE. Another pre-established organisation (Life Sciences Hub Wales) was tasked with industry engagement and the assessment of PPE offers, with qualifying offers forwarded to Shared Services to be progressed into the procurement process. While Shared Services had to implement some changes to its standard procedures, including some higher levels of delegated spend authority, the usual controls remained in place for contracts above £5mn and all contracts above £1mn had to be reported to the Welsh Government. Compliance with controls was achieved within pre-existing staff capacity. Shared Services created a new Finance Governance Group in early April 2020 to manage increased risks. Audit Wales subsequently found, on the basis of a sample of the larger or riskier contracts, that "in all cases there was a documented evidence trail, picking out the key issues and risks and how they would be managed. All the decisions we reviewed had been made in line with the required processes, and the subsequent approvals of the orders were in line with Shared Services' scheme of delegation and Welsh Government requirements." (Audit Wales, 2021, paras 2.3 and ff, esp para 2.16). In general, Audit Wales was satisfied that, despite the required adaptations and challenging conditions, Shared Services had implemented adequate governance and controls. These mostly relied on the existing organisational and line management structures and systems, slightly modified due diligence and control criteria and processes, and continuity in boards tasked with decision-making. However, Audit Wales also found evidence of non-compliance with transparency obligations, either due to the absence of publication, inadequate notices, or delays (id, para 2.28 and ff).

344.4. In Scotland, NHS National Services Scotland (NHS NSS) led on the response to increased demand for PPE, and managed PPE offers through a dedicated online portal. NHS NSS adopted internal measures to deprioritise non-Covid-19 activity and redeploy staff (NHS NSS statement, INQ000521969, para 141). NHS NSS relied on its existing processes and contract approval documentation, although due diligence on South East Asian providers was carried out by Scottish Enterprise. In her statement to the Inquiry, the former Scottish Cabinet Secretary for Health and Sport between June 2018 and May 2021, stressed that "standard tried and tested NHS NSS procedures for due diligence, quality control and pricing applied" to the procurement of PPE from new suppliers (INQ000493484, para 24). The Auditor General for Scotland confirmed that this was the approach followed, although its report on the 2020/21 audit of NHS NSS highlighted how documentation was not completed to a consistent level of detail, that there were instances where it had

been signed after the contract start date or not signed at all, and that there was inconsistent use of contract award letters (Auditor General for Scotland, 2021, at 25). It also found that most contract award notices were not published in time (id, 32). NHS NSS also adapted its approach to spend approvals to streamline the authorisation process for new contracts and reduce the associated workload of staff involved in approving contracts. This was found to have been operated mostly satisfactorily (id, 34).

344.5. In Northern Ireland, the Northern Irish Health and Social Care Business Services Organisation, Procurement and Logistics Service ('PaLS') led on the response to increased demand for PPE. PaLS relied on its existing organisational arrangements and systems, standard internal approval mechanisms and safeguards on conflicts of interest. The Northern Ireland Audit Office found that, although there had been no significant problems, some of the contracts awarded to suppliers identified as high-risk by PaLS were entered into without requiring heightened internal approvals, there were risks around multiple prepayments made to the same suppliers, and inadequate risk assessments on suppliers requesting prepayments (NIAO, 2022, paras 15 and 4.17). It also found that no additional conflict of interest checks were introduced and that such exclusive reliance on relevant officials making declarations was unlikely to detect any undisclosed conflicts (id, paras 16, 4.20 and 4.21). It also found that there were gaps in record-keeping concerning direct awards (id, paras 17 and 4.29 to 4.31). It also found that around 15% of contract award notices were published late, which PaLS justified on the basis of the high volume of work facing the organisation at the time (id, para 4.19).

344.6. From this high-level comparison, it thus seems that Wales, Scotland and Northern Ireland managed to create continuity of organisational arrangements and processes with limited adaptations that were relatively easy to define and identify, and that this facilitated the oversight of those arrangements. This seems to generally support the key finding in the Boardman Review that it is easier to scale an existing operation, or to use existing structures, than it is to create something new from first principles (above para 332.4). Making allowances for the different scale of PPE procured in the devolved nations compared to, initially, NHS Supply Chain, and later the Parallel Supply Chain, this different starting point and details on how centralised healthcare procurement organisations in the devolved nations adapted their organisation and processes could helpfully inform any further review of arrangements in England related to the implementation of the Boardman Review recommendations.

344.7. At this high level, there is also a less positive commonality, as it is also clear that, like in England, the approach taken in Wales, Scotland and Northern Ireland also resulted in significant non-compliance with proactive transparency obligations and, except in the case of Wales, in shortcomings in record-keeping, especially in relation to decisions concerning direct awards and conflict of interest checks. In both cases, the root cause for shortcomings in meeting applicable requirements seemed to be a deprioritisation of compliance with record-keeping and transparency obligations, compared with the rest of the tasks related to centralised emergency procurement. In that regard, the recommendations of the Boardman Review could helpfully inform a review of arrangements for procurement transparency and record-keeping across

the four nations. As these will change with the Procurement Act 2023, this will be discussed later (paras 380 ff).

345. Within the UK, the High-Priority Lane was a unique feature of PPE procurement by the UK Government. No evidence of an equivalent twin-track or preferential treatment of potential suppliers because of the person referring them was found in relation to devolved procurement in Wales (Audit Wales, 2021, at 9 and paras 2.9 and 2.10; INQ000391237, para 532), Scotland (Auditor General for Scotland, 2021, at 31) or Northern Ireland (NIAO, 2022, para 16).

Summary Box 23 – Comparison of Approaches Within the UK

- From a law and policy perspective, there were no material differences in approaches to urgent and extremely urgent procurement across the UK, before or during the pandemic.
- The different scale of procurement carried out by the UK Government and the devolved administrations makes it hard to compare them, but some issues can be stressed.
- NHS Wales Shared Services Partnership, NHS National Services Scotland and the Northern Irish Health and Social Care Business Services Organisation, Procurement and Logistics Service were able to lead on efforts to procure eg PPE by relying on their pre-pandemic organizational and line management arrangements, systems and processes, with relatively minimal adaptations.
- These efforts were mostly endorsed by Audit Wales, the Auditor General for Scotland and the Northern Ireland Audit Office. However, there was also significant non-compliance with proactive transparency obligations across the three nations, and gaps in record-keeping in Scotland in Northern Ireland, as a result of deprioritisation of these activities.
- Within the UK, the High-Priority Lane was a unique feature of PPE procurement by the UK Government. No two-track systems operated in Wales, Scotland or Northern Ireland.

International Comparison of Approaches

346. This sub-section provides focused comparative analysis of the approach to emergency procurement and systemic emergency procurement during the pandemic across selected jurisdictions, with a primary focus on EU and OECD countries. The report does not include a detailed comparison of the regulation of emergency procurement across jurisdictions before the pandemic because, in general, there would be very limited identifiable differences. Most comparator jurisdictions are GPA parties and thus bound by the same general constraints discussed above (paras 58 and 59, see also Annex 4). This translates into very similar sets of rules authorising the use of noncompetitive procedures, for example in the US (CRS, 2023), Canada (OPO, 2020), Japan (Kusunoki, 2021) or Singapore (Gao, 2021). Many comparator jurisdictions are also EU Member States and thus subject to the additional constraints arising from EU law. Some jurisdictions had followed the approach of the UNCITRAL Model Law and imposed some constraints on the direct award of contracts in emergency situations, such as minimum competition requirements, value limits, or a restriction on the contracting authorities that could carry out direct awards. Where relevant,

these issues are discussed below, in the context of the legislative changes implemented during the pandemic (paras 348 to 355).

347. The purpose of this comparative overview is not to provide an exhaustive description of the approaches that emerged globally, but to establish a comparative benchmark against which the Inquiry may want to assess some of the salient aspects of the UK's approach. The comparison focuses on the issues that I find most salient or relevant in view of the UK's pandemic public procurement response discussed earlier in this report.

Comparison of Use of Competition Where Possible

348. It is worth recalling that the UK followed a 'copy-out' approach to transposing EU law and that the UK rules on extremely urgent procurement were identical to the EU's (para 106). Other jurisdictions, such as the Netherlands or Austria, had followed a similar approach. Not all EU jurisdictions followed the same approach, though, and some included minimum requirements to use competition where possible—mostly in line with the approach in the UNCITRAL Model Law (para 62 and Annex 4)—or limited the availability of direct awards to certain contracting authorities only. However, at the outset of the pandemic, some of these jurisdictions passed emergency legislation to deactivate minimum negotiations or competition requirements, to make direct awards available above the value limits applicable before the pandemic, or to open up the possibility of direct awards to a broader range of contracting authorities than during ordinary times.

349. For example, Italy had rules that required contracting authorities facing an extremely urgent need to request quotations from at least five potential suppliers 'whenever possible', and to make subsequent award decisions in compliance with the principles of transparency, competition and rotation. Direct awards to contractors identified without this prior informal competition were strictly limited to situations where such requests for quotations would not be possible at all, in which case the total value of the contracts directly awarded was also subject to strict limits, and direct awards were only permitted during predetermined short time periods immediately following the catastrophic event that gave rise to the emergency. This was shown to be too restrictive to enable effective procurement at the initial stages of the pandemic. Emergency legislation effectively deactivated all these constraints, providing a general authorisation for direct awards not subject to the previous value and time limits. This aligned Italian law to the minimum requirements under EU law. At later stages of the pandemic, Italy adopted further legislation that reintroduced some but not all of the pre-pandemic requirements (Albano and La Chimia, 2021).

350. Portugal also adopted emergency legislation to facilitate the award of public contracts (Telles, 2020). The main simplification implemented in Portugal also concerned the suppression of the pre-pandemic requirement for contracting authorities to carry out a mandatory request for at least three quotations prior to the award of a contract under a negotiated procedure without prior publication (Telles, 2017).

351. Similarly, but in a more radical manner, Poland adopted emergency legislation that excluded the application of public procurement law to the procurement of services or supplies necessary to counteract Covid-19. This entirely exempted from compliance with procurement law the direct award of contracts of any value by any contracting authority. This raised

questions on the compatibility of such absolute exemption with EU law (Zalewski and Niewiadomska, 2020) as well as concerns of corruption risks (Nowicki, 2021).

352. A similarly broad approach to the complete exemption from procurement law for the procurement of certain medical devices and consumables was also initially adopted in Bulgaria, Czechia and Slovakia, and in some jurisdictions in relation to procurement from domestic sources only, such as in Hungary (Elsner *et al*, 2020). Such attempts to completely exclude emergency procurement from the legal framework applicable in 'ordinary times' also reflect comparable approaches in major jurisdictions, such as China, where the government relieved procuring entities of the duty to comply with the Government Procurement Law and implementing regulations (Wang and Ren, 2021).

353. Romania also implemented emergency legislation including derogations from public procurement law to allow for the direct award of contracts of any value. This disapplied a pre-pandemic value limit (ca £20,000) for the direct award of supply contracts (Vornicu and Dragos, 2021). Although it is not clear from existing accounts, it seems that the emergency legislation would also have set aside requirements for a minimum number of requests for quotations ahead of the award of a contract under a negotiated procedure without prior publication.

354. It is also worth noting that there were different approaches to the adoption of guidance on emergency procurement during the pandemic. While some countries adopted their own guidance, such as Denmark (Risvig Hamer, 2021b), the Netherlands (Janssen and Stuitjs, 2021) or Ireland (OGP, 2020), other EU countries simply relied on the EC Guidance (above para 210). The guidance issued at the start of the pandemic tended to focus more on impacts on existing public contracts than on emergency contract awards (Gullhagen-Revling and Volstad, 2020). Guidance adopted later on in some jurisdictions, such as Ireland (OGP, 2021), focused on the heightened justification required for direct awards in the advanced stages of the pandemic, but did not focus on the issue of the use of informal competition or requests for quotations where resorting to direct awards was still justified. To the best of my knowledge, no country used its guidance to promote the use of competition where possible.

355. Overall, it is clear that EU countries that had more demanding regimes pre-pandemic used emergency legislation or guidance to disapply or reduce requirements and formalities for the direct award of contracts under their domestic legislation to the bare minimum mandated by EU law. This aligns with broader international experiences showing that the availability and use of non-competed direct awards was specifically extended in many countries (e.g. Colombia, Brazil, China, Nigeria, Singapore or South Africa) under exceptional approaches to Covid-19 procurement, with no or limited conditions (Butler, 2021), and sometimes with very limited disclosure of information to protect what was perceived as a national interest in not compromising negotiating positions (such as in the case of Singapore, see Gao, 2021). To the best of my knowledge, emergency legislation and guidance were not used to promote competition where possible in relation to the direct award of contracts under negotiated procedures without prior publication.

Comparison of Operational Changes with a Focus on Centralisation

356. Many jurisdictions adopted a more centralised approach to procurement during the pandemic. As mentioned above (para 119), an OECD stocktaking report on immediate

procurement responses to Covid-19 showed that two thirds of the surveyed countries increased the co-ordination or centralisation of the procurement of essential goods during the pandemic, including not just health products but also IT equipment and services (OECD, 2021a, p.168). Increased centralisation is particularly clear in the approaches taken in several EU jurisdictions (Ling Song, 2021). Non-OECD jurisdictions show similar trends (Frauscher *et al*, 2020). Some small countries like Singapore evidence a relative advantage derived from the existence of a single tier of governmental administration that lends itself to centralised coordination (Gao, 2021). Jurisdictions like South Korea combined centralisation with restrictions on exports and mandatory sales to the public sector. South Korean producers were required to sell 80 percent of their total production through the Public Procurement Service (Kwon, 2020), and this was then made available for distribution through public systems that rationed distribution to individual users to maximise the availability of stocks (ADB, 2021). This approach partially replicated mechanisms put in place in Taiwan (Lee *et al*, 2020).

357. Germany took a rather structured approach to centralised emergency procurement. The Federal government directly engaged in the procurement of PPE through the procurement offices of four of its major Ministries (Defence, Finance, Interior and, later on, Health) and then distributed that PPE according to a fixed quota to the federal states, which passed the goods on, primarily to hospitals and care facilities. One of the interesting and effective centralised procurement initiatives involved a 'fixed terms' (or 'take-it-or-leave-it') mechanism whereby the Ministry of Health set technical conditions and prices for specific products and any company that could meet the requirements and agreed to that price was entitled to a contract. This mechanism was open for two weeks and led to deliveries of a total of 233 million FFP2 masks and 63 million surgical masks. After the national and international markets eased, central procurement was terminated at the end of June 2020 (Burgi and Krönke, 2021).

358. Despite having a system of regional centralisation of healthcare procurement in operation pre-pandemic, Italy adopted a nationally-centralised approach. Being the first EU country with a major Covid-19 outbreak, and having declared the state of emergency at the end of January 2020, Italy started this process quite early on. At an initial stage, in early March 2020, it tasked the national central purchasing body (Consip) with executive purchasing powers for Covid-19 on behalf of the Department of Civil Protection. However, shortly after, in mid-March 2020, a Special Commissioner was appointed and made responsible for coordinating and conducting all emergency purchasing until the end of the state of emergency (Albano and La Chimia, 2021). The Commissioner was supported by a special unit tasked with carrying out emergency procurement procedures and organising national production (Racca, 2021).

359. In Denmark, the national central purchasing body (SKI) had several framework agreements in place, through which it was possible to purchase different types of equipment. However, at the start of the pandemic, SKI experienced some difficulties with the suppliers of various products and this triggered some additional responses. For example, while the regions are ordinarily responsible for hospitals, one region (Region Hovedstaden) became responsible for all purchases of PPE and gear during the pandemic, with financial support by the State. Similarly, municipalities needed protective equipment and had difficulties early on in

purchasing this. A joint purchasing unit for all 98 Danish municipalities was set up (Risvig Hamer, 2021b).

360. At the start of the pandemic, the Swedish government appointed the Agency of Health and Welfare (Socialstyrelsen) as a central purchasing body to procure PPE. However, this proved ineffective and soon after it was decided that Socialstyrelsen would only carry out purchases to supplement those made by the regions and municipalities themselves. Swedish regions and municipalities had at their disposal framework agreements put in place by Adda, a central purchasing body owned by the Swedish Association of Local Authorities and Regions. The Swedish government facilitated an agreement between Adda and the largest municipalities and central government agencies to coordinate purchases and avoid domestic competition. The agreement established the coordination of 'Covid-19 purchases' with the regions in order not to compete against one another, as well as sharing information about opportunities (both of supplies and transportation), testing of products, test results, etc (Edman, 2021).

361. In Spain, the central government imposed the centralisation of PPE and other consumables at national level. However, in view of initial difficulties, some regions tasked their central purchasing bodies with the centralised procurement of PPE within those regions and revoked hospitals' powers to buy independently. The logistics, storage and distribution process for medical and health material was centralised, to be prioritised on the basis of real and daily needs. As the pandemic progressed, there was increasing coordination between central and regional procurement and a framework agreement was put in place to cover the needs of the central administration and 16 out of 17 regional administrations (Valcárcel Fernández, 2021).

362. These national experiences show that at the beginning of the pandemic there was a clear trend towards centralisation of procurement and often at several levels of government within a single EU Member State, although centralisation at national or federal level played a particularly relevant role. The country experiences above also show that the centralisation of procurement at speed not always was immediately successful and that initial approaches could require tweaking or replacing within relatively short time periods.

363. There is, however, also evidence of adaptations to facilitate more decentralised procurement.

364. As mentioned above (para 350), under its emergency legislation, Portugal allowed all contracting authorities to purchase products and services necessary for the fight against the pandemic through a direct award procedure. The main effect of this emergency legislation was to give entities otherwise obliged to carry out their procurement under the national system for public purchases (NSPP) the possibility to purchase products and services for the fight against Covid-19 outside a pre-existing framework agreement. However, such acquisitions by direct award had to be made only if strictly necessary and for reasons of extreme urgency (Cerqueira Gomes, 2021) and can thus be seen as an escape valve in case the centralised procurement system became overwhelmed.

365. Similarly, despite initially tasking the National Office for Centralised Procurement (NOCP) with the centralised procurement of healthcare consumables and equipment, the Romanian government soon realised that the purchases carried out by NOCP would not be sufficient and thus adopted the emergency legislation mentioned above (para 353) to allow for a much more widespread use of direct awards (Vornicu and Dragos, 2021).

366. It is also relevant to highlight that several countries engaged, in different ways and to a different extent, private sector entities in efforts to procure healthcare consumables.

367. For example, in Sweden, the publicly-owned central purchasing body Adda entered into a temporary framework agreement with a wholesaler that had distribution lines established with all Swedish municipalities. The agreement was that both Adda and the wholesaler would be sourcing goods, but the wholesaler would enter into the contracts with the suppliers and be responsible for quality assurance. A small executive group at Adda was set up to scrutinise and swiftly decide on the offers received by Adda and the wholesaler, and Adda guaranteed payment to the wholesaler for procured supplies that were not sold on to the Swedish public sector (Edman, 2021).

368. Similarly, in Denmark, private undertakings became involved in purchasing protective equipment directly from suppliers abroad, and some of them became involved with the regions' purchases (Risvig Hamer, 2021b).

369. Also similarly, in Germany and in relation specifically to procurement from the Chinese market, the government concluded an instrument for framework agreements with large German companies whereby the companies bought on behalf of the Federal Ministry of Health. A centralised transport arrangement was put in place to cooperate with an airline to secure daily flights from Shanghai (Burgi and Krönke, 2021).

370. This shows that several EU jurisdictions relied on private sector entities to carry out procurement on behalf of the government. However, there do not seem to be sufficient publicly available details to get a full view of the different types of collaboration that took place.

Summary Box 24 – International Comparison of Approaches

- At the outset of the pandemic, many jurisdictions that had set minimum competition requirements (such as a minimum number of quotations to be requested), or other limits on the value or availability of direct awards, passed emergency legislation to deactivate them and create additional flexibility.
- In many countries, the availability and use of non-competed direct awards was extended under exceptional approaches to Covid-19 procurement, with no or limited conditions.
- Some jurisdictions went as far as temporarily suspending public procurement law altogether, although this approach is questionable under the GPA and EU law.
- No country used its guidance to promote the use of competition where possible.
- Many jurisdictions adopted a more centralised approach to procurement during the pandemic. Some of them adopted procurement centralisation at multiple levels of government, with central or federal governments seeking to play a leading role.

- In many countries, despite pre-pandemic centralisation and the availability in principle of supplies through framework agreements, additional mechanisms and further centralisation were needed in the early stages of the pandemic.
- There are examples of successful practices, such as Germany's 'take-it-or-leave-it' market engagement, but most countries faced significant difficulties in setting up centralised procurement in the early stages of the pandemic.
- The centralisation of procurement at speed was not always immediately successful and initial approaches required tweaking or replacing within relatively short time periods.
- There is also evidence of adaptations to facilitate more decentralised procurement where pre-pandemic centralised procurement arrangements of mandatory use were overwhelmed, to facilitate procurement from a broader and more diverse range of sources.
- Several countries engaged private sector entities in efforts to procure healthcare consumables on behalf of the government.

Key Similarities and Differences between the UK and Comparator Jurisdictions

371. In general terms and global trends, the approach to emergency procurement in the UK and in comparator jurisdictions was similar, with the notable exception of the 'VIP Lane' (para 372).

371.1 The minimalistic regulatory framework in place in the UK aligned with that in comparator jurisdictions. Most reviewed jurisdictions, and especially EU jurisdictions, had limited their rules on emergency procurement to an authorisation clause comparable to reg.32(2)(c) PCR2015, and those that initially had more requirements to use competition where possible in line with the UNCITRAL Model Law, proceeded to modify their legislation and policy to expand the possibility of resorting to direct awards on extreme urgency grounds (paras 348 to 355).

371.2 The operation of heavily centralised procurement in the UK, both through the UK-wide Parallel Supply Chain and the centralised efforts at devolved administration level, also aligns with approaches in comparator jurisdictions. Most reviewed jurisdictions adopted a more centralised approach to procurement during the pandemic than before it, in some cases at multiple levels of government, and in many jurisdictions central or federal governments sought to play a leading role (paras 356 to 362). The OECD highlighted procurement centralisation as a pillar of emerging strategies to improve procurement performance during the pandemic (paras 118 and 119).

371.3 Most reviewed comparator jurisdictions experienced organisational and operational challenges largely comparable to those faced by the UK in the conduct of centralised procurement, especially for PPE, under stringent conditions.

The UK Government's 'VIP Lane' from a Comparative Perspective

372. To the best of my knowledge, internationally, no other country implemented a prioritisation system for the triaging of offers for PPE or other healthcare supplies similar to the UK Government's 'VIP Lane'.

373. Some countries seem to have taken a rather different approach. For example, as discussed above (para 357), Germany used a 'take-it-or-leave-it' mechanism for companies offering PPE supplies to express interest in obtaining a contract in pre-determined terms within two weeks. This secured a high volume of FFP2 and surgical masks. In my view, a similar approach could have been attempted in the UK. Cabinet Office has indicated that the Bundesrechnungshof, the supreme federal authority for audit matters in the Federal Republic of Germany, subsequently identified problems in the fulfilment of some of those contracts, and that some of the supplies obtained in this way were above average unit prices (Bundesrechnungshof, 2021). This, however, does not detract from the fact that such an alternative 'open house' approach to issuing a "call to arms" would have allowed a much more structured analysis of detailed offers and the setting of core contractual terms and conditions on a 'take-it-or-leave-it'. As a complement to targeted engagement with industry, it could have created advantages over the approach followed in what became the 'VIP Lane' (above paras 291 and ff).

Lessons for the UK from International Approaches to Emergency Procurement

374. Perhaps counterintuitively, there seem to be limited lessons for the UK emerging from international approaches because those approaches were very similar to the UK's on most issues, with the main exception of the 'VIP Lane'. As mentioned above, most analysed countries sought to maximise flexibility for the direct award of contracts, even by adopting emergency legislation where required. The guidance that emerged was also aligned with the UK's. Most countries implemented centralised procurement for key consumables such as PPE, and most of their experiences show significant challenges in the early stages due to the pace at which organisational changes were being implemented and the distorted conditions in global markets for those key supplies. Several countries relied on private sector organisations as agents or delegates to source key supplies, particularly abroad.

375. There is also evidence that most countries faced similar challenges arising from matters outside of their control, such as the upheaval of global markets for PPE, and had to deal with the downsides of procurement implemented at high pace, such as the receipt of unusable deliveries. There is also evidence that most countries adopted similar additional measures, such as imposing export restrictions or bans, supporting a ramp up in domestic production, or withdrawing stocks from pre-existing emergency stockpiles (Webb *et al*, 2020).

376. In my view, differences in emergency procurement performance across jurisdictions probably had much more to do with levels of professionalism, risk appetite or tolerance, procurement systems and processes in place (in particular IT systems), data availability, and other organisational issues; than with general approaches to the regulatory framework or the big drivers of change in operations (centralisation, public-private collaboration, etc).

377. For example, a comparison of the volume of PPE contracts awarded until October 2020 identified and analysed awards for a total of €21bn across Europe. It shows that all countries made intensive use of direct awards, even for very large contracts. In that regard, the UK's general strategy does not seem particularly different from that of other European countries. However, half of those (€10bn) were UK contracts, including €4.9bn PPE purchases by the Department of Health and Social Care (OCCRP, 2020). Total expenditure in PPE in the UK is generally estimated to be significantly higher than that. This suggests that decision-making and risk-management may have played a significant role in cross-country comparisons of the performance of emergency procurement.

378. Participation in the EU's JPA procurement seems to be another element that could have played a significant role in moderating direct PPE procurement by EU Member States, as the JPA awarded the largest single framework agreement for PPE (potentially worth €1.5bn) (OCCRP, 2020) and in that way provided significant flexibility to participating countries. The UK Government decided not to participate in the JPA. This may also explain to some extent why the UK had to independently secure much larger volumes of PPE than other countries—with the associated risk of overbuying—as the UK would not have had access to those framework agreements a failsafe position on PPE procurement. This could have potentially impacted the functioning of the Parallel Supply Chain, or its purchasing targets (above para 22).

Summary Box 25 – Lessons for UK from International Approaches

- Given the similarity of approaches to maximising flexibility and discretion, procurement centralisation and public-private collaboration, there seems to be limited scope for international lessons to be learned from the UK that are sufficiently distinct from the lessons to be learned based on the UK's own experience.
- Differences in emergency procurement performance across jurisdictions probably had much more to do with operational issues than with general approaches to the regulatory framework or the big drivers of change in operations.
- The UK's position seems to have been at least in part determined by the UK Government's decision not to participate in the JPA, forcing the UK to independently secure higher volumes of supplies—with the associated risk of overbuying.

The Current State and the Future of Emergency Procurement

379. This section provides my views on changes that will arise from the Procurement Act 2023, and broader reflections on measures that could be implemented to improve emergency procurement in the UK in the future.

Procurement Act 2023, Urgency and Emergency Procurement

Direct Awards under the PA23

380. One of the stated goals in the reform of UK procurement law initiated in December 2020 was to create a more foreseeable and adequate regime for 'crisis procurement'. The UK Government considered that, under the PCR2015, there was "ambiguity in the regulations regarding contracting in the case of crisis where immediate, short term responses are required, as distinct from situations where there is extreme urgency due to unforeseeable events. It is not always entirely clear what is possible with regard to the award of contracts without advertisement. We want to ensure that contracting authorities can act quickly and effectively in appropriate circumstances, but also ensure transparency in the process and encourage competition as far as possible" (Cabinet Office, 2020b, para 78). It thus proposed introducing a new circumstance specifically relating to crisis, which would cover:

- an event which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life or health of people;
- where measures are required to protect public morals, order or safety; or
- where measures are required to protect human, animal or plant life or health (id, para 79).

381. After significant changes, and despite not including some of the initial aspects in the proposal for the new 'crisis procurement' circumstance (which had been taken into account in the Boardman Review to suggest that the new rules would bring improvements, see above para 336), the Procurement Act 2023 (PA23) contains several routes to the direct award of public contracts. Those of relevance for this report comprise:

- a 'standard' authorisation for direct award in the case of extreme urgency;
- expanded possibilities for direct awards in relation to the development of prototypes, or supply of other novel goods or services; and
- direct award of contracts required to 'protect life'.

382. The primary or 'standard' route concerns a justification for direct awards in cases of extreme urgency, and is very similar to the current rules. Although the wording has been slightly altered in relation to reg.32(2)(c) PCR2015, there is no clear indication that the rules will be interpreted or applied in a significantly different way. Table 9 provides a detailed comparison.

Table 9: Comparison of authorisation for extremely urgent procurement under PCR2015 and PA23

PCR2015	PA23
Use of the negotiated procedure without prior publication 32.—(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication. General grounds (2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:— (c) insofar as is **strictly necessary** where, **for reasons of extreme urgency brought about by events unforeseeable by the contracting authority**, **the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with**. (4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency **must not in any event be attributable to the contracting authority**.	41 Direct award in special cases (1) If a direct award justification applies, a contracting authority may award a public contract directly. SCHEDULE 5 Direct award justifications Urgency 13 Where— (a) the goods, services or works to be supplied under the public contract are **strictly necessary for reasons of extreme and unavoidable urgency**, and (b) as a result **the public contract cannot be awarded on the basis of a competitive tendering procedure**. 14 For the purpose of paragraph 13, urgency is unavoidable if it— (a) **is not attributable to any act or omission of the contracting authority**, and (b) **could not have been foreseen by the contracting authority**.

383. The PA23 also includes a new direct award justification for the "production of a prototype, or supply of other novel goods or services [understood as those designed or developed at the request of the contracting authority], for the purpose of—(a) testing the suitability of the goods or services, (b) researching the viability of producing or supplying the goods or services at scale and developing them for that purpose, or (c) other research, experiment, study or development." (Schedule 5 para 2). This justification seems to be intended to cover direct awards such as those in the 'Ventilator Challenge'.

384. The PA23 also includes an alternative regime for the direct award of contracts required to 'protect life'.

384.1. Where necessary, the PA23 authorises the adoption of regulations for the direct award of contracts "as if a direct award justification applies." Those regulations may specify which contracts, classes of contracts, or describe the purpose of the contracts that can be directly awarded; they can include any relevant conditions or limitations; or confer discretion (s.42 PA23).

384.2. This is the result of the UK Government's intention to create a specific regime for 'crisis procurement', although the new rules have not retained the primary innovation that could have limited the rules to genuine systemic emergencies by explicitly restricting the applicability of this regime to events "which clearly [exceed] the dimensions of harmful events in everyday life and which substantially endangers or restricts the life or health of people" (above para 380). Notably, the PA23 only includes an enabling clause for government to adopt such a regime for the direct award of contracts required to 'protect life' in the future. Given the absence of other constraints, this could be done in relation to events that do not acquire such 'systemic' scale. It is not clear how this will be used in future.

384.3. What seems clear, however, is that this justification ground and the related regulations seem to be intended to cover mechanisms for direct awards such as those in the 'VIP Lane' and the Parallel Supply Chain, and more generally in cases where the stringent conditions for resorting to direct awards may not apply. Therefore, this change goes against the grain of seeking to limit the use of emergency procurement and to foster a return to competitive procurement as soon as possible (as recommended in the Boardman Review, above paras 331 and 332.9) because it empowers government to create a blanket authorisation for direct awards for a specified period of time. S.42 PA23 is thus *by itself* not geared towards ensuring minimal use of direct awards. Moreover, deviating from those stringent conditions for resorting to direct awards could generate issues of (non-)compliance with international frameworks. However, this will not be explored in detail in this report.

385. It is worth noting that the creation of this new ground for direct awards also creates confusion about its interaction with the 'standard' justification for direct awards on the basis of extreme urgency (para 382). The Explanatory Notes to the PA23 stress that the purpose of s.42 "is to ensure procurements during an emergency event (like the Covid-19 pandemic) can be conducted as quickly and in full knowledge, even if the circumstances leading to the event are foreseeable (which would rule out the extreme urgency justification for direct award contained in paragraphs 13 and 14 of Schedule 5)" (EN PA23, para 278). However, this is not clearly reflected in the legal provision and there is a clear possibility that direct awards under both routes is concurrently possible. This can be particularly problematic in cases where s.42 PA23 is triggered, or susceptible of being triggered and, at the same time, contracting authorities seek to directly award contracts under s.41 PA23. Nothing in the PA23 prevents a contracting authority from relying on s.41 once s.42 has been triggered, although it is possible that such a constraint is embedded in future regulations adopted under s.42 PA23. This will not be explored in detail in this report.

386. As things stand, it is hard to assess whether the changes in the PA23 are likely to lead to stronger governance frameworks for emergency procurement or, conversely, to provide broad legal justifications to shield decision-making and the direct award of public contracts from scrutiny and judicial review. Given the learning that can be extracted from earlier sections of this report, and in particular the importance for contracting authorities engaging in emergency or crisis procurement to continue to comply with basic record-keeping, transparency and conflict of interest obligations, as well as for direct awards being subjected to heightened scrutiny; it will be paramount that the regime in s.42 PA23 is not used to deactivate those basic obligations or to reduce oversight. In that regard, a clarification that

the discretion that the future regulations can grant contracting authorities cannot deactivate any of the mandatory requirements under the PA23 should be made explicit.

Transparency of Direct Awards under the PA23

387. It is also worth highlighting that the PA23 alters the regime of proactive transparency obligations related to the direct award of contracts. All direct awards discussed above will in principle require the publication of a transparency notice before the award of the contract (s.44 PA23), as well as a contract award notice before entering into the public contract (s.50 PA23). The information that needs to be provided in each of these notices is set in the Procurement Regulations 2024 (SI 2024 No. 692) ('PR24') (regs. 26 and 27). A contract details notice will also be required within 30 days from the contract being entered into, as well as a redacted copy of contracts with a value of more than £5 million before the end of the period of 90 days beginning with the day on which the contract is entered into (s.53 PA23, as developed in reg.35 PR24). It is however unclear whether any consequences would arise from a breach of those obligations, even on a systemic scale. In my view, the possibility for the Procurement Review Unit to issue section 109 recommendations in relation to such breaches would not provide a sufficient or timely safeguard.

388. The modes of enforcement of the PA23 are the same as those for the PCR2015 (above paras 167 and 168). Under both regimes, a breach of mandatory requirements does not immediately stop the award or execution of a public contract, unless an action is brought within prescribed time limits. To facilitate the exercise of such action before the contract is implemented, a standstill period follows the publication of a contract award notice. However, the PA23 explicitly excludes the standstill obligation in relation to both direct awards on the basis of s.41 extreme and unavoidable urgency, and s.42 awards to protect life, etc (ss.51(3)(a) and (b)). This means that, even in the absence of a publication of the required transparency and contract award notices, contracting authorities will be able to immediately put directly awarded contracts into effect. In this regard, the PA23 does not improve on the enforceability of the rules on direct award compared to the PCR2015 and PCSR2015. At the same time, the absence of those notices will make it nigh on impossible to lodge a challenge in a timely manner to secure interim measures, which would in any case be very difficult to obtain. In my view, given the practical impossibility of enforcing timely compliance with those proactive transparency obligations in a meaningful manner, they are insufficient to guarantee that there will be more transparency in the case of a future systemic emergency. I thus disagree with the statement by CO that the creation of these notices is a major safeguard and provides improved transparency, in particular *before* contract award (INQ000497031, paras 7.18 to 7.20 and note on Transparency Notices and Direct Awards).

Conflicts of Interest under the PA23

389. The PA23 also introduces some changes in the rules on conflicts of interest, some of which had in part been anticipated in PPN 04/21 (above para 136). In my view, most of the changes refer to obligations that were already in place under the PCR2015 (regs.24 and 57), but the PA23 makes them more explicit and detailed. A key change is in the requirement to complete a conflicts assessment prior to publishing a tender or transparency notice (s.83(1) PA23). However, in my view, this suffers from the same weakness in enforcement mechanisms discussed above in relation to transparency obligations (para 388).

Overall Opinion

390. In my view, the PA23 introduces minimal changes in relation to crucial issues arising from this report. While some of the changes *could* have a positive effect if contracting authorities complied with their obligations (in particular in relation to conflicts of interest and proactive transparency), there are no effective enforcement mechanisms to *ensure* that this is the case. This weakness is not specific to changes arising from lessons learned during the pandemic, but a structural weakness in the UK system of procurement regulation that remains unaddressed (above para 168; Justice, 2024). In my view, further consideration should be given to the creation of effective mechanisms to ensure compliance, especially in the context of systemic emergencies where there is a risk to deprioritise compliance with those obligations as seen during the pandemic. In my opinion, creating a dedicated specialist administrative tribunal would be the most effective approach to boost the effectiveness of procurement regulation in general. In relation to systemic emergencies, it could be necessary to either provide additional powers to the tribunal, or to activate stand-by powers for other independent organisations tasked with a proactive approach to procurement oversight. However, a detailed assessment of such reforms exceeds the possibilities of this report, as they would need to interact with the broader system of procurement oversight and judicial challenge.

Features of an Effective Systemic Emergency Procurement

391. As mentioned throughout the report, my opinion is that the legislative and policy frameworks in place before the pandemic, and the additional guidance that emerged during the pandemic, have the key features of an effective regulatory framework for emergency procurement. They facilitated a very flexible approach to the direct award of contracts for urgently needed supplies and made the limits of that extraordinary intervention clear. They also imposed crucial integrity requirements in relation to the identification and mitigation of conflicts of interest, and required adequate record-keeping and post-award disclosure. In my view, if those requirements had been strictly and systematically complied with, the UK's procurement reaction to the pandemic would not have triggered the loss of public confidence it did generate. Any future effective system of emergency procurement should thus retain the key features of the regulatory system that was in place in the UK pre-pandemic, but mechanisms for the enforcement of key obligations should be significantly improved.

392. Moreover, as also mentioned throughout the report, in my view, the shortcomings in procurement governance during the pandemic, and the instances of likely maladministration in which they resulted, have more to do with operational and organisational issues than with the regulatory framework. Some of those were aggravated by failings in pandemic preparedness. Some of those were also aggravated by sustained austerity and by the problematic governance and inadequate implementation of centralised procurement in the healthcare sector. And some of those were aggravated by the political context of Brexit and the then current UK Government's approach to e.g. risk-taking and antipathy for procurement rules as a specific sort of 'red tape' and 'EU law shackles'. Other issues were aggravated by the limited availability of quality procurement data and by difficulties in centralising such data and the insights that could be derived from it, as well as defective approaches to processing large volumes of data related to ramping up the procurement of supplies in extraordinarily high demand, such as PPE. This was made even more difficult by the poor state of adoption

of full lifecycle electronic procurement in the UK, and the absence of a standard data and business process architecture underpinning such an e-procurement model. Finally, some of those were aggravated by limited capability and professionalism in the workforce tasked with carrying out emergency procurement and inadequate understanding of the flexibility within the procurement rules for 'ordinary times', both of which would have in part resulted from engaging consultants with an inadequate set of skills and large numbers of buyers without prior experience of healthcare procurement. Most of those issues were targeted by the recommendations in the Boardman Review (above paras 330 to 332) and in internal reports by GCFF and GIAA (above para 298). Effective compliance with those recommendations would go a long way in addressing the issues and shortcomings highlighted in this report. However, there is insufficient public information, and detail in the statements to this Inquiry I have been able to review, for me to reach an opinion on the extent to which adequate and sustainable measures have been put in place. The production of detailed public reports on the specific measures put in place to implement the lessons learned from the pandemic would be a major change in facilitating political debate and civil society scrutiny.

393. In my opinion, in general, improving the effectiveness of emergency procurement in the future will require, amongst other interventions:

- a clear change management plan and dedicated funding targeting a transition to full lifecycle electronic procurement methods based on standardised data architectures and business processes to ensure interoperability across e-procurement platforms;
- significant investment in professionalisation and capacity building, well beyond the meagre and unhelpful approach taken to support the rollout of the PA23;
- the creation of clear coordination mechanisms across procuring organisations—both across healthcare sector specialist organisations (such as NHS Supply Chain and its equivalents in the devolved administrations) and with general central procurement bodies (such as CCS, and its devolved administration equivalents), and the design, drilling, and stress-testing of 'stand by' arrangements that can be activated at speed;
- the definition of broader 'stand by' or 'break glass' organisational arrangements to ramp up procurement capacity, including not only 'sourcing and deal-making', but the entirety of the procurement lifecycle and, in particular, record-keeping and proactive transparency;
- pre-definition of clear spend control mechanisms and due diligence checks that can be deployed at scale—which will probably require mechanisms to ensure value for money that very closely map those applicable to procurement in 'ordinary times' and heightened conflict of interest controls beyond routine approaches—and the creation of a specific temporary arrangement to provide prompt independent verification of compliance with those checks and controls;
- a significant improvement in procurement data, including in relation to contract management—which could be facilitated by the implementation of the procurement data aspects of the PA23 if additional resource was allocated to it; while the new central digital platform is expected to make a positive contribution to quality and availability of procurement data, it is still necessary to consider forms of automation

of data capture at source and streamlined publication, including the possibility for iterative revisions of published notices;

- the design of effective approaches to the potential 'reuse' of procurement data to proactively identify potential suppliers, as well as careful consideration on the usefulness of implementing dynamic purchasing systems (to be named dynamic markets under the PA23) for goods, services, and works likely to be required in future emergencies, not only those related to future pandemics, but also those likely to be triggered by climate change and the increasingly recurring severe weather events;
- the development of a structured mechanism of risk-assessment and mitigation; and
- stronger culture of integrity and commitment to zero tolerance on conflicts of interest.

These interventions would be necessary at both UK and devolved administration levels, although their implementation may require some adaptation at those different levels. It would also be important to ensure coordination and interoperability across such implementations.

394. Several of those interventions have also been flagged as areas for improvement in the governance of emergency procurement by others.

394.1. Transparency International UK (2024) concurs in some recommendations, including:

- Measures to improve the quality of procurement data (recommendations 1 to 6);
- Need to reduce the risk of over-reliance on non-competitive direct awards during emergency situations by ensuring that regulations made under s.42 PA23 clearly define the cause for urgency, impose clear limits on the use of direct awards exclusively to address immediate needs stemming from such events, and detail in as much specificity as possible the types of contracts covered by those regulations as well as the conditions and limitations applicable to their award (recommendation 8);
- Need to strengthen Parliamentary oversight of the use of s.42 PA23 through the introduction of explicit sunset clauses, heightened requirements for the renewal of s.42 regulations, and mandatory post-crisis reviews (recommendation 9); and
- Need to increase preparedness to reduce high-risk procurement during future emergencies, including developing emergency frameworks, providing extended advice and guidance, developing dynamic emergency procurement lists and a helpdesk for contracting authorities (recommendation 14).

394.2. The Institute for Government (2024) also issued recommendations focusing on improving the quality of procurement data and clarifying accountability for compliance with transparency requirements, reviewing procurement policies and controls, and increasing public sector commercial capability.

394.3. Within its broader proposal for an improvement of government outsourcing, Justice (2024) also issued recommendations to improve contract oversight through

improved data quality and data audits, as well as improvements in transparency, including close monitoring of compliance with the transparency obligations under the PA23.

Future Negotiation of Emergency Contracts, and Model Clauses

395. As mentioned in the report, it is not possible to establish detailed systems and processes for the negotiation of procurement contracts during systemic emergencies. These are issues that need to be left to the discretion and judgement of contracting officers so that they can take adequate decisions in view of the potentially very different circumstances they face. In my view, the negotiation of future emergency contracts can however be improved through training and professionalisation, including a serious investment in continuous professional development with a focus on commercial skills and contract negotiations.

396. As mentioned in the report, it would be useful to have a pre-determined set of default clauses for emergency contracts. In my view, clauses that could be helpfully included in emergency contracts would include:

- Strict quality control and technical sampling clauses, including the creation where possible of mechanisms for the testing of samples while the goods are in transit, at the contractors' expense and risk;
- Open book accounting and maximum profit / margin clauses;
- Price review clauses with market-matching mechanisms;
- Early termination and limited indemnification clauses;
- Consideration of the use of escrow accounts for at least part of the payments under the contract, as well as clauses on rescheduling of payments, compensation of advanced payments and return of advanced payments that facilitate a rebalancing of the financial equilibrium of the contact throughout its duration.

Summary Box 26 – The Current State and the Future of Emergency Procurement

- The Procurement Act 2023 (PA23) keeps a justification for the direct award of contracts in case of extreme urgency that is very similar to that under PCR2015.
- However, the PA23 also includes new justifications for the direct award of contracts that seem tailored to the 'Ventilator Challenge' and the Parallel Supply Chain for PPE.
- It is not clear how these new grounds will be used or interpreted, or whether they will result in stronger governance frameworks for emergency procurement in the future. However, there is a clear risk that they will support blanket approaches to the use of direct awards, in contravention of the principle that they should be used in limited ways and under stringent conditions, and that a return to competitive procurement when possible should be prioritised.
- The PA23 also introduces new proactive transparency requirements in relation to the award of contracts under extreme urgency or in the context of a pandemic, but there are no meaningful mechanisms to enforce compliance before contract award.
- The PA23 also introduces more detailed obligations in relation to conflicts of interest. However, there are also no meaningful mechanisms to enforce timely compliance.
- The general weakness in the enforcement mechanisms underpinning the PA23 detract from the likely future effectiveness of legal reforms arising from lessons learned exercises.
- If pre-pandemic requirements had been strictly and systematically complied with, the UK's pandemic procurement would not have triggered such a loss of public confidence.
- Generally, any future effective system of emergency procurement should retain the key features of the regulatory system that was in place in the UK pre-pandemic, but mechanisms for the enforcement of key obligations should be significantly improved.
- Improving the effectiveness of emergency procurement in the future will require, amongst other interventions: a change management plan and dedicated funding for e-procurement; significant investments in professionalisation and capacity-building; improved coordination across procuring organisations; 'stand by' or 'break glass' organisational arrangements to ramp up procurement capacity; pre-established spend control and due diligence mechanisms subject to prompt independent verification; improvements in procurement data; proactive approaches to the 'reuse' of procurement data to identify potential suppliers and, potentially, creation of dynamic purchasing systems for emergencies; structured mechanisms of risk-assessment and mitigation; and a stronger culture of integrity and commitment to zero tolerance on conflicts of interest.
- The negotiation of future emergency contracts can be improved through training and professionalisation, including serious investment in continuous professional development with a focus on commercial skills and contract negotiations.
- It would be useful to have a pre-determined set of default clauses for emergency contracts.

Annex 1: Abbreviations and Glossary

This Annex contains a list of abbreviations and a glossary. The glossary provides simplified definitions for the common procurement terms most frequently used in the report. It is just intended to aid readers without previous procurement knowledge. Where there is a discrepancy between the simplified definition provided in this glossary and the more detailed discussion included in the report, the content of the report prevails.

List of Abbreviations

CCS	Crown Commercial Service
CO	Cabinet Office
DHSC	Department of Health and Social Care
FCA	Financial Conduct Authority
FTA	Free Trade Agreement
GCCO	Government Chief Commercial Officer
GDP	Gross Domestic Product
GPA	World Trade Organization's Government Procurement Agreement
HMT	HM Treasury
MHRA	Medicines and Healthcare products Regulatory Agency
NAO	National Audit Office
NHS NSS	NHS National Services Scotland
OECD	Organisation for Economic Co-operation and Development
PAC	House of Commons Committee on Public Accounts
PCR2015	Public Contracts Regulations 2015
PCSR2015	Public Contracts (Scotland) Regulations 2015
PEP	Politically-Exposed Person
PHE	Public Health England
PPD	Directive 2014/24/EU, the Public Procurement Directive
PPN	Procurement Policy Note
SCCL	Supply Chain Coordination Limited, a company indirectly owned by DHSC

TCA (UK-EU)	UK-EU Trade and Cooperation Agreement
TED	Tenders Electronic Daily, a supplement of the Official Journal of the European Union dedicated to the publication of procurement notices
UKHSA	UK Health Security Agency
UNCAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law

Glossary

Accelerated Procurement (or Expedited Procurement) – Competitive procurement carried out under shortened timescales due to urgency.

Award (Decision) – Through an 'award' or an 'award decision', a 'contracting authority' selects the 'economic operator' that will supply the relevant goods or services. When the award follows a 'competitive procurement', it must be based on the application of the 'technical specifications' and 'award criteria' to the 'tender' submitted by the economic operator.

Award Criteria – the set of considerations the 'contracting authority' will take into account to choose the 'most economically advantageous tender' and their relative weightings. Award criteria tend to take into account cost and quality aspects, although it is also possible for contracting authorities to award contracts on the basis of the lowest price where they can fully specify the goods or services they intend to acquire.

Bid, *see* Tender

Bidder, *see* Tenderer

Call-off (Contract) – A 'public contract' that is awarded either as a 'direct award' or as a result of a mini-competition within a 'framework agreement' or a 'dynamic purchasing system'.

Candidate – An 'economic operator' that submits an 'expression of interest' or a 'request to participate' in multi-stage 'competitive procurement' procedures.

Central Authority – a 'contracting authority' covered by the UK's Annex 1 to the GPA. This includes both the central government, as well as the devolved governments.

Commercial Vehicle – a flexible tool based on a list of candidates or contractors put in place following a 'competitive procurement' to facilitate its mass use by several 'contracting authorities' over an extended period of time for the procurement of common goods and services. Commercial vehicles seek to facilitate the 'award' of 'call-off contracts' through 'mini-competitions' or 'direct awards' to minimise the burden of carrying out the procurement for the contracting authority. They also reduce the burden for economic operators as they only need to complete most phases of a competitive procurement once over the relevant time period.

Competitive Procedure with Negotiations – A procurement procedure in two or multiple stages used by the 'contracting authority' to select a 'contractor' through a mix of pre-determined criteria and negotiations. A competitive procedure with negotiations is launched by a 'contract notice' and the related 'tender documents' must specify the 'exclusion' and 'qualitative selection criteria', as well as the minimum 'technical specifications' and 'award criteria' that the contracting authority wishes to impose as constraints on the 'negotiations', if any. Following the receipt of 'expressions of interest', the contracting authority issues several 'invitations to negotiate' to 'candidates' and engages in negotiations of their indicative tenders. The contracting authority must usually engage in negotiations with a minimum number of candidates. Upon completion of the negotiations, the contracting authority invites all candidates to submit their final 'tenders', which it then evaluates. The contracting authority will 'award' the 'public contract' to the 'most economically advantageous tender'.

Competitive Procurement – refers to any of the procurement procedures that require an element of open competition, including the 'open procedure', the 'negotiated procedure', the 'competitive procedure with negotiations', and other procedures not covered in this report, such as competitive dialogue and innovation partnership procedures.

Contracting Authority – the public authority or public sector body running a procurement procedure and awarding a public contract.

Contractor – An 'economic operator' that has been awarded a 'public contract'.

Contract Notice (Call for Competition, Call for Tenders, or Call for Expressions of Interest) – a public notice or advertisement indicating that a 'contracting authority' intends to award a 'public contract' for the provision of goods or services. A contract notice will usually include or link to the relevant 'tender documents' and will explain to 'economic operators' how to submit their expressions of interest or their tenders, depending on the type of 'competitive procurement' being used.

Contract Award Notice – a public notice or advertisement disclosing the terms of the 'award' or 'direct award' of a 'public contract'. It can include a copy of the contract, which will usually be redacted to protect commercially sensitive information.

Contracts Finder (Find a Tender) – an electronic platform for the publication of contract notices and contract award notices in the UK.

Direct Award – the placing of an order by a 'contracting authority' to a 'contractor', usually without a previous competitive procurement. A direct award can either follow from a request for 'quotations' issued by a contracting authority to several 'economic operators' to generate some informal competition, from a request for a quotation issued to a single economic operator, or follow the acceptance by the contracting authority of an 'offer' made by the economic operator without any previous approach or prompt by the contracting authority. Such an offer can, but does not need to, be negotiated prior to the direct award. Direct awards are also permitted under some 'framework agreements' that already set out all the terms of the relevant order. In those cases, they follow the competitive procurement that led to the conclusion of the framework agreement. In this report, unless it is clear from the

context that it refers to a framework agreement, direct award is used in relation to the non-competed placing of an order.

Dynamic Purchasing System (or DPS) – electronic tool used to buy commonly used goods and services by triggering 'mini-competitions' between the candidates included in the DPS list of potential suppliers. They are similar to 'framework agreements', but 'economic operators' can join at any time during the DPS' life, which means that DPS are less restrictive of competition.

Economic Operator (or Supplier) – A business entity, usually a company or other entity with corporate form, that provides or could provide goods or services to a contracting authority.

Emergency Procurement (Extremely Urgent Procurement, or Crisis Procurement) – public procurement carried out as a response to an extremely urgent need arising from unforeseeable events; most typically refers to procurement responding to catastrophic events.

Exclusion (Grounds) – 'Contracting authorities' can exclude 'economic operators' from participating in procurement procedures where they are affected by exclusion grounds. Exclusion is the check carried out by the contracting authority to assess if an economic operator is affected by exclusion grounds. Exclusion grounds, such as serious criminal offences, are mandatory and will prohibit the award of a public contract to the economic operator. Other exclusion grounds, such as a track record of poor performance, are discretionary and the contracting authority will exercise its own discretion in deciding whether the economic operator should be excluded. In making such a decision, a contracting authority can take into account remedial actions taken by the economic operator to self-clean.

Expression of Interest (or Request to Participate)– Confirmation by an 'economic operator' of its interest in receiving an 'invitation to tender' or an 'invitation to negotiate' in a multi-stage 'competitive procurement'. An expression of interest must provide the 'contracting authority' with all the information it requires to carry out 'exclusion' and 'qualitative selection' checks.

Framework Agreement – a 'commercial vehicle' put in place following a 'competitive procurement' to allow one or multiple 'contracting authorities' to make repeated 'awards' to one or several 'contractors' for a specified type of goods or services. Framework agreements are closed commercial vehicles. After their award, it is not possible for unlisted contracting authorities to use them, or for further economic operators to join the framework agreement. Framework agreements can last up to four years and can cover procurement up to very high cumulative values. Framework agreements can allow for the direct award of call-off contracts by specifying all terms of those call-offs. Otherwise, where the framework agreement does not specify all terms, contracting authorities can launch 'mini-competitions' between the included contractors.

Limited Tendering – an expression equivalent to Direct Award used in the World Trade Organisation's Government Procurement Agreement.

Local Authority – a 'contracting authority' covered by the UK's Annex 2 to the GPA, which includes all local authorities, across the four nations.

Invitation to Tender (or to Negotiate) – a confirmation sent by a 'contracting authority' to a 'candidate' that it has passed exclusion and qualitative selection checks and is thus entitled to submit a tender for evaluation, or an indicative tender for negotiation, depending on the type of competitive procurement.

Mini-Competition (or Call-off Procedure) – a procedure within a 'framework agreement' or 'dynamic purchasing system' that a contracting authority uses to invite 'tenders' from the 'candidates' or 'contractors' included in the relevant list. The launch of a mini-competition needs to include the technical specifications and/or award criteria that had not been determined in the broader commercial vehicle. In practice, call-off procedures operate as accelerated tendering by candidates or contractors included in the relevant list.

Most Economically Advantageous Tender (or MEAT) – the tender that obtains the highest score following an evaluation based on the 'award criteria' chosen by the 'contracting authority'. Unless the contracting authority uses lowest price as its sole award criterion, the most economically advantageous tender will be the one that offers the best combination of quality and cost to the contracting authority. It is also possible to refer to the MEAT as the tender that offers the best price/quality or cost/quality ratio (sometimes known as BPQR).

Negotiated Procedure without Prior Publication – an extraordinary non-competitive procurement procedure that can be used only in a limited set of circumstances, such as where the 'contracting authority' cannot benefit from competition for the 'public contract' because there is only on possible contractor due to technical or legal constraints, or where the contracting authority faces such an extremely urgent need for the goods or services that it is not possible to complete a competitive procurement before the award of the public contact. Negotiated procedures without prior publication can be used in different ways, and can be as simple as a direct award of a contract based on the acceptance of an offer received from an economic operator (*see* Direct Award).

Negotiations – the phase of a procurement procedure in which the 'contracting authority' and the 'economic operator' seek to reach a mutually-acceptable agreement on the content of the public contract. Negotiations with a single economic operator can be carried out in stages or continually. A contracting authority negotiating with multiple candidates can structure the negotiations sequentially (negotiating with one economic operator, then another, then another) or in parallel. Ensuring commercial confidentiality and avoiding cherry-picking are key issues in the conduct of negotiations with multiple potential contractors.

Offer – A proposal made by an economic operator to a contracting authority. It is not a 'tender' because it does not follow prescriptive 'tender documents' published by the contracting authority and it is not a 'quotation' because it does not follow a more informal request by a contracting authority. An offer is usually unsolicited and initiated by the economic operator.

Open Procedure – A single stage procurement procedure that the 'contracting authority' launches through a 'contract notice' including all relevant 'tender documents'. Following this 'call for tenders', 'economic operators' submit their 'tenders' for evaluation by the contracting authority, together with all the information required to ensure that, as 'tenderers', they meet all exclusion and qualitative selection requirements. The contracting authority will 'award' the 'public contract' to the 'most economically advantageous tender' submitted by a qualifying tenderer. In an open procedure, any economic operator can submit a tender, which makes

open procedures rather cumbersome or inappropriate where a contracting authority expects to receive a large number of tenders. In that case, a contracting authority will often resort to a 'restricted procedure' instead.

Open Tendering – an expression equivalent to the Open Procedure used in the World Trade Organisation's Government Procurement Agreement.

Politically Exposed Persons (PEP) – individuals entrusted with prominent public functions, such as heads of government, ministers and deputy or assistant ministers, members of parliament or other legislative bodies, members of the governing bodies of political parties, or members of the administrative, management or supervisory bodies of State-owned enterprises.

Pre-Qualification (or Exclusion and Qualitative Selection) – in two stage procurement procedures, pre-qualification refers to the verification that interested economic operators meet the requirements to be invited to tender or negotiate. Where a maximum number of invitations have been set, pre-qualification also involves the shortlisting of qualified economic operators.

Public Buyer, *see* Contracting Authority

Public Contract – The set of terms and conditions governing the provision of goods or services by an 'economic operator' to a 'contracting authority'.

Public Procurement (Government Procurement, Government Contracts, or Public Contracts) – The activities of a 'contracting authority' in purchasing on the market, from an external source, goods, construction or other services.

Public Tender, *see* Competitive Procurement

Qualitative Selection (Criteria) – the check by a 'contracting authority' that 'tenderers' or 'candidates' have the required financial, technical and professional standing.

Quotation – A proposal made by an economic operator following a request from a contracting authority. Usually, requests for quotations are less detailed and more informal that 'invitations to tender', 'invitations to negotiate', or 'calls for tenders'.

Regional Authority – a 'contracting authority' covered by the UK's Annex 2 to the GPA, which includes all regional authorities, across the four nations.

Restricted Procedure – A procurement procedure in two stages used by the 'contracting authority' to select a 'contractor' through pre-determined criteria. A restricted procedure is launched by a 'contract notice' and the related 'tender documents' must specify the 'exclusion' and 'qualitative selection criteria', as well as a sufficient description of the object of the contract and the applicable 'technical specifications' and 'award criteria'. Following the receipt of 'expressions of interest', the contracting authority issues several 'invitations to tender' to 'candidates', which it then evaluates. The contracting authority will 'award' the 'public contract' to the 'most economically advantageous tender'. The restricted procedure does not involve 'negotiations'. It is best understood as an 'open procedure' in two stages to

facilitate a reduction in the number of potential tenders through the filtering carried out by the contracting authority prior to issuing the invitations to tender.

Selective Tendering – an expression used in the World Trade Organisation's Government Procurement Agreement to refer to 'competitive procurement' by means of, amongst others, 'restricted procedures' or 'competitive procedures with negotiations'.

Technical Specifications – the set of performance, functional, or physical requirements that need to be met by the goods or services provided by the contractor. Technical specifications will seek to ensure that the goods are suitable for their intended use and that they meet any applicable regulatory requirements, for example where the goods need to be certified as compliant with relevant technical standards. Technical specifications can be used to assess compliance of the tenders during the procurement, as well as the suitability and conformity of the received supplies during contract implementation.

Tender – A proposal made by an economic operator following a 'call for tenders' or an 'invitation to tender' issued by a contracting authority. A tender must comply with the 'technical specifications' and will seek to maximise its compliance with 'award criteria', as those are the two benchmarks the contracting authority needs to apply objectively to choose its contractor.

Tenderer – An 'economic operator' that submits a 'tender'.

Tender Documents – a set of documents usually including the 'exclusion' and 'qualitative selection' criteria, the 'technical specifications', and the 'award criteria' to be used by the 'contracting authority'. Usually, tender documents are published with the 'contract notice', but it is possible for some tender documents to be disclosed only to candidates in multi-stage competitive procurement.

Tenders Electronic Daily (TED) - an electronic platform for the publication of contract notices and contract award notices in the EU.

Annex 2: List of materials provided by the Inquiry

INQ000528391	Witness Statement of Jonathan Marron (Director General of Primary Care & Prevention) on behalf of DHSC, dated 16/12/2024.
INQ000409251	Witness statement provided by Amanda Pritchard on behalf of NHS England, dated 16/01/2024
INQ000081245	Welsh Government Procurement Advice Note based on PPN 04/20
INQ000492085	Witness Statement of Paul Webster on behalf of Supply Chain Co-ordination Limited, dated 27/06/2024.
INQ000521969	Witness statement of Gordon Beattie (Director of National Procurement) on behalf of NHS National Services Scotland, dated 21/10/2024.
INQ000391237	Witness Statement of Vaughan Gething M.S, Minister for the Economy and the former Minister for Health and Social Services, dated 03/01/2024.
INQ000502043	Witness Statement provided on behalf of Scottish Government's Director General for Corporate, dated 29/08/2024.
INQ000493484	Witness Statement of Jeane Freeman, Cabinet Secretary for Health and Sport, dated 18/07/2024.
INQ000521972	Final Witness Statement of Sarah Collins (Commercial Director) on behalf of UK Health Security Agency, dated 03/12/2024.
INQ000198576	Welsh Government Guidance titled PPE Buying: A Quick Guide for Procurement, dated 09/06/2020.
INQ000497031	Witness Statement of Sir Gareth Rhys Williams on behalf of the Cabinet Office, dated 05/07/2024.
INQ000540488	**Witness Statement of Andy Wood, dated 01/01/2025.**
INQ000506956	Witness Statement of Andrew Slade on behalf of the Welsh Government, dated 30/09/2024.
INQ000536362	Third Witness statement of Sir Gareth Rhys Williams, Former Government Chief Commercial Officer (GCCO), dated 14/01/2025.
INQ000535017	Fourth Witness statement of Sir Gareth Rhys Williams, Former Government Chief Commercial Officer (GCCO), dated 23/01/2025.
INQ000536351	Witness Statement of Max Cairnduff (Commercial Specialist, Cabinet Office), dated 09/01/2025.

INQ000477274	Document titled guidance on progressing offers, dated 07/05/2020.
INQ000478791	Briefing titled QA Documentation check used in Opportunities, with examples of certificates of compliance/conformity and more, undated.
INQ000528389	Witness Statement of Claire Gibbs (Director and Senior Commercial Specialist) on behalf of the Cabinet Office, dated 20/12/2024.
INQ000540487	**Witness Statement of Dan Webster, dated 29/01/2025.**
INQ000541374	Witness Statement of Dame June Munro Raine on behalf of the Medicines and Healthcare products Regulatory Agency (MHRA)
INQ000512992	Emails between Lord Agnew (Burnley Hall) and Gareth Rhys Williams (Government Chief Commercial Officer, CO), regarding Volumes requirements for program, between 10/04/2020 and 11/04/2020.
INQ000563560	Written Statement of the Rt Hon Michael Gove (Former Chancellor of the Duchy of Lancaster)

Annex 3: References and Other Materials

This Annex provides references to the materials cited in the report, as well as other references that have been consulted while preparing the report. Citations have been kept to a minimum to make the report accessible to a non-academic audience.

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Annex 4: Key Provisions in International Legal Frameworks on Public Procurement and in International Guidance Documents

This Annex reproduces key provisions in International Legal Frameworks on public procurement binding the UK, as well as on sources of international guidance of relevance to the UK and its comparator jurisdictions. They are introduced in the report at paras 54 to 63.

Binding International Legal Frameworks

United Nations Convention Against Corruption (UNCAC)

Article 9 – Public procurement and management of public finances

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

World Trade Organization Agreement on Government Procurement (GPA)

Article IV — General Principles

4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

(a) is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;

(b) avoids conflicts of interest; and
(c) prevents corrupt practices.

Article XIII — Limited Tendering

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles VII through IX, X (paragraphs 7 through 11), XI, XII, XIV and XV only under any of the following circumstances:

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;

Article XXII — Final Provisions

4. Each Party shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by its procuring entities, with the provisions of this Agreement.

UK-Australia Free Trade Agreement

Article 16.4 – General Principles

6. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

(a) is consistent with this Chapter, using methods such as open tendering, selective tendering and limited tendering;
(b) avoids conflicts of interest; and
(c) prevents corrupt practices.

Article 16.12 – Limited Tendering

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party, or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles 16.6 (Notices) through 16.8 (Qualification of Suppliers), paragraphs 8 through 12 of Article 16.9 (Technical Specifications and Tender Documentation), and Articles 16.10 (Time-Periods), 16.11 (Negotiations), 16.13 (Electronic Auctions) and 16.14 (Treatment of Tenders and Awarding of Contracts) only under any of the following circumstances:

(h) in so far as is strictly necessary if, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the good or service could not be obtained in time by means of open or selective tendering.

UK-New Zealand Free Trade Agreement

Article 16.4 – General Principles

5. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

(a) is consistent with this Chapter, using methods such as open tendering, selective tendering and limited tendering;
(b) avoids conflicts of interest; and
(c) prevents corrupt practices.

Article 16.14 – Limited Tendering

1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles 16.6 (Notices) to Article 16.8 (Qualification of Suppliers), paragraphs 7 to 11 of Article 16.9 (Technical Specifications and Tender Documentation), Article 16.12 (Time Periods), Article 16.13 (Negotiation), Article 16.15 (Electronic Auctions), and Article 16.16 (Treatment of Tenders and Awarding of Contracts) only under any of the following circumstances:

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;

UK-EU Trade and Cooperation Agreement

ARTICLE 277 – Incorporation of certain provisions of the GPA and covered procurement

1. The provisions of the GPA that are specified in Section A of Annex 25, including the Annexes of each Party to Appendix I to the GPA, are hereby incorporated into this Title.

ANNEX 25 – PUBLIC PROCUREMENT

SECTION A – RELEVANT PROVISIONS OF THE GPA

Articles I to III, IV.1.a, IV.2 to IV.7, VI to XV, XVI.1 to XVI.3, XVII and XVIII.

International Guidance and Best Practice

UNCITRAL Model Law

Article 30. Conditions for the use of methods of procurement under chapter V of this Law (two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations and single-source procurement)

4. A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 51 of this Law, in the following circumstances:

(a) There is an urgent need for the subject matter of the procurement, and engaging in open-tendering proceedings or any other competitive method of procurement, because of the time involved in using those methods, would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open-tendering proceedings or any other competitive method of procurement because of the time involved in using those methods;

Article 34. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement: requirement for an advance notice of the procurement

3. Where the procuring entity engages in procurement by means of competitive negotiations in accordance with paragraph 4 of article 30 of this Law, it shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

UNCITRAL Model Law's Guide to Enactment

Regarding the difference between Article 30(4)(a) and (b) in the Model Law, the Guide to Enactment clarifies that "The difference is in the level of urgency: to justify the use of single-source procurement, the urgency must be so extreme that holding negotiations with more than one supplier or contractor would be impractical. For example, following a catastrophic event, there may be immediate needs for clean water and medical supplies; a need for semi-permanent shelter may arise out of the same catastrophe but is perhaps not so urgent. As is the case in competitive negotiations, the need to link the extent of the procurement with the extreme urgency will limit the amount that can be procured using this method: the amount procured using emergency procedures should be strictly limited to the needs arising from that emergency situation." (pp. 221-222).

The Guide to Enactment also clarifies that its rules "prevent the procuring entity from using single-source procurement where competitive negotiations are available […] the procuring entity is required first to consider the use of open tendering or any other competitive method of procurement. Where the procuring entity concludes that the use of other competitive methods is impractical, it must use competitive negotiations, not single-source procurement, unless it concludes that there is extreme urgency […] This is because competitive negotiations are inherently more competitive than single-source procurement and more safeguards are built in the provisions of the Model Law regulating procedures in competitive negotiations, making the

latter more structured and transparent than single-source procurement. This method can therefore be considered the preferred alternative to single-source procurement in situations of urgency owing to a catastrophic event" (p. 216).

OECD Methodology for Assessing Procurement Systems (MAPS)

MAPS is closely aligned to the GPA and the UNCITRAL Model Law. This is clearly reflected, for example, in its approach to the use of 'less competitive' procurement procedures, which follows the Model Law's in stressing that "justifying single-source procurement on the grounds of an emergency should be permitted only in the exceptional circumstances of a catastrophic event, where there is an extremely important need and where any other method of procurement would be impractical given the time constraints. It should not, however, be used simply because of poor planning." (OECD, 2018, pp. 20-21).

Annex 5: Detailed Default Time Limits

This Annex provides further details on the minimum time limits under the GPA and EU/UK Law, which are discussed in paras 72 to 86.

Table A5.1 Minimum Default Time Limits under the GPA

Procedure/Stage	Default timescale	e-Procurement reduction	Notice published at least 40 days earlier	Urgent requirements	Extremely urgent requirements
Open tendering					
Tender	40 days	25 days	10 days	10 days	-
Open tendering total	40 days	25 days	50 days	10 days	-
Selective tendering					
Expression of interest	25 days	25 days	25 days	10 days	-
(Indicative) Tender	40 days	25 days	10 days	10 days	-
Selective tendering total	65 days	50 days	75 days	20 days	
Limited tendering (Direct award)					No minimum

Table A5.2 Minimum Default Time Limits under EU/UK Law

Procedure/ Stage	Default timescale	e-Procurement reduction	Notice published at least 35 days earlier	Urgent requirements	Extremely urgent requirements	Regional and local authorities
Open procedure						
Tender	35 days	30 days	15 days	15 days		-
Standstill period	10 days	10 days	10 days	10 days		
Open procedure total	45 days	40 days	60 days	25 days		
Restricted procedure and competitive procedure with negotiations						
Expression of interest	30 days	30 days	30 days	15 days		30 days
(Indicative) Tender	30 days	25 days	10 days	10 days		10 days (or shorter by agreement with tenderers)
Standstill period	10 days	10 days	10 days	10 days		10 days
Restricted procedure and competitive procedure with negotiations total	70 days	65 days	85 days	35 days		50 days (or shorter, potentially down to 41 days, by agreement with tenderers
Negotiated procedure without prior publication (direct award)					No minimum	

Annex 6: Key Provisions in UK Procurement Legislation

This Annex reproduces key provisions in UK public procurement legislation.

Public Contracts Regulations 2015

Conflicts of interest

24.—(1) Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) For the purposes of paragraph (1), the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Use of the negotiated procedure without prior publication

32.—(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

General grounds

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—

(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

Contract award notices

50.—(1) Not later than 30 days after the award of a contract or the conclusion of a framework agreement, following the decision to award or conclude it, contracting authorities shall send for publication a contract award notice on the results of the procurement procedure.

(2) Such notices shall contain the information set out in part D of Annex 5 to the Public Contracts Directive and shall be sent for publication in accordance with regulation 51.

Individual reports

84.—(1) For every contract or framework agreement covered by this Part, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following:—

(f) for negotiated procedures without prior publication, the circumstances referred to in regulation 32 which justify the use of this procedure;

(i) where applicable, conflicts of interests detected and subsequent measures taken.

Documentation of progress and decisions

(7) Contracting authorities shall document the progress of all procurement procedures, whether or not they are conducted by electronic means.

(8) To that end, contracting authorities shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on —

(a) communications with economic operators and internal deliberations,
(b) preparation of the procurement documents,
(c) dialogue or negotiation if any,
(d) selection and award of the contract.

Public Contracts (Scotland) Regulations 2015

Conflicts of Interest

25.—(1) A contracting authority must take appropriate measures to prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) Without prejudice to the generality thereof, reference to "conflicts of interest" in paragraph (1) includes any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Use of the negotiated procedure without prior publication

33.—(1) A contracting authority may award a public contract following negotiated procedure without prior publication of a contract notice or prior information notice in any of the following cases—

(c) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open procedure, restricted procedure or competitive procedure with negotiation cannot be complied with.

(3) For the purposes of paragraph (1)(c), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.

Contract award notices

51.—(1) Not later than 30 days after the award of a contract or conclusion of a framework agreement, a contracting authority must send for publication in accordance with regulation 52

(form and manner of sending notices for publication at EU level) a contract award notice on the results of the procurement procedure.

(2) A contract award notice must contain the information set out in Part D of Annex V to the Directive.

Reporting and documentation requirements

83.—(1) Subject to paragraph (2), every contract or framework agreement covered by this Part, and every time a dynamic purchasing system is established, a contracting authority must draw up a written report which must include—

(g) for negotiated procedures without prior publication, the circumstances referred to in regulation 33 (use of the negotiated procedure without prior publication) which justify the use of this procedure;

(j) where applicable, conflicts of interests detected and subsequent measures taken.

(7) A contracting authority must document the progress of all procurement procedures, whether or not those are conducted by electronic means.

(8) To that end, a contracting authority must ensure that the authority keeps sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on—

(a) communications with economic operators and internal deliberations;
(b) preparation of the procurement documents;
(c) dialogue or negotiation (if any);
(d) selection and award of the contract.

Annex 7: Comparison of Detailed Provisions on Emergency Procurement

This Annex provides a comparison between the main provisions of international legal frameworks and UK legislation on issues relevant to this report.

	GPA (and UK-EU TCA)	PPD	PCR2015	PCSR2015	UNCITRAL Model Law
General / boilerplate	Article XIII *Limited Tendering* 1. Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles VII through IX, X (paragraphs 7 through 11), XI, XII, XIV and XV only under any of the following circumstances:	Article 32 *Use of the negotiated procedure without prior publication* 1. In the specific cases and circumstances laid down in paragraphs 2 to 5, Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication. 2. The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:	*Use of the negotiated procedure without prior publication* 32.—(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication. General grounds (2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—	*Use of the negotiated procedure without prior publication* 33.—(1) A contracting authority may award a public contract following negotiated procedure without prior publication of a contract notice or prior information notice in any of the following cases—	Article 30. *Conditions for the use of […] competitive negotiations and single-source procurement* 4. A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 51 of this Law, in the following circumstances:

	GPA (and UK-EU TCA)	PPD	PCR2015	PCSR2015	UNCITRAL Model Law
Conditions for authorisation	(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;	(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.	(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.	(c) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open procedure, restricted procedure or competitive procedure with negotiation cannot be complied with.	(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open-tendering proceedings or any other competitive method of procurement because of the time involved in using those methods;
Non-attributability to contracting authority		The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.	(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.	(3) For the purposes of paragraph (1)(c), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.	

Annex 8: Technical Summary of Procurement Procedures

This Annex provides a technical summary of the procurement procedures discussed in the report. It provides detailed legal references to the different requirements and constraints that contracting authorities need to take into account in carrying out competitive procurement. This Annex is solely intended for readers with legal and/or procurement background.

Open Procedure

1. An open procedure is a single-stage procedure where, following a call for competition by means of the publication of a contract notice (reg.27(1) PCR2015, reg.28(1) PCSR2015), tenderers submit all qualitative selection information and their tenders together (reg.27(3) PCR2015, reg.28(2) PCSR2015). Contracting authorities will typically first carry out exclusion and qualitative selection checks and then assess the tenders received from qualified tenderers—thus largely replicating the processes involved in two-stage procedures discussed below—but they can decide to invert that process (reg.56(3)(a) PCR2015, reg.57(3) PCSR2015). In those cases, given the risk that having knowledge of the content of the tender could lead the contracting authority to being excessively lax or permissive in relation to qualitative selection, legislation makes it explicit that "where contracting authorities make use of that possibility, they shall ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that—(i) should have been excluded […], or (ii) does not meet the selection criteria set out by the contracting authority." (reg.56(3)(b) PCR2015, reg.57(4) PCSR2015).

2. The use of an open procedure presupposes that the contracting authority can set all relevant requirements at the stage of publishing the call for competition, including exclusion and qualitative selection criteria, technical specifications, contract award criteria, and any applicable contract performance requirements (reg.49(a), in relation to regs.42, 57, 58, 67 and 70 PCR2015; reg.50(a), in relation to regs. 43, 58, 59, 67 and 70 PCSR2015).

3. Open procedures are generally subject to a 35-day minimum time lime for the receipt of tenders from the date on which the contract notice is submitted for publication (reg.27(2) PCR2015, reg.28(3) PCSR2015). This can be reduced to 30 days where tenders can be submitted electronically (reg.27(6) PCR2015, reg.28(6) PCSR2015), which will usually be possible. Moreover, this time limit can be shortened to 15 days if the contracting authority had published a prior information notice containing all relevant information between 35 days and 12 months before the date on which the contract notice is submitted for publication (reg.27(4) PCR2015, reg.28(4) PCSR2015).

4. The minimum time limit can also be shortened to not less than 15 days to allow for an accelerated open procedure in case of a state of urgency duly substantiated by the contracting authority (reg.27(5) PCR2015, reg.28(5) PCSR2015).

Restricted Procedure

5. A restricted procedure is a two-stage procedure that comprises a first qualitative selection stage following a call for requests to participate, and a second tendering stage following the issue of invitations to tender (reg.28(1) and (3) PCR2015, reg.29(1) and (4) PCSR2015).

6. The use of a restricted procedure presupposes that the contracting authority can set all relevant requirements at the stage of publishing the call for competition, including exclusion and qualitative selection criteria, technical specifications, contract award criteria, and any applicable contract performance requirements (reg.49(a), in relation to regs.42, 57, 58, 67 and 70 PCR2015; reg.50(a), in relation to regs. 43, 58, 59, 67 and 70 PCSR2015). However, there is CCS guidance that indicates, in relation to the procurement documents that need to be published with the contract notice for a restricted procedure, that "As the procurement and competition becomes more crystallised, CCS expect more of the documents falling within that wide definition of procurement documents to be generated and therefore supplied. In contrast, at very early stages, fewer of the documents, if any, would be included. We believe a purposive interpretation is appropriate here." (CCS, 2016b, p. 13). This suggests that there is flexibility and that, at the start of the restricted procedure, it would be acceptable to provide versions of e.g. the technical specifications that would still need refining, and which final version would be provided to those candidates eventually invited to tender.

7. Contracting authorities must permit any economic operator to submit a request to participate in response to the relevant call for competition (reg.28(1) PCR2015, reg.29(1) PCSR2015), which they can do by providing the information for qualitative selection that is requested by the contracting authority (reg.28(1) PCR2015, reg.29(2) PCSR2015). Contracting authorities must allow for a 30-day minimum time limit for receipt of requests to participate from the date on which the contract notice is submitted (reg.28(2) PCR2015, reg.29(3) PCSR2015). Prior to 2023 it was possible to use invitations to confirm interest in combination with the publication of prior information notices, but that would not have altered the relevant time limits or procedural steps.

8. Contracting authorities can choose to issue invitations to tender to all operators that submit a request to participate and meet the exclusion and qualitative selection criteria, or to limit the number of suitable candidates to be invited to participate in the procedure (reg.28(4) PCR2015, reg.29(5) PCSR2015). In that case, "contracting authorities shall indicate, in the contract notice, the objective and non-discriminatory criteria or rules they intend to apply [to carry out the reduction of the number of otherwise qualified candidates to be invited to tender], the minimum number of candidates they intend to invite and, where applicable the maximum number" (reg.65(2) PCR2015, reg.66(3) PCSR2015). "In the restricted procedure, the minimum number of candidates shall be 5." (reg.65(3) PCR2015, reg.66(4)(a) PCSR2015). Contracting authorities must *in principle* invite the required minimum of five candidates (reg.65(6) PCR2015, reg.66(6) PCSR2015). However, where not enough candidates meet the required selection criteria and the minimum levels of ability, "the contracting authority may continue the procedure by inviting the candidates with the required capabilities." (reg.65(7) PCR2015, reg.66(7) PCSR2015), provided that "In any event the number of candidates invited shall be sufficient to ensure genuine competition." (reg.65(5) PCR2015, reg.66(5) PCSR2015). Contracting authorities cannot "include economic operators

that did not request to participate, or candidates that do not have the required capabilities." (reg.65(8) PCR2015, reg.66(8) PCSR2015).

9. Once exclusion and qualitative selection is completed and the relevant invitations to tender have been issued by the contracting authority, "Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender" (reg.28(3) PCR2015, reg.29(4) PCSR2015). Contracting authorities must set a 30-day minimum time limit for the receipt of tenders from the date on which the invitation to tender is sent (reg.28(5) PCR2015, reg.29(6) PCSR2015). However, this can be reduced to 25 days where the contracting authority accepts tenders submitted by electronic means (reg.28(9) PCR2015, reg.29(10) PCSR2015). Moreover, this time limit can be shortened to 10 days if the contracting authority had published a prior information notice containing all relevant information between 35 days and 12 months before the date on which the contract notice is submitted for publication (reg.28(6) PCR2015, reg.29(7) PCSR2015). Until 2023, it would also have been necessary that the prior information notice was not itself used as a means of calling for competition. As an exception from these minimum time limits, regional and local contracting authorities may set the time limit for the receipt of tenders by mutual agreement with all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders (reg.28(7) PCR2015, reg.29(8) PCSR2015). In the absence of such an agreement, the time limit must be at least 10 days from the date on which the invitation to tender was sent (reg.28(8) PCR2015, reg.29(9) PCSR2015).

10. The minimum time limits can also be shortened to not less than 15 days for the receipt of requests to participate, followed by 10 days for the receipt of tenders, to allow for an accelerated restricted procedure in case of a state of urgency duly substantiated by the contracting authority (reg.28(10) PCR2015, reg.29(11) PCSR2015).

Competitive Procedure with Negotiations

11. A competitive procedure with negotiations is *at a minimum* a two-stage procedure that comprises a first qualitative selection stage following a call for requests to participate, and a second tendering *plus* negotiation stage following the issue of invitations to tender (reg.29(1), (11) and (22) PCR2015, reg.30(1), (13) and (23) PCSR2015).

12. There is significant flexibility in the design and conduct of competitive procedures with negotiations. Where the contracting authority reserves this possibility in the contract notice, the competitive procedure with negotiations can operate like a restricted procedure where the contracting authority decides to award the contract on the basis of one of the tenders received immediately after invitation to tender and without any further negotiation (reg.29(15) PCR2015, reg.30(16) PCSR2015). Conversely, it is possible for a competitive procedure with negotiations to structure the tendering and negotiation phase in successive stages (reg.29(19) PCR2015, reg.30(20) PCSR2015). In that case, this possibility and the way in which such stages would be applied must have been pre-disclosed. In this case, the reduction in the number of tenders susceptible of further negotiation need to be made by reference to the award criteria.

13. In the procurement documents for a competitive procedure with negotiations, contracting authorities need to identify the subject-matter of the procurement by providing a description

of their needs and the characteristics required of the supplies, works or services to be procured; indicate which elements of the description define the (non-negotiable) minimum requirements to be met by all tenders, and specify the contract award criteria (reg.29(2)PCR2015, reg.30(3) PCSR2015). The procurement documents "shall be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure." (reg.29(3)PCR2015, reg.30(4) PCSR2015).

14. Therefore, the use of a competitive procedure with negotiations *in principle* presupposes that the contracting authority can set all relevant requirements at the stage of publishing the call for competition, including exclusion and qualitative selection criteria, technical specifications (including minimum criteria), contract award criteria, and any applicable contract performance requirements (reg.49(a), in relation to regs.42, 57, 58, 67 and 70 PCR2015; reg.50(a), in relation to regs. 43, 58, 59, 67 and 70 PCSR2015). However, this will not be entirely possible in relation to those elements that depend on the outcome of the relevant negotiations.

15. CCS guidance addresses this issue. It stresses that "The rules do not specifically cover these cases where elements of the final documents may necessarily depend on the outcomes of negotiations or dialogues. However, Regulation 29 (2) sets out some minimum information which must be provided about the requirement. This '[…] shall be sufficiently precise to enable suppliers to identify the nature and scope of the requirement and decide whether to request to participate'." CCS' view is that "This would mean that for procedures involving negotiations, or two stage process, the contracting authority would need to publish all the documents that are available so the market could make the decision on whether to express an interest or not. In construction for example, detailed specifications are normally not available until further into the procurement process and therefore those documents would not be required to be published at the advert stage. However the procurement documents that explain what the final output would be, volume/size, any specific specialities etc would be required at advert stage as the supplier needs them so they can make the decision on whether to express an interest or not, and whether they would have the capacity and capability to do the work, and if not time to start preparing to build that capacity/capability. These documents would then be added to as more detailed information is developed." (CCS, 2016b, pp. 12–13).

16. Contracting authorities must permit any economic operator to submit a request to participate in response to the relevant call for competition (reg.29(1) PCR2015, reg.30(1) PCSR2015), which they can do by providing the information for qualitative selection that is requested by the contracting authority (reg.29(1) PCR2015, reg.30(2) PCSR2015). Contracting authorities must allow for a 30-day minimum time limit for receipt of requests to participate from the date on which the contract notice is submitted (reg.29(4) PCR2015, reg.30(5) PCSR2015). Prior to 2023 it was possible to use invitations to confirm interest in combination with the publication of prior information notices, but that would not have altered the relevant time limits or procedural steps.

17. Contracting authorities can choose to issue invitations to tender to all operators that submit a request to participate and meet the exclusion and qualitative selection criteria, or to limit the number of suitable candidates to be invited to participate in the procedure (reg.29(12) PCR2015, reg.30(12) PCSR2015). In that case, "contracting authorities shall indicate, in the

contract notice, the objective and non-discriminatory criteria or rules they intend to apply [to carry out the reduction of the number of otherwise qualified candidates to be invited to tender], the minimum number of candidates they intend to invite and, where applicable the maximum number" (reg.65(2) PCR2015, reg.66(3) PCSR2015). "In the competitive procedure with negotiation [...] the minimum number of candidates shall be 3." (reg.65(4) PCR2015, reg.66(4)(b) PCSR2015). Contracting authorities must *in principle* invite the required minimum of three candidates (reg.65(6) PCR2015, reg.66(6) PCSR2015). However, where not enough candidates meet the required selection criteria and the minimum levels of ability, "the contracting authority may continue the procedure by inviting the candidates with the required capabilities." (reg.65(7) PCR2015, reg.66(7) PCSR2015), provided that "In any event the number of candidates invited shall be sufficient to ensure genuine competition." (reg.65(5) PCR2015, reg.66(5) PCSR2015). Contracting authorities cannot "include economic operators that did not request to participate, or candidates that do not have the required capabilities." (reg.65(8) PCR2015, reg.66(8) PCSR2015).

18. Once exclusion and qualitative selection is completed and the relevant invitations to negotiate have been issued by the contracting authority, "Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations." (reg.29(11) PCR2015, reg.30(13) PCSR2015). Contracting authorities must set a 30-day minimum time limit for the receipt of initial tenders from the date on which the invitation to negotiate is sent (reg.29(5) PCR2015, reg.30(6) PCSR2015). However, this can be reduced to 25 days where the contracting authority accepts tenders submitted by electronic means (reg.29(9) PCR2015, reg.30(10) PCSR2015). Moreover, this time limit can be shortened to 10 days if the contracting authority had published a prior information notice containing all relevant information between 35 days and 12 months before the date on which the contract notice is submitted for publication (reg.29(6) PCR2015, reg.30(7) PCSR2015). Until 2023, it would also have been necessary that the prior information notice was not itself used as a means of calling for competition. As an exception from these minimum time limits, regional and local contracting authorities may set the time limit for the receipt of initial tenders by mutual agreement with all selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders (reg.29(7) PCR2015, reg.30(8) PCSR2015). In the absence of such an agreement, the time limit must be at least 10 days from the date on which the invitation to tender was sent (reg.29(8) PCR2015, reg.30(9) PCSR2015). Effectively, this implies that, while the conduct of the negotiations can take significantly longer, the minimum duration of the tendering *plus* negotiation phase is of 25 days in the general case.

19. The minimum time limits can also be shortened to not less than 15 days for the receipt of requests to participate, followed by 10 days for the receipt of initial tenders, to allow for an accelerated restricted procedure in case of a state of urgency duly substantiated by the contracting authority (reg.29(10) PCR2015, reg.30(11) PCSR2015).

20. As safeguards against the difficult to foresee the evolution of the negotiations and the possibility that they ended up substantially changing the foreseeable object of the contract (CCS, 2016c, p. 4), contracting authorities must clearly identify which elements of the description of their needs and the characteristics required of the supplies define the minimum requirements to be met by all tenders (reg.29(2)(b) PCR2015, reg.30(3)(b) PCSR2015).

Such minimum requirements are not susceptible of negotiation (reg.29(14) PCR2015, reg.30(15) PCSR2015), cannot be modified (reg.29(16)(b) PCR2015), and failure to meet them would prevent the award of a contract following the negotiations (reg.29(21)(b) PCR2015, reg.30(23)(b) PCSR2015). Additionally, award criteria shall not be subject to negotiation either (reg.29(14) PCR2015, reg.30(15) PCSR2015). These safeguards determine the leeway afforded to the negotiations and can have the function of ensuring that contracting authorities receive tenders of an adequate minimum quality and content or conditions, regardless of negotiation dynamics. At the same time, having pre-disclosed minimum non-negotiable elements also reduces the scope for unequal treatment in situations where a contracting authority could be tempted to trade some of those minimum requirements off for particularly advantageous conditions, or for other reasons. However, it is hard to assess whether *in practice* the minimum requirements being set by contracting authorities are demanding, or create significant constraints on the discretion they can exercise during the negotiation process and in the final award decision.

21. Except where there is a possibility for the award of the contract on the basis of the initial tenders received, contracting authorities must "negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content" (reg.29(13) PCR2015, reg.30(14) PCSR2015). There are rules on how contracting authorities must conduct the relevant negotiations (reg.29(16) PCR2015, reg.30(17) PCSR2015), although they have limited content and rather tend to reiterate the need to comply with the principles of equal treatment, non-discrimination and transparency. There are also constraints on the information pertaining to a specific tenderer that contracting authorities can disclose to other tenderers in the context of their negotiations (reg.29(17) and (18) PCR2015, reg.30(18) and (19) PCSR2015). There are rules on the conclusion of the negotiations, which require contracting authorities to afford all candidates not yet excluded from the procedure the possibility of submitting a final tender within a common deadline (reg.29(21)(a) PCR2015, reg.30(23)(a) PCSR2015). Those final tenders are then assessed on the basis of the award criteria reg.29(21)(c) PCR2015, reg.30(23)(a) PCSR2015).