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An analysis of the role of the European Commission in the health, energy and defence sectors

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Abstract

In the last years, the EU has been hit by several crises: the Covid-19 pandemic; and the energy and security crises triggered by the outbreak of the war in Ukraine. In order to tackle them and secure access to critical goods such as vaccines, energy and defence capabilities, the European Commission presented several proposals envisaging a joint purchasing mechanism. Given that these proposals were advanced in the context of crises and in areas that do not fall under the exclusive competence of the EU, this work tries to explore the extent to which the European Commission acted as a supranational entrepreneur able to find solutions to cross-border challenges and whether it can be considered an orchestrator that managed the procedures behind the scenes.

INTRODUCTION

Since its foundation, the European Union¹ had to shape, adapt and update its institutional structure and functioning to respond to the challenges of the time. However, it was mainly in the last fifteen years that the EU had to reinvent itself and advance innovative solutions. It had to tackle a financial crisis, respond to a pandemic and the socio-economic consequences that came with it, and deal with an energy and security crisis stemming from the outbreak of the war in Ukraine while keeping up the fight against climate change. Each reshaped how the EU works, how institutional cooperation functions and, ultimately, how it is perceived internationally.

The EU played a significant role in advancing solutions to respond to the various menaces that hit Europe and whose effects varied in terms of the impact on society, Member States' exposure, and the ability of the European institutions to act given the competencies is foreseen in the treaties. Some institutions played a much more central role than others. Some scholars highlighted the central role of the European Council during the Eurozone crisis², whilst others underlined the European Commission's role in negotiating the joint procurement of vaccines during the Covid-19 pandemic.³

In the last years, the number of joint purchasing initiatives increased substantially, probably driven by the success of the procurement of vaccines. In 2022, two initiatives were triggered by the outbreak of the war in Ukraine: the EU Energy Platform to jointly purchase gas, LNG and hydrogen to respond to the energy crisis; and a joint procurement initiative in the defence sector was advanced to fill the Member States' strategic military, financial,

¹ For clarity, the term European Union will be used also to refer to the European Community.

² Edoardo Bressanelli and Nicola Chelotti, "The Shadow of the European Council. Understanding Legislation on Economic Governance", *Journal of European Integration* 38, no. 5, (2016), 511-525.

³ Hussein Kassim, "The European Commission and the COVID-19 Pandemic: A Pluri-Institutional Approach", *Journal of European Public Policy* 30, no.2, (2022), 1-23.

industrial and capability gap⁴ as they had sent weapons and armaments to Ukraine to counter Russia's invasion. Finally, the most recent proposal advanced on 16 March 2023 refers to the joint purchasing of critical raw materials.⁵

All these initiatives were presented in a context of crisis, in which there was the need to aggregate demand at the EU level to purchase a specific critical good and thus avoid the fragmentation of the market and secure goods for all the Member States despite their size. Moreover, the areas in which these proposals were presented vary considerably in terms of the competencies of the EU.

Analysing the role of the European Commission in joint purchasing is particularly interesting as it strengthens its ability to present solutions to cross-border issues. Therefore, by scrutinising the procurement of vaccines, the establishment of the EU Energy Platform, and the joint procurement in defence, this work will investigate whether the Commission can be considered a supranational entrepreneur in fields that do not fall under the exclusive competence of the EU. Moreover, it will consider the organisational structure of the initiatives to test the hypothesis for which the Commission could be considered an orchestrator⁶ that, by using intermediaries, manages joint purchasing behind the scenes.

The following section will provide an overview of the theoretical framework, followed by the introduction of the three case studies described above.

⁴ Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions "on the Defence Investment Gaps Analysis and Way Forward", JOIN (2022) 24 final, Brussels, 18 May 2022.

⁵ European Commission, "Proposal for a regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials", COM (2023) 160 final, 2023/0079(COD), Brussels, 16 March 2023.

⁶ Kenneth W. Abbott et al., "Two Logics of Indirect Governance: Delegation and Orchestration," *British Journal of Political Science* 46, no. 4 (2016), 1-11.

THEORETICAL FRAMEWORK

The theory of supranational entrepreneurship, which takes inspiration from neo-functionalism,⁷ aims at understanding how the Commission behaves considering the structural conditions and the environment in which it acts. Differently from neo-functionalism for which the power of initiative represented the central means for the realisation of further integration and a European common interest,⁸ scholars of supranational entrepreneurship stressed the centrality of the agenda-setting power and highlighted how the conditions under which this power is exercised are determinant for the supranational institution to achieve positive results.

Pollack distinguishes between two types of agenda-setting⁹. A formal one consists of the right to present proposals that the co-legislators can easily adopt because the cost of agreeing on those policies is low. An informal one concerns the institution as a “policy entrepreneur” that presents proposals that gather consensus. The Commission succeeds when it advances proposals that are very likely to be accepted by Member States in the negotiation phase or when the environment in which it advances them is full of uncertainty and the actors that need to make a decision possess imperfect information.¹⁰ The latter constitutes one of the conditions to make the agenda-setting power more incisive. In their analysis on focal points, Garrett and Weingast¹¹ reinforce this view by arguing that when the transaction cost to negotiate or wait for a new valid alternative is high, supranational institutions might be successful. Especially in the context of crises, the fear of uncertainty, the uneven access to information, or the need

⁷ Dermot Hodson, "The Little Engine that Wouldn't: Supranational Entrepreneurship and the Barroso Commission," *Journal of European Integration* 35, no. 3 (2013), 303.

⁸ Ernst Haas, "Technocracy, Pluralism and the New Europe", in *A New Europe?*, Stephen Richards Graubard, (Boston: Houghton Mifflin, 1964),70.

⁹ Mark A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford: Oxford University Press, 2003),47.

¹⁰ Mark A. Pollack,, "Delegation, Agency, and Agenda Setting in the European Community," *International Organization* 51, no. 1 (1997), 125.

¹¹ Geoffrey Garrett and Barry R. Weingast, "Ideas, Interests, and Institutions: “Constructing the European Community’s Internal Market”, in *Ideas and Foreign Policy*, eds. Judith Goldstein and Robert O. Keohane, Cornell University Press, 1993), 173-206.

to provide a rapid response allows the European Commission to introduce items on the agenda that the Member States might accept.

Yet, the success of the Commission is also the result of its intrinsic characteristics. Kingdon maintains that a successful policy entrepreneur needs to fulfil three criteria:¹²

- It must be taken seriously and considered an expert;
- It should be known for its political connections or negotiating skills;
- It must be persistent and wait for the opening of a “*policy window*”.¹³

On most occasions, the Commission fulfils these criteria by acting as an “honest broker”¹⁴ during negotiations and being able to take advantage of the evolving circumstances to present new proposals or reintroduce the ones that failed in the past. This scenario is particularly evident in cases where there is an economic or political change that triggers the emergence of new social interests that require transnational coordination. Here, supranational institutions can advance solutions before national governments due to their access to wider networks of social groups and their internal organisation.

Orchestration Theory

Orchestration theory (O-I theory) was developed by Abbott, Genschel, Snidal and Zangl while analysing the role of international organisations¹⁵ and the existence of forms of indirect governance. The latter was often described by Principal Agent theory (P-A),¹⁶ which, like orchestration, highlights the benefits that the governors have in outsourcing tasks to third parties, since the latter can perform them more efficiently.¹⁷ Still, differently from P-A theory,

¹² John W. Kingdon, *Agendas, alternatives, and public policies*. (Boston: Little, Brown, 1984), 250.

¹³ John W. Kingdon, "How do Issues Get on Public Policy Agendas," *Sociology and the Public Agenda* 8, no. 1 (1993), 40.

¹⁴ Andrew Moravcsik, "A New Statecraft? Supranational Entrepreneurs and International Cooperation", *International Organization* 53, no. 2 (1999), 278.

¹⁵ Kenneth W. Abbott et al., "Orchestration: Global Governance through Intermediaries", in *International Organizations as Orchestrators*, ed. Kenneth W. Abbott and others (Cambridge: Cambridge University Press, 2015), 3-36.

¹⁶ Hussein Kassim and Anand Menon, "The Principal-Agent Approach and the Study of the European Union: Promise Unfulfilled?", *Journal of European Public Policy* 10, no. 1 (2003), 121-139.

¹⁷ Kenneth W. Abbott et al., "Two Logics of Indirect Governance: Delegation and Orchestration", *British Journal of Political Science* 46, no. 4 (2016), 2.

orchestration varies in terms of the relationship between the principal and the agent. The former entails a strong bond of delegation, which implies a formal or implicit contract. It is considered a hard form of indirect governance implying a hierarchical relationship in which the principal has formal legal control over the agent, can supervise its activities, and ultimately rescind its authority.¹⁸ Orchestration, on the contrary, takes the form of a horizontal relationship¹⁹ and is defined as the mobilisation of an intermediary by an orchestrator voluntarily in pursuit of a joint governance goal or target. Yet, the boundary between the two models is often blurred to the extent that it is possible to talk about hybrid forms of indirect governance.²⁰

What drives the principal actor or the institution to adopt orchestration is either its moderate governance capacity, the loss of those capabilities that would have allowed it to govern unilaterally, or the lack of operational capacity which can be defined by the concept of “governor’s dilemma”.²¹ To solve this deficiency, the role of the intermediary is often covered by NGOs, business organisations, trans-governmental networks and international organisations which possess the technical expertise, material resources and information to fulfil the task and reach the objective. The intermediary is chosen according to the compatibility of goals with the orchestrator as the lack of similarity would endanger the relationship between parties and would end orchestration.²² Finally, under this framework, “governance actors are more likely to engage in orchestration when their organizational structure and culture encourage policy entrepreneurship”.²³

¹⁸ *Ibid.*, 9.

¹⁹ Ileana Daniela Serban, "Debating European Union Governance in Times of Crisis," *Journal of Contemporary European Studies* 31, no. 1 (2023), 236.

²⁰ Kenneth W. Abbott et al., "Orchestration: Global Governance through Intermediaries", *op.cit.*, 10.

²¹ Kenneth W. Abbott et al., "Competence Versus Control: The Governor's Dilemma," *Regulation & Governance* 14, no. 4 (2020), 621.

²² Kenneth W. Abbott et al., "Orchestration: Global Governance through Intermediaries", *op. cit.*, 18.

²³ *Ibid.*, 25.

On the one hand, it is crucial to consider the conditions under which the initiatives for joint procurement were presented. The three case studies are particularly important, given that the proposals were introduced in a context of crisis characterised by a common sense of fear about the future and asymmetry of information. Supranational entrepreneurs might be successful in these cases, and their agenda-setting power incisive.

On the other hand, the EU has limited governance and enforcement powers, including in the health, energy, and defence sectors. It is useful to see whether the Commission used orchestration as model of indirect governance in the initiatives of joint procurement to overcome the Member States' reluctance and become more involved in the sectors.

The paper will be structured around three main areas: health, energy and defence. Each section provides a general overview of the EU's competence as defined by the treaties. As regards health, we focus on the evolution of the Commission's involvement in the Swine Flu A(H1N1) and Covid-19 pandemics and the creation of the Health Emergency Response Authority (HERA) to set a permanent structure dealing with procurement under the control of the Commission. The second section recalls the failed attempt to pool energy demand under Juncker's Commission and, subsequently, the introduction of the EU Energy Platform. Finally, the last section explores the adoption of the European defence industry Reinforcement through common Procurement Act (EDIRPA) for joint procurement in the defence sector.

HEALTH

The European Union's competence in health matters is minimal,²⁴ although it was only with the entry into force of the Treaty of Lisbon and the establishment of Decision 1082/2013/EU²⁵ on serious cross-border threats to health that there was an expansion and redefinition of health competence at the European level.²⁶ The treaties define in Article 4 of TFEU and article 168 TFEU²⁷ the shared competence between the EU and its Member States for public health, as well as the attribution of the power to support, coordinate or supplement national policy in the protection and improvement of human health (Article 6 TFEU).²⁸ On the public health side, Article 168 clearly describes “monitoring, early warning of and combating serious cross-border threats to health”,²⁹ and it provides for the possibility to “adopt harmonisation measures setting high standards of quality and safety for organs, substances of human origins and medicinal products and devices”.³⁰ Thus, Member States are responsible for their national health policies and the management and delivery of health services. As such, the procurement and distribution of vaccines is a national prerogative.

Nevertheless, the European Commission was involved in their procurement at the EU level on two occasions: in 2009 during the (A)H1N1 influenza and then in 2020 during the Covid-19 Pandemic. The ensuing paragraphs will analyse the vaccine negotiation process, the European Commission's role in the crises, and how its behaviour evolved from the A(H1N1) pandemic to the Covid-19 crisis.

²⁴ Kai P. Purnhagen et al., "More Competences than You Knew? the Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak," *European Journal of Risk Regulation* 11, no. 2 (2020), 297-306.

²⁵ Decision no 1082/2013/EU of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 2119/98/EC, *Official Journal of the European Union*, Brussels, 22 October 2013.

²⁶ Hervey Tamara, *European Union Health Law: Themes and Implications* (Cambridge: Cambridge University Press, 2015), 60.

²⁷ European Union, “Consolidated Version of the Treaty on the Functioning of the European Union of 13 December 2007”, *Official Journal of the European Union*, C326/47, 26 October 2012, Article 4.

²⁸ *Ibid.*, Article 6.

²⁹ *Ibid.*

³⁰ *Ibid.*

EU Joint Procurement in the A(H1N1) pandemic

In April 2009 the first A(H1N1) influenza cases were discovered in Mexico and the USA. In June 2009, the World Health Organisation declared the pandemic outbreak.³¹ As a response, the Council of the European Union reiterated in a meeting that the competence on health lay within the Member States, and that the Commission was invited to enhance the level of coordination among them.³² By July, most of the countries had already concluded some Advanced Purchase Agreements with pharmaceutical companies to secure vaccines. However, in an Informal Health Council,³³ the Swedish Presidency proposed to the Commission to set up a mechanism for the joint procurement of vaccines, given that smaller Member States had not finalised any agreement. On the one hand, the Commission acknowledged and underlined the benefits that joint procurement could have in terms of prices and pooling of expertise. On the other hand, it considered that starting a joint purchase at the EU level, several months after the start of the pandemic and given the high number of Advance Purchase Agreements (APA) already signed, would have been inefficient.³⁴ At that time, the Commission's alternative option was to launch a series of national calls for tenders on behalf of the interested Member States for which it offered its support.³⁵ In addition, it also proposed a common approach to cross-border sharing and voluntary sale within the EU to allow a redistribution of vaccines from Member States with an excess of doses to the ones suffering shortages. The latter was inserted in the agreements concluded by some Member States.³⁶

³¹ Anna Bowman et al, "Evolution of a pandemic A(H1N1) 2009", World Health Organisation, 2nd edition, 2013. Retrieved 25 March,

https://apps.who.int/iris/bitstream/handle/10665/78414/9789241503051_eng.pdf;jsessionid=4909E9FF5820FBDF49FADDC4E14A0F8?sequence=1

³² Council of the European Union, "Council Conclusions on Influenza A/H1N1 infection", Luxembourg, 30 April 2009.

³³ European Commission, "Commission Staff Working Document on Joint Procurement of vaccine against influenza A(H1N1)", SEC (2009) 1188, Brussels, 15 September 2009.

³⁴ *Ibid.*

³⁵ European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Pandemic A (H1N1) 2009, COM (2009) 481, Brussels, 15 September 2009.

³⁶ *Ibid.*

The A(H1N1) management was mainly dealt with at the national level without coordination between Member States. An internal competition between States jeopardised access to vaccines, and action at the European level was taken at a later stage. Nevertheless, in the last phase of the pandemic, the Commission played an essential role in assisting the Member States in the conclusion of the agreements by pushing forward the introduction of a cross-border sharing mechanism in the contracts.

The EU adopted the Decision 1082/2013/EU³⁷ which established a procurement framework to allow Member States to participate voluntarily and purchase pandemic vaccines to protect citizens in the event of a cross-border health threat. As specified by the Commission in an internal document,³⁸ the Joint Procurement Agreement (JPA) intends to implement a provision of a legislative act and is not a legal act *per se*. The EU considers the JPA as a budgetary implementing measure of Decision 1082/2013/EU. The particularity of this type of agreement is that, although it was created within the legal framework established in Article 168 TFEU, the EU does not consider it a demonstration of its powers in the field of public health. Still, it is an administrative arrangement concerning purchasing, where “the Commission implements the decisions taken by the Member States and coordinates the joint procurement procedure”³⁹.

Thirty-six parties signed the current agreement⁴⁰ - an increase of signatories was seen during the Covid-19 Pandemic- that reaches countries that are not part of the EU, such as candidate countries. As health falls under the Member States' competence, its design clearly reflected the possibility of each Member State to decide whether to participate. Although

³⁷ Decision no 1082/2013/EU of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 2119/98/EC, *Official Journal of the European Union*, Brussels, 22 October 2013.

³⁸ European Commission, DG SANTE, “Considerations on the legal basis and the legal nature of the Joint Procurement Agreement”. Retrieved 25 March 2023, https://health.ec.europa.eu/system/files/2016-11/jpa_legal_nature_en_0.pdf

³⁹ *Ibid.*, 3.

⁴⁰ Signing parties of the JPA agreement, retrieved 25 March 2023, https://health.ec.europa.eu/health-security-and-infectious-diseases/preparedness-and-response/signing-ceremonies-joint-procurement-agreement_en

innovative in 2013, this measure was inappropriate to fight a pandemic of a larger scale such as Covid-19. Thus, the directive has been amended with Regulation (EU) 2022/2371, signalling the will of the EU to strengthen the rules on cross-border health threats and the joint procurement procedure.

The EU Vaccination Strategy

When the Covid-19 pandemic broke out, the European Commission immediately mobilised its resources to find a vaccine by financing research.⁴¹ Furthermore, its help was requested by the Member States which proved to be unable to tackle a cross-border crisis. In June 2020, the *Inclusive Vaccine Alliance* formed by Germany, Italy, France, and the Netherlands was created⁴² to negotiate with AstraZeneca. Nonetheless, the fear that smaller Member States could not have access to vaccines, as it happened with the A(H1N1), made the Member States shift to a supranational approach.

In June 2020 the Commission presented the Vaccination Strategy⁴³ for developing, manufacturing, and deploying vaccines. Among the many points the strategy touched upon, the Commission presented a proposal for a joint action at the EU level to procure vaccines to speed up the negotiation process, avoid having 27 different agreements, and prevent the rise of competition between Member States for purchasing singularly vaccines and consequently putting at risk access to vaccines for smaller states. The strategy was presented in a moment of crisis, full of uncertainty and during which the amount of available information was low. Instead, the European Commission possessed a broader view of the situation due to the strong cooperation installed with the European Centre for Disease Control that monitored the

⁴¹ European Commission, “COVID-19: Commission steps up research funding and selects 17 projects in vaccine development, treatment and diagnostics”, Press Release, Brussels, 6 March 2020.

⁴² Government of the Netherlands, “France, Germany, Italy and the Netherlands working together to find a vaccine for countries in Europe and beyond”, retrieved on 25 March, <https://www.government.nl/latest/news/2020/06/03/france-germany-italy-and-the-netherlands-working-together-to-find-a-vaccine-for-countries-in-europe-and-beyond>

⁴³ European Commission, “Communication from the Commission: EU Strategy for COVID-19 vaccines”, Brussels, 17 June 2020.

evolution of the pandemic. These conditions opened the Commission a window of opportunity to act as an entrepreneur.

The Commission and the Member States signed an agreement recognised in a Commission decision;⁴⁴ its Annex⁴⁵ determined how procurement had to be carried out and highlighted that, although the Commission had the mandate to conclude the APA, Member States were *de facto* acquiring the doses from the companies and were responsible for their vaccination policies.

Seemingly, a form of delegation was established between the Member States and the Commission. However, no control mechanism allowing for its revocation in case of overstepping was introduced. In that moment, giving the mandate to the Commission might have been the only possible way out and opting for another solution or even engaging in separate agreements would have delayed access to vaccines.

To carry out the procurement efficiently, the Commission set up a steering board co-chaired by the Commission and by a representative of the Member States with proven experience in negotiating and who represented a country holding production capacities for vaccines. The co-chairs had to propose a team of experts that, together with the Commission, would have negotiated the terms of the APAs acting as a single unit. Finally, the Commission, assisted by the steering board, decided which APAs to conclude. Once defined, Member States would have been able to acquire vaccines directly from the producer on the basis of the conditions laid down in the agreement, as Germany did in December 2020 by securing 30 million extra doses.⁴⁶ Nonetheless, Member States could not conclude separate contracts envisaging different conditions than the ones achieved with the central purchasing procedure.

⁴⁴ European Commission, “Commission decision approving the agreement with Member States on procuring COVID-19 vaccines on behalf of the Member States and related procedures”, C (2020) 4192, Brussels, 18 June 2020.

⁴⁵ European Commission, “Annex I to the Commission Decision on approving the agreement with Member States on procuring Covid-19 vaccines on behalf of Member States and related procedures”, C (2020) 4192 final, Brussels, 18 June 2020, Article 1.

⁴⁶ Jillian Deutsch et al., “Thanks to deep pockets, Germany snaps up extra coronavirus jabs”, *Politico*, retrieved 30 March, <https://www.politico.eu/article/germany-buys-extra-coronavirus-vaccine-doses-from-eu-countries/>

What happened in reality was that the Commission took the lead despite the presence of the Member States in the steering board. Their complaints on the general outcome of the negotiations⁴⁷, or about not having stricter compliance rules in the treaties,⁴⁸ clearly show their lack of participation and the centrality of the Commission in the whole process.

To have an overview of the evolution of the relationship between the two parties, one must consider different stages. In the first phase, when the Commission decision was adopted, one can see a hybrid form of indirect governance with the Member States acting as orchestrators and the Commission the intermediary that purchased vaccines. In the second phase, when the agreements were concluded, the Commission not only secured the doses but it also established the criteria for the distribution of vaccines within the APAs by determining how, when, and to whom vaccines had to be distributed and supplied to the Member States.⁴⁹ This impacted Member States' national health policy by dictating how their vaccination campaigns had to be organised. The Commission's central role was subject to criticism, not only by the Member States but by the European Parliament, which highlighted a lack of transparency in the whole negotiations process.⁵⁰ The names of the people involved in the negotiation team were not disclosed by the Commission to avoid any possible external intervention or pressure. In addition, the vaccine procurement was mostly financed via the Emergency Support Instrument, a fund used in case of disasters which is directly managed by the Commission. The total value was €2.15 billion,⁵¹ and, together with Member State contributions, reached €2.7 billion.

⁴⁷ Francois Murphy "EU defends vaccine distribution as nations complain it is uneven" *Reuters*, Retrieved 30 March, <https://www.reuters.com/article/us-health-coronavirus-eu-austria-idUSKBN2B50F5/>.

⁴⁸ Henning Deters and Federica Zardo, "The European Commission in Covid-19 Vaccine Cooperation: Leadership Vs Coronationalism?" *Journal of European Public Policy* 30, no. 6 (2023),11.

⁴⁹ Retrieved 1 April 2023,

[https://commission.europa.eu/system/files/2021-01/curevac - redacted advance purchase agreement 0.pdf](https://commission.europa.eu/system/files/2021-01/curevac_-_redacted_advance_purchase_agreement_0.pdf)

⁵⁰ European Parliament, "Motion for a resolution on EU transparency in the development, purchase and distribution of COVID-19 vaccines", B9-0519/2021, Brussels, 13 October 2021

⁵¹ European Court of Auditors, "EU COVID-19 vaccine procurement", Special Report, 2022, retrieved 30 March, https://www.eca.europa.eu/Lists/ECADocuments/SR22_19/SR_EU_COVID_vaccine_procurement_EN.pdf

Despite the limited role that the treaties attribute to the EU, the vaccine strategy did more than merely support or integrate national plans: it limited the scope of action of the Member States that could not negotiate separately with pharmaceutical companies. Moreover, adopting procurement decisions for scarce materials, such as vaccines in a health crisis, directly affected Member States' decisions to organise their national healthcare systems⁵² since they had to plan the delivery of vaccines by considering the initial distribution set at the supranational level and could not implement their vaccination plans autonomously.

Setting a permanent mechanism? An analysis of HERA's role.

In 2021 the Commission presented a proposal⁵³ establishing the Health Emergency Response Authority (HERA) under the framework of creating a European Health Union.⁵⁴ HERA was a response to the lack of coordination between Member States in the early stage of the pandemic, and would “address vulnerabilities and strategic dependencies within the Union related to the development, production, procurement, stockpiling and distribution of medical countermeasures”.⁵⁵ This would strengthen the level of coordination between the Union and the Member States during its two operational phases of preparedness crisis.

HERA was not designed as an independent agency but rather within the institutional framework of the European Commission. Nonetheless, frameworks for cooperation with the Member States were still envisaged in both the preparedness and emergency phases. In the former, one representative per Member State sits on the HERA Board, which assists and advises the Authority when formulating decisions. In the latter, they sit on the Crisis Board

⁵² Francesco Saverio Della Corte, "The EU Vaccines Strategy: A Missed Opportunity for EU Public Health?" *European Journal of Risk Regulation* (2023), 6.

⁵³ European Commission, "Commission Decision establishing the Health Emergency Preparedness and Response Authority", C (2021) 6712 final, *Official Journal of the European Union*, Brussels, 16 June 2021.

⁵⁴ European Commission, "Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats", Brussels, 11 November 2020.

⁵⁵ *Ibid.*, 2.

with the President of the European Commission, the Commissioner for Health and Food Safety, and other members of the Commission.

The authority carries out several tasks, such as analysing with other agencies any potential health threats and adopting the necessary prevention measures. Furthermore, HERA ensures that the production of medical equipment or other goods meets the needs of every country, even before the outbreak of an emergency. By spurring long-term investments, creating strategic alliances involving Member States, and planning with industries, the Authority aims to build a resilient European industry that does not rely on external production. HERA also procures and distributes medical countermeasures.⁵⁶ These contracts are negotiated and concluded by the head of HERA, which is appointed by the European Commission.

The internal organisation and powers attributed to it largely reflect the ones given to the Commission during the pandemic. HERA's board recalls the steering board that negotiated vaccines. The emergency phase is regulated by Article 8 of the Council Regulation 2022/2372,⁵⁷ which puts the Commission at the centre of managing the health crisis, given its central role in negotiating and concluding procurement agreements. However, to avoid the lack of transparency that was highlighted during the pandemic, during joint procurement of medical countermeasures, there should be more involvement of the Member States and more information shared.⁵⁸

Finally, procurement of the equipment and medical countermeasures constitutes one of the core elements for an efficient health crisis response, and HERA is investing in more of such initiatives, such as procurement of DPR or influenza vaccines. In the case of Covid-19,

⁵⁶ European Commission, "Commission Decision establishing the Health Emergency Preparedness and Response Authority", C (2021) 6712 final, *Official Journal of the European Union*, Brussels, 16 June 2021.

⁵⁷ Council Regulation (EU) 2022/2372 "on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level", *Official Journal of the European Union*, Brussels, 24 October 2022.

⁵⁸ *Ibid.*, Recital 10.

however, the joint procurement of vaccines represented an unprecedented measure to help solve the pandemic, and the success of this experience likely led to the idea of pooling the EU's demand power in other sectors.

ENERGY

With the entry into force of the Treaty of Lisbon, energy became a shared competence between the Member States and the EU.⁵⁹ The main objectives are to ensure the functioning of the energy market, security of supply in the Union, and “promote energy efficiency and energy saving and the development of new and renewable forms of energy”.⁶⁰ If normally a shared competence implies the pre-emption of the Member States when the EU has already legislated, in this case, the EU is prohibited to intervene if it affects the possibility of a Member State “to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of energy supply”.⁶¹ Nevertheless, such decisions can be taken through other provisions or by unanimous decision in the Council⁶². Moreover, article 122 TFEU,⁶³ known as the solidarity clause, provides a guarantee to Member States in case their energy supply is cut off.⁶⁴

Energy is thus considered an area of high politics where Member States like to have control.⁶⁵ Nevertheless, gradually the European Commission was able to “build credibility and competence”⁶⁶ by advancing the idea that energy is a common European problem and, as such, it requires a European solution.⁶⁷ In 2006, during a dispute between Russia and Ukraine that

⁵⁹ European Union, “Consolidated Version of the Treaty on the Functioning of the European Union of 13 December 2007”, *Official Journal of the European Union*, C326/47, 26 October 2012, article 194.

⁶⁰ *Ibid.*, article 194.1.

⁶¹ *Ibid.*, article 194.2.

⁶² *Ibid.*

⁶³ *Ibid.*, article 122.

⁶⁴ Sijbren De Jong, Jan Wouter and Steven Sterkx, “The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management After Lisbon,” *European Foreign Affairs Review* 15, no. 4 (2010), 532.

⁶⁵ Tomas Maltby, “European Union Energy Policy Integration: A Case of European Commission Policy Entrepreneurship and Increasing Supranationalism”, *Energy Policy* 55 (2013), 442.

⁶⁶ *Ibid.*, 437.

⁶⁷ *Ibid.*

led to a gas shortage⁶⁸ in many EU countries, the Commission acted as an entrepreneur.⁶⁹ Although it pushed for a diversification of gas transit routes and gas sources, the problems of security of supply and diversification remained.

In autumn of 2021, energy prices increased substantially⁷⁰ due to the reopening of the activities after the end of lockdowns, which led to a higher level of demand by consumers, factories and companies, but also because of the progressive reduction of gas supply by Russia.⁷¹ With the start of the war in Ukraine, the trend worsened. In March 2022, the Commission presented a Communication on REPowerEU⁷², introducing several measures to lessen the EU's dependence on Russia. Among the proposals: the Commission coordination of refilling operations through a joint purchasing mechanism;⁷³ and setting up a European Energy platform.

Nevertheless, the idea was not new, as in 2014, Donald Tusk already talked about jointly purchasing Russian gas. The following paragraphs will first recall the failed attempt at introducing joint purchasing that Tusk proposed. Then, it will focus on how the EU Energy Platform works and analyse the role of the Commission in the purchasing mechanism.

A failed attempt to jointly purchase gas: Tusk's project

With the outbreak of the Ukrainian-Russian crisis of 2014, the Commission highlighted the need to overcome the tendency of Member States to conclude energy supply agreements in complete isolation from other countries⁷⁴ and to diversify gas suppliers. It

⁶⁸ *Ibid.*, 438.

⁶⁹ *Ibid.*

⁷⁰ European Council, "Infographic - Energy price rise since 2021", Retrieved 15 April 2023, <https://www.consilium.europa.eu/en/infographics/energy-prices-2021/>

⁷¹ Mark Flanagan et al., "How a Russian Natural Gas Cutoff Could Weigh on Europe's Economies", retrieved 15 April 2023, <https://www.imf.org/en/Blogs/Articles/2022/07/19/blog-how-a-russias-natural-gas-cutoff-could-weigh-on-european-economies>

⁷² European Commission, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU: Joint European Action for more affordable, secure and sustainable energy", Strasbourg, 8 March 2022.

⁷³ *Ibid.*, 5.

⁷⁴ Andrew Judge and Tomas Maltby, "European Energy Union? Caught between Securitisation and 'riskification'", *European Journal of International Security* 2, no. 2 (2017), 187.

sought an “Energy Union”,⁷⁵ with a single liberalised and competitive internal market for energy where prices were based on supply and demand fluctuations and unrestricted movement of supplies across the Members.⁷⁶

A year before the proposal for the Energy Union package, Polish Prime Minister Donald Tusk suggested introducing a joint purchasing mechanism, taking inspiration from the experience of purchasing uranium through EURATOM.⁷⁷ Russia’s annexation of Crimea in 2014 highlighted the EU’s high degree of dependency on Russia, given high energy prices and security of supply was at risk. Tusk proposed pooling the EU’s demand to negotiate with Russia for lower gas prices. He proposed to proceed in stages by allowing first bilateral agreements without market-distorting clauses, then the introduction of a contract template to ensure the same negotiating conditions to all Member States. Strikingly, the Commission had the task of assessing the demand aggregation⁷⁸ and would participate in all the negotiations.

This approach was not included in the Energy Union package due to Member State reluctance. For Germany, joint gas purchasing would have run against the liberalisation of the market⁷⁹ and would have reduced competitiveness of the energy market.⁸⁰

The EU Energy Platform & AggregateEU

The European Commission took advantage of the window of opportunity that the 2022 crisis opened to introduce the EU Energy Platform that aimed to avoid overbidding between

⁷⁵ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank on A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy”, COM (2015) 80 final, Brussels, 25 February 2015.

⁷⁶ Andrew Judge and Tomas Maltby, "European Energy Union? Caught between Securitisation and 'riskification', *op. cit.*, 188.

⁷⁷ Donald Tusk, “A united Europe can end Russia’s energy stranglehold”, *The Financial Times*, 21 April 2014. Retrieved on 25 April 2023: <https://www.ft.com/content/91508464-c661-11e3-ba0e-00144feabdc0>

⁷⁸ *Ibid.*

⁷⁹ Kerstine Appunn, “Germany views European Energy Union proposals through Energiewende lens”, *Clean Energy Wire*, retrieved on 27 April 2023, <https://www.cleanenergywire.org/news/germany-views-european-energy-union-proposals-through-energiewende-lens>

⁸⁰ Marco Siddi, "The EU’s Energy Union: A Sustainable Path to Energy Security?" *The International Spectator* 51, no. 1 (2016), 137.

countries and ensure a lower price for refilling gas storages for the winter of 2023/2024 while increasing the diversification of suppliers.

This idea first was introduced in the RePowerEU Communication⁸¹, then at Versailles the European Council⁸² issued a declaration calling on the Commission to structure a REPowerEU plan⁸³ to overcome the dependency on Russia's supplies. The European Council meeting on 25 March 2022⁸⁴ called for a voluntary mechanism to be extended to the participation of Western Balkan countries as well as Moldova, Georgia and Ukraine.

The REPowerEU Plan, presented in May, contained a provision envisaging the EU Energy Platform for the joint purchase of gas, LNG and hydrogen, whose framework was formally established in the Council Regulation 2022/2576 known as the "Solidarity Regulation".⁸⁵ Initially, as for the vaccines, the Commission envisaged itself leading the negotiations.⁸⁶ Nevertheless, in the REPowerEU plan, the platform's governance structure was redefined by downgrading the Commission's role, with suppliers and buyers negotiating outside the platform⁸⁷ in the AggregateEU mechanism managed by a service provider.

The role of the service provider is essential when analysing the functioning of the platform through the lens of orchestration theory. Member states consider energy as a matter of high politics. Where the issues at stake are politically sensitive for Member States, orchestration can be used to present solutions that strengthen the supranational level.⁸⁸ The

⁸¹ European Commission, "Communication on REPowerEU: Joint European Action for more affordable, secure and sustainable energy", *op. cit.*

⁸² European Council, "Versailles Declaration", Informal meeting of the Heads of State or Government, Versailles, 10 and 11 March 2022.

⁸³ European Commission, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU Plan", COM (2022) 230 final, Brussels, 18 May 2022. The plan called also for a redefinition of some targets of the Fitfor55 package and it introduced some measures for increasing diversification of supply.

⁸⁴ European Council, "European Council meeting (24 and 25 March 2022) - Council Conclusions", EUCO 1/22, Brussels, 25 March 2022.

⁸⁵ Council regulation (EU) 2022/2576 on "enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders", *Official Journal of the European Union*, Brussels, 19 December 2022.

⁸⁶ *Ibid.*

⁸⁷ European Commission, "Communication on REPowerEU: Joint European Action for more affordable, secure and sustainable energy", *op. cit.*, 2.

⁸⁸ Ileana Daniela Serban, "Debating European Union Governance in Times of Crisis," *op.cit.*, 237.

introduction of the service provider as an intermediary for aggregating demand and supply allowed the Commission to bypass Member States' reluctance.

Since 2012, Prisma European Capacity Platform GmbH⁸⁹ has been offering a marketplace for gas capacity by connecting more than 20 markets digitally. Moreover, it is already established in several European countries, and thus it possesses the necessary information to act on the territory.⁹⁰ The company's objectives – enhancing digitalisation, contributing to green transition and, ensuring the security of supply in times of emergency, providing services for integrating the energy market-⁹¹ match the initiatives and goals that have been on the European Commission's agenda. Although the contract established might imply a hierarchical relationship, orchestration theory maintains that the border between delegation and orchestration is often blurred.⁹² In this case, the relationship between the two parties appears a horizontal one based on cooperation and assistance, thus more prone towards orchestration. In fact, the Commission only assists and supports the intermediary in the design and aggregation of the tendering process and engages with the Member State and companies to encourage participation. In this way, the intermediary can interact with high level actors.

The Commission does not engage in negotiations⁹³, but it is in the steering board, chaired by Commissioner Šefčovič and composed of one member of the Commission, one member per Member State and the representatives of the Energy Community Contracting Parties, when invited. The board facilitates the coordination of demand aggregation and joint purchasing⁹⁴ by assessing whether gas purchases strengthen security of supply and respect the principle of solidarity. It focuses on optimising infrastructure and activities, ensuring

⁸⁹ For simplicity it will be referred to only as Prisma.

⁹⁰ "Prisma European Capacity Platform GmbH", retrieved on 19 April 2023, <https://www.prisma-capacity.eu/company>

⁹¹ *Ibid.*

⁹² Kenneth W. Abbott et al., "Orchestration: Global Governance through Intermediaries", *op.cit.*, 10.

⁹³ DG ENER and Prisma "on the EU Energy Platform and Aggregate EU" (Workshop European Commission, Brussels, 7 March 2023). Retrieved on 22 April 2023: <https://www.youtube.com/watch?v=Ay6pJAneluk>

⁹⁴ Council regulation (EU) 2022/2576, "Enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders", *op. cit.*, article 4.

transparency, and international outreach to the governments between the EU and third countries' suppliers.

The functioning of the platform occurs in three different phases: demand aggregation, tendering and matching, and reporting. The Commission must be informed before launching tenders or opening negotiations with a producer or supplier to purchase a volume of above 5 TWh/year.⁹⁵ In this way, it gains a broad overview of the functioning of the market and the contracts put in place between companies and suppliers coming within and outside the EU.

After each phase, Prisma publishes the outcome. With the publication of the matching between demand and supply, the negotiation phase opens outside the platform. The Commission introduces two possibilities for cooperation frameworks for companies:⁹⁶

- *Central buyer*: one company centralises the demand for a group of smaller buyers and submits the demand. The contracts are then formalised between the seller and the central buyer and the smaller buyers.
- *Agent on Behalf*: Companies entrust another company to act as an agent providing services (e.g. balancing services, transport). Companies may contract an agent/shipper on behalf either outside/before or after the tender, with or without the involvement of the AggregateEU.

The Commission, therefore, put in place a safeguard for smaller companies that might not possess the right infrastructure or power to enter in bilateral negotiations. Despite some criticism,⁹⁷ large companies could negotiate better conditions in pure autonomy. Moreover, as the mechanism is voluntary and there is no prohibition of negotiating separately, differently from the vaccine's procurement, some doubts of the efficacy of the mechanism have risen. Nonetheless, differently from the companies which participate voluntarily and purchase if the

⁹⁵ *Ibid.*

⁹⁶ DG ENER and Prisma "on the EU Energy Platform and Aggregate EU", *op.cit.*

⁹⁷ Nicoli Francesco, Burgoon Brian and Van der Duin David, " Which Energy Solidarity Union?" *Center for Open Science* (2023), 10.

conditions are favourable, Member States are required, according to the gas storage regulation,⁹⁸ to purchase an equivalent of 15% of their gas storage via their local companies that submit the demand on their behalf.

As of this writing, four calls for joint gas purchases have been launched and three tendering periods were concluded.⁹⁹ Each call for gas purchases revealed an increase in companies' participation. Moreover, thanks to the platform and the adoption of the gas demand reduction regulation,¹⁰⁰ Member States refilled their gas storage before the deadline set by the gas storage regulation. Already in August 2023 the EU's gas storage capacity reached 90%.¹⁰¹ Commissioner Šefčovič called for making the platform a permanent mechanism and to replicate it for other commodities to foster the EU's strategic autonomy and increase the competitiveness of the European industry.¹⁰²

DEFENCE

In the European Union the defence sector has always been an area in which intergovernmentalism clashed with supranational tendencies. Defence is considered to be Member States' sphere of high politics *par excellence*.¹⁰³ The Common Foreign and Security policy and the Common Security and Defence Policy are largely intergovernmental¹⁰⁴ with armed forces remaining under national control and defence spending and procurement falling

⁹⁸ Regulation (EU) 2022/1032 of the European Parliament and of the Council amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage, *Official Journal of the European Union*, Brussels, 29 June 2022.

⁹⁹ European Commission, "EU Energy Platform", Retrieved 15 November 2023, https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en#:~:text=After%20the%20first%20three%20rounds.gas%20to%20cover%20European%20demand.

¹⁰⁰ Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas.

¹⁰¹ European Commission, "EU reaches 90% gas storage target ahead of winter", Retrieved on 15 November 2023, https://energy.ec.europa.eu/news/eu-reaches-90-gas-storage-target-ahead-winter-2023-08-18_en

¹⁰² European Commission, "Remarks by Executive Vice-President Šefčovič on the results of the third joint EU gas purchasing tender", Retrieved 15 November 2023,

https://ec.europa.eu/commission/presscorner/detail/en/speech_23_4798

¹⁰³ Anand Menon, 'Defence Policy and the Logic of 'High Politics'', in *Beyond the Regulatory Polity? The European Integration of Core State Powers*, eds. Philipp Genschel, and Markus Jachtenfuchs (Oxford, 2013), 66.

¹⁰⁴ Riddervold Marianne, "(Not) in the Hands of the Member States: How the European Commission Influences EU Security and Defence Policies", *JCMS: Journal of Common Market Studies* 54, no. 2 (July, 2015), 353.

under the responsibility of the country. The defence market in the European region is characterised by an inter-state competition on production where different procurement schemes exist and clash with each other.¹⁰⁵

The European Commission advanced in 2009 a proposal for a directive for regulating defence and sensitive security procurement.¹⁰⁶ Nonetheless, in 2016, fragmentation persisted, and two major initiatives were launched: the European Global Strategy and the European Defence Action Plan. The former highlighted once again the necessity of cooperation between the Member States,¹⁰⁷ and focused on strengthening the European defence industry for Europe's strategic autonomy. The latter established a European Defence Fund directly managed by the European Commission.

The persistent fragmentation of the market was made more evident with the outbreak of the war in Ukraine. In March 2022, the European Council¹⁰⁸ commissioned from the Commission and the HR/VP Josep Borrel an analysis on the Member States' defence investment gap¹⁰⁹ and committed to "bolster European capabilities".¹¹⁰ Member States would increase defence expenditure, cooperate on joint projects and procurement, boost innovation through civil and military cooperation, and strengthen the EU's defence industry.¹¹¹ Nevertheless, the joint communication¹¹² presented by the Commission and the HR/VP, pointed out that the military gap resulted in part from a general tendency over the last years to cut defence expenditure. Therefore, they called for the replenishment of stocks of defence

¹⁰⁵ *Ibid.*, p.15.

¹⁰⁶ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, Brussels, 13 July 2009.

¹⁰⁷ European External Action Service, Shared Vision, Common Action: A Stronger Europe: a Global Strategy for the European Union's Foreign And Security Policy", Brussels, June 2016, retrieved on 1st of May: https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf, 46.

¹⁰⁸ European Council, "Versailles Declaration", *op. cit.*

¹⁰⁹ Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions "on the Defence Investment Gaps Analysis and Way Forward", JOIN (2022) 24 final, Brussels, 18 May 2022.

¹¹⁰ *Ibid.*

¹¹¹ European Council, "Versailles Declaration", *op. cit.*

¹¹² "Joint Communication", *op. cit.*

material, with the Commission advancing a proposal for the establishment of the European Defence Industry Reinforcement through Common Procurement Act (EDIRPA).¹¹³

Failing to address the EU's defence market fragmentation

In 2009 the European Commission advanced a proposal¹¹⁴ regulating defence and sensitive security procurement to increase cooperation in the market. Member State, however, continued to conclude agreements individually, and the introduction of article 346 TFEU¹¹⁵ excluded defence procurement from the internal market rules. In addition, the exemption allows Member States not to disclose any information they consider contrary to their security interests and given the lack of a clear definition of 'security interest', countries use this exemption clause extensively, even in unjustified cases.¹¹⁶

The European institutions have launched both intergovernmental and supranational frameworks of cooperation in the sector. For what it concerns the latter, the Commission introduced in 2016 the European Defence Action Plan to ensure that the EU's technological and industrial base remained integrated. The plan envisaged the creation of the European Defence Fund (EDF) to increase the defence industrial base and limit market fragmentation under the Multiannual Financial Framework 2021-2027. The fund, available from January 2021, has been often considered an exercise of the supranational power of the European Commission¹¹⁷ because by using as a legal basis articles 173, 182, 183 and 188 TFEU,¹¹⁸ it exported the community method to the defence sector. In this way, the institution overcame

¹¹³ European Commission, "Proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act", 2022/0219 (COD), Brussels, 19 July 2022.

¹¹⁴ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, *op. cit.*

¹¹⁵ European Union, "Consolidated Version of the Treaty on the Functioning of the European Union of 13 December 2007", *Official Journal of the European Union*, C326/47, 26 October 2012, article 346.

¹¹⁶ Calcara Antonio, *European Defence Decision-Making: Dilemmas of Collaborative Arms Procurement*, 15.

¹¹⁷ *Ibid.*, p. 856.

¹¹⁸ European Union, "Consolidated Version of the Treaty on the Functioning of the European Union of 13 December 2007", *Official Journal of the European Union*, C326/47, 26 October 2012.

the legal prohibition enshrined in article 41(2) TEU¹¹⁹ that maintains the ban for the EU to finance activities having defence implications.¹²⁰ However, given the repercussions on national defence decisions, Member states strongly criticised and feared the possible involvement of the European Commission in a sector pertaining to their competence.¹²¹ The final design of the EDF reflected the need of Member States to limit the role of the Commission.¹²² The final amount of the fund was reduced from 12 to 8 million euros, and its scope was limited to research and development. Although the programme is implemented by the Commission, it is inserted in a series of intergovernmental initiatives such as Permanent Structured Cooperation (PESCO) between Member States, the Capability Development Plan, and the Coordinated Annual Review on Defence. Some claimed that the fund is a “enabler of intergovernmentalism”.¹²³

The Commission without “weapons”: EDIRPA and the European Defence Investment Programme

The war in Ukraine brought back to the Commission’s agenda the need to address market fragmentation. In July 2022, the European Commission advanced the EDIRPA proposal to establish a temporary joint purchasing mechanism for procuring weapons. The purpose of this initiative did not differ much from the vaccines and energy procurements, with the objective of avoiding competition between Member States and a fragmentation of the demand which could lead to inefficiencies on the supply side, since “defence manufactures might privilege major orders”¹²⁴, hence leaving smaller or vulnerable countries that lack the financial means

¹¹⁹ European Union, “Consolidated Version of the Treaty on the European Union of 13 December 2007”, *Official Journal of the European Union*, C326/47, 26 October 2012.

¹²⁰ *Ibid.*, article 41(2).

¹²¹ Catherine Hoeffler, "Beyond the Regulatory State? the European Defence Fund and National Military Capacities," *Journal of European Public Policy* (2023), 17.

¹²² *Ibid.*, p. 18.

¹²³ *Ibid.*

¹²⁴ European Commission, “Proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act”, 2022/0219 (COD), Brussels, 19 July 2022, 3.

exposed. The other feature it shares with the EU Energy Platform is that the purpose of the EDIRPA is to use joint procurement for refilling the military capability of the Member States, along the same line of using joint purchasing of gas to refill gas storages.

The Commission took advantage of this momentum to expand Member State cooperation, while simultaneously strengthening the defence market and industry. The proposal, the first of its genre, shares the same legal basis of the EDF, Article 173 TFEU,¹²⁵ aiming to support the competitiveness of European industry. The proposal envisages the possibility to reimburse with the EU budget Member States whose joint purchases involve a consortium of at least three countries.¹²⁶ However, the total budget available stands currently at EUR 300 million, against the initial proposal of EUR 500 million.

Contrary to the previous cases, here the Commission does not envisage itself as a negotiator on behalf of the Member States. Instead, it proposed a *procurement agent* to act on their behalf¹²⁷ that could be a Union body or an international organisation contracted by at least three Member States. Therefore, neither the Commission nor other union institutions would cover this role. The final text agreed by the co-legislators substituted the definition of procurement agent that is defined as the “contracting authority as described in Directives 2014/24/EU and 2014/25/EU, established in a Member State or an associated country, or the European Defence Agency or an international organisation contracted by the Member States”.¹²⁸ The restriction to include only the European Defence Agency, which is purely an intergovernmental body under the control of the Council, reiterates the will of the Member States to exclude any kind of supranational intervention in the negotiations.

¹²⁵ European Union, “Consolidated Version of the Treaty on the Functioning of the European Union of 13 December 2007”, *Official Journal of the European Union*, C326/47, 26 October 2012, Article 173.

¹²⁶ Regulation (EU) 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA), *Official Journal of the European Union*, Brussels, 18 October 2023.

¹²⁷ European Commission, “Proposal on establishing the European defence industry”, *op. cit.*, article 2.

¹²⁸ Regulation (EU) 2023/2418 “EDIRPA”, *op. cit.*

The Commission will still play a role in defining via an implementing act the multiannual work programme that sets the funding priorities and conditions. Moreover, it monitors its implementation and informs the European Parliament and the Council about the progress made in strengthening the EU's industrial base and the cooperation between Member States.

Given the limited role of the Commission in the procurement scheme and the absence of a connection with an intermediary that carries out the negotiations, one cannot consider it an orchestrator. However, as it happened with the EDF, the European Commission can use its power of “fund manager” to try to have an impact, albeit limited.

In connection with the EDIRPA, the Commission presented a long-term plan with the proposal for the creation of a European Defence Investment Programme (EDIP)¹²⁹ that would establish a European Defence Capability Consortia through which Member States could purchase necessary defence instruments. As the purchased goods will be developed in common within the EU, the European Commission would introduce some incentives, such as VAT exemption, new financial solutions, and the review of the European Defence Fund Bonus.¹³⁰

As in the previous cases, the Commission was acting in a scenario full of uncertainty caused by the war in Ukraine¹³¹. On the other hand, the need for the European Council to request the Commission and High Representative to carry out a study to verify the level of strategic gap of the current defence capability of the Member States demonstrates the low level of information that Member States possess on the market. Regardless of the above conditions, the Commission cannot be considered a supranational entrepreneur, as it acted on the proposal

¹²⁹ *Ibid.*

¹³⁰ European Commission, “Stronger European defence”, retrieved on 29 April 2023, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/stronger-european-defence_en#documents

¹³¹ David E. Sanger and Steven Erlanger, “Fears Are Mounting That Ukraine War Will Spill Across Borders”, *The New York Times*, Retrieved on 1st May 2023, <https://www.nytimes.com/2022/04/27/us/politics/ukraine-war-expansion.html>

advanced by the European Council in Versailles.¹³² As Moravcsik claimed,¹³³ a supranational entrepreneur is successful when it is able to overcome transnational collective problems that manifest when there is an economic or political change that triggers the emergence of a new social interest requiring transnational coordination. The war in Ukraine undoubtedly highlighted the need to have an EU coordinated response against Russia. However, it is unlikely that the Commission will act as an entrepreneur in this purely intergovernmental field, despite some authors maintaining the contrary.¹³⁴

CONCLUSION

The Covid-19 pandemic represents a watershed in the European Commission's crisis management power. After the first joint procurement for vaccines took place, it presented more proposals envisaging the same mechanism. Until now, all of them have been introduced during cross-border crises where it was necessary to avoid a fragmentation of the demand to purchase a rare good and a prompt response was needed. The Covid-19 crisis, as well as the outbreak of the war in Ukraine, set off a European-level response, despite neither health, nor energy nor defence being fields in which the European Union possesses an exclusive competence. Using the theories of supranational entrepreneurship and orchestration, this paper investigates the extent to which the European Commission acted as a supranational entrepreneur and, at the same time, whether it performed the role of orchestrator.

In both the health and energy crises, the Commission introduced strategies envisaging joint procurement frameworks, thus acting as an entrepreneur able to find solutions to cross-border challenges. The emergency and temporary measures that were introduced during the crises became permanent. After the pandemic, HERA was established as a new authority dealing with the procurement of influenza vaccines or personal equipment. Equally, in

¹³² European Council, "Versailles Declaration", *op. cit.*, 4.

¹³³ Andrew Moravcsik, "A New Statecraft?", *op. cit.*, 283.

¹³⁴ Pierre Haroche, "Supranationalism Strikes Back: A Neofunctionalist Account" *op. cit.*, 858.

December 2023, the Gas and Hydrogen Package was adopted, instituting a permanent joint purchasing mechanism for gas and LNG and a temporary pilot project for joint purchasing of hydrogen. These permanent and new initiatives are clear symptoms of a system that is changing and that sees more supranational involvement.

For what concerns orchestration theory, the health and energy sectors differed substantially. In the former, the first stage saw a hybrid form of indirect governance, entailing elements of orchestration with the Member States acting as orchestrators and the Commission being the intermediary that purchased vaccines. Whereas in the second stage, it became the central negotiator that both procured vaccines and determined vaccine distribution, clearly imposing limits on the Member States' power over their national health policy. In the energy field, the Commission acted as an orchestrator by providing assistance and soft support to the service provider. By doing so, it expanded its involvement and knowledge of the sector, setting the path towards a more supranational energy policy.

Finally, the defence sector strongly differs from the others. In the EU, cooperation on joint development or procurement of defence equipment has always been limited. The war in Ukraine highlighted the weakness of cooperation and called for more unity. The EDIRPA regulation represented an answer to the request of the European Council calling for the establishment of joint procurement for the sector. Here, the possibility for the Commission to shine as a supranational entrepreneur was limited, despite the crisis. The final text of the regulation did not foresee any possible involvement of the institution in the negotiation process, neither directly (like in the health case) nor via an intermediary. Its role was limited to the management of the working programme of a sum that for the defence sector is quite derisory.

This work tried to explain the role of the Commission by following the crisis patterns. However, further research should be conducted on understanding how the institutional dimension, both within and outside the European Commission, changes with the introduction

of these new mechanisms, as well as on the impact that these proposals have in fostering further integration at EU level in these areas.

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