CHAPTER 3
European Joint Cross-border Procurement and Innovation

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1. The Challenges for Cross-border Procurement

Arguably, European integration in the procurement sector is still a challenge. More than forty years of Procurement Directives have not yet succeeded in opening the internal procurement market. Many of the reasons are well-known: the initially limited scope of the Directives, and the varied implementations in different national procurement systems, which raise legal barriers and exacerbate language barriers. Integrity issues must also be addressed.(1) All these factors help explain the reluctance of suppliers to cross the national borders, and buyers' inclination to maintain their nationally based supply chains.

The Directives seem to have done better at opening national markets compared to even more fragmented markets at regional and local levels. The development of electronic means for a fully digital transition has also logged behind. Nonetheless, significant changes are coming rapidly and the developments across the Atlantic make the trajectory of those changes clearer. Technologies and joint procurement have radically changed the procurement sector as we know it. The burdens of a traditional paper based award of a single contract for a single procuring entity seem to be rapidly receding.

(1) R. CAVALLO PERIN and G. M. RACCA, "Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process", *in The Changing Administrative Law* (D. SORACE and L. FERRARA eds.), Giappichelli, Springer, 2019, forthcoming; Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally (G. M. RACCA and C. R. YUKINS eds), in *Droit Administratif/Administrative Law Collection* (J.-B. Auby dir.), Bruylant, Bruxelles, 2014.

Public purchasing power seems to have become a lever of industrial policy as Europe moves to support integration through the growth of SMEs, sustainability and innovation. From the other side of the Atlantic, more pragmatically procurement is used as a lever for gaining more efficiency and savings, including across borders, but without Europe's market integration goals.

From this perspective it is easier to understand the differing approaches to joint cross-border procurement in the EU and in the United States.

Given the integration imperative in the European Union, it is important to highlight the critical issues that have emerged in the European experience. Administrative cooperation seems to be a strategic necessity for the ongoing European integration to develop shared knowledge and capacities on a voluntary basis of shared public interest. This will also allow European governments to pursue increasingly efficient, innovative, and high quality goods and services. An analysis of different ways to set agreements to reconcile differing goals and provisions may also provide useful ideas to share across the Atlantic.

Developing transparent and efficient procurement systems appears to be a shared goal. Nonetheless, the real challenge is implementing them thorough the most advanced technologies so as to ensure that public purchasing power is steered toward benefiting citizens across the EU Member States.

2. The European Administrative Cooperation among Public Administrations

Over the last decades the relationships among the EU Member States' administrations have been favored by the application of some key principles, such as those of sincere cooperation and of mutual recognition.(2) Yet, a prominent role has also been played by more recent provisions on administrative cooperation.(3) Administrative cooperation represents a significant

(2) K. A. Armstrong, 'Mutual recognition', in C. Barnard and J. Scott, *The Law of the Single European Market*: *Unpacking the premises*, Hart Publishing, Oxford and Portland, Oregon, 2002, 231; M. Lottini, 'From 'Administrative Cooperation' in the Application of European Union Law to 'Administrative Cooperation' in the Protection of European Rights and Liberties', in *European Review of Public Law*, 2012, 131; D. U. Galetta, 'Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di 'cooperazione amministrativa' dell'art. 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?', in *L'interesse pubblico tra politica e amministrazione* (A. Contieri, F. Francario, M. Immordino, and A. Zito eds), ESI, 2010, I, 191. E.C.J. 10 February 2000, FTS, C-202/97, *Fitzwilliam Executive Search Ltd v. Bestuur van het Landelijk instituut sociale verzekeringen*; E.C.J. Presidential ordinance, 19 April 2005, C-521/2004, *Tillack v. EC Commission*.

(3) Arts. 6, 74-76 and 197, Treaty on the Functioning of the European Union (hereinafter also referred to as 'TFEU'); M. P. Chiti, 'Introduzione. Lo spazio amministrativo europeo', in *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (M. P. Chiti and A. Natalini eds), Il Mulino, Bologna, 2012, 19.

challenge for European public administrations.(4) That is because it is one of the recent areas of competence of the European Union, together with protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport.(5) Such competences are defined as 'supporting competences' related to areas where the European Union has already intervened by means of cross-cutting policies.

The European Union's general competence on administrative cooperation 'shall [...] be without prejudice to other provisions of the Treaties providing for administrative cooperation among Member States, and also between Member States and the Union'.(6) That objective envisages customs cooperation.(7) It also envisages coordination and cooperation between police, judicial and other competent authorities as well as the recognition of judgments in criminal matters.(8) Also in the scope of administrative cooperation is the creation of an area of freedom, security and justice with respect for fundamental rights. All this, however, safeguarding the peculiarities of the different jurisdictions and different legal traditions of the Member States.(9)

In these areas, national laws are not required to be harmonized. Nonetheless, supporting Member States' direct actions in such areas become essential to support, develop, and ultimately coordinate an integrated network of the national public administrations among the Union.

A lack of professionalism and capacity causes shortcomings in correctly performing public activities, though.(10) Professionalism arguably is the essential prerequisite for a structural reorganization and allocation of functions, including cooperation among European administrations.(11) Indeed, the development of professionalism is needed to prevent that the 'substantial

(4) Arts. 6 and 197, TFEU.

(5) Art. 6, TFEU.

(6) Art. 197(3), TFEU.

(7) Art. 33, TFEU: 'Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission'.

(8) Art. 82, TFEU. *See* E. Selvaggi, *Rapporti per la cooperazione penale fra Stati, Osservazioni a CGUE, 16 luglio 2015, n. 237*, in *Cass. Pen.*, 2015, 3800B; F. Spiezia, *La proposta di regolamento del 17 luglio 2013 per la creazione dell'agenzia dell'unione europea per la cooperazione giudiziaria penale. Lo stato dei negoziati e le prospettive per il futuro di Eurojust*, in *Cass. Pen.*, 2015, 1614C.

(9) Art. 67, TFEU. *See* also art. 87 TFEU, where it is affirmed that 'The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences'. F. Lafarge, *Administrative Cooperation between Member States and Implementation of EU Law*, in *European Public Law*, 2010, p. 600 et seq.; *The Internal Market after 1992. Meeting the Challenge. Report to the EEC Commission by the High Level Group on the Operation of the Internal Market*, op. cit.

(10) In Italy the principle of adequacy is set out in the Constitution, art. 118(1).

(11) *See*: EU Commission, *Making Public Procurement work in and for Europe*, COM(2017) 572 final, October 2017; Id. *Europe 2020 A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, March 2010. *See*: P. T. Mckeen, 'The importance of a professionally educated public procurement workforce: lessons learned from the U.S. experience', in *Integrity and Efficiency in Sustainable Public*

ineffectiveness – even if not formal – of European law' may result in inefficiencies within administrative structures, which would result in 'asymmetry' in the implementation of the European law.(12)

Arguably, professionally adequate organizations, capable of pursuing public interests and ensuring the effectiveness of public authorities, are therefore needed.(13)

The introduction of new European institutions and new levels of governance requires a redefinition in the competences of the different institutions at all levels in the 'European administrative space'.(14) The objectives are, notably, to support 'integration between national administrations and with the EU institutions which, while respecting national autonomy', pursue integrated administration models 'having the effect of defining common principles', while also favoring the possible convergence of organizational models.(15)

An 'open, efficient and independent' European administration, which is gradually going to be established, should progress in ensuring the right to good administration enshrined in the Charter of Fundamental Rights, also in order to foster the idea of 'administrative citizenship'.(16)

Contracts. Balancing Corruption Concerns in Public Procurement Internationally (G. M. Racca and C. R. Yukins eds), *op. cit.*, 319.

(12) D. Sorace, 'Una nuova base costituzionale europea per la pubblica amministrazione', in Lo *spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona*, (M. P. Chiti and A. Natalini eds.) cit., 82.

(13) On the forms of cooperation allowing the application of the EU law and related policies see H. C. H. Hofmann, *Mapping the European administrative space*, in *West European Politics*, 2008, 31. On the public procurement sector, see G. M. Racca, 'Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement', in *Public Procurement Law Review*, 3, 2010, 119-133.

(14) R. Cavallo Perin and G. M. Racca, *Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process*, cit. *See* also M. P. Chiti, *Lo spazio amministrativo europeo*, in *Studi in Onore di Alberto Romano*, Editrice Scientifica, Napoli, 2011, 163; Id., *Introduzione. Lo Spazio amministrativo europeo*, in *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (M. P. Chiti and A. Natalini eds.), cit., 19.

(15) *See* A. H. Turk, 'Judicial Review of Integrated Adminstration in the Eu', in *Legal Challenges in Eu Administrative Law* (H.C.H. Hofmann and A.H. Turk eds.), Cheltenham, Edward Eglar, 2009), 218. *See* also D. Deirdre Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account', in *European Law Journal*, Vol. 13, 4, July 2007, 523–541.

(16) R. Cavallo Perin, 'La configurazione della cittadinanza amministrativa', in *Dir. Amm.*, 2004, 201-208; J. Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon', in *European Public Law*, 2012, 297-298; EU Parliament, *Towards an EU Regulation on Administrative Procedure?*, 2010. Art. 41, Charter of Fundamental Rights of the European Union, codifies the principle of good administration (J. Schwarze, *ibidem*, 298). According to the jurisprudence of the European Court of Justice (hereinafter referred as to 'ECJ') the right to a good administration 'is one of the general principles of the rule of law common to the constitutional traditions of the Member States [and in which they find expression rights such as the] right of diligent and impartial treatment of a complaint' (ECJ, 30 January 2002, case T-54/99 *Max.Mobil v. Commission* Racc. II-313, par. 48 and 49). Those rights are enshrined in the law even before the entry into force of the Charter (ECJ, 18 September 1992, T-24/90, *Automec v. Commission*, Racc. II-2223, § 79, 15 September1998, T-95/96, *Gestevisión Telecinco v. Commission*, Racc. II-3407, § 53). *See* also ECJ, 22 February 2005,

Direct interventions in the European Union on administrative cooperation were traditionally limited by the principles of subsidiarity and proportionality.(17) Administrative cooperation may advance through European interventions to support Member States' administrations in order to increase the 'administrative capacity to implement Union law' for specific purposes.(18) Its effectiveness becomes a matter of public interest.(19) Administrative cooperation thus becomes an essential tool for the proper functioning of the European Union to the benefit of EU citizens.(20)

Strengthening 'cooperation' amongst public administrations is essential to ensure the effectiveness of European Union law and its national

C-141/02, *Commission v. Max.Mobil*, Racc. I-1283, par. 72; E. NIETO-GARRIDO, I. M. DELGADO, *European Administrative Law in the Constitutional Treaty*, Oxford 2007, 26; K. LENAERTS, '"In the Union we trust": Trust-enhancing principles of Community law', in *Common Market Law Review*, Issue 2, 2004, 317 – 343; I. RABINOVICI, *The Right to Be Heard in the Charter of Fundamental Rights of the European Union*, in *European Public Law* 18, n. 1, 2012, 149; M. TRIMARCHI, 'L'art. 41 della Carta europea dei Diritti Fondamentali e la disciplina dell'attività amministrativa in Italia', in *Dir. Amm.*, 2011, 537; J. PONCE SOLÈ, EU Law, 'Global Law and the Right to Good Administration', in *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison* (E. CHITI and B. G. MATTARELLA eds.), 2011, Part 2, 133; M. CARTABIA, 'I diritti fondamentali in Europa dopo Lisbona: verso nuovi equilibri?', in *Giorn. Dir. Amm.*, no. 3/2010, 221; D.U. GALETTA, 'Diritto ad una buona amministrazione e ruolo del nostro giudice amministrativo dopo l'entrata in vigore del trattato di Lisbona', in *Dir. amm.*, 2010, 601; F. TRIMARCHI BANFI, 'Il diritto ad una buona amministrazione', in *Trattato di diritto amministrativo europeo* (M. P. CHITI and G. GRECO eds.), Milano, 2007, I, 49 - 86; E. CHITI, 'Il principio di buona amministrazione', in *Diritto amministrativo europeo – Casi e materiali* (E. CHITI, C. FRANCHINI, M. GNES, M. SAVINO, and M. VERONELLI eds), Milano, 2005, 3940; F. NICOLETTI, *'Il principio di "buona amministrazione" nell'Unione europea tra garanzia ed efficienza'*, in *Il diritto dell'economia*, n. 4/2006, 776.

(17) Treaty on European Union (hereinafter referred to as 'TEU'), art. 5; Treaty of Lisbon, annex protocol 2.

(18) Arts. 6 and 197, TFEU. *See* F. LAFARGE, 'Administrative Cooperation between Member States and Implementation of EU Law', in *European Review of Public Law*, 2010, 597-616, qualifies administrative cooperation as an essential element for the proper functioning of EU policies and related European legislation, particularly with regard to matters related to the internal market. Administrative cooperation is the instrument to ensure free movement of goods, persons, services and capital, and to reduce barriers between the public administrations of the States. In this context, the transition from the concept of a common market to that of the single market implies a higher level of cooperation. *See* Directive 2006/123/EC, 12 December 2006, on services in the internal market, which states that 'administrative cooperation is essential to make the internal market in services function properly. Lack of cooperation between Member States results in proliferation of rules applicable to service providers or duplication of controls for cross-border activities, and can also be used by rogue traders to avoid supervision or to circumvent applicable national rules on services. It is, therefore, essential to provide for clear, legally binding obligations for Member States to cooperate effectively'. *See The Internal Market after 1992. Meeting the Challenge. Report to the EEC Commission by the High Level Group on the Operation of the Internal Market*, 28 October 1992.

(19) TEU, art. 4: 'The Member States shall take any appropriate measure, general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union'.

(20) *See* arts. 6 and 197, TFEU. F. CORTESE, *Il coordinamento amministrativo. Dinamiche e interpretazioni*, Milano 2011, 140; E. CHITI, 'Il Trattato di Lisbona', in *Giorn. Dir. amm.*, 2010, 221, where it is stated that art. 197 TFEU seems to be posing a new 'constitutional' attention to the issue regarding national public administrations' capacity, qualifying the effectiveness of enforcement as a question of common interest and acknowledging that it should be ensured by a system of cooperation at the EU level.

implementation, thus favoring integration among public administrations and different national legal systems.(21) Administrative cooperation, either as vertical cooperation between the European and national levels or horizontal collaboration among national administrations, is being developed as a new way of acting of the European Union. That does not limit the responsibility of the Member States. Rather, an EU internal policy requires actions being taken to 'support, coordinate or supplement the actions of the Member States'.(22) That policy applies without prejudice to the Member States' obligation to implement the EU law. The same can be said as far as the prerogatives and duties of the EU Commission.(23) The latter should thus support the efforts of Member States in the exercise of their functions without necessarily requiring a harmonization of the provisions among the different legal systems of Member States.(24) The aim of such a cooperation can be the creation of an integrated system of public administrations, whether national or European, aimed at promoting the wellbeing of European citizens and the enhancement of social cohesion.(25)

The "European administrative space" has developed in different sectors by identifying suitable administrative cooperation tools to define 'integrated

(21) M. Lottini, 'From "Administrative Cooperation" in the Application of European Union Law to "Administrative Cooperation" in the Protection of European Rights and Liberties', in *European public law*, 2012,127-147, where cooperation is considered as an integration tool, which aims to ensure the proper application of EU law and the protection provided by the ECJ.

(22) Art. 6, TFEU: 'The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be (a) protection and improvement of human health; (b) industry; (c) culture;(d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation'. EU Commission, *Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')*, 4 October 2011, SEC(2011) 1169 final. *See* J. Wiggen, 'Public Procurement Law and Public-Public cooperation: reduced flexibility but greater legal certainty ahead? A note on the Commission's Staff Working Paper on the application of EU public procurement law to relations between contracting authorities and proposal for a new directive', in *Public Procurement Law Review*, 2012, 225–233.

(23) *See* art. 197(3), TFEU.

(24) F. Cortese, 'Gli strumenti per la cooperazione amministrativa verticale', in Astrid Rassegna, n. 150/2012; *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (M. P. Chiti and A. Natalini eds), cit., 168; J. Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon', in *European public law*, 2012, 287.

(25) M. P. Chiti, *Introduzione. Lo Spazio amministrativo europeo*, *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (M. P. Chiti and A. Natalini eds), cit., 19. *See* EU Parliament, *European administrative law in the light of the Treaty of Lisbon: introductory remarks*, 2011; Id., *Towards an EU Regulation on Administrative Procedure?*, 2010, where the convergences between the evolution of European administrative law and of the national administrative laws are highlighted. From the beginning the legal traditions of the Member States have influenced the ECJ case law in the formulation of general principles in the matter of 'circular motion'; then, the principles of law established by the ECJ have influenced the administrative law of the Member States and, increasingly, the European legislation and secondary sources, at times pushing Member States to change their internal administrative laws in compliance with European standards even in areas outside the Union's competence.

administrations' models.(26) These can favour the effectiveness of the internal market and competition among economic operators, both of which are fundamental goals (in view of a European administrative citizenship), particularly in the public contracts and services sectors.(27)

The wording 'to supplement the actions of the Member States' can be interpreted as an effort to create a system of reciprocal interaction among administrations within a European framework that may develop common experiences and principles in the implementation of EU provisions in different sectors. The same applies to procurement related to works, goods and services.(28) Indeed, further provisions for the development of such cooperation have been introduced in the last EU Directives on public procurement.(29) Such cooperation might significantly innovate organizational models pursuing the most efficient solutions in the procurement sector.(30) As the integration process is notably asymmetric, it should be observed that such differences are inevitable and that only more advanced experiences may drive future changes in the long run.(31)

Such forms of cooperation are of 'common interest' to the Member States for the purpose of adapting the peculiarities of the national legal systems to the common goals of development and enlarging participation in the public

(26) H. C. H. Hofmann, *Mapping the European administrative space*, in *West European Politics*, cit., 665 - 668.

(27) A. Romano Tassone, *'I "diritti" tra ordinamento interno ed ordinamento comunitario'*, in *Diritto e processo amministrativo*, 2008, 112. J. Schwarze, *European Administrative Law in the Light of the Treaty of Lisbon*, cit., 298 - 299, where it is clarified that the choice of founding 'European administrative law' on the concept of rule of law has made it possible to define the development of the protection of fundamental rights, including the right to good administration (Charter of Fundamental Rights of the European Union, art. 41) and the right of access to documents (Charter of fundamental rights of the European Union, art. 42). F. Bassanini, 'Prefazione', in *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (M. P. Chiti and A. Natalini eds), cit.,16.

(28) Art. 6, TFEU; in addition to arts. 114-117 TFEU.

(29) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (hereinafter collectively referred to as 'Procurement Directives'; for clarity purposes, the terms 'Procurement Directive' and 'Directive' refers only to Directive 2014/24/EU).

(30) Art. 298, TFEU: '1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end'. P. Craig, *A General Law on Administrative Procedure, Legislative Competence and Judicial Competence, European Review of Public Law*, 2013, 503, where the legitimacy of the European institutions to adopt a general regulation on administrative procedure is brought back to the rules of the Treaty, which expressly confers the regulatory power in certain sectors: telecommunications, waste management, and protection of competition.

(31) R. Cavallo Perin and G. M. Racca, *Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process*, cit.

procurement market.(32) That is particularly true considering that the competitiveness of European countries also depends on the performance of their public administrations and the quality of the services they assure to citizens and companies. Therefore, the intervention of the European institutions should be aimed at completing national actions so as to ensure 'European quality services' to citizens, with the aim of fulfilling the social goals of the Treaties.(33)

Another area of interest might be the special provisions of the TFEU on cooperation in tax and civil matters.(34) These provisions may in fact favour the harmonization of national legislations in order to guarantee 'the establishment and functioning of the internal market and to avoid distortions of competition'(35), especially in the procurement sector, from the definition of needs to the award and execution of public contracts. Cooperation among contracting authorities may become an effective tool to spur the single market of public procurement so as to develop new award and execution procedures, which will inevitably tend to integrate and harmonize the practice and acts of the administrations involved. Effects of such harmonization may be also viewed from the supply-side perspective, as simplification of the participation of EU suppliers, including SMEs, award procedures, which might lead to further growth and quality of procurement.

The Treaty fosters actions aimed at promoting 'the exchange of information and public officials' while 'supporting training programs' to overcome inadequate systems that are inefficient and unable to properly implement the

(32) D. U. GALETTA, 'Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di «cooperazione amministrativa» dell'art. 10 Tce, per definire il fenomeno dell'amministrazione intrecciata?', in *Riv. it. dir. pubbl. com.*, 2009, 1689; M. P. CHITI, *A rigid Constitution for a flexible Administration*, in *European Review of Public Law*, 2004, 175.

(33) D. U. GALETTA, *L'autonomia procedurale degli Stati membri dell'Unione europea: «Paradise Lost?»*, Torino, Giappichelli, 2009; M. P. CHITI, 'Lo spazio amministrativo europeo. Introduzione', in *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (M. P. CHITI and A. NATALINI eds), cit., 26 - 27. *See*: J. SCHWARZE, *European Administrative Law in the Light of the Treaty of Lisbon*, in *European Public Law*, 2012, 294, where the 'voluntary' nature of cooperation is highlighted, as governed by art. 197 TFEU where the European Union action is used to support the Member States in order to 'improve their administrative capacity to implement Union law' (TFEU art. 197(2)) helping to ensure their effectiveness.

(34) Arts. 113 and 115, TFEU; Directive 2011/16/EU, 15 February 2011, on the obligations of national authorities to send information to the competent authorities of the other Member States. Art. 81, TFEU, where it is provided that 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States'.

(35) Art. 113, TFEU. F. LAFARGE, *Administrative Cooperation between Member States and Implementation of EU Law*, cit., 602 - 611, where a distinction is made between the duties of cooperation provided for by the EU legal framework (art. 33, TFEU, in the field of customs cooperation; art. 46(a), TFEU, in the field of free movement of workers; art. 74, TFEU, in the field of an area of freedom, security and justice; art. 81, TFEU, in the field of judicial cooperation on civil matters) and optional tools aimed to favour cooperation.

EU law and to meet the needs of the communities.(36) The EU Cooperation in public officials' training leads to the dissemination of best practices and information for the pursuit of the effectiveness of European law as a common goal.(37) All this is beyond, even, the effects of legislative harmonization.(38)

Cooperation and networking strategies among European public administrations involve an inevitable comparison among the services rendered by national administrations (benchmarking) and the circulation of best procurement strategies and practices. Thus, it may be possible to develop qualitative performance standards (minimum and uniform), supranational parameters and the definition of European indicators, levels of performance, and the accountability of public administrations in the implementation of 'the right to good administration'.(39)

Cooperation provides a balance between the exercise of economic freedom and the principle of solidarity, with an effective implementation of social rights, already recognized in the Member States legal orders. As a result, it pursues an effective social and economic cohesion. In addition to that, it may encourage the development of European public services, mainly through horizontal cooperation among public administrations. The implementation of the European administrative space may bring a progressive overlap with the organizational, administrative, and judicial autonomy of legal entities, as defined by national legislation. From this perspective, horizontal cooperation

(36) Art. 197(2), TFEU, with regulations approved by the Parliament and Council.

(37) *See*, by way of example, the Austrian Public Procurement Excellence Programme (PPE), which is the first European training program dedicated to CPBs professionals only. It is an EU-funded specialised training programme to provide public procurement practitioners with the core knowledge, skills and methods of modern public procurement. Among the forms of cooperation in the training of public officials in Europe, we should note the European Institute of Public Administration (EIPA) which, through a network among public administrations (European, national and local), offers integrated training with activities of research and applied consultancy. Another example is the European Public Administration Network (EUPAN), which is a type of informal cooperation among the public administration ministers of the Member States, the EU Commission and possible observers, carrying out its activities at the political, managerial and technical levels (including through special groups of work): Common Assessment Framework, 2013. S. Ponzio, *La valutazione della qualità delle amministrazioni pubbliche*, Nel Diritto editore, Roma, 2012, 22; D. U. Galetta, *Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di «cooperazione amministrativa» dell'art. 10 Tce, per definire il fenomeno dell'amministrazione intrecciata?*, cit., 1689.

(38) C. Franchini, 'Les notions d'administration indirecte et de coadministration', in *Droit administratif européen* (J.B. Auby and J. Dutheil De La Rochére eds.), II ed., Brussels, 2014; S. Cassese, 'Concentrazione e dispersione dei poteri pubblici', in *Studi in onore di Biscaretti di Ruffia*, Milano, Giuffrè, 1987, I, p. 155; Id., 'Global administrative law: The state of the art', in *International Journal of Constitutional Law* 13(2), April 2015; Id. *Research Handbook on Global Administrative Law*, Edward Elgar Publishing, 2016.

(39) Charter of Fundamental Rights of the European Union, art. 41. *See*: F. Bassanini, 'Prefazione', in *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (M. P. Chiti and A. Natalini eds), cit., 15 - 16, concerning the creation of a 'Maastricht public administration' and to the possible setting in the Treaty of 'quality standards and minimum efficiency while respecting the diversity of the choices made by each country with regard to the institutional and organizational models and the status of civil servants''.

among professional organizations, such as central purchasing bodies (CPBs) through joint cross-border procurement, might genuinely promote innovation, growth, and sustainable development in specific sectors.

Administrative cooperation, enhanced by the increasing use of technology, may develop a number of European networks able to improve the quality of administrative action at European and national levels.(40) The development of 'smart contracts' through new technology may also favor new forms of cooperation with collaborative agreements among suppliers and public administration aiming at a shared goal, *i.e.*, the correct and prompt execution of public contracts.(41)

3. Cooperation Agreements involving Contracting Authorities from Different Member States

As mentioned earlier, implementing administrative cooperation among public administrations from different Member States' in the procurement sector might result in increasing the participation of tenderers. It would also enhance the quality of the selection process to the benefit of the final stakeholders of any procurement system, the citizens.

Any cooperation among procurement entities, both of the same country or cross-border, can turn into a benefit for the stakeholders, whenever the goals and the strategies are correctly and intelligently defined.

(40) Tools that can be used to exploit the full potential of these means include the exchange of information between institutions, agencies and national public administrations, the so-called IDABC Interoperable Delivery of pan-European eGovernment Services to Public Administrations, Business and Citizens whose objective is the development of e-government services to public authorities, economic operators and citizens; and the Internal Market Information System, which is the European cooperation tool aimed at facilitating the exchange of information among public administrations of EU States. In addition, the EU Commission has unified in one program – the Interoperability Solutions for European Public Administrations (ISA) – forty actions related to activities carried out in previously EU-funded projects aimed at interoperability of information of public administrations and standardization of content in which a special interest has been taken in those specifically aimed at simplifying the formalities relating to public contracts, especially of cross-border and transnational character. As part of the ISA program on interoperability tools for public administrations on public contracts, a mention goes to the action called 'Greater clarity of evidence requirements in the EU public procurement' – aimed at developing computer tools (e-Certis) to facilitate participation in the selection procedures for a contractor, including for SMEs – and to the European Single Procurement Document (ESPD). *See*: F. LAFARGE, *Administrative Cooperation between Member States and Implementation of EU Law*, cit., 612 - 614, on the forms of administrative cooperation developed in Europe since the mid-1990's through the use of databases.

(41) *See* G.M. DI GIUDA and G.M. RACCA, *From Works Contracts to Collaborative Contracts: The Challenges of Building Information Modeling (BIM) in public procurement*, Chapter 8 in this book; S. VALAGUZZA, 'Governare per contratto. Come creare valore attraverso i contratti pubblici', Editoriale scientifica, Napoli, 2018; G. M. RACCA, *I contratti pubblici collaborativi e le prospettive innovative della modellazione digitale (il* Building Information Modeling), in *La prossima città* (G. F. FERRARI eds), II ed. (Smart cities 2), Nemesis, forthcoming.

Cooperation depends on the market in which the contracting entities operate, and on the goals that they decide to pursue – for instance, setting industrial policy targets at National, regional or local level within the framework of a coordinated and agreed cross-border strategy.

The Procurement Directives encourage that kind of cooperation, including cross-border cooperation. They also grant the contracting entities freedom to opt for it, and pursue shared goals.(42)The provision that 'member States shall not prohibit' cross-border procurement implies that forms of cross border cooperation should enjoy support from the EU. That probably is due to the very limited cross-border participation in undertakings for the procurement of different Member States(43). European policymakers are also likely to stand for, and provide funds to cooperation projects of that kind in a design to promote cooperation and integration through the sharing of knowledge and experience.

The cross-border cooperation might apply to different phases of procurement, from the definition of needs to contract execution and management, and therefore contribute to meeting the common public objectives defined in the cooperation agreements.

Cooperation aimed at creating an aggregate 'public demand side', in fact, may contribute to achieving many of the objectives of the EU public procurement policies. It may also trigger economic operators' responsiveness to specific joint procurement strategies on a case-by-case basis.

Relevant tools and strategies should be adapted so as to reach goals of interest to the contracting entities involved, for instance by sharing risks arising from buying innovation, and also promoting the participation of SMEs. Pursuing such an objective may require adopting a specific strategy which calls for contract splitting into lots, and bids limited to a maximum of one or two lots so as to encourage the participation of economic operators from different Member States, and market penetration as well.

It can even be assumed that suppliers will be encouraged to collaborate in order to create an aggregate 'supply side' (e.g. temporary partnerships) which would allow them to keep having a competitive position while meeting the aggregate 'public demand side' requirements – something that has not happened frequently so far. Cooperation on the demand side in relevant sectors

(42) ECJ, 7 October 2004, Case C-247/02, where the Court declared void a national provision which restricted contracting authorities to choose a single criterion for the award of public contracts, thereby depriving them of the possibility of taking into consideration the nature and specific characteristics of such contracts, and of choosing the criterion most likely to ensure free competition and thus the best tender. *See* also Advocate General's Opinion delivered on 27 November 2007 in the Joined Cases C-147/06 and C-148/06, footnote no. 39

(43) Art. 39(2), Dir. 2014/24/EU.

may increase the purchasing power and help reduce contract fragmentation in highly concentrated oligopolistic markets, which would result in significant savings.(44) The strategies and goals of such forms of cooperation may vary in different markets and European economic areas based on the industrial policy objectives to be pursued.

It should be added that systematic cooperation through a network of competences can open the way to the development of legal systems capable of overcoming administrative nationalism, thus favoring case-by-case harmonization.(45) Indeed, cross-border cooperation in the public demand side can help overcome legal barriers arising from 'conflicts between different national provisions'.(46) The same applies to practical obstacles linked to language barriers.(47) These have actually limited cooperation agreements between public contracting authorities.(48)

Yet, such cooperation has already been envisaged, although implicitly, in the Directive 2004/18/EC on public procurement.(49) Not only does the

(44) I. Locatelli, *Public Contracting and innovations: lessons across borders*; Chapter 1 in this book. For the U.S. experience see: J. B. Kaufman, *Cooperative Purchasing: A US Perspective*, Chapter 2 in this book.

(45) R. Cavallo Perin and G. M. Racca, *Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process*, cit.

(46) Directive 2014/24/EU, recital no. 73: 'Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties concerning conflicts of national laws. Despite the fact that Directive 2004/18/EC implicitly allowed for cross-border joint public procurement, contracting authorities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding public contracts. In order to allow contracting authorities to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority, those difficulties should be remedied. Therefore, new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting authorities and enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers'; EU Commission, Making Public Procurement work in and for Europe, COM(2017) 572 final, cit.

(47) *See* the Commission's announcement: 'To increase transparency in public procurement opportunities, an online machine translation service will be available, free of charge, for all public procurement notices published in Tenders Electronic Daily (TED) from 15 January 2016'. This service is available from and to all 24 EU official languages and is subject to prior registration on the TED (Tenders Electronic Daily) platform, which is the online version of the Supplement to the Official Journal of the EU, dedicated to European public procurement.

(48) The EU Commission supports the strategic implementation of integrated networks of contracting authorities from different Member States by the creation of transnational networks: 'Enprotex', to stimulate innovation in textile protection products; 'Sci-Network' to promote the restructuring of existing buildings with innovative and sustainable materials, the analysis and the use of life-cycle analysis (LCA) and life-cycle costing (LCC); 'Lcb – Healthcare' with the purpose of creating innovative solutions with low emissions for the health sector. F. Lafarge, *Administrative Cooperation between Member States and Implementation of EU Law*, cit., 600, on the so-called Sutherland report (cit.) for the establishment of a general system of administrative cooperation.

(49) Recital no. 73, Dir. 2014/24/EU, highlights: 'specific legal difficulties concerning conflicts of national laws' in case of 'Joint awarding of public contracts by contracting authorities from different Member States'. It also reports that 'Despite the fact that Directive 2004/18/EC implicitly allowed for cross-border joint public procurement, contracting authorities are still facing considerable legal and

Procurement Directive explicitly allow contracting authorities to develop participation procedures that are accessible to the authorities of other Member States, but also forbids Member States to prohibit such an opportunity.(50) This implies supporting cooperation as well as the aggregation of public demand, thus favoring the achievement of the goals of the European internal market of public procurement.(51)

It should be noted that the aforementioned provisions recall the Italian legislation which, since the early years of the last century, has exempted public administrations establishing consortia from the obligation to tender for the establishment of public purchasing groups.(52)

Most forms of cooperation among public entities are grounded in national legal traditions envisaging administrative agreements among public entities. The European Court of Justice validated such a principle.(53) In fact, it excluded the obligation to tender for consortia constitutive agreements.(54) It can be argued, therefore, that traditional forms of administrative cooperation anticipated the provisions set forth in the recent EU Procurement Directive, aimed at fostering an institutional public administration culture that many countries in continental Europe have in common.(55) All this has been reaffirmed in the EU legal framework while recalling the legal orders of the Member States.(56)

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practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding public contracts', implicitly admitting this possibility. Similar programs are: the Competitiveness and Innovation Framework Programme (CIP – Competitiveness and Innovation Framework Programme; Programme for the Competitiveness of enterprises and SMEs (COSME) 2014-2020 and the Framework Programme for Research and Technological Development (FP7). Among the most advanced testing of innovative joint procurement across borders, a mention goes to the project HAPPI (Healthy Ageing – Public Procurement of Innovations), which aimed to favour product innovation and enabled a significant change in the contractor selection process, being carried out with a joint framework agreement among several Member States and open to accession by others, anticipating solutions now covered by the new directive on public procurement. *See* art. 69, Dir. 2014/24/EU.

(50) Arts 37 – 39, Dir. 2014/24/EU.

(51) Recital no. 71, Dir. 2014/24/EU. R. Cavallo Perin and G. M. Racca, *Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process*, cit.

(52) S. Civitarese, Art. 31, in *Commentario breve al testo unico sulle autonomie locali* (R. Cavallo Perin and A. Romano eds.), Breviaria Iuris, CEDAM, Padua, 2006, 182.

(53) ECJ, C-480/06, *Commission* v. *Federal Republic of Germany* (the so called 'Hamburg case), excluded the obligation to tender for the establishment of a public purchasing group. *See* R. Cavallo Perin, 'I servizi pubblici locali: modelli gestionali e destino delle utilities' in *L'integrazione degli ordinamenti giuridici in Europa* (P. L. Portaluri eds), Edizioni Scientifiche Italiane, Napoli, 2014, 23-40.

(54) R. Cavallo Perin – G. M. Racca, *La cooperazione amministrativa europea nei contratti e nei servizi pubblici*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2016, 1464.

(55) Art. 12, Dir. 2014/24/EU.

(56) R. Cavallo Perin, *Concluding remarks, Conference Proceedings: Appalti pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove direttive*, State Council, Rome, 14 May 2014, *Ius Publicum Network Review*, 38. *See* amplius: R. Cavallo Perin, *I servizi pubblici locali: modelli gestionali e destino delle utilities*, cit., 23-40.

In the absence of any explicit prohibition, various forms of cross-border administrative cooperation for joint procurement were initially established on the basis of applicable National and European principles and rules. Legal difficulties arose in terms of conflict between national laws, though. The Procurement Directive recalls existing legal and practical difficulties in purchasing from central purchasing bodies in other Member States, and even jointly awarding public contracts. Yet, it also remarks that the aforementioned type of cooperation was already possible under the previous EU Directive on public procurement.(57)

Indeed, cooperation among contracting authorities from different Member States for meeting public needs was first foreseen in the Green Paper for the Modernization of the EU public procurement, issued by the European Commission in 2011. That document acknowledged that 'cross-border cooperation between contracting authorities from different Member States could help us integrate procurement markets further, and also encourage the defragmentation of European markets across national borders'.(58) Indeed, the Procurement Directive reinforced those aims by stating that '[a] Member State shall not prohibit its contracting authorities from using centralized purchasing activities offered by central purchasing bodies located in another Member State'. It is therefore clear that the European principle aimed at promoting a single market while protecting competition among private actors does change the way in which EU countries and public authorities may procure.(59)

The Procurement Directive explicitly bars Member States from prohibiting their contracting authorities to use central purchasing bodies from other Member States.(60) As such, any National law in contrast with that provision should be considered inapplicable as breaching the said directive.

As already mentioned, national rules on cooperation are based on common national traditions in many EU Member States. In Austria provisions allowing cross-border cooperation in the procurement sector were already in force before 2014, and have probably been taken as a reference model for the Procurement Directive. Those provisions, however, had not been particularly successful as far as actual cooperation was concerned, especially with Germany. Besides, cross-border procurement was explicitly forbidden in Finland, where, as a

(57) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

(58) EU Commission (2011), *Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market*.

(59) I. Locatelli, *Public Contracting and innovations: lessons across borders*, Chapter 1 in this book.

(60) Art. 39(2) and (4), Dir. 2014/24/EU.

consequence, participation in joint cross border procurement projects was not possible. In the Italian legal system, the legal basis for joint cross border procurement can be found in the agreements among public authorities covered by the general law on administrative procedure and, at the local level, in conventions among municipalities.(61)

As far as the Belgian law and the law of Grand-Duchy of Luxembourg are concerned, the legal basis for the forms of cooperation in question can be found in their procurement law.(62)

In such a multifaceted European context, further clarification from the EU institutions to foster cooperation was therefore necessary: although already available as an option, in practice cooperation was a complex issue because of "specific legal difficulties concerning conflicts of national laws".(63)

Some pilot projects aimed at testing joint cross-border procurement, in fact, brought to the fore evidence of the criticalities in the development of its models.(64)

Pilot projects had to overcome many challenges, but their outcomes may lead to further improvement, especially because the implementation of the Procurement Directives has demonstrated that joint cross-border public procurement is the key to strengthening the single market.(65)

The EU Commission and, more recently, the European Parliament, have observed that the internal market could be shaped so as to develop innovative methodologies, products, works or services which do not yet exist.(66) In this

(61) *See* Art. 11, Law of 7 August 1990, no. 241 ('*Norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*'). *See* also art. 30, Legislative Decree of 18 August 2000, no. 267 ('*Testo unico delle leggi sull'ordinamento degli enti locali*').

(62) Under the Belgian Law, the opportunity to establish a central purchasing body was made possible pursuant articles 24, 31 and 32 of the Act of 15 June 2006 on public procurement, and also articles 136, 137 and 138 of the Royal Decree of 15 July 2011. The Public Procurement Act of 17 June 2016 replaced the former Act of 15 June 2006 as it transposed the Public Procurement Directives 2014/24/EU and 2014/25/EU. Under the law of the Grand-Duchy of Luxembourg, central purchasing bodies are governed by articles 3, paragraph 9, and 25, paragraph 2, of the Law of 25 June 2009 on public procurement, while framework agreements are provided for by articles 3, paragraph 5, 5, paragraphs 2 and 3, and 46 of the same law on public procurement. On 20 April 2018, the new law on public procurement of 8th of April 2018 ('*Loi sur les marchés publics du 8 avril 2018*') became effective.

(63) Recital no. 73, Dir. 2014/24/EU.

(64) *See* below, the HAPPI case. On the 28 March 2019, the European Commission announced that 15 Member States and the Commission had signed framework contracts, on the basis of Article 5 of Decision 1082/2013/EU. EU Commission, *Making Public Procurement work in and for Europe*, cit.

(65) BBG-SKI, *Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, December 2016. *See* the criticalities evidenced by A. Sanchez- Graells, *Is Joint Cross-Border Public Procurement Legally Feasible or Simply Commercially Tolerated? – A Critical Assessment of the BBG-SKI JCBPP Feasibility Study*, in *European Procurement & Public Private Partnership Law Review*, 12, 2017, p. 97.

(66) EU Parliament, *Resolution of 4 October 2018 on the public procurement strategy package* (2017/2278(INI)), October 2018, 5. EU Commission, Making Public Procurement work in and for Europe, COM(2017) 572 final, cit.

view, the role of aggregation acquires greater importance when combined with adequate techniques, for instance contract splitting into lots, in a design to favour the participation of SMEs.(67) Arguably, more Member States should thus take advantage of the CPBs and aggregation of public purchasing to enhance expertise, best practices. and innovation.

Public-public cooperation, which does not necessarily mean huge contracts of unmanageable complexity, nonetheless requires a sophisticated and constantly revised procurement strategy.

Purchasing on a cross-border basis is not just aimed at minimizing what the economists define as 'market failures'. Nor is it meant to allow enterprises and SMEs to pursue mere commercial interests in the common market. Administrative cooperation aims to implement fundamental rights effectively while meeting commonly shared transnational needs and interests.

4. The European Territorial Cooperation Grouping and other Joint Entities

The Procurement Directives recalled the establishment of European Groupings of Territorial Cooperation (EGTCs) and other entities established under the EU law, as a means for cross-border cooperation.(68) In particular, mentioned in the Directive are 'European Groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and Council' as joint entities which 'contracting authorities from different Member States' can establish to pursue cross-border procurement. In that event 'the participating contracting authorities shall, upon decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the Member States by choosing either *(a)* the national provisions of the Member State where the joint entity has its registered office or *(b)* the national provisions of the Member State where the joint entity is carrying out its activities'. According to the European Union law, the EGTC is a subject with legal personality set up to promote cross-border cooperation at a transnational or interregional level(69).

(67) EU Commission, *Commission Notice Guidance on Innovation Procurement, Brussels*, May 2018 C(2018) 3051 final, 7.

(68) Art. 39(5), Dir. 2014/24/EU.

(69) All approval authorities adopted the original EGTC regulation (EC) 1082/2006/CE of 5 July 2006; but only 23 of the 54 approval authorities would have adopted the EGTC Regulation as amended by the Regulation (EU) 1302/2013 by December 2017. Since the introduction of the EGTC in 2006, 69 EGTCs were founded in the EU with various local, regional and national authorities as well as other members. Currently there are 68 EGTCs as one closed in 2017. *See*: European EU Commission, Assessment of the application of EGTC regulation, Final report, April 2018, p. 2; EU Commission, European Territorial Cooperation. Building Bridges Between People, 2011; L. LANZONI, 'Le forme della democrazia partecipativa nell'ambito della cooperazione transfrontaliera', in *Riv. it. dir. pubbl. comunit.*,

It should be noted that the reference to an entity conceived as a means for joint procurement, offers a new perspective on implementation.

Territorial cooperation was regarded as a priority objective in the 2014-2020 programming period of the European Structural Investment (ESI) Funds, which fostered networking and the exchange of experience while enabling public administrations to identify suitable legal tools for implementing the European cohesion policy.(70) Administrative integration at transnational territorial levels has been hindered by the complexity of national legal frameworks applicable to the establishment of, and participation in EGTCs.(71) Adding to that is the Member States' tendency to maintain sovereignty on territorial policies.(72) In the light of all this, it seems clear that the recent European Union regulation was specifically aimed at simplifying the rules for the establishment and functioning of the aforementioned legal entities.(73)

The preamble to the Regulation states different objectives, namely facilitating the establishment and operation of EGTCs, clarifying relevant provisions and allowing for a more extensive use of EGTCs so as to improve policy coherence while pursuing cooperation between public bodies without creating an additional burden on national or Union administrations.(74) Nevertheless, territorial and linguistic challenges in the implementation of the Regulation have led to the creation of heterogeneous national and regional frameworks. In that respect, the degree of detail in national implementation rules, including the latest amendments, differs considerably. As reported by a recent analysis of the European Commission, some include extremely technical guidance

2011, 503; V. Cocucci, 'Nuove forme di cooperazione territoriale transfrontaliera: il Gruppo Europeo di Cooperazione Territoriale', in *Riv. it. dir. pubbl. comunit.*, 2008, 89; L. Soverino, 'I servizi pubblici nell'Euroregione: nuove prospettive di diritto comunitario per la cooperazione transfrontaliera, tra Consiglio d'Europa e potere estero delle Regioni', in *Riv. it. dir. pubbl. comunit.*, 2009, 17; R. Dickmann, 'Il gruppo europeo cooperazione territoriale (gect)', in *Foro amm. CDS*, 2006, 2901.

(70) EU Commission, *European Structural and Investment Funds 2014 - 2020: Official texts and commentaries*, April 2015. The objectives of cohesion policy are, namely: '*Investment for growth and employment*', with the national and regional programs being funded through the ERDF (European Regional Development Fund), the ESF (European Social Fund) and the Cohesion Fund, aiming at cross-border and transnational cooperation programs, also inter-financed by the ERDF. *See* Regulation 1303/2013/EU of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Fund for Maritime Affairs and Fisheries, and general provisions on the European regional development Fund, the European social Fund, the cohesion Fund and the European Fund for Maritime Affairs and Fisheries, and repealing Regulation (EC) No. 1083/2006 of the Council.

(71) European Parliament, *European Grouping of Territorial Cooperation as an Instrument for Promotion and Improvement of Territorial Cooperation in Europe,* July 2015; Committee of the Regions, *Conclusions of the Committee of the Regions about the Joint Consultation. The Review of Regulation (EC) 1082/2006 on the European Grouping of Territorial Cooperation*, 2010.

(72) They may be based on national legal forms (e.g. associations) formed by partners from different countries, or through a valid bilateral regional agreement.

(73) Regulation (EU) No 1302/2013 of the European Parliament and Council of 17 December 2013 amending Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC).

(74) Regulation (EU) No 1302/2013.

such as task descriptions, approval procedures and provisions for the EGTC staff, and/or registration procedures in Member States. Other provisions focus on selective criteria to help EGTCs set-up in the territory of the approval authority. Although the amendment to the original EGTC regulation has considerably facilitated EGTCs, there is still room for further clarification and legal certainty of applicable rules.(75)

As typically seeking a decrease in administrative costs and burden while demanding speedier and less complicated arrangements, simplification helps joint cross-border procurement as well. Hence, the new regulatory framework provides for tacit consent, after six months, to the establishment of an EGCT from the competent national authorities excepting the Member State where the EGTC's seat is located, as in that case formal approval is required.(76) The six-month period is interrupted when the Member State requests more information and the prospective members of the EGTC do not provide that information after ten days.(77) EGTCs can be set up by public administrations (National and local), public enterprises, bodies governed by public law, and enterprises entrusted with the operation of services of general economic interest.(78) In principle, therefore, private entities are excluded from participation unless they meet the criteria applicable to bodies governed by public law.(79)

The possibility of creating an EGTC among bodies governed by public law might fit, in particular, cooperation among contracting entities from different member States for the purpose of joint cross-border procurement. Even more challenging might be the cooperation, not only among traditional contracting entities, but instead among European central purchasing bodies, as provided in the aforementioned Procurement Directives.

It is also worth noting that, in addition to what was provided for in the previous legislation, the national and central authorities of the Member States may become EGTC members, alone or together with sub-national authorities or bodies. The rationale behind the new EGTC regulation is reaching

(75) EU Commission, *Assessment of the application of EGTC regulation*, cit., 10.

(76) *See* Regulation 1302/2013/EU, art. 4, par. 3, providing that at least the Member State where the registered office of the EGTC is to be located formally approves the Convention.

(77) The extension from three to six months is justified by the fact that the previous period was rarely respected as it worked as an obstacle to the creation of new EGTCs.

(78) Regulation 1082/2006/EC, art. 3, as amended by EU Regulation 1302/2013. The approval of the participation in an EGTC by the competent authorities at the national level requires the submission of a proposal for the EGCT Convention to the competent national authorities. In Italy, the Community Law of 2008 (Law of July 7, 2009, no. 88, *Provisions for the fulfilment of obligations deriving from Italy to the European Communities – Community Law 2008*) provides for rules on the participation of the national authorization procedure in an EGCT, which has to be adapted in light of the renewed European framework of the EGCT by a new Regulation.

(79) E.g. a private association, or a public company solely composed of public members and financed by public funds is to be seen as a body governed by public law and may therefore participate in an EGTC.

beyond regional and territorial boundaries, and limiting agreements that envisage cross-border cooperation exclusively between neighboring territorial areas (regions, departments, etc.).(80) All this may ultimately enable bodies governed by public law to pursue common interests and structural cooperation while developing networks across the European Union's geographical boundaries.(81)

The establishment of an EGTC has to be based on a cooperation agreement between Member States setting out the objectives, duration, term and termination, and the methods to be adopted for carrying out a given activity.(82) The agreement may envisage the realization of programs that are co-financed by the EU, and also cross-border cooperation projects that may be transnational or interregional and not funded by the EU, including cooperation agreements for contract or public service undertakings.(83) To be specified in the agreement is the applicable law, which must be that of one of the Member States where the registered office of the EGTC is located or where the activity is performed.(84)

(80) Examples of such agreements are the Karlsruhe agreement (1997), Mainz agreement (1998), Isselburg-Anholt agreement (1991) and the Benelux agreement (1986).

(81) For example the EGTCs located on the borders between the six founding EU Member States (i.e. the Benelux countries, France and Germany) and Nordic countries. A large number of CPSPs can also be observed on the German-Swiss, French-Swiss, Czech-German borders. *See* also ESPON EGTC, *Cross-border Public Services (CPS)*, Final report, January 2019.

(82) Regulation 1082/2006/EC, art. 8 as modified by Regulation 1302/2013/EU. The agreement must specify: the name of the EGTC and its registered office; the extent of the territory in which the EGTC may carry out its duties; the goal and the tasks of the EGTC; the duration of the EGCC and the conditions for its dissolution; the list of the EGTC's members; the list of the EGTC's organs and their competencies; the applicable Union law and the law of the Member State in which the national EGTC has its registered office regarding the interpretation and application of the Convention; the applicable Union law and that of the Member State in which the national organs of the EGTC operate; the arrangements for the participation of members from third countries or the OCT, where appropriate including the identification of the applicable law where the EGTC carries out tasks in third countries or in the OCT; the applicable Union and national law directly relevant to the grouping's activities conducted in accordance with the tasks specified in the agreement; the rules applicable to the EGTC's staff as well as the principles governing the arrangements concerning personnel management and recruitment procedures; the provisions regarding the liability of the EGTC and of its members; the appropriate provisions on mutual recognition, including with regard to the financial control of the management of public funds; the procedures for adopting the statutes and amending the convention. The tasks of the EGTC are defined by the convention agreed by its members. Their boundaries, a delicate point of balance between the aspirations of the Regions and the integrity of sovereignty and state control, are specified by a number of factors but remain flexible for extended cooperation and progressive processes. The members may decide by unanimity to empower the execution of tasks to one of its members. *See* European EU Commission, *Assessment of the application of EGTC regulation*, cit., p. 21; S. CARREA, 'The discipline of the European Grouping of Territorial Cooperation (EGTC) between European Union law, statutory autonomy and private international law: an attempt at synthesis', in *Dir. comm. internaz.*, 2012, 611.

(83) EU Commission, *Note for guidance on the funding of joint EDF-ERDF projects 2014-2020*, November 2014. *See*: Recital no. 7, Regulation 1082/2006/EC.

(84) Within ten working days from the registration or publication of the convention and statutes of the country where the EGTC has its registered office, the EGTC shall notify the Committee of the Regions (CoR), which maintains a register of EGTCs. The CoR then transmits the information to the Office of the European Union, which publishes a notice announcing the establishment of the EGTC.

Within the framework of territorial cooperation supported by the European Union it is possible to distinguish between EGTCs that deal with specific programs having a broad cross-border content and EGTCs pursuing cooperation projects having one, specifically identified, goal.(85)

Further distinctions can be made in respect to the EGTCs' legal form of establishment, applicable law (public or private), and the liability system (limited or unlimited).(86)

Initially, EGTCs were mainly aimed at achieving cooperation in limited geographical areas and in some sectors.(87) Administrative cooperation was pursued to achieve different goals, including tourism, sustainable development in agriculture, integration between urban and rural areas, economic and social development, cross-border transport system management, cross-border project development, the construction of infrastructures or the creation of hospitals, yet always ensuring the exchange of experience and good practices.(88)

The internal organization and functioning of the EGTC is governed by its Statute. *See* EC Regulation 1082/2006, art. 9 as amended by EU Regulation 1302/2013. The Statutes of each EGTC governing the internal organization identifies: the tasks of the organs and how they work; decision-making procedures and language; the methods of operation and employment contracts; financial contributions, the rules on accounting and financial statements. The statutes specify a minimum for: the operating mode of its organs and powers of these bodies, as well as the number of representatives of the members in the relevant organs; its decision-making procedures; its language or its working languages; the arrangements for its operation; the procedures concerning the management and staff recruitment; the provisions concerning the financial contribution of its members; the applicable rules of accounting and budget for its members; the appointment of an independent external auditor of the accounts; the amendment of its articles of association procedures. The statutes set up an assembly composed of representatives of each EGTC member and a director who represents the EGTC itself, and establish an annual budget based on the legislation of the country where it has its registered office. The statutes also characterize any other organs by defining their competencies: Regulation 1082/2006/EC, art. 11 as amended by Regulation 1302/2013/EU. The preparation of accounts including the annual report accompanying them, and the auditing and publication of those accounts shall be governed by the national law of the Member State where the EGTC has its registered office. The budget is divided into a component of operating costs and, if necessary, an operational component.

(85) With regard to the object of cooperation, the EGTC Regulation is relatively generic with reference to 'actions' of general cooperation without distinguishing between issues of cross-cutting interest and a long period, or by activities.

(86) European Parliament, *European Grouping of Territorial Cooperation as an Instrument for Promotion and Improvement of Territorial Cooperation in Europe*, cit., 53. Committee of the Regions, EGTC Monitoring Report 2012, 2013, where it is reported that most of the EGTCs are legal entities of public law. Regulation 1082/2006/EC, art. 12, as amended by Regulation 1302/2013/EU. An EGTC shall be liable for its debts. In the event of insolvency, the members are responsible depending on their contribution (fixed in the statutes). It can, however, impose a 'limited EGCT' (including the phrase in their name), provided that at least one of its members is a limited liability entity.

(87) Example: Hungary and France. *See* European Parliament, *European Grouping of Territorial Cooperation as an Instrument for Promotion and Improvement of Territorial Cooperation in Europe*, cit. 24. EGTCs established with specific thematic focus: Big Région EGTC was established to manage a cross-border project; EGTC TATRY Ltd. as an agency for the management of the Small Project Fund (SPF). *See* also the EGTC: Secrétariat du Sommet de la Grande Région, European Park / Parc Européen Maritime Alps – Mercantour and Hospital de la Cerdanya.

(88) Examples of administrative cooperation in tourism: EGTC Pirineus – Cerdanya; EGTC ArchiMed; EGTC TRITIA Ltd.; ZASNET EGTC; Territorio dei comuni: Comune di Gorizia, Mestna

In general, the possibility of providing public services at a cross-borders level (through a Central Purchasing System, CPS) is a key factor for boosting territorial cohesion and the European internal market development. It contributes to reducing negative border effects, for example by fostering cultural integration, and increases understanding of shared issues or needs. By increasing the accessibility and scope of services, the quality of the services can be improved because knowledge and resources from both sides of a border can be used effectively.(89) It is worth highlighting how such a tool can be used for the 'joint management of public services', particularly insofar as services of general economic interest are concerned. All this may lead to in-house companies establishing EGTCs to develop innovative forms of cooperation in the field of public services and, as a result, strengthen the economic, social, and territorial cohesion of the European Union.(90)

Although the EGTC has a limited role in the public procurement sector at present, such a model is regarded as having the potential to promote cooperation between traditional contracting authorities (State and local authorities), and also between bodies governed by public law (central purchasing bodies). Indeed, it may ensure innovative developments in the procuring function through institutionalized forms of cooperation between contracting authorities from different Member States.(91) EGTCs formed by several public procurers from different countries, meeting minimum requirements, and having a mandate to procure, can purchase on behalf of them. That means minimizing

Občina; Nova Gorica e Občina Šempeter-Vrtojba; EGTC 'Espacio Portalet'; EGTC Spoločný region Ltd.; EGTC 'Euregio Senza Confini r.l. – Euregio Ohne Grenzen; mbH'; Karst-Bodva EGTC; ABAÙJ-ABAÙJBAN EGTC Ltd.; EGTC Pons Danubii; Rába-Duna-Vág EGTC Ltd.; EGTC Gate to Europe Ltd.; BODROGKÖZI EGTC Ltd.; Eurocity of Chaves-Verín EGTC; EGTC Parc européen/Parco europeo Alpi Marittime; Mercantour; in the agricultural sector: EGTC Euroregion Aquitane-Euskadi; EGTC 'Euregio Senza Confini r.l. – Euregio Ohne Grenzen mbH'; Banat Triplex Confinium Ltd. EGTC; Raba-Duna -Vag EGTC Ltd; in urban and rural areas: EGTC TRITIA Ltd.; EGTC TATRY Ltd.; EGTC Spoločný region Ltd.; EGTC Karst-Bodva; Pons Danubii EGTC; for building infrastructures for economic and social development: EGTC TRITIA Ltd.; EGTC Hospital de la Cerdanya – Karst-Bodva EGTC; Territorio dei comuni: Comune di Gorizia, Mestna Občina Nova Gorica e Občina Šempeter-Vrtojba; EGTC 'Espacio Portalet'; Arrabona EGTC Ltd.; Bánát-Triplex Confinium Ltd. EGTC; Douero-Douro EGTC; EGTC Parc européen/Parco europeo Alpi Marittime and also for the creation of hospitals. It is the case of the Agrupació Europea de Cooperació Territorial Hospital de Cerdanya (HC), which is, at currently, the first cross-border healthcare project at European Level, aiming to ensure the availability of proper and multi-profile healthcare to the local (French and Spanish) population. *See* on this topic: European Parliament, *European Grouping of Territorial Cooperation as an Instrument for Promotion and Improvement of Territorial Cooperation in Europe*, cit.

(89) *See* also ESPON EGTC, *Cross-border Public Services (CPS)*, Final report, cit. 13.

(90) G. M. Racca, 'Joint Procurement Challenges in the Future Implementation of the New Directives', (F. Lichère, R. Caranta and S. Treumer eds.) *Modernising Public Procurement: the New Directive*, Copenhagen, cit., 225-254.

(91) Art. 39(5), Dir. 2014/24/EU.

transaction costs, which would be higher in the event of separate tenders, and pursuing common goals of public interest.(92)

Still, the possibility of carrying activities beyond national and regional borders requires further clarification in the interpretation of the national rules for establishing an EGTC to achieve aggregated and collaborative European procurement.(93) As the term 'cooperative procurement' encompasses various modes of cooperation between public buyers, establishing (or mandating) dedicated entities – such as the European Grouping of Territorial Cooperation (EGTCs) to perform joint procurement on a regular basis – might be the most structured means of cooperation.(94) As mentioned earlier, the Procurement Directives specifically indicate the EGTCs (or other joint subjects covered by Union law) as a means to implement administrative cooperation in public contract award and execution.(95)

The EGTC agreement from which the joint entity originates may also define the rules and strategies to use within the sector in which the EGTC operates, the procedure to be followed in the procurement phase (mainly framework agreements), and address contract management and contract execution.

As far as the procurement phase is concerned, the applicable law can either be that of the Member State where the EGTC's registered office is or that of the Member State where the activity in question is performed. The legal framework set out thereby can remain unchanged for an indefinite period of time (if so envisaged by constitution) or only for limited period (as with certain types of contracts for single or occasional joint procedures). Supplementing that legislation are the European rules on conflicts of laws, and rules allowing for the choice of a different law to be applied in the execution phase of a contract. Aside from European directives, those rules promote integration among legal systems and prompt 'competition' when it comes to chosing the applicable national law, and allowing case-by-case harmonization under the more effective rule.(96)

(92) *See*, by way of example, the 'Hospital de la Cerdanya' case. This EGTC was established under Spanish Law; under the statutes, common legal provisions will, in case of conflict, prevail; citizens from both countries have the explicit right to file their complaints against the members of the EGTC, while procurement and employment is subject to Spanish and Catalan legislation. The statutes foresee that the winding-up of the EGTC might not disrupt the provision of health services; in that case, a specific decision by the partners must be taken accordingly.

(93) This possibility is expressly provided by the Regulation 1302/2013/EU. *See*: EU Commission, *Assessment of the application of EGTC regulation*, cit., 21.

(94) EU Commission, *Commission notice Guidance on Innovation Procurement*, cit., 18; Exploring collaborative public procurement practices (A. Patrucco, J. Lynch, J. Harland, J. Telgen, T. Tatrai eds), 2018; EU Commission, *Public procurement – a study on administrative capacity in the EU*, 2016.

(95) Recital no. 24, Regulation 1302/2013/EU: 'The convention should also list the applicable Union and national law directly relevant to the EGTC's activities carried out under the tasks specified in the convention, including where the EGTC is managing public services of general interest or infrastructure'.

(96) Recital no. 73, Dir. 2014/24/EU.

The administrative cooperation model provided by the ETGC regulation might open way to the development of other 'second level' horizontal cooperation forms that may enter agreements and and establish networks that may join central purchasing bodies through an EGTC.(97) Also, joint strategies for the implementation of the European administrative scope of action in the public contracts area may be developed so as to ensure efficiency, quality, and integrity to European citizens while sharing risks arising from innovation.

As it has become easier to establish them, more and more joint entities operating under National or EU laws can now experience joint cross-border procurement. EU pilot projects have often envisaged coordinated procurement being awarded by different contracting authorities, which cannot be regarded as joint procurement in its own right. Those projects, however, were easier to start and allowed authorities to define common technical specifications for buying innovation.(98)

Occasional joint-cross border procurement funded by European projects may also establish an Association, operating under National law, open to forms of voluntary cooperation among contracting authorities from different Members States (e.g. central purchasing bodies). That is the case, for example, of the European Public Procurement Alliance (EHPPA). As a French law association, EHPPA is an alliance of non-profit Group Procurement Organizations which aims to pool expertise, leverage performance and provide its members with a strategic position in the European health procurement market.(99) At present, the EHPPA activities are aimed at favouring the cooperation and exchange of information among members willing to improve their own procurement performance, and also at facilitating the use of innovative procurement in healthcare. Establishing a framework for joint procurement to be carried by the EHPPA's Members, taking advantage of the previous project 'HAPPI (Healthy Ageing – Public Procurement of Innovations)' is another praiseworthy objective. The EHPPA was an associated member of the a pre-existing consortium funded by an EU project aimed at encouraging joint cross-border procurement. That led to the creation of a joint framework agreement among several central purchasing bodies from different Member States which was open to accession by hospitals normally served by the CPBs, and

(97) *See* recital no. 5, Regulation no. 1302/2013/EU: 'Under Regulation (EC) No 1082/2006 EGTCs have in each Member State the most extensive legal capacity accorded to legal persons under that Member State's national law, including the possibility of concluding agreements with other EGTCs, or other legal entities, for the purposes of carrying out joint cooperation projects to, inter alia, provide for more efficient operation of macro-regional strategies'.

(98) *See*: P. Valcarcel Fernandez, *The Relevance of Promoting Collaborative and Joint Cross Border Procurement for Buying Innovative Solutions*, Chapter 4 in this book.

(99) EHPPA (European Health Public Procurement Alliance) is an association governed by the French law of July 1st, 1901 and the decree of August 16th, 1901.

also others, thus anticipating solutions that are now covered by the Procurement Directive.(100)

The public healthcare sector has experienced the potential benefits of innovative instruments for the joint procurement of medical countermeasures against cross-border health threats.(101) Joint Procurement Agreements, although established on the basis of the Financial Regulation, have shown their potential in improving the health system efficiency through collaboration at a European level aimed at granting supply safety, cost saving, reduction in administrative burdens, and the creation of professional networks. All this may be particularly appealing to smaller Member States.(102)

Another example of trans-border collaboration across the EU which took place before the entry into force of the Procurement Directive was the collaboration between the banks of the European system under the European Central Bank.(103)

(100) HAPPI is one of the first cross-border joint public procurements founded by the European Commission and a consortium of European partners consisting of procurement organizations (CPBs) in the health sector, by experts in the field of public procurement, by innovation agencies and academic institutions. *See*: G. M. Racca, *Joint Cross-Border Procurement of Innovative Solutions in the Healthcare Sector. The HAPPI project experience*, Turin University Press, 2019, forthcoming. *See* also: EU Commission, *Support of the internal market policy for growth: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, December 2016, 62 (BBG-SKY); EU Commission, Making Public Procurement work in and for Europe, COM(2017) 572 final, cit.

(101) Art. 168(5) TFEU and art. 5 of Decision 1082/2013/EU on serious cross-border threats to health provided the legal basis for the establishment of the joint mechanism: '*The institutions of the Union and any Member States which so desire may engage in a joint procurement procedure* […] *with a view to the advance purchase of medical countermeasures for serious cross-border threats to health*'. As the referenced memorandum recalls, Botulinum anti-toxin was the first procurement procedure successfully concluded in 2016. Apart from the joint procurement on pandemic influenza vaccines, for the future, EU Member States have expressed interest in joint procurement procedures for diphtheria anti-toxin, Tuberculin and BCG vaccines, and Personal Protective Equipment, all of which are currently in the preparatory phase. *See* on this topic: N. Azzopardi-Muscat and P. Schroder-Bäck, H. Brand, *The European Union Joint Procurement Agreement for cross-border health threats: What is the potential for this new mechanism of health system collaboration*? In *Health Economics, Policy and Law*, Cambridge University Press, 2017, 12(1), 43-59.

(102) The JPA, which was adopted by the Commission on 10 April 2014, is based on the Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union. The JPA is an agreement between the Commission and the participating Member States which implements a provision of a legislative act, namely, Article 5 of Decision 1082/2013/EU. As the JPA was concluded pursuant to the Financial Regulation, it can be considered as a budgetary implementing measure of Decision 1082/2013/EU. The joint procurement procedure was preceded by a Joint Procurement Agreement (JPA) between the mentioned entities determining the practical arrangements governing that procedure, and the decision-making process with regard to the choice of the procedure, the assessment of the tenders and the award of the contract. On 28 March 2019, the European Commission announced that 15 Member States and the Commission signed framework contracts with a pharmaceutical firm for the supply of pandemic influenza vaccines to 30 national contracting authorities, which represented the first "umbrella" joint procurement agreement for influenza pandemic.

(103) EU Commission, *Support of the internal market policy for growth: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member* States, cit. *See*: European Economic and Social Committee, *Europe's cooperative banking models*, 2018.

An International agreement was signed for the Italian-Austrian Brenner Tunnel (BTT) collaboration.(104) The first phase of the procurement concerned the tender for a geological assessment to be carried out in both Austrian and Italian territory. The tender was organized as an open procedure to award a contract to a single economic operator (or consortium) using bilingual Italian and German documents. Governed by the Italian public procurement law, that agreement stated that the Italian courts would have jurisdiction in the event of litigation arising therefrom.(105)

Public-public cooperation, especially cross-border cooperation, can strengthen the ability of public administrations to pursue public interests (in specific areas and sectors). Public-public cooperation can also establish a 'positive collusion' strengthening the ability of public entities to pursue public interest and shared industrial policy goals to the benefit of growth, innovation and the integrity of European Union.(106)Asymmetric integration through administrative cooperation may offer ways of taking steps forward to achieve European integration effectively.(107)

(104) The first phase (1999-2003) consisted of the preliminary project and assessment; in the second phase (2003-2010) the project was finalized, and the EIA carried out; the second part of phase II (2007-2013) was the exploratory portion; with the building phase starting in 2011. The construction work and the railway outfitting of the Brenner Base Tunnel should be completed by 2025. After that, there will be a year of test operations. The tunnel will become fully operational in December of 2026. *See*: EU Commission, *Study on permitting and facilitating the preparation of TEN-T core network projects Annex 4 – Case studies*, September 2016, 19. Id., *Support of the internal market policy for growth: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, December 2016, 62.

(105) EU Commission, *Support of the internal market policy for growth: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, cit.

(106) G. M. Racca and R. Cavallo Perin, 'Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty', in *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally* (G. M. Racca and C. R. Yukins eds.), *op. cit.*, 23; A. Sánchez Graells, 'Prevention and deterrence of bid rigging: a look from the new EU directive on public procurement', *ivi*, 171; A. López Miño and P. Valcarcel Fernandez, 'Contracting authorities' inability to fight bid rigging in public procurement: reasons and remedies', *ivi*, 199. G. M. Racca and R. Cavallo Perin – G. L. Albano, 'Public Contracts and International Public Policy Against Corruption', in *Transnational law of Public Contracts* (M. Audit and S. W. Schill eds.), Bruylant, Bruxelles, 2016, 845. *See* also: Cavallo Perin and G. M. Racca, *Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process*, *cit.*

(107) R. Cavallo Perin and G. M. Racca, *Plurality and Diversity of Integration Models*: *The Italian Unification of 1865 and the European Union Ongoing Integration Process*, *cit.*

5. *The Different models of Cross-border Joint Procurement: Joint award or Use of Offered Centralised Purchasing Activities*

As mentioned earlier, the EU Procurement Directive envisages forms of joint cross-border cooperation through the establishment of joint entities, or EGTC's, operating under European or national laws.(108)

Joint procurement strategies may be implemented relying on joint award procedures or centralized activities offered by a central purchasing body from a different Member State.

The Directive prevents a distorted use of cooperation as a way as to avoid 'the application of mandatory public law provisions', provided that those 'mandatory public law provisions' are 'in compliance with the EU law to which they are subject in their Member State'.(109)

The first part of the provision seems to warn against the intentional distorted use of national rules implementing the EU Directive in different Member States.(110) Such a risk could be avoided by requiring a specific choice to be made with regard to national provisions applicable to procurement procedures, and perhaps also introducing further clauses that meet all national implementation requirements, especially on transparency. The cooperation agreement might establish the same set of rules applicable in each country on mandatory exclusion grounds, thus enhancing harmonization and striving for stricter qualifications, perhaps through self-declarations according to the ESPD. Choosing the provisions of one Member State does not prevent adding further provisions (in view of the cooperation) governing selection and

(108) Recitals nos. 71 and 73, Dir. 2014/24/EU. *See* EU Commission, *Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities (public-public cooperation*), Brussels, SEC(2011) 1169 final, October 2011, 12. A distinction is made therein between cooperation for the performance of tasks of public interest in the proper sense, and assigned activities that would require a competitive tendering within the market.

(109) Art. 39(1) e (4), Dir. 2014/24/EU. A. SANCHEZ-GRAELLS, *Is joint cross-border public procurement legally feasible or simply commercially tolerated? A critical Assessment of the BBG-SKI JCBPP Feasibility Study,* cit., p. 16.

(110) The ECJ's case-law has repeatedly ruled against any distorting or elusive use of the European Union's provisions: on the principle of prohibiting abusive practices in taxation see: ECJ, 21 February 2006, case C-255/02, Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise, § 69: '[t]he application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law'. *See* also: ECJ, 5 July 2007, case C-321/05, Hans Markus Kofoed v. Skatteministeriet, § 38: '[i]ndividuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law'.

award, according to the legal system in which the contract shall be executed (e.g. the *Anti-mafia* certificate which is required only by Italian legislation). The rationale of the aforesaid European provision is avoiding an intentional misuse of cooperation with a view to allowing the participation of suppliers which, according to national provisions only, would not be able to participate. Should all this be proved, it might be a case of intentionally avoiding mandatory public law provisions.

The U.S. experience of setting a 'Participating Addendum' to joint framework agreements for each Member State involved, although taking the local legal requirements into account, might offer a useful solution to be adopted for European purposes.(111) Under this approach, the master framework agreement with vendors is subordinate to the 'Participating Addendum' entered into between those vendors and the participating state and local governments.

In many other cases national implementation may be irrelevant as transparency, required as a principle for any cooperative initiative, should ensure that the selection process is conducted fairly.

Other issues stem from national implementation of the remedy Directives and the national legal regimen on the challenges of award procedures. Yet, a very clear and transparent cooperation agreement, and relevant contract notice, can call for an 'innovative' application of harmonized provisions and clauses that may spur the development of more effective templates for future contracts. That can be the case for innovative framework agreements, which may define a specific procurement strategy for the master contract, with a limited possibility to call off from it directly and the provision of subsequent mini-competitions for the award of higher value contracts. The remedies to be applied to the mini-competition might be the ones of the Member State concerned, thus verifying the full compliance to mandatory rules (as provided in the cooperation agreement).

Such sophisticated models of cooperation, as already noted, work on an exclusively voluntary base and require an ability to meet specific shared strategies. Since cross-border procurement covers contracting entities from different Member States and local agencies, it requires procurement professionals to be able to manage their own procurement systems, respectively, and also any applicable practices of the countries involved in the cross-border procurement agreement. Indeed, cross-border procurement poses challenges in addressing significant issues arising from variations in procurement regulations and practices and requires support to develop capacity to work out such administrative cooperation.(112)

(111) *See* J. B. KAUFMAN, *Cooperative Purchasing: A US Perspective*, Chapter 2 in this book.
(112) *Ibid.; EU Commission, Public procurement – a study on administrative capacity in the EU,* cit.

The effectiveness of joint procurement requires an agreement stating how responsibilities shall be distributed, and also setting out provisions for the selection of participants, contract award, and contract execution.

Using the centralized purchasing activities of a different Member State is also an option. That model requires the purchasing entity to publish a contract notice stating that it is possible (but not necessarily mandatory) for contracting authorities from different Member States to call-off from a lot, either directly or after a mini-competition, In those circumstances, the central purchasing body in question could act as an intermediary. Indeed, having the central purchasing body fulfilling that role and coordinating the procurement process may be the easiest way to succeed in cooperation.

In other cases the purchasing entity may act as a wholesaler, thus resell goods and services to contracting entities from different Member States. Few central purchasing bodies in the EU have been acting that way so far.(113)

A recent ECJ decision stated that when a framework agreement is to be awarded, the tender documents should clearly specify which contracting authorities may benefit from the agreement and the maximum amount of purchases to be covered by the subsequent contracts.(114) Although the case in question focused on the provisions of the former Directive 2004/18, it is likely that the ECJ's conclusion would be the same under the Directive 2014/24, which has repealed and replaced Directive 2004/18 starting from April 2016, that includes similar yet more detailed provisions on framework agreements.

The horizontal public-public cooperation among contracting authorities from different Member States might serve as a legal basis for establishing a system of joint cross-border procurement superseding the individual award procedure of any contracting authority acting alone.

Administrative cooperation can be developed through occasional joint procurement initiatives even though they do not qualify as systematic and institutionalized acquisition systems like central purchasing bodies.(115) That is because they would allow two or more contracting authorities to 'perform jointly certain specific procurements', the need of which results from a shared interest in innovative projects.(116)

(113) *See* I. Locatelli, *Process innovation under the new Public Procurement Directives*, Chapter 1 in this book.

(114) ECJ, 19 December 2018, Case C-216/17, Antitrust and Coopservice Soc. coop. arl v. ASST Sebino *et al.* The case involved a request for a preliminary ruling under Article 267 TFEU concerning the decision of a regional healthcare authority to accede to a contract for environmental services (classified as a 'framework agreement' within the meaning of EU law on public procurement) concluded by another healthcare authority without a new public tendering procedure; see G.M. Racca and S. Ponzio, 'La scelta del contraente come funzione pubblica: i modelli organizzativi per l'aggregazione dei contratti pubblici', in *Dir. Amm.*, 2019, 33.

(115) Recital no. 71, Dir. 2014/24/EU.

(116) Art. 38, Dir. 2014/24/EU.

The joint implementation of an award procedure (either on behalf of the administrations involved, or executed by a CPB on behalf of other contracting entities) entails the joint duty to fulfill all obligations prescribed by the EU Directives and principles. Conversely, the contracting entity will be held responsible for any part of a procedures that has not been implemented jointly.(117)

On one hand, the rationale behind the aforesaid provisions on joint and cross-border purchasing stems from EU principles concerning the development of the internal market and the protection of competition through the demand side aggregation. On the other hand, it ties in with public interest in cooperation among central purchasing bodies (or individual contracting authorities) for overcoming the territorial, linguistic, and legal limits existing at national levels.(118)

As already mentioned, cooperation among contracting authorities may well enhance the procuring entities' potential, in terms of human resources and technology while favouring the harmonization of tender documents, procedures, contract clauses, and conditions of execution, all of which should encourage more enterprises to bid. All of this is expected to boost development and innovation in the internal market.(119)

(117) Recital no. 71, Dir. 2014/24/EU: 'Each contracting authority should be solely responsible in respect of procedures or parts of procedures it conducts on its own, such as the awarding of a contract, the conclusion of a framework agreement, the operation of a dynamic purchasing system, the reopening of competition under a framework agreement or the determination of which of the economic operators party to a framework agreement shall perform a given task'.

(118) Recital no. 73, Dir. 2014/24/EU. *See* EU Commission, *Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities (public-public cooperation)*, cit. 21. *See* also R. Cavallo Perin and D. Casalini, 'Control over In-house Providing Organisations', in *Public Procurement Law Review*, 2009, 227-241; N. Bassi, 'Appalti pubblici comunitari (gli accordi internazionali in materia di)', in *Trattato di diritto amministrativo europeo* (M. P. Chiti, G. F. Cartei and G. Greco eds.), Milano, Giuffrè, 2007, 551; T. Tátrai, 'Joint Public Procurement', in *Journal of the Academy of European Law*, 2015; G. M. Racca, 'Joint Procurement Challenges in the Future Implementation of the New Directives', in *Modernising Public Procurement: the New Directive* (F. Lichère, R. Caranta, and S. Treumer eds.), DJØF Publishing, Copenhagen, 2014, 234-235. The use of a central purchasing body is a form of public-public cooperation, with reference to which the EU Court of Justice has already ruled on the risks that may result from collusion among public entities. *See* ECJ, 14 October 2004, EC *Commission v. Kingdom of the Netherlands*, in Case C-113/02, excluding in some cases: CGCE, 11 July 2006, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. EC Commiss*ion, C-205/03, § 26; ECJ, 26 March 2009, *Selex v. EC Commission – Eurocontrol*, in C-113/07 P, § 102. In these cases, the Court held that 'in order to assess the nature of that purchasing activity, we should not separate the activity of purchasing goods from the subsequent use made of them, and that the economic or not next use of the income of the product purchased necessarily determine the character of purchase'. On this aspect see A. Sánchez Graells, *Public Procurement and the EU Competition Rules*, Hart Publishing, 2011, 150-151 and 165-166.

(119) R. Cavallo Perin, *Relazione Conclusiva in Atti del Convegno: Appalti pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove direttive*, cit., 37. *See* also G. L. Albano, F. Dini, and G. Spagnolo, 'Strumenti a Sostegno della Qualità negli Acquisti Pubblici', in *Quaderni Consip*, 2008. I, 3; L. Fiorentino, 'Introduzione', in *Gli acquisti delle amministrazioni pubbliche nella repubblica federale* (L. Fiorentino eds), Il Mulino, Bologna, 2011, 18; *Gli acquisti delle amministrazioni pubbliche nella repubblica federale* (L. Fiorentino eds), Il Mulino, Bologna, 53; G. Racca

Successful cooperation among contracting authorities requires a prior assessment of the appropriate scope and sector of aggregation. For instance, if purchasing at local levels is hampered by significant price differences caused by failures in competition (such as horizontal agreements among economic operators, other agreements, or cartels), a solution could be devised on a transnational basis and among contracting entities from different Member States.

The Directive provides that, unless international bilateral agreements between Member States have already been established, all necessary elements underpinning their legal relationship shall be set out within an agreement between the contracting authorities.(120) Similarly, the procurement strategy should be defined according to the cooperation goals, the relevant market, the territory, and the public administrations involved.

The establishment of joint-cross border public procurement requires a deep analysis of the existing regulatory models in order to identify the most suitable cooperation agreement as well as the best procurement strategy and means that the central administrations of each country involved can adopt. Third countries whose public administrations are not directly covered by the cooperation agreement may also be involved in the process.

It is worth remarking that national central purchasing bodies already manage important shares of the public procurement markets. Therefore, they may well play a decisive role in sharing domestic best practices and strategic approaches with their counterparts in joint procurement projects. These can increase the leverage of public purchasers, which is essential in certain markets dominated by a small number of market operators.(121)

Cooperation agreements define each party's responsibilities as well as relevant national provisions on the internal organisation of the procurement procedure, including key aspects of contract award and execution, the allocation of responsibilities, and the applicable EU and/or national laws. Aside from the assignment of competencies and responsibilities as appropriate, therefore, cooperation agreements thus take into account both the contract award and the administration phases. Addressing all these aspects means foreseeing competition between different legal system frameworks, and fostering European integration by harmonising tender documents and contract clauses in a design to implement tender procedures jointly and

and R. Cavallo Perin, 'Organizzazioni sanitarie e contratti pubblici in Europa: modelli organizzativi per la qualità in un sistema di concorrenza', in *I servizi sanitari: organizzazione, riforme e sostenibilità. Una prospettiva comparata* (A. Pioggia, S. Civitarese Matteucci, G. M. Racca, and M. Dugato eds), Maggioli Editore, Rimini, 2011, 197.

(120) Art. 39(4), Dir. 2014/24/EU ; art. 57(4), Dir. 2014/24/EU; art. 114 TFEU.

(121) EU Commission, *Making Public Procurement work in and for Europe*, cit., 12.

outline 'terms and conditions' running parallel with contract execution according to national laws.

Cooperation agreements may also envisage forms of cooperation at different procedural stages – from issuing technical specifications to selecting economic operators. All this can be achieved by finding the least common denominator for the different countries involved. Another way to reduce burdens and increase participation is devising a procedure within which some requirements are mandatory only in certain legal systems.

Aside from the consortium-based model engaging central purchasing bodies from several countries, as discussed above, it is also possible to opt for a joint cross-border 'Evaluation Team' with experts from the different countries involved in the evaluation of offers, who could make recommendations about contract award to competent officers, or committees.(122) A more thorough evaluation could thus be made by complementing the inputs received with the opinions of experts from different countries. For example, a procurement strategy could envisage identifying different territorial lots or functional lots, based on what is set out in the cooperation agreement of interest.

In the process of harmonization of the tender documents and contract clauses, several differences to address may concern performance conditions such as invoicing, delivery of the ordered goods, and payment terms. Contract management may therefore need to be handled by each contracting entity separately in order to ensure compliance with the specific terms and conditions called for by their national laws, respectively.

Clearly, joint cross-border procurement requires a sophisticated organisational and contractual design to coordinate effectively the different procurement regimes at stake. Each central purchasing body involved in this model is expected to contribute to drafting of tender documents, and also to provide relevant information about its national legislation.(123)

(122) Such was the case with the project PAPIRUS ('Public Administration Procurement Innovation to Reach Ultimate Sustainability/Innovation in Hiring Public Administration to Achieve Maximum Sustainability') which led to a 'Joint Cross-Border Evaluation Team' (JCBET) responsible in the formulation of technical specifications and the award criteria, wherein each PAPIRUS partner promoted and awarded its own contract, with its documentation, publication and respective award. *See* the chapter in this book: P. VALCÁRCEL FERNÁNDEZ, *The Relevance of Promoting Collaborative and Joint Cross Border Procurement for Buying Innovative Solutions*; A. SANCHEZ-GRAELLS, *Is joint cross-border public procurement legally feasible or simply commercially tolerated? A critical Assessment of the BBG-SKI JCBPP Feasibility Study*, cit., p. 8.

(123) A similar model of "joint evaluation team" has been implemented in the HAPPI project, which provided an example of a cross-border joint public procurement founded by the European Commission and a consortium of European partners consisting of procurement organizations (CPBs) in the health sector, by experts in the field of public procurement, by innovation agencies and academic institutions. HAPPI brings together partners from France (Réseau des Acheteurs Hospitaliers d'Ile-de-France, Ecole des Hautes Etudes en Santé Publique (EHESP), BPIFRANCE), the United Kingdom (NHS Commercial Solutions, BITECIC Ltd), Germany (ICLEI – Local Governments for Sustainability),

Choosing cross-border procurement to buy innovation means taking many challenges, which compels contracting entities to have well developed organizational skills. Managing such a major project, in fact, requires undertaking an extensive market analysis in order to identify the options available in a particular sector of interest. It also implies defining, with the aid of a committee appointed *ad hoc*, the subject matter of the contract/s to award, and the legal relationships binding the parties involved in contract award and execution within the framework of joint public procurement at EU and national level.

The EU Directive allows Member States to choose which kind of centralised purchasing activity contracting entities may opt for, for instance the centralised activities of a CPB acting either as a wholesaler or as an intermediary. Surprisingly enough, it seems that all Member States except Italy have implemented the Directive with a broader scope, so as to allow either approach.

Italy, in fact, allows its contracting entities to use the purchasing activities of a CPB from another Member State only when the CPB acts as wholesaler.(124) Such a restrictive implementation does not exclude agreements for joint cross border cooperation, but limits the options available when buying under framework agreements with Member States. Consequently, a reciprocal basis principle could limit cross-border cooperation opportunities.

The execution of purchasing activities by a central purchasing body located in another Member State shall be conducted in accordance with the legal provisions of that same country, including substantive rules and remedy rules.(125)

The fact that joint procurement has to be carried out complying with the rules of the CPB's home country makes joint procurement a strategy going beyond the scope of maximising the economic benefits of centralised procurement. Indeed, it opens the way to different forms of wider participation and competition among economic operators, which the aggregation of public demand might foster as a logical-legal antecedent to tenders.(126)

Public-public cooperation allows contracting authorities to adhere to the framework agreements entered by central purchasing bodies with a Member State as an alternative to their own need-meeting process at national level.

Italy (University of Turin and the Piedmont Region Client Company, SCR), Belgium (MercurHosp – mutualisation hospitalière), Luxembourg (Fédération des Hôpitaux Luxembourgeois (FHL), Austria (the Federal Procurement Agency (FPA) – Associate partner) and Spain (FIBICO – Associate partner). For a description of the project activities, see G. M. Racca, *The Happi experience*, op.cit., forthcoming. *See* also S. Ponzio, *'Joint Procurement and Innovation in the new EU Directive and in some EU founded projects'*, in *Ius Publicum Network Review*, 2/2014.

(124) Art. 43 of Legislative Decree no. 50 of 18 April 2016 (Italian Public Procurement Code) which recalls art. 37(13) of the same Legislative Decree.

(125) Recital no. 73, Dir. 2014/24/EU.

(126) I. H. Anchustegui, *Collaborative Centralized Cross-Border Public Procurement: Where are we and where are we going to?*, in *Centralização Das Compras Públicas*, 2018, forthcoming.

That approach foreshadows a 'tender of tenders' or second-tier award procedure.(127) In principle, it allows contracting authorities to bypass dysfunctional procurement systems or severe corruption in their own country. Such a model of cross-border procurement promises a greater impact on the economic, social and territorial cohesion of the European Union.(128)

6. *Innovative Joint Cross-border Procurement Strategies through Framework Agreements*

Cross-border cooperation framework agreements seem to be the most flexible tools for sophisticated strategies among contracting authorities from different Member States. Cross-border procurement may mean gaining very high value, but it may also yield sophisticated strategies based on market analyses to pursue industrial policy goals. Such strategies may contribute to safeguarding competition and ensuring SMEs' access to opportunity, for example through more (and appropriately sized) lots. By defining and translating similar and harmonized clauses, cross-border procurement may help overcome legal and linguistic barriers to procurement trade arising from conflicts among different national provisions.(129)

The choice of the contractual model to adopt in order to carry out a joint cross-border procurement is closely related to the definition of the underlying cooperation agreement. Under the Procurement Directives, framework agreements have become a stimulus for innovation and for the access of SMEs to public procurement markets through aggregation of public demand and the division (and fair allocation) of that demand into lots by territory or sector.

(127) *See* R. Cavallo Perin and G. M. Racca, *Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process*, cit.. *See* also R. Cavallo Perin, *Appalti pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove direttive*, *cit.*, 36.

(128) G. M. Racca and S. Ponzio, *Nuovi modelli organizzativi per il 'joint procurement' e l'innovazione dei contratti pubblici in Europa* in *Compra conjunta y demanda agregada en la contratación del sector público. Un análisis jurídico y económico* (P. Valcárcel Fernández eds), Thomson-Aranzadi, 2016. As for territorial cohesion, however, it is noteworthy that a recent document by the European Court of Auditors (*ECA Special Report 15/2017, Ex ante conditionalities and performance reserve in Cohesion: innovative but not yet effective instruments*) complained that only 2 of the 57 action plans suggested for public procurement in the ECA General Report 4 were effectively implemented. In fact, in another special report (*ECA Special Report 10/2015, Efforts to address problems with public procurement in EU cohesion expenditure should be intensified*), the ECA also noted that 'failure to comply with public procurement rules has been a perennial and significant source of error. Serious errors resulted in a lack, or complete absence, of fair competition and/or in the award of contracts to those who were not the best bidders'. In a following report (*ECA Special Report 17/2016*), the ECA also noted that 'EU institutions can do more to facilitate access of economic operators (especially of small and medium-sized enterprises) for example by simplifying the rules to the fullest possible extent and by removing unnecessary hurdles which make life difficult for potential tenderers who want to identify procurement opportunities offered by the EU institutions'.

(129) Recital no. 73, Dir. 2014/24/EU.

In general, efficiency has improved because of a wide range of framework agreements that may be awarded; the number of awardees (single or multi-supplier framework agreements) may vary as well as the degree of accuracy of the contractual conditions ('closed' or 'open'). The Directives provide, for 'open' frameworks, for a reopening of competition so that local authorities may tailor their requests to their needs in the purchasing phase, which is particularly useful for cross-border joint procurement.(130)

The Procurement Directives provide for an additional innovative model of framework agreement (the so-called 'mixed' or 'hybrid model'). Such a model, where explicitly provided for in the tender documents, allows agencies to buy directly through the framework agreement (as in 'closed' model) or to re-open the tender between the economic operators under previously specified terms and conditions. This model seems to fit the joint cross-border award of a master contract that might allow users either to call off under their terms and conditions or to launch a mini-competition.

The possibility of using both options (re-opening the tender or not) must be specified in the tender documents as to avoid ambiguous interpretations of the rules governing procurement.(131)

An interesting and innovation-friendly national solution may also consist in having framework agreements, whose subject-matter is the supply of innovative goods and services. An annual expenditure analysis permits to define the categories of products and services and the related thresholds for which regional bodies, their consortia and associations, as well as National Health Service bodies, are obliged to join the framework agreements.(132)

In this way the choice of innovative solutions is encouraged with a quick entering in the market. Such a model might be experimented also cross-border to encourage partecipation of innovative suppliers.

(130) Art. 33(4), Dir. 2014/24/EU. G. M. Racca – G. L. Albano, *Collaborative Public Procurement and Supply Chain: the European Union Experience* in *The SAGE Handbook of Strategic Supply Management* (C. Harland, G. Nassimbeni and E. Schneller eds.), SAGE Publishing, London. G. L. Albano, C. Nicholas, *The Law and Economics of Framework Agreements*, Cambridge University Press, 2016. OECD, *Framework Agreements*, Public Procurement Brief 19, August 2011. CCS, *Guidance on Framework Agreements*, October 2016. The reopening of competition 'shall be based on the same terms as applied for the award of the Framework Agreement and, where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the procurement documents for the framework agreement'. OGC, *Framework Agreements,* September 2008. M. Andrecka, *Framework Agreement Transparency in the Call-Off Process*, in *EPPPL*, 2015, 231. G.M. Racca and R. Cavallo Perin, *Framework Agreements and Joint Procurement: the Future Challenge*, presentation held at the University of Nottingham (24-25 June 2013).

(131) C. R. Hamer, 'Regular purchases and aggregated procurement: changes in the new Public Procurement Directive regarding agreements frameworks, dynamic purchasing systems and central purchasing bodies', in *Public Procurement Law Review* 2014, 4, 201-210.

(132) G. L. Albano, A. Cipollone, M. Sparro, *Divisione in lotti, partecipazione e competizione nelle gare d'appalto*, Quaderni Consip, 2, 2016, 13. *See* http://www.consip.it on innovative framework agreement.

In the public procurement market, demand aggregation allows governments to obtain economies of scale, lowering prices and transaction costs, and also to develop professionalism and to achieve strategies in defining specific objectives to be pursued through public tenders (social, environmental, innovation).

The forms of cooperation among contracting authorities from different Member States and, among these, the role played by framework agreements, may encourage further risk-benefit sharing in developing innovative cross-border procurement.(133)

7. The Execution Phase of Joint Cross-border Contracts

The Procurement Directives notably provide for cooperation agreements which may define the procurement phase, as well as contract management and execution.(134)

As the execution of the contract is beyond the scope of the Procurement Directives, the relevant legislation is supplemented by national provisions and the European rules on international private law. These allow for the choice of the set of national rules to be applied to the execution phase that can differ from that of the award but can thus promote 'competition' among different legal systems.(135)

Each Member State can provide different terms and conditions for the execution phase. Nonetheless, the contracting authorities involved in joint procurement experiences might frame contract clauses, whenever possible, in accordance with regulations of the other partners in order to minimise the legal differences and facilitate the effective performance of the contract.

In this context, the tender documents could present a common set of rules which could serve as a platform for discussing new legal tools and models at the European level. In other words, administrative cooperation might serve as the basis for future European regulation in those fields – e.g. the execution of the contract – which are currently outside the scope of the Procurement Directives.

An example arises in providing a common term of payment or the pre-determination of the commitment by each partner in relation to each product or

(133) Recital no. 73, Dir. 2014/24/EU. *See*: G. L. Albano, 'Demand aggregation and collusion prevention in public procurement', in *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally* (G. M. Racca and C. R. Yukins eds), *op. cit.*, 155; G. L. Albano and C. Nicholas, *The Law and Economics of Framework Agreements*, op. cit.

(134) Art. 39(4), Dir. 2014/24/EU.

(135) G. M. Racca, 'The role of third parties in the execution of public contracts', in *Contrôles et contentieux des contrats publics | Oversight and Challanges of public contracts* (L. Folliot-Lalliot and S. Torricelli eds), Bruylant, Bruxelles, 2018, 415.

service to be performed.(136) This process should be kept consistent with the subject matter of the contract, in accordance with rules which comply with the existing regulations and always in keeping with mandatory rules.(137) A similar issue might arise in relation to bond provisions applied to suppliers awarded contracts in certain legal systems or applied in anticipation of award in others. In a cross-border framework agreement it would seem problematic to apply such different domestic rules and a compromise solution might be to require the successful tenderer the minimum amount admitted as a bond.

The evidence of such different provisions might prompt some to propose a more effective and harmonized rule.

Conversely, the contracts' execution might be performed according to the national law of the country of destination, as provided in the agreement. Such choice appears particularly suitable in case of awarding framework agreements on a cross-border basis, where normally the law of execution of the subsequent contracts depends on the place of the registered office of the beneficiaries of the framework.

It might be of interest to recall that, in order to enter into contracts under a framework agreement, the potential beneficiaries do not have to be directly parties to the relevant framework agreement, as recently confirmed by the ECJ.(138) The only requirements are that the tender documents clearly specify both the contracting authorities that may be potential beneficiaries of the framework agreement and the maximum amount of purchases to be covered by the subsequent contracts. In this model, it is possible that only one among the contracting authorities involved in the project signs the framework while

(136) In the HAPPI case, in order to smooth the potential negative impact of such differences on the award phase, the project leader and the participants created a special document, explaining the call-off procedure for each country, and sent it both to the supplier and to all contracting authorities which were interested in calling off. *See*: EU Commission, *Making Public Procurement work in and for Europe*, cit.; G. M. Racca, *Joint Cross-Border Procurement of Innovative Solutions in the Healthcare Sector. The HAPPI project experience*, cit.; EU Commission, *Support of the internal market policy for growth: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, report written by BBG and SKI, Brussels, March 2017.

(137) This question was addressed in the HAPPI case where the Italian rules on mandatory deposit pursuant to art. 103 of the Italian Public Contract code (Legislative Decree no. 50 fo 18 April 2016) should have been harmonized with the French legislation, under which it is not compulsory, except in the case of a request for anticipated payment by the successful tenderer (art. R2191-3, Code de la Commande Publique – Décret n° 2018-1075 du 3 décembre 2018). A compromise solution has therefore been proposed where the successful tenderer had to guarantee in Italy a minimum value deposit.

(138) ECJ, 19 December 2018, Case C-216/17, Antitrust and Coopservice Soc. coop. arl v. ASST Sebino et al., § 56. *See* also Advocate General's Opinion, § 65, according to which 'There is no reason why the status of party to a framework agreement should mean that a party that has that status must have signed the agreement or even have played a direct part in its conclusion. As the Consiglio di Stato (Council of State) points out, the provisions of civil law governing representation and *negotiorum gestio* permit a person (in this case, an ASST) to conclude a binding agreement on behalf of others where those others have entrusted that person with this task or ratify it *a posteriori*'.

the other partners, if interested, remain free to submit orders (*call-offs*) and enter into the subsequent contracts.

Nevertheless, it should not go unmentioned that if contracting authorities agree on having their domestic law apply to contract execution, tenderers might find it problematic to accept asymmetrical choice of law conditions as part of the tender documentation. As a consequence, tender costs might be raised due to additional transparency requirements concerned with the law applicable to the contract during execution. Disconnecting public procurement and contract laws might create difficulties especially in countries that keep differentiated public contract law regimes. A decision like that might even trigger additional legal risks insofar as there is interaction of pre-award and post-award documentation and requirements, such as call-offs without mini-competition within framework agreements. Nonetheless all these issues can be addressed in the cooperation agreement and clearly explained in the contract documents. The tenderers might know that they bid for a cross-border lot of a framework that would imply the possibility (not mandatory) to deliver according to the master contract and the terms and conditions of different Member States. Thus an opportunity to easy entrance in a new marker could be provided.

Given all of these constraints, in all the joint cross-border projects experienced before the entry into force of the last Procurement Directive, the idea to purchase goods and services from a CPB was truly greatly innovative and challenging. In the mentioned HAPPI project the CPBs signed the framework agreement on behalf of the partners that subsequently provided access free of charge to end users interested in purchasing the goods or the services covered by the agreement. Each subsequent contract had, then, to be concluded by individual beneficiary institutions (i.e. procuring entities) with the economic operator (holder of the contract) on the basis of what was provided for in the framework agreement and of what was evidenced by non-binding documents (e.g., a letter of consultation issued by the contracting establishment) which, however, could not make any substantial change to the terms defined in the framework agreement.

From a demand-side standpoint, the joint cross-border procurement may enhance the administrative, legal and coordinating capacities and resources of contracting authorities among Member States of the Union. A further aspect requiring specific consideration is that economic players, especially SMEs, do not always have the means or an adequate degree of flexibility in coping with the legal risks involved in cross-border activity or with the administrative complexities in different Member States. Therefore, the purpose of this process of 'self-regulation' is the integration, consolidation and homogenization of different provisions so that the enterprises, especially SMEs, are not

discouraged from exploiting the opportunities afforded by the internal market. The next challenge is to prove that evolution through electronic means and open and transparent platforms.

8. Lessons Learned from Transatlantic Experiences

Cross-border procurement poses challenges which virtually cross the Atlantic, and which require shared capacities and strategies. Cross-border procurement in the U.S. and in the EU face common issues of policy, competencies, conflicts of law, jurisdictions and remedies.

The experience to date in cross-border procurement proves that it may significantly improve transparency, integrity and efficiency, and encourage the emergence of more effective contract rules as well. The voluntary choice of cooperation among contracting entities and mainly professional agencies provides the opportunity for administrative cooperation, as sister agencies define their way forward. A further understanding of how jurisdiction rules can be reconciled will help resolve pressing issues beyond joint procurement – how to assess mandatory grounds of exclusion, for example, and how to use tender evaluation to encourage innovation.

From the European standpoint, this will help European integration and the growth of the internal market; this suggests that Member States should not discourage such administrative cooperation, so that European citizens and firms can take advantage of this open and transparent cooperation that would, with time, improve quality in procurement.

Joint procurement is also of utmost importance for fostering innovative procurement of cross-border interest, for improving outcomes, and for leveraging all the advantages of the internal market, although sometimes in different and asymmetric ways and sectors.

The focus on integration helps explain why Europe goes much further in fostering cross-border procurement than the U.S federal government, and why the European regulatory regime seems more similar to voluntary cooperation among countries.

Uniquely, the EU has embraced joint procurement with the objective of promoting goals other than simply ensuring cost-savings, such as encouraging cross-border participation of SMEs, counteracting cartels, assuring integrity and efficiency, furthering environmental sustainability and developing circular economy tools. Interestingly, despite convergence, the EU's ideal of 'Unity in Diversity' allows EU Member States to promote those 'other goals,' which can be shared cross-border on a case-by-case basis. More pragmatically, joint (or

cooperative) in the United States procurement is used as leverage for gaining more efficiency and savings, including across borders, but without Europe's market integration goals. Nonetheless, in the long run such experiences show how cross-border procurement might improve procurement systems from without while also permitting them to pursue specific policy goals, not only nationally defined but also at regional and local levels. This might reconcile the imperative of local choice with the integrity and efficiency of transnational procurement systems.