

Book Discussion:

Joint Public Procurement and Innovation: Lessons Across Borders

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Agenda

- * Introduction
 - * Gabriella Racca/Christopher Yukins: 15:00-15:15
- * Discussants
 - * Caroline Nicholas: 15:15-15:30
 - * Rozen Noguellou: 15:30-15:45
 - * Paulo Magina: 15:45-16:00
 - * Stephane de La Rosa: 16:00-16:15
- * Observations
 - * Gabriella Racca/Christopher Yukins: 16:15-16:25
 - * Laurence Folliot Lalliot: 16:25-16:35
 - * Jean-Bernard Auby: 16:35-16:50
- * Questions and Conclusion

Introduction



Gabriella Racca, University
of Turin



Christopher Yukins, George
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DROIT ADMINISTRATIF
ADMINISTRATIVE LAW
DIRECTOR JEAN-BERNARD AUBY

Joint Public Procurement and Innovation

Lessons Across Borders

<https://www.larcier.com/fr/joint-public-procurement-and-innovation-2019-9782802763802.html>

Directed by G.M. Racca and C. R. Yukins, this book contains the texts of: A. Asatryan, J.-B. Auby, M. Borodina, R. Cavallo Perin, L. Diesing, G.M. Di Giuda, D. Dragos, G.F. Ferrari, L. Folliot-Lalliot, J.M. Gimeno Feliu, M. Ismail, J. Kaufman, C. Kronke, I. Locatelli, P. Magina, P.T. McKeen, A. Miño Lopez, J. Molino, M. Pignatti, S. Ponzio, G.M. Racca, B. Racolța, A. Romeo, C. Santerre-Funderburg, D. Schoeni, M.A. Simovart, P. Valcarcel Fernandez, Ch. R. Yukins



Public Procurement International

Public Procurement International

A resource on public procurement practice, policy and law, from around the globe.

KCL-GWU Symposium – March 16, 2020 Agency-Level Bid Protests GWU Law Government Procurement Program – Teaching Materials (firewall)

New Book — Joint Public Procurement: Lessons Across Borders



Excerpts from the Book (in draft form):

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FOREWORD – BY JEAN-BERNARD AUBY (DRAFT)

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AUTHORS AND EDITORS (DRAFT)

[Authors and Editors](#)

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INTRODUCTION – BY CHRISTOPHER R. YUKINS & GABRIELLA RACCA (DRAFT)

[Introduction: The Promise and Perils of Innovation in Cross-Border Procurement](#)

CHAPTER 1: PROCESS INNOVATION UNDER THE NEW PUBLIC PROCUREMENT DIRECTIVES – BY IVO LOCATELLI (DRAFT)

[Chapter 1 – Ivo Locatelli](#)

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Joint Public Procurement and Innovation: Lessons Across Borders

(Eds. By G.M. Racca – C.R. Yukins)

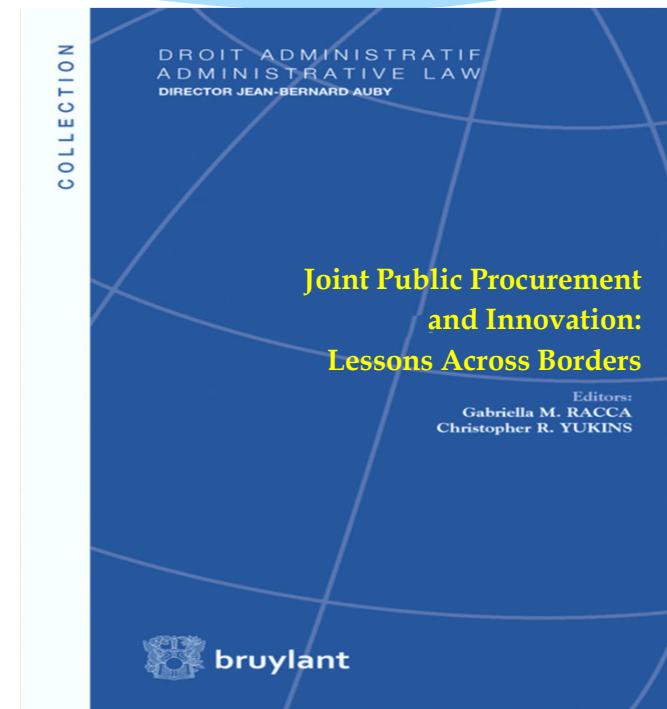
Table of contents:

PART I. Crossborder Procurement and Innovation

PART II. Smart Cities and Procurement

PART III. Encouraging Innovation

PART IV. Innovation in the Procurement Process





Innovation in Procurement:

PURCHASE OF INNOVATION

Buying cutting-edge technology in public procurement markets.

INNOVATION IN PROCUREMENT

Encouraging innovative suppliers in the procurement process.

INNOVATION IN THE PROCUREMENT PROCESS ITSELF

Developing methods and approaches for the procurement process.

JOINT - CROSSBORDER



Directive 2014/24/EU, Art. 39

Cleared the Way for Joint Procurement in the European Union



“A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State.”



Choice of Law

*** Whose law applies?**

EU Procurement Directive, Art. 39, para. 4:

The provision of **centralised purchasing activities** by a **central purchasing body** located in another **Member State** shall be conducted in **accordance with the national provisions** of the Member State where the central purchasing body is located . . .





NATIONAL ASSOCIATION OF
STATE PROCUREMENT OFFICIALS



NASPO
ValuePoint

formerly WSCA-NASPO

Master
Agreement
(Minnesota)

“Cooperative Purchasing”
(Joint Procurement) in the
United States

Alabama



Wisconsin



Demand
Supply
Legal
Control

"Like a Bully at the Lunchroom": How the Federal Government Took Control of the PPE Pipeline

FEMA denies seizing shipments of masks and ventilators, but hospital workers tell a different story, and one medical equipment supplier says the agency—"those eat bastards"—along with the FBI, has taken over his entire operation.

BY DIANA FALONE
MAY 6, 2020

VIRGINIA MERCURY

Virginia's senators call on federal government to explain seizures of medical supplies

Hospitals say feds are seizing masks and other coronavirus supplies without a word

Delaware medical supplier says FEMA seized 400,000 N95 masks; now he's out millions of dollars

Karl Baker Delaware News Journal

Published 3:05 p.m. ET Apr. 21, 2020 | Updated 12:32 p.m. ET Apr. 22, 2020

Is Trump Admin Seizing COVID-19 Protective Equipment from States?

An urgent shortage persists of N95 masks and other supplies in U.S. medical facilities.

JESSICA LEE

PUBLISHED 24 APRIL 2020

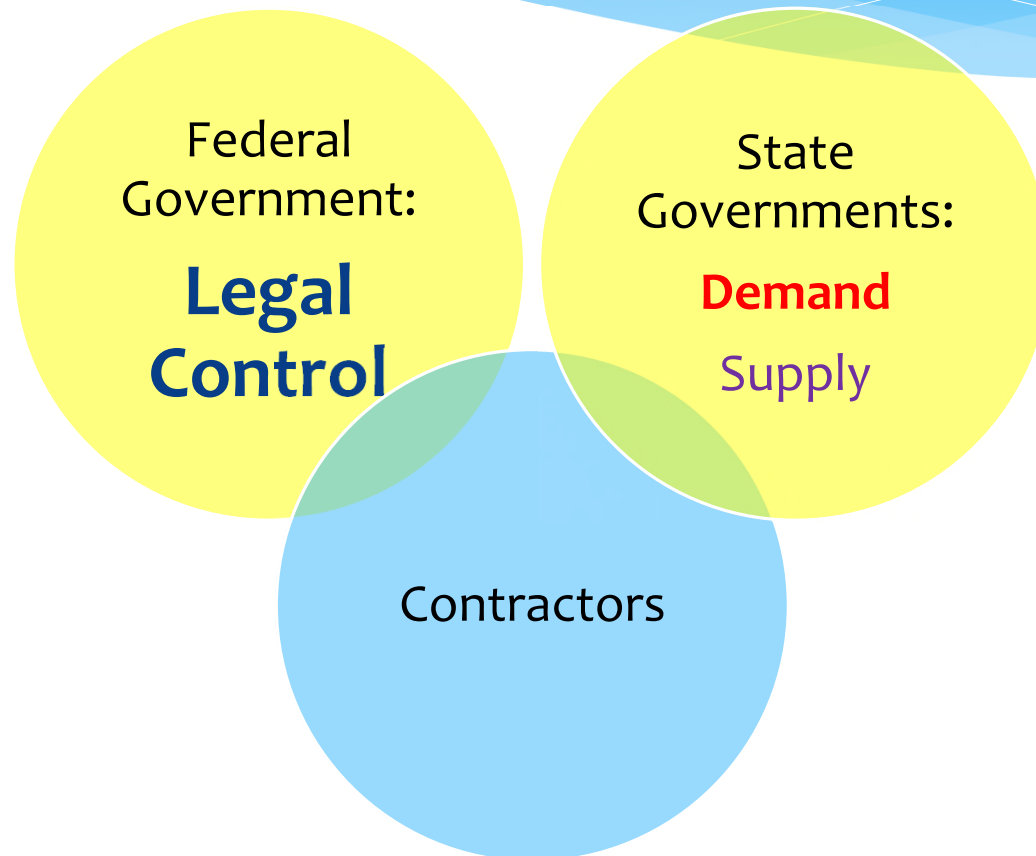
U.S. Government Seized Supplies Using the Authority of the Defense Production Act

NATIONAL

A 'War' For Medical Supplies: States Say FEMA Wins By Poaching Orders

April 15, 2020 - 4:18 PM ET
Heard on All Things Considered

“Un-cooperative Purchasing” in the Pandemic



Supply Chain Risk

Private



Public



Discussants

Caroline
Nicholas



Rozen
Noguellou



Paulo
Magina



Stephane
De La
Rosa





Caroline Nicholas
UNCITRAL



Caroline
Nicholas

Discussion points



Key themes: Innovation and its potential benefits; turning potential into reality

- * Innovation as “new ways of doing things”
 - * Engaging/empowering citizens/suppliers
 - * Improving business processes
 - * Working **collaboratively**
 - * Diversifying supply chains
- * Flexible notion of innovation in PP: beyond industrial policy through PP
 - * Cultural shift: supply side as innovators (existing concept in PPPs/Competitive Dialogue)
 - * “Problem-based procurement methods and practices”
 - * Small business support in US, EU “launch customer/early adopter”
 - * Preferences/guaranteed sales once innovative product available
 - * Flexibility and possibilities to scale up (pandemic recovery)
 - * Examples: general and Covid-19 related



Caroline
Nicholas

Discussion points



Turning potential into reality: Trust and risk

* Collaboration

- * Voluntary for both parties
- * Benefits (commercial, experience-sharing – CPAs; key role of data) against time and costs (familiarity, legal, regulatory, etc)

* Challenge 1: Legal relationships (fitness checks needed)

- * Horizontal: between partners eg CPAs (especially across borders)
- * Vertical: CPAs/procuring entities/suppliers
- * “Public procurement remains highly regulated”
- * Examples: creation of a joint purchasing entity under an international agreement; creation of a group with lead procuring entity based one State – can bodies in another State join? whose law for the procurement procedure (two stages under framework agreements – they may differ); whose law for the contracts/disputes?
- * Indications of some national legal restrictions on use of joint purchasing arrangements (eg maximum contract values, ability to procure directly from a CPA in another State)
- * “Joint responsibility” and “lead agency responsibility” – theory and practice



Caroline
Nicholas

Discussion points



Turning potential into reality: Trust and risk

* Challenge 2 – policy areas

- * Trade offs – short-term focus on value for money, administrative efficiency (key benefits of digitisation) and costs of innovation
- * “Just in time” vs “Just in case” – has Covid-19 led to acceptance of more qualitative approach and longer-term view?
- * Less formal collaboration among suppliers: risks to competition?
- * Demarcation between market interaction for research and procurement processes
- * Risk aversion (SMEs research shows procurement is inherently conservative)
 - * Risk-sharing eg contractual mechanisms so that suppliers remain responsible for operation/management of infrastructure

* Challenge 3: Practical considerations ...

- * Languages, cross-border recognition of certificates
- * Trust: reliance on others’ conduct of steps in the procedure (examples of cross-border suppliers’ lists in some regions)?
- * Time to conclude collaborative arrangements (timely supply)



Caroline
Nicholas

Discussion points



Conclusions (from an UNCITRAL perspective)

- * Many of the issues in joint and innovative procurement involve new aspects of traditional procurement problems
- * Harmonisation and modernisation offer key benefits
- * One size does not fit all => toolbox approach
- * Ensuring transferability of solutions – national, regional, international
- * Some issues are not procurement issues: legal issues in e-commerce; political relations, closed borders ...
- * Keep up the exchange of ideas and dialogue!





UNIVERSITÉ PARIS 1
PANTHÉON SORBONNE

**Rozen Noguellou –
University of Paris**



Paulo Magina
OECD



24-09-2020

Book Discussion:

***Joint Public Procurement and
Innovation: Lessons Across Borders***

(Racca-Yukins eds.)

Paulo Magina

Head of Public Procurement Unit - OECD

Dialogue facilitated and evidence on public procurement policy responses collected by OECD

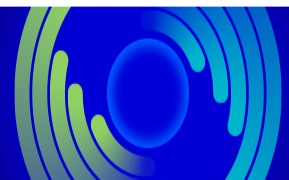


Purchasing environment

What did public buyers experience?



- A radically **new purchasing environment relying on emergency contracting frameworks** never tested to this extent
- **Fierce competition** between public buyers for the same vital products and services
- Serious **disruptions** in supply chains
- Several countries imposed export prohibitions and **restrictions** on “essential goods”
- **Unexpected market responses** (many suppliers demanded advance payments)
- **Price inflation**
- Higher risk for **counterfeit products**



Immediate responses taken by countries

The new challenges required adaptive policy responses and new alliances:

Emergency contracting

- with clear and strong support to public buyers on how to do it!
- with enhanced transparency and accountability

Joining forces

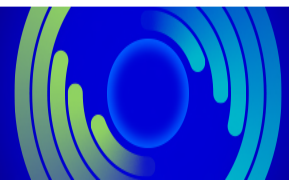
- collaborative and co-operative purchasing approaches
- new ways of managing existing public contracts and concessions

New means of engaging with the market

- to find alternative and innovative solutions
- going deeper in the understanding of the supply chains

More digitalisation

- to cover all phases of the procurement cycle



Joint Public Procurement and Innovation: Lessons Across Borders

(eds. by G.M. Racca – C.R. Yukins)

THE BOOK ANTICIPATED THESE APPROCHES

PART I. Crossborder Procurement and Innovation

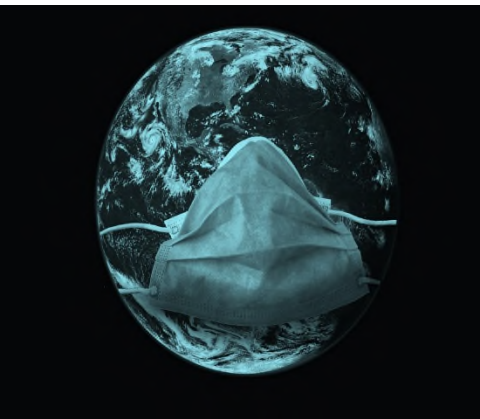
PART II. Smart Cities and Procurement

PART III. Encouraging Innovation

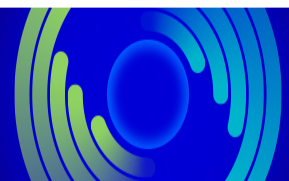
PART IV. Innovation in the Procurement Process



Country initiatives from the COVID-19 crisis that are likely to continue



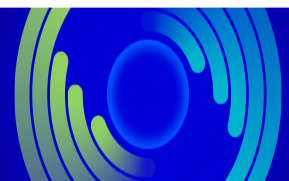
- **Increased transparency:** record keeping and publishing COVID-19 contracts
- **Digital tools** for ensuring bigger transparency and accountability, such as setting up **central price and supplier tracking portals**
- Strengthened **verification of suppliers** and the quality of the supplies



Country initiatives from the COVID-19 crisis that are likely to continue



- Increased dialogue with the market (“***Understand and engage the market better***”) – to find more sustainable and innovative solutions
- Relying more on **local, regional supply chains** (compliance with FTAs and market openness?)
- Relying on **co-operative and collaborative** approaches on national and regional level
- Opening of a **debate around essential** goods/services
- **Data-driven approaches** for emergency contracting



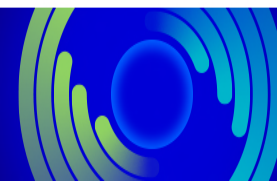
The way forward – post-COVID recovery

A new reality?

Wider digitalisation of the whole procurement process

Expanded and enhanced risk management approaches

Improved strategic sourcing

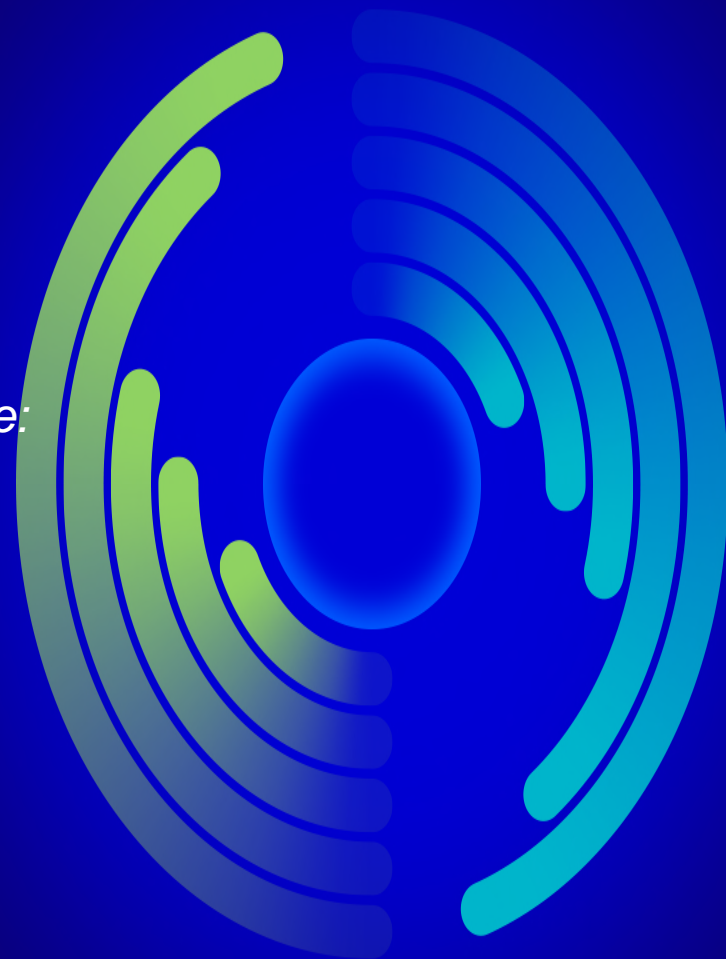


TACKLING CORONAVIRUS (COVID-19)
CONTRIBUTING TO A GLOBAL EFFORT

*Find out more about OECD work on
Public Procurement and Infrastructure here:*
www.oecd.org/gov/public-procurement

✉ Paulo.Magina@oecd.org

📧 www.oecd.org/gov/public-procurement





Stéphane de La Rosa
Université Paris Est Créteil

Book Discussion:

Joint Public Procurement and Innovation: Lessons Across Borders

**Discussion by S. de La Rosa,
Full Professor of Public Law,
Jean Monnet Chair**

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The implementation of cross-borders procurement in Europe. Ambitious objectives but poor implementation?

- * The book rightly stresses on the diversity of meaning of cross-borders
 - * Relevant distinctions and typology between cross-border (a single entity joining two Member States), joint procurement (2 MS acting as contracting authorities) and using resources of another MS (resources of central purchasing body)
 - * A question which appears in several contributions of the book: introduction, ch. 3, ch. 4.
- * The topic became central with the Covid-19 crisis
 - * The “Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis” refers to joint procurement for medical supplies
=> common needs but weakness of common answers.

Lack of appropriation of cross border procurements : 2 topical examples

1) EGTC (European Grouping of Territorial Cooperation - reg. 1302/2013)

- A legal instrument and a legal entity designed to facilitate and promote cross-border, transnational and interregional cooperation.
- Success of the tool: 77 GECT at the current stage (see <https://portal.cor.europa.eu/egtc/CoRAactivities/Pages/egtc-list.aspx>)
- Virtually, a proper ground to foster cross procurement: art. 39 d. 2014/24.
 - The provision sets up a real leeway for MS and recognizes a form of “law shopping” (possibility to choose or to mix the law which apply to the contract).
 - Existence of a “friendly environment” (p. 15 of the book)

Lack of appropriation of cross border procurements : 2 topical examples

- 1) **EGTC (European Grouping of Territorial Cooperation - reg. 1302/2013):** *The mountain labored and brought forth a mouse ?*
 - In practice: **very few examples** of public procurements concluded by EGTC acting as contracting authority.
 - Using keyword “EGTC” on TED database :
 - On the last 7 years, only 25 contracts notices for EGCT/CGET
 - Always the same entities: Eurorégion Aquitaine Euskadi, Eurorégion Luxembourg, Hopital Cerdanya (FR/ESP)
 - For similar needs: e.g. Miscellaneous engineering services, interpretation services, marketing or communication (**no notices** for public work contracts or concessions or object related to innovation).
 - Therefore, most of the contracts of these entities are below the threshold ? Or inexistent ? Or a lack of relevant legal competences conferred to such entities for concluding contracts ? .

Lack of appropriation of cross border procurements : 2 topical examples

2) Joint procurement for medical supplies

- Strong insistence in the Covid-19 communication of the Commission on public procurement: *“the Commission together with the Member States has already stepped up efforts by launching joint procurement actions for various medical supplies”*
- Legal base in the directive 2014/14, art. 39 (often quoted by several contributors), allowing “contracting authorities from different Member States may act jointly in the award of public contracts by using one of the means provided for in this Article”: central purchasing body in a Member State, framework agreement, EGCT.

Lack of appropriation of cross border procurements : 2 topical examples

2) Joint procurement for medical supplies

- In practice: uselessness of. art. 39 for the Joint Procurement of medical countermeasures in the context of the Covid-19
- Activation of the joint procurement mechanism : a "lex specialis" legal base: décision n° 1082/2013 on serious cross-border threats to health, art. 5 "joint procurement procedure"
- and Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369 on the ground of art. 122 TFUE (emergency measures).

Lack of appropriation of cross border procurements : 2 topical examples

Regulation (EU) 2020/521, art. 5. Emergency support under this Regulation may be granted in any of the following forms:

(a) joint procurement with Member States as referred to in Article 165(2) of Regulation (EU, Euratom) 2018/1046 whereby Member States may acquire, rent or lease fully the capacities jointly procured;

➔ *Legal base from financial regulation of EU (rules applying to public contracts of EU institutions) and not from directive. Need to use to budget of EU and specific requirements.*

(b) procurement by the Commission on behalf of Member States based on an agreement between the Commission and Member States; (but no references to art. 39 dir. 2014/24).

(c) procurement by the Commission, as wholesaler, by buying, stocking and reselling or donating supplies and services, including rentals, to Member States or partner organisations selected by the Commission.

➔ Commission acting as a purchasing entity

Concluding remarks

- * Difficulty to find and to establish a common normative framework for cross border procurement, at least in Europe : more a cobweb of rules rather than a clear book of rules.
- * Discrepancy between the legal bases, the flexibility of the rules and new tools (e.g. EGCT) and the practical implementation. A “friendly environment” is a pre requisite but is not sufficient : a common administrative culture and convergences in the practices of purchasing are needed
- * Covid-19: (excessive?) temptation to tighten at the national level issues of public purchase

Observations



Laurence Folliot Lalliot



Jean-Bernard Auby



REFERENCES

Directive 2014/24/EU

Whereas 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.**

Directive 2014/24/EU

Whereas no. 73

...Those rules should determine the **conditions for cross-border utilisation of central purchasing bodies** and designate the **applicable public procurement legislation**, including the applicable legislation on remedies, in cases of **cross-border joint procedures**, complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and the Council (13). In addition, **contracting authorities from different Member States should be able to set up joint entities established under national or Union law**. Specific rules should be established for such forms of joint procurement.

However, contracting authorities should not make use of the possibilities for cross-border joint procurement for the purpose of circumventing mandatory public law rules, in conformity with Union law, which are applicable to them in the Member State where they are located. Such rules might include, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies.

Directive 2014/24/EU
Article 39

Procurement involving contracting authorities from different Member States

1. Without prejudice to Article 12, contracting authorities from different Member States may act jointly in the award of public contracts by using one of the means provided for in this Article.

Contracting authorities shall not use the means provided in this Article for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in their Member State.

2. A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State.

In respect of centralised purchasing activities offered by a central purchasing body located in another Member State than the contracting authority, **Member States may, however, choose to specify that their contracting authorities may only use the centralised purchasing activities as defined in either point (a) or in point (b) of point (14) of Article 2(1).**

Directive 2014/24/EU
Article 39

3. The provision of **centralised purchasing activities by a central purchasing body located in another Member State** shall be conducted **in accordance with the national provisions** of the Member State where the central purchasing body is located. The national provisions of the Member State where the central purchasing body is located shall also apply to the following:
- (a) the award of a contract under a dynamic purchasing system;
 - (b) the conduct of a reopening of competition under a framework agreement;
 - (c) the determination pursuant to points (a) or (b) of Article 33(4) of which of the economic operators, party to the framework agreement, shall perform a given task.

Directive 2014/24/EU
Article 39

4. Several contracting authorities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system. They may also, to the extent set out in the second subparagraph of Article 33(2), award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary elements have been regulated by an **international agreement** concluded between the Member States concerned, the participating contracting authorities shall conclude **an agreement that determines:**

- (a) the **responsibilities** of the parties and the relevant applicable **national provisions**;
- (b) the **internal organisation** of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.

Directive 2014/24/EU
Article 39

4. ...

A participating contracting authority fulfils its obligations pursuant to this Directive when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure. When determining responsibilities and the applicable national law as referred to in point (a), the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective Member States. The allocation of responsibilities and the applicable national law shall be referred to in the procurement documents for jointly awarded public contracts.

5. Where **several contracting authorities from different Member States have set up a joint entity**, including **European Groupings of territorial cooperation** under Regulation (EC) No 1082/2006 of the European Parliament and of the Council (30) or other entities established under Union law, the **participating contracting authorities** shall, by a decision of the competent body of the joint entity, agree on the **applicable national procurement rules** of one of the following Member States:

- (a) the national provisions of the Member State where the joint entity has its registered office;
- (b) the national provisions of the Member State where the joint entity is carrying out its activities.

The agreement referred to in the first subparagraph may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards.

Conclusion

*Thank you for your
attention!*

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SSRN page:

https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1571949