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Modernising Public Procurement
The New Directive



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Joint Procurement Challenges in the Future Implementation of the New Directives

Gabriella M. Racca

1. Introduction

The need to improve efficiency and effectiveness in public procurement markets requires the promotion of collaborative procurement arrangements and the use of framework agreements in order to modernize the procurement system.¹ Aggregation of demand can yield considerable positive effects for contracting authorities and suppliers including economies of scale, increased buying power on the part of public authorities and a possibility for them to pool skills and expertise and to share the procurement related costs and risks. A coherent strategy of lots in framework agreements might favour the development of SMEs and promote the entrance of new economic operators in the relevant market, preventing an excessive concentration of contracts in favour of larger undertakings. Such evolution, together with increased skills of procurement officials, can foster transparency, equal treatment and accountability.

Widespread fragmentation of procurement entities across the public sector is still present.² An overall vision on how to organize and exploit the strategic

1. OECD Centralised Purchasing Systems in the EU, January 11, 2011, at www.oecd-ilibrary.org/governance/centralised-purchasing-systems-in-the-european-union_5kgkgqv703xw-en.
2. The contracting authorities and entities concluding contracts outside of the scope of the Public Procurement Directives must comply with the fundamental principles of the EU Treaty in general and the principle of non-discrimination on grounds of na-

power of public spending is still missing.³ This leads to a fragmentation of contracts of limited value below the European thresholds, being a first key factor that limits the creation of a European procurement market. According to the Green Paper, only 1.6 percent of public contracts are awarded to operators from other Member States.⁴ From a transaction cost viewpoint, the signing of hundreds of thousands of low-value contracts can possibly result in large price variations for very similar products resulting in considerable inefficiency. Consequently, a new complex approach for a complete and comprehensive vision of the possible strategies of Collaborative Procuring policies and Framework Agreements strategies is required.⁵

The Europe 2020 Strategy requires a more efficient use of public funds by improving the conditions for business to innovate and supporting the shift towards a resource-efficient and low-carbon economy. Directive 2014/24/EU has introduced simplified rules and procedures with the aim of opening EU

markets (especially for SME). It aims, among other objectives, to overcome barriers to aggregation of public demand of goods, services and works and to foster cooperation between public entities, preventing any distortion of competition.

A special Chapter on “Techniques and instruments for electronic and aggregated procurement” has been introduced.⁶ It allows national contracting authorities, and contracting authorities from different EU Member States, to engage in public-public cooperation following various models. The opening of new models of joint procurement could foster cross-border participation but also requires means to tackle the problem of persisting differences among Member States’ national procurement systems and solutions to barriers faced by economic operators seeking to participate in electronic procedures, particularly across the borders. A significant and effective aggregation can be achieved through framework agreements. An innovative use of electronic instruments that could foster transparency and accountability⁷ will assure citizens’ monitoring of the quality of the public spending and which is an important imperative in times of economic crisis. Aggregated procurement undoubtedly constitutes an important future challenge for innovation in public procurement award procedures.⁸

Joint procurement and electronic tools implemented by central purchasing bodies (CPBs) for the award of framework agreements changes the perspective of public procurement and opens up new forms of strategic sourcing which individual procuring entities may find difficult to fully understand and comprehend.

Such change requires the adoption of common standards and interoperable systems as well as procedures conducted by electronic means in the performance phase too. Central purchasing bodies (CPB) are best equipped to ensure such development through use of the most innovative e-procurement platforms. Such bodies could also assure effective translation given that language remains a significant barrier to cross-border procurement. Equally, joint procurement presents an opportunity to introduce greater scru-

- tionality in particular, where those contracts are of certain cross-border interest. Case C-324/98 *Telaustria Verlags GmbH v Telekom Austria AG* [2000] ECR-I 10745; Joined Cases C-147/06 and C-148/06, *SECAP SpA v Comune di Torino* [2008] ECR I-3565, for procurement below the threshold with a certain cross-border interest. Case C-412/04, *European Commission v Repubblica italiana* [2008] ECR I-619. See also: G. M. Racca, ‘The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers’ in D. Dragos – R. Caranta (eds.) *Outside the EU Procurement Directives – inside the Treaty?*, (Copenhagen, DJØF, 2012), 373 et seq.
3. A high percentage of the total amount of public procurements is awarded without complying with most of the rules set by European Directives, and value of approximately 4 percent is below threshold. Organisation for Economic Co-operation and Development, ‘Public Procurement in EU Member States – The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives’, May 27, 2010, 13 et seq, in http://www.oecd-ilibrary.org/governance/public-procurement-in-eu-member-states_5km91p7s1mxv-en, where on explain that “an evaluation of the Public Procurement Directives carried out by Europe Economics for the European Commission and published in 2006 concluded that only about 20% of the total amount of public procurement was covered by the detailed rules of the Directives, while the remainder would be covered by exceptions to the Directives, such as certain defence procurements and below threshold procurement”. Racca G. M., ‘The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers’, above fn. 2, 376.
 4. Commission EU ‘Green paper on the modernisation of EU public procurement policy – towards a more efficient European procurement market’, COM(2011) 15 final, January 27, 2011.
 5. Edler J. – Georghiou L., ‘Public procurement and innovation – resurrecting the demand side’, in *Research Policy*, 2007, 36(7): 949-963.

6. Directive 2014/24/EU, Art. 33-39.
7. On this point, see G. M. Racca, ‘The electronic award and execution of public procurement’, in *Ius Publicum Network Review*, available at http://www.ius-publicum.com/repository/uploads/17_05_2013_19_31-Racca_IT_IUS-PUBLICUM-EN.pdf.
8. See G. M. Racca, ‘Aggregate Models of Public Procurement and Secondary Consideration: An Italian Perspective’, in R. Caranta and M. Trybus (eds.), *The law of green and social procurement in Europe*, (Copenhagen, DJØF, 2010), 165.

tiny within procurement systems, providing ways to apply more objectivity in selecting suppliers, supporting better governance and assuring the quality of the performance required.⁹

2. Collaborative procurement in Europe

National governments, local authorities and public organizations, utilities and agencies at any level are normally endowed with contractual autonomy and can purchase independently, according to international, European, and national rules. This means that a considerable mix of individual procuring efforts can be utilised within a public administration.¹⁰ Entities that carry out single procuring procedures often cannot assure the required professional skills and procurement training.¹¹ Many small procurement units do not have highly trained professionals with necessary skills. Further, the risks and transaction costs of a huge number of award procedures may become very high.

This widespread fragmentation of procuring entities hinders an overall vision of public purchasing power and becomes an obstacle to complete and comprehensive procurement strategies.¹² The promotion of value achieved through forms of collaborative procurement and professionalism might change the perspective on public procurement, allowing the achievement of a deeper knowledge of the different market conditions and characteristics¹³ and of the possibility to orient innovation or promote sustainability policies.

The previous rules on public procurement were mainly concentrated only on single award procedures by individual procuring entities. Nonetheless, several Member States coordinated a number of procuring activities in order to deliver the 'best value' in public spending. Over the years, awareness of the efficiency of joint procurement increased and was finally introduced in the European legal framework, thus facilitating a quicker growth of these new opportunities and strategies in public procurement. The previous Directives provided a number of tools for the aggregation of demand, including central purchasing bodies (CPBs) and other instruments that may be used for this purpose.¹⁴ Procuring entities can coordinate their activities by simply sharing their experiences or coordinating certain phases of the procurement procedure. Procurements can be awarded on the basis of a contract of cooperation between several procuring entities through a 'contractual model' of cooperation.¹⁵ Collaborative purchasing arrangements between municipalities in a specific geographical area, formally and permanently established, are not unusual in a number of EU Member States, and which have recently taken off in Italy.¹⁶ Such arrangements are especially feasible for goods and services that are commonly in demand in any municipality, such as food, fuel, and energy.¹⁷

9. Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' SEC(2010) 1214 final October 10, 2010, 7. G. M. Racca, 'Collaborative procurement and contract performance in the Italian healthcare sector: Illustration of a common problem in European procurement', in P.P.L.R., 2010, 119.
10. M. Burgi, 'In-house providing in Germany', in M. Comba and S. Treumer (eds.), *The In-House Providing in European Law*, (Copenhagen, DJØF Publishing), 2010, 71-93.
11. G. M. Racca, 'Collaborative procurement and contract performance in the Italian healthcare sector: Illustration of a common problem in European procurement', cit. above fn. 10, 119-133. The value of these single award procedures can be very limited if we consider, for example, a small rural community. On the contrary, this value can also be very high for an urban city hospital.
12. Edler J. – Georghiou L., 'Public procurement and innovation resurrecting the demand side' above fn. 5, 949.
13. Commission EU, 'European code of best practices facilitating access by SMEs to public procurement contracts' SEC(2008) 2193, June 25, 2008.

14. Different kinds of agreement between contracting entities. G. M. Racca 'Collaborative procurement and contract performance in the Italian healthcare sector': illustration of a common problem in European procurement' above fn. 10; S. Arrowsmith, 'Framework Purchasing and Qualification Lists under the European Procurement Directives' in P.P.L.R., 1999, 115-146 and 168-186; J. Chard, G. Duhs, J. Houlden, (2008) 'Body beautiful or vile bodies? Central purchasing in the UK', in P.P.L.R., 2008, NA26; C. R. Yukins, 'Use and Regulation of Electronic Reverse Auctions in the United States', in S. Arrowsmith (ed.), *Reform of the UNCITRAL model law on procurement: Procurement regulation for the 21st century*, Danvers: Thomson Reuters/West.
15. See G. M. Racca, 'Le modalità organizzative delle aziende sanitarie in relazione all'attività contrattuale e le prospettive di razionalizzazione degli acquisti connessi alla prestazione dei servizi sanitari pubblici', in A. Pioggia – M. Dugato – G. M. Racca – S. Civitarese Matteucci (eds.), *Oltre l'aziendalizzazione del servizio sanitario*, (Milano, Franco Angeli, 2008), 264-297. This normally leads to a sum of separate procuring procedures or the sum of lots included into them, sometimes with a common elaboration of technical specifications and the estimation of aggregate requirements. Cooperation can also lead to informal agreements for the exchange of information on highly standardized products and their prices.
16. Italian D.L. 24 April 2014, Article 9, converted in law 23 June 2014 No. 89.
17. OECD, *Centralised Purchasing Systems in the EU*, above fn. 1.

In Europe, CPBs are created to purchase goods, services or works or other contracting authorities without having to comply with the public procurement rules.¹⁸ The Directives provide discretion to Member States to choose whether to create CPBs and the choice of how to use these instruments.¹⁹ Ordinarily, the aim is to achieve economies of scale and to limit the transaction costs. The new Directives define different models for such activity, underlining certain advantages especially in sharing the risks of innovative procurements.

In this regard, joint procurement and the professionalization of public procurement have become two of the most important challenges for public purchasers and for the suppliers.

Joint procurement is regarded as a fundamental step in optimising professional skills, since it allows Member States to address the present fragmentation and dispersion of these skills.²⁰ The increasing complexity of the award procedure can only be addressed through a number of different legal, economic and technical skills that a small or medium-sized procuring entity cannot afford. This should lower the increasing legal risk of dealing with protests and complaints during both the award of framework agreements and the procedure for call-offs and mini-competitions.

Moreover collaborative procurement can significantly improve the use of IT tools.²¹ A CPB can use these instruments for the digitalization of procuring documents and, in particular, to implement new procedures of selecting

bidders such as e-auctions, framework agreements, dynamic purchasing systems as well as build archives of award data.²²

At the European level, the presence of a number of barriers faced by public organizations buying innovations is increasingly evident. These barriers include a lack of coordination among CPBs as well as a lack of understanding as to how purchasing power can drive innovation at both national and European level. To address this issue, the EU²³ is promoting European public procurement networks²⁴ as strategic means of cooperation.

18. DG internal policies of the UE 'The Applicability of Internal Market rules for Inter-Communal Co-operations' September 2006. According to Article 1, para. (10) European Parliament and Council of Directive 18/2004 [2004] O.J. L134/114 A/18/EC a "central purchasing body" is a contracting authority which: – acquires supplies and/or services intended for contracting authorities or – awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.
19. Directive 2004/17/EC, Recita No. 23.
20. OECD, Centralised Purchasing Systems in the EU, cit above fn. 1.
21. C. R. Yukins, 'Use and regulation of electronic reverse auctions in the United States', above fn. 15. As is known, the provisions inside in the EU directives have to implemented by Member States. Directive 2014/24/EU requires national transposition within 24 months from the date of entry into force of the directive itself (see directive 2014/24/EU, cit., Article 90). Yet, Member States may postpone the application of "rules applicable to communication" ex Article 2, § 1 until 18 October 2018, except where use of electronic means is mandatory pursuant to Articles 34, 35 or 36, Article 37(3), Article 51(2) or Article 53, respectively on dynamic purchasing systems, electronic auctions, electronic catalogues, electronic means of communication to be used in all procurement procedures conducted by a central purchasing body, electronic transmission of notices and electronic availability of procurement documents.

22. In view of the large volumes purchased by these organizations, it has been considered that these techniques can help increase competition and streamline public purchasing. L. Albano – L. Carpineti – F. Dini, L. Giamboni, F. Russo, G. Spagnolo, 'Riflessioni sull'impatto economico degli istituti innovativi del codice dei contratti pubblici relativi a lavori, servizi e forniture', in Quaderni CONSIP, 2007, IV, 13 et seq.
23. Commission EU, DG Enterprise and Industry, 'The lead market initiative' (2009).
24. For significant examples of such networks, see the projects launched within the Competitiveness and Innovation Programme. The legal basis for such networks is the Decision No. 1639/2006/EC of the European Parliament and of the Council, of 24 October 2006, establishing a Competitiveness and Innovation Framework Programme (2007 to 2013). Specifically, the call under which the networks have been launched is the Call for Proposals, "Supporting Public Procurement Of Innovative Solutions: networking and financing procurement" (ENT/CIP/11/C/N02C011), and the financed project are: "HAPPI", which establishes long-term collaboration between healthcare purchasing organisations across Europe in order to identify "ageing well" and innovative health products, services and solutions and to put in place joint cross-border procurement for the benefit of healthcare organisations (about "HAPPI", see <http://www.happi-project.eu/>); "FIREd-uP", with the aim of creating the conditions in which the procurement of new solutions can occur, "by engaging with the market, developing specifications, and addressing legal and operational risk factors", and by launching a competitive dialogue procedure through which one of the two partners, the London Fire Brigade, will award a framework agreement split in lots on behalf of other contracting authorities (about FIREd-uP, see <http://www.fired-up.eu/>); "PRO-LITE", with the aim to support the development of guidance for public sector authorities on how they can consolidate their procurement power to create economies of scale, procure innovatively and drive the European economies, also through delivering common specifications – across member states – for lighting requirements (about "PRO-LITE", see <http://www.prolitepartnership.eu/>); "EcoQUIP", with the aim to support public procurers in purchasing new/improved solutions in order to offset the additional risks and costs of innovation procurement, enable collaboration to create a critical mass of demand and test the feasibility and options for a future EU support scheme; in this context, the project will give birth to an 'Innovation Procurement Leaders Group' of hospitals that have competence in innovation procurement and the capacity to pioneer new approaches to collaborative procurement (about "EcoQUIP" see <http://www.ecoquip.eu/>); "InnoBuild", whose main objective is to improve the process by which contracting public authorities and entities are acquiring

The instruments for establishing and regulating the activities of CPBs differ across EU Member States. Some CPBs in the EU have the legal status of a publicly-owned limited company.²⁵ In other cases, a public-private partnership is established. The question of how activities are funded using such methods becomes more and more complex. This is a key point whenever

goods and services, developing a joint public procurement strategy and then implementing this joint procurement for sustainable high tech building projects for senior citizens (about "InnoBuild" see <http://www.innobuild.eu/>); "Inno booster inLIFE", with the aim to support public procurers in purchasing new and improved solutions in the field of energy efficiency and resource scarcity, through defining technical specifications for innovative solutions and formulating a business-case regarding the procurement of innovation (about "Inno booster inLIFE" see <http://www.bbg.gv.at/index.php?id=1028>); "SPEA", with the aim of undertaking a joint procurement between the three partners, for the purchasing of innovative solutions in the area of energy efficiency in municipal buildings in the three partner cities (about "SPEA" see <http://www.speaproject.eu/en/spea>); "SYNCRO", with the aim to develop a smart road system with measures that range from road and/or car sensors to smart data collection, proposing itself to be a business opportunity for SMEs to access a transnational tender through the launch of transnational public procurement of innovative solutions promoting high tech ITS solutions (about "SYNCRO" see <http://www.synchromobility.eu/>); "PPI Platform", with the objective to structure and coordinate networking, capacity building, dissemination and use of public procurement as a mechanism for procurement of innovation. To achieve the overall objective, the project has created a European Procurement and Innovation Platform consisting of a highly interactive public website supported and complemented by guidance tools, events, training and staff exchange to support public procurement of innovative solutions (about "PPI Platform" see <https://www.innovation-procurement.org>).

25. Hansel (Finland), Consip (Italy), and SKI (Denmark) are all non-profit limited companies that are partially or totally owned and controlled by their countries' ministries of finance.²⁵ SKI has, in addition, a second owner that is the Association of Local Authorities, which owns 45 percent of the company. UGAP (France) is a public body with legal personality and no share capital, fully controlled by the State. Others are public bodies, or agencies or public-private partnerships such as NHS Supply Chain in the UK which has considerable economic independence and a relationship with the German-owned logistics business, DHL. OECD, Centralised Purchasing Systems in the EU, cit above fn. 1. See also G. M. Racca – R. Cavallo Perin, 'Organizzazioni sanitarie e contratti pubblici in Europa: modelli organizzativi per la qualità in un sistema di concorrenza', in A. Pioggia – S. Civitarese Matteucci – G. M. Racca – M. Dugato (eds.) *I servizi sanitari: organizzazione, riforme e sostenibilità. Una prospettiva comparata*, Santarcangelo di Romagna, 2011, 193. In the same book there are more detailed articles concerning Joint Procurement in UK (by D. Casalini), France (by S. Ponzio), Germany, Spain (by M. Pignatti) and US (by M. Mattalia and M. Consito).

CPBs are funded through fees as service charges.²⁶ Procurements can be designed such that procuring entities pay a fee when call-offs (second-round efforts) are made, or fees are paid by suppliers when they invoice through framework agreements. Service charges enable CPBs to make profits which can be reinvested to improve the quality of their services. Further, national rules can define whether they can operate only in specific sectors, act as wholesalers in predetermined product categories,²⁷ or arrange framework agreements in the capacity of intermediary.²⁸ The mandates given to CPBs may be different and specify whether the framework agreements have to be considered mandatory or voluntary for the procuring entities. Some countries require adherence to CPBs contracts as mandatory with the aim to encourage and strengthen collaborative procurement.²⁹ The new Directive offers Member States the possibility to oblige recourse to such methods, even if only for just some categories of public contracts to specific CPBs (Directive 2014/24/EU, Article 37(1)). A more flexible approach is often adopted, leaving procuring entities with a choice to adhere to a non mandatory framework contract of a CPB, based on the evaluation that better conditions are unlikely to be found in the market.

This requires an in-depth knowledge of the specific market, appropriate organizational design and a strategic system for local, regional, national and European procurement. When the requirements are broadly similar, sometimes CPBs face highly concentrated supply markets amongst multi-national

26. OECD, Centralised Purchasing Systems in the EU, above fn. 1, 11, where it is noted that the service fee is based on the invoiced turnover generated under the framework agreement and normally amounts to between 0.6% and 2%.
27. See ECD Centralised Purchasing Systems in the EU, cit. above fn. 1, particularly on Italy, Hungary, Finland and Denmark experiences the operations of Consip (Italy) and KSzF (Hungary) are regulated quite in detail, while the CPBs in the Nordic countries are given more freedom to plan and manage their operations. As an example, the regulatory instrument in Hungary governing the operations of KSzF prescribes in detail the product areas and public sector bodies covered and specifies whether the framework agreements are mandatory or voluntary as well as the financing mechanism. No similarly detailed regulations exist in countries such as Denmark, Finland and Sweden. There, CPBs may basically decide for themselves on the products and service areas that are subject to framework agreements, the financing models, the type of framework agreements to use including call-off systems and, in particular, the organisation, staffing, market relationships and design of all of the steps in the procurement process.
28. OECD, Centralised Purchasing Systems in the EU, above fn. 1.
29. OECD, Centralised Purchasing Systems in the EU above fn. 1.

suppliers and it seems unefficient to set up hundreds of award procedures.³⁰ The limit to free competition considered to be a risk involved in the aggregation of purchases can be overcome³¹ through the provision of different kind of lots for size and type of products when the market conditions require it.

2.1. Joint Procurement as public-public cooperation

In 2011, the EU Commission identified the need to distinguish what is meant by public-public cooperation with the aim to clarify when the EU Public Procurement Directives apply and when they do not for the benefit of contracting authorities wishing to cooperate.³² As highlighted by the ECJ case law, joint procurement can follow different organizational models, which the EU Commission qualifies as “non-institutionalized/horizontal co-operation” (without creating a jointly controlled ‘in-house’ entity) to jointly fulfil public tasks.³³ The Court has stressed that EU law does not require contracting authorities to use any particular legal form in order to jointly carry out their public service tasks.³⁴ On this basis, contracting authorities may establish horizontal co-operation amongst themselves, which involves the conclusion of agreements, not covered by EU public procurement law, if at least the following conditions are met: the arrangement involves only contracting authorities; there is no participation of private capital; the agreement is aimed at real co-operation for the joint performance of a common task, as opposed to a normal public contract³⁵; and the cooperation is governed only by considerations relating to the public interest.³⁶

As recalled, the new Directive highlights the difference between individual contracting authorities and any forms of PP cooperation (Public-to-Public), (voluntary, contractual, corporate) and better defines the role of CPBs as wholesaler or intermediary. In this legal framework contracting authorities may, without applying the procedures provided in the new Directive, “award a public service contract for the provision of centralised purchasing activities to a central purchasing body” (Directive 2014/24/EU, Article 37(4)).

The Court of Justice³⁷ has dealt with the risk of public-public collusion³⁸ related to the concentration of public purchasing power. The Court of Justice excluded such risks considering that such coordination is for the benefit of citizens. Moreover, a lots strategy can avoid the risks of awarding too few and too large contracts. Correctly addressed, Public-Public cooperation can result in a “positive collusion” for the benefit of competition. It can drive the market according to public interest and encourage sharing risks and costs of innovations among a number of contracting authorities. However, aggregated purchasing also requires more transparency since the use of contractual tools such as Framework Agreements can determine risks for integrity as happens in the US with the IDIQ (indefinite delivery – indefinite quantity) “umbrella contract”.³⁹ In the EU, risks of discrimination were related to the award of Framework Agreements, particularly in the UK Healthcare sector.⁴⁰

The substantial challenge of collaborative procurement is to overcome language and legal barriers among Member States. Cross-border cooperation among CPBs might be an important tool to foster competition and participation of economic operators from different Member States and of innovative SMEs.

30. S. Williams, T. Chambers, S. Hills, F. Dowson, ‘Buying a better word: sustainable public procurement’, 2008, available at <http://www.forumforthefuture.org/projects/buying-a-better-world>.
31. G. M. Racca, ‘Professional Buying Organisations, Sustainability and Competition in Public Procurement Performance’ proceeding at 4th International Public Procurement Conference, Seoul, August 26-28, 2010,
32. 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, 3.
33. EU Commission, Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities (‘public-public cooperation’), above fn. 34, 12.
34. Case C-480/06, Commission v Germany, [2009] ECR I-04747, par. 47.
35. EU Commission, Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities (‘public-public cooperation’), above fn. 34, 13. Case C-480/06 Commission v Germany [2009] ECR I-4747, par. 38. On the basis of the Hamburg-judgment, the aim of cooperation is to

jointly ensure the execution of a public task which all the cooperation partners have to perform.

36. EU Commission, Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities (‘public-public cooperation’), above fn. 34.
37. Case C-205/03P, Federación Española de Empresas de Tecnología Sanitaria (FENIN) v EC Commission in [2006] ECR I-6295; Case C-113/07, Selex v EC Commission – Eurocontrol, [2009] ECR I-2207. in C-113/07 P.
38. Case C-113/02, EC Commission v Kingdom of the Netherlands, [2004] ECR I-9707.
39. See C. R. Yukins, ‘Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting’, in P.C.L.J., 2008, 545. G. I. Gordon – G. M. Racca, ‘Integrity Challenges in the EU and U.S. Procurement Systems’, in G. M. Racca – C. Yukins, Integrity and Efficiency in Sustainable Public Contracts, Bruylant, 2014, 117-145.
40. Case C- 406/08, Uniplex (UK) Ltd v NHS Business Services Authority, ECR I-00817.

3. New perspectives of Joint Procurement in the recent provisions

The issue of joint procurement is addressed in a special Chapter on “Techniques and Instruments for Electronic and Aggregated Procurement” (Articles 33 to 39 of Directive 2014/24/EU). Electronic and aggregated procurement are the two main instruments to innovate award procedures.

A combination of these two elements may also be considered of utmost relevance for the purpose of improving procurement efficiency and competition (Directive 2014/24/EU, Recital 69). From a legal, economic or technical viewpoint, IT-tools (Directive 2014/24/EU, Recital 68)⁴¹ might be fully exploited when used by CPBs because of their highly professional and specialized workforce (Directive 2014/24/EU, Recital 72). The new Directive provides for extensive use of electronic means by CPBs’ contractual activity before other procuring entities (Directive 2014/24/EU, Article 37(3)). In order to implement electronic procurement fully, Member States may extend the period of time of 24 months to bring into force the laws, to 30 months. This extension of time is not applicable in the case of the mandatory use of IT-tools by CPBs (Directive 2014/24/EU, Article 90(2)).

The new Directive highlights that there is a strong trend emerging in the European Union towards the aggregation of demand by public purchasers, as the fragmentation of public demand in 250,000 procuring entities seems largely inefficient. Aggregation of public demand is a strategic instrument to obtain economies of scale, including lower prices and transaction costs, and to improve and professionalize procurement management. These objectives can be pursued by concentrating purchases, either by the number of contracting authorities involved or by volume and value over time. Possible problems of procurement aggregation may be an excessive concentration of purchasing power. Therefore, such aggregation should be carefully monitored in order to preserve transparency and competition, as well as market access opportunities for SMEs (Directive 2014/24/EU, Recital 59). Joint Procurement changes the perspective of public procurement since it requires different skills, wider

41. E-Procurement can play a strategic role as it can increase transparency and stimulate innovation and the development of e-marketplaces and participation of SMEs. Concerning the use of IT tools in public procurement see: G. M. Racca, ‘The Electronic Award and Execution of Public Procurement’, in *Ius Publicum Network Review*, 2012, available at http://www.ius-publicum.com/repository/uploads/17_05_2013_19_31-Racca_IT_IUS-PUBLICUM-_EN.pdf.

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market analysis, wider procurement strategies and the implementation of innovative IT solutions.

At present, centralized purchasing activities are used in some EU Member States, consisting of making acquisitions, managing dynamic purchasing systems or awarding public contracts or framework agreements for other contracting authorities by CPBs (Directive 2014/24/EU, Recital 69).

The activities of CPBs can follow two different models defined as “centralised purchasing activities” (Directive 2014/24/EU, Article 2(15)). The first model implies that CPBs operate as wholesalers, i.e., they buy, stock and resell supplies or services to the interested public entities. The second model entails that CPBs act as intermediaries by awarding contracts, concluding framework agreements or operating dynamic purchasing systems to be used by contracting authorities. The new Directive specifies that this intermediary role may in some cases be carried out by conducting the award procedures autonomously, i.e. without detailed instructions from the contracting authorities concerned, while in other cases, CPBs may conduct the award procedures under the instructions of the contracting authorities concerned, on their behalf and for their account (Directive 2014/24/EU, Recital 69).

Moreover, the new Directive highlights the importance of allocating responsibilities for the observance of obligations deriving from the Directive itself (Directive 2014/24/EU, Article 37(2)). Such responsibilities have to be allocated between the individual contracting authorities making recourse to a CPB and the CPB itself, following the principle that an entity is responsible only for the parts of the procedure directly carried on. The allocation of responsibility for the observance of the obligations pursuant to the EU Directives is considerable in case of multi-supplier framework agreements and framework agreements that require two different phases. The multi-supplier framework agreement normally is more complex, both in the award of the agreement and in the design of the call-off system. The award of a multi-supplier agreement is completed only upon conclusion of the call-off procedure, whether this procedure is carried out by ranking or mini-competition. This means that the responsibility for completing a multi-supplier framework agreement in general is shared between the CPB and the procuring entities, affecting the distribution of risk between the two parties for the final completion of the framework agreement.⁴² In this perspective the new Directive establishes the responsibility of the contracting authority when the award of a contract under a framework agreement (operated by a CPB), is conducted by

42. OECD, *Centralised Purchasing Systems in the EU*, above fn. 1, 50.

the re-opening of competition (concluded by a CPB), and determines “which of the economic operators, party to the framework agreement, should perform a given task” (Directive 2014/24/EU, Recital 61). A multi-supplier framework agreement that establishes all the terms (concluded by a central purchasing body) can also be re-opened in order to set a mini-competition (Directive 2014/24/EU, Article 37(2c)). In the latter case, the contracting authority’s responsibility is also extended in case of a “closed” framework agreement provides a partial reopening of the competition (Directive 2014/24/EU, Article 33(4b)). The new Directive provide the mandatory use of electronic means of communication (Directive 2014/24/EU, Article 33(4b))

Further to providing the contractual activity carried out by CPBs, as legal entities established specifically for such purpose, the new Directive also recognizes the several forms of joint procurement that have been realized in the Member States (and therefore also on a local basis) and defined as “occasional joint procurement” (Directive 2014/24/EU, Article 38). According to the new Directive, the strengthened provisions concerning CPBs should not affect the current practices of occasional joint procurement. On the contrary, certain features of these practices should be clarified as joint procurement can play an important role, not least for innovative projects (Directive 2014/24/EU, Recital 71). Moreover, joint procurement may be carried out through many different forms, ranging from coordinated but separate award procedures to more centralized systems of management. Namely, these latter can be arranged by contracting authorities either by acting together or by delegating one contracting authority to manage the procurement procedure on behalf of all contracting authorities.

At a regional level, a procurement policy can be more flexible and meet local needs and circumstances. A deliberate strategy to improve collaborative procurement, however, can also be pursued with sub-regional or municipal consortia.⁴³ The aggregation of local procurement teams, should have the aim of improving the relevant skills. Many procurement officials might be freed up from the repetitive individual award procedures and deal with the contract management. The recourse to the contractual activity of CPBs gives rise to a

43. The Italian D.L. 24 April 2014, Article 9, above fn 16, states that municipalities purchase works, goods and services within the unions of municipalities (referred to in Article 32 of the Italian Legislative Decree 15 August 2000, n. 267), where they exist, or constituting a separate consortium agreement between the municipalities and availing themselves of the competent office, or by resorting to a “soggetto aggregatore” or to the provinces.

public service contract in the meaning of the new Directive (Directive 2014/24/EU, Article 2(9)), but such contract is not subject to the obligation of conducting an award procedure (Directive 2014/24/EU, Article 37(4)) and moreover exempts the individual contracting authorities using CPBs’ activities from the award procedure obligations deriving from European Union law (Directive 2014/24/EU, Article 37(2)). Yet, in case of purchase through a framework agreement or a dynamic purchasing system (DPS), the new Directive specifies that responsibility remains with the individual contracting authorities for what concerns the award of specific contracts within a DPS, the reopening of competition under a framework agreement and, in case of a framework agreement concluded with more than one operator, the determining of the economic operator to whom a specific public contract should be awarded.

The new Directive allows Member States to identify categories of public contracts that can be awarded solely by CPBs or even by specific CPBs (Directive 2014/24/EU, Article 37(1)).

The recourse to organisational models for aggregation of public demand implies the need to identify the most appropriate level of aggregation depending on the goods and services required and characteristics of the supply market. The most innovative level of aggregation would be, of course, the European one. Indeed, geographic regroupings can be identified with the purpose to federate public entities active on the same territory, as well as regroupings set by the nature of the organization in order to set different forms of joint procurement (Directive 2014/24/EU, Article 38). This organisational model does not exclude forms of centralization based on the creation of specialized networks to purchase certain categories of goods and services, and possibly of innovative products. In both cases, the new Directive clarifies the distribution of responsibilities deriving from respect of EU public procurement law among the participating contracting authorities. Specifically, a distinction is made between activities carried out jointly by all the involved contracting authorities (where all such authorities are jointly responsible) and activities that are carried out individually by each contracting authority, like in case of a DPS or a framework agreement (Directive 2014/24/EU, Article 38(2)).

3.1. The ancillary purchasing activities

One of the novelties of the new EU Directive is the introduction of “ancillary purchasing activities” consisting in supporting purchasing activities through the provision of technical infrastructure, of advice on the conduct or design of award procedures, or of preparation and management of procurement procedures on behalf of a contracting authority (Directive 2014/24/EU, Article

2(15)). Contracts for the provision of ancillary purchasing activities should be concluded without applying the procedures provided in the Directive, when such activities are carried out by CPBs in the exercise of their central purchasing activities. Similarly, the Directive's rules do not apply in the instance where ancillary purchasing activities are not provided through a contract for pecuniary interest.

On the contrary, in all the other cases, that is whenever ancillary purchasing activities are not conducted by a CPB in connection with the provision of central purchasing activities, and/or they are conducted through a contract for pecuniary interest, the public service contract, including such ancillary purchasing activities, should be awarded in accordance with the rules provided in the Directive (Directive 2014/24/EU, Recital 70).

The ancillary purchasing activities might be conducted either by CPBs (Directive 2014/24/EU, Article 2(16)) or through the award of a contract to private entities specialized in such activities (Directive 2014/24/EU, Article 2(17)). In this latter case, it seems that the "procurement service provider" should be identified through a procedure for the award of a public service contract (Directive 2014/24/EU, Article 37(4)). Indeed, the initial proposal of the European Commission expressly subjected the identification of such provider to an obligation to conduct an award procedure, yet without identifying whether such provision also concerns ancillary purchasing activities conducted by a CPB.⁴⁴

4. The strategic tool of cross-border Joint Procurement

The express acknowledgment of the possibility for contracting authorities established in different Member States to act jointly in the award of public contracts can be considered as one of the main innovations of the new Directive (Directive 2014/24/EU, Article 39).

At present, joint cross-border procurement encounters specific practical obstacles and legal difficulties concerning conflicts of national laws, although the previous procurement directive implicitly allowed for such practice. In

44. European Commission, Proposal for a Directive of the European Parliament and of the Council on public procurement, 20 December 2011, COM(2011) 896 final, Article 36, "Ancillary purchasing activities": "The providers of ancillary purchasing activities shall be chosen in accordance with the procurement procedures set out in this Directive".

particular, contracting authorities are now experiencing considerable difficulties in purchasing from central purchasing bodies in other Member States.

One of the main objectives of the new Directive on public procurement is to remedy such difficulties, allowing contracting authorities to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, especially for innovative projects where the risks cannot ordinarily be borne by a single contracting authority. Moreover, fostering cross-border joint procurement may help to create cross-border opportunities for economic operators (Directive 2014/24/EU, Recital 73).

The new Directive provides different models for adopting joint cross-border procurement.

The first model is referring to a CPB located in another Member State. In this regard, the Directive states that Member States "shall not prohibit their contracting authorities from making recourse to centralised purchasing activities offered by central purchasing bodies located in another Member State" (Directive 2014/24/EU, Article 39(2)). Member States may only specify which kinds of centralised purchasing activities their contracting authorities may use and particularly wholesaler or intermediary activities as defined in the Directive itself.

With regards to the determination of the applicable law, the Directive states that the national provisions of the Member State where the CPB is located should be applied (Directive 2014/24/EU, Article 39(3)). Such national provisions should apply also to the award of a contract under a dynamic purchasing system operated by a CPB, and, in case of a multiple framework agreement – i.e. a framework agreement with more than one economic operator – concluded by a CPB, to the reopening of competition and to the determination of which of the economic operators, party to the framework agreement, shall perform a given task. With regards to framework agreements, national provisions of the Member State where the CPB is located apply to the definition of the roles of the selected economic operators, specifically where the framework agreement is both multiple and with all the terms defined in the "master contract", without reopening the competition (closed framework agreement) or partly reopening the competition. This latter possibility, concerning the conclusion of a "partly closed framework agreement", has been provided by the new Directive⁴⁵ in order to pursue one of the objectives of the public procurement European law reform, which is flexibility. Moreover, the possibility of partly reopening competition should also apply to any lot of

45. See also the chapter by Lichère in this book.

a framework agreement which has all the terms defined in the master contract (Directive 2014/24/EU, Article 33(4b)).

The new Directive determines the conditions for cross-border utilisation of CPBs framework agreements and provides guidance for the choice of the applicable public procurement legislation, complementing the European rules governing conflict of laws.⁴⁶

5. Cross-border Joint Procurement through a public-public cooperation, mainly among CPBs

Cross-border public-public cooperation is the second model provided to carry out joint cross-border procurement. The new EU Directive states that “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 Article 33(2) second subparagraph, award contracts based on the framework agreement or on the dynamic purchasing system” (Directive 2014/24/EU, Article 39(4)).

These activities may be realized through the inclusion of a provision concerning cooperation in an international agreement concluded by Member States. Where there is no international agreement, the participating contracting authorities shall conclude an agreement that determines to identify the allocation of responsibilities among them, as well as the applicable national legal system and the forms of internal organization. When determining responsibilities and the applicable national law, “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” (Directive 2014/24/EU, Article 39(4)). These choices shall also be mentioned in the procurement documents for the joint award procedure.

This organizational model appears to be an efficient way to achieve cooperation among contracting authorities of different Member States and mainly among Central Purchasing Bodies, that have the skills and the structure to implement such kind of cooperation also for the benefit of other Member States, setting a kind of European Central Purchasing body.

Such model has been tested by the “Healthy Ageing Public Procurement of Innovations – HAPPI Project) founded by the EU Commission with the

46. Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

aims to realize a first, concrete experience for a strategic collaboration among central purchasing bodies operating in the healthcare sectors of France, Italy, United Kingdom, Belgium, Luxembourg, Spain and Austria, opening also to the adhesion of other Member States. The objective is to perform the first European-level aggregated purchase of innovative solutions for the active and healthy ageing, also through market analysis and the split into lots in order to favor a broad participation.⁴⁷

5. Cross-border Joint Procurement through the European Grouping of Territorial Cooperation or other entities established under Union Law

A third model to perform a joint cross-border procurement is to establish a joint legal entity. This may take the form of a European grouping of territorial cooperation (EGTC)⁴⁸ or another entity established under Union law. In such a renewed legal context, contracting authorities established in different Member States should be able to set up joint legal bodies established under national or Union law. Such joint legal entity may also act as a central purchasing body and might be established as a European association.⁴⁹

The only major limit that procurement entities shall respect is, obviously, that they cannot exploit the possibilities for cross-border joint procurement for the purpose of circumventing mandatory public law rules in conformity with EU law, that may be for example provisions on transparency and access

47. See <http://www.happi-project.eu/> and footnote No. 25.

48. Such instrument is regulated by Regulation No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), as amended by Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings.

49. One relevant experience in this sense is the constitution of the European Health Public Procurement Alliance (EHPPA), a European association established under French law (Association Loi 1901; see Loi du 1er juillet 1901 relative au contrat d'association) and made up by contracting authorities from different Member States. According to its recently updated statutes, EHPPA may act as a European CPB, the first to be expressly allowed to act this way (European Health Public Procurement Alliance (EHPPA), Statuts de l'association, art.Article 5).

to documents, as well as specific requirements for the traceability of sensitive supplies.⁵⁰

The objective of an EGTC is to facilitate and promote cross-border, transnational and/or interregional cooperation (overall, territorial cooperation) between its members, which may be Member States, regional authorities, local authorities, and especially, bodies governed by public law, or associations made up of bodies belonging to one or more of these categories,⁵¹ with the exclusive aim of strengthening economic and social cohesion.⁵²

At first, the tasks of EGTC have been limited to the implementation of territorial cooperation programmes or projects co-financed by the Community through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund.⁵³ European territorial cooperation is particularly influential in thematic areas like energy efficiency, innovation, seeking solutions for better functioning of the single market and addressing territorial challenges in the fields of environment and risk prevention, transport and communication links, demographic change and maritime issues.⁵⁴ From a general viewpoint, moreover, an EGTC is a legal instrument capable of providing a strong legal basis for cross-border cooperation. This instrument aims to simplify administration, cooperation and financial control of territorial cooperation in Europe, which is therefore provided with a structure, stability and certainty.⁵⁵

The EGTC is considered the first European cooperation structure with the above mentioned characteristics and provides a legal basis to apply to external activities of local and regional authorities. Nonetheless, as it is a relatively

recent instrument, it still needs to find its place in national legal systems of each Member State. This process is neither quick nor easy, yet its potential benefits should compensate the investment in time and efforts, especially in the procurement sector.⁵⁶ In late 2012, national provisions had been adopted in almost all Member States with the exception of Austria, Germany and Belgium, where the process is in a deadlock due to their federal administrative structures.⁵⁷

The EGTC is probably one of the most innovative instruments in order to foster cooperation among Member States, also for setting a joint cross-border public procurement. Its potential in the procurement sector has not yet been highlighted, but is undoubtedly significant.

The EU Regulation on the EGTC explicitly provides the possibility for a contracting authority to participate in an EGTC. With the only limits of respecting competences under national law and of the composition of the EGTC by members located on the territory of at least two Member States,⁵⁸ an EGTC may be made up of “bodies governed by public law” in the meaning of the public procurement EU directive.⁵⁹

According to the new public procurement directive, contracting authorities established in different Member States may establish an EGTC and agree on the applicable national procurement rules, choosing between the national provisions of the Member State where the joint legal entity has its registered office, and national provisions of the Member State where the entity carries out its activities.⁶⁰ This agreement formalized in a decision of the competent

50. Directive 2014/24/EU, cit., Wh. 73.

51. Regulation 1082/2006, cit., Article 3 (1).

52. Regulation 1082/2006, cit., Article 1 (2).

53. Regulation 1082/2006, cit., Article 7 (3). Nevertheless, an EGTC may carry out other specific actions of territorial cooperation also without a financial contribution from the Community, with the possibility however for Member States to limit the tasks that an EGTC may carry out without the EU financing. INTERACT, ‘European Territorial Cooperation post 2013 – Position Paper’, available at http://www.interact-eu.net/downloads/2152/INTERACT_Position_Paper_ETC_beyond_2013_07_2010.pdf.

54. INTERACT, ‘European Territorial Cooperation post 2013 – Position Paper’, cit.

55. Through Regulation No. 1082/2006, cit. See also METIS GmbH, ‘The European Grouping of Territorial Cooperation (EGTC): state of play and prospects’, 2009, available at <http://cor.europa.eu/en/documentation/studies/Documents/c971da76-082c-4357-9b2c-10a176f1ddd8.pdf>. An EGTC may be established on Community territory under the conditions and subject to the arrangements provided for by the EGTC Regulation, see Regulation 1082/2006, cit., Article 1, § 1.

56. Mission Opérationnelle Transfrontalière, ‘The European grouping of territorial cooperation’, 2008, available at http://www.espaces-transfrontaliers.org/document/Cahier_MOT7_GB_web.pdf.

57. See Metis GmbH, ‘EGTC Monitoring Report 2013. Towards the New Cohesion Policy’, February 2014, available at https://portal.cor.europa.eu/egtc/en-US/Events/Documents/EGTC_MonitoringReport_2013_Paper_pdf.pdf; Metis GmbH, ‘EGTC Monitoring Report 2012’ (2013) 3, available at https://portal.cor.europa.eu/egtc/en-US/discovertheegtc/Documents/Monitoring%20Report%202012/EGTC_Monitoring_Report_2012.pdf. In the case of Belgium, one of the reasons why the adoption is still pending is the recent three-year long government crisis. Effectively, in these three countries, strong federalist structures have led to a situation where national provisions have been adopted by the regional bodies but federal law is still pending. Therefore, all Austrian and German Länder have adopted a legal framework for the EGTC while the federal authorities are expected to approve these provisions.

58. Regulation No. 1082/2006, cit. Article 3, § (1) and (2).

59. Regulation No. 1082/2006, cit. Article 3, § 1(d).

60. Directive 2014/24/EU, Article 39, § (5). This agreement “may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be

body of the joint legal entity may be established either for an undetermined period of time or for a determined period, as well as for certain types of contracts or for individual contracts (Directive 2014/24/EU, Article 39(5)).

For some countries, such as the UK, this solution would be particularly innovative, as it has never been used. Additionally, in different Member States, offices were settled in the context of the European programme aimed at providing assistance for European Territorial Cooperation, and therefore also for the constitution of EGTCs.⁶¹

The EGTC Regulation has recently undergone reform. The new Regulation on the EGTC, amending the former, provides an extension of the maximum period for approval of the EGTC – by the competent national authorities of prospective members – from three to six months. This extension is motivated by the fact that the present three-months period has been rarely respected and represents an obstacle to the establishment of new EGTCs.⁶² The other novelty of the amended Regulation is that any EGTCs will be approved tacitly after 6 months in absence of objection (which has to be duly motivated) by the national authorities, provided that at least the Member State where

limited to a certain period of time, certain types of contracts or to one or more individual contract awards”. Regulation No. 1082/2006, cit., Article 1 (3) and (4). The EGTC could act as a CPB and “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”.

61. Reference is made to the INTERACT Programme: <http://www.interact-eu.net/>.

62. Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013 amending Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings, whereas 13: “Experience gained from establishing EGTCs shows that the three-month period for the Member States’ approval procedure has rarely been respected. That period should therefore be extended to six months. On the other hand, in order to ensure legal certainty after that period, the convention should be deemed to be approved by tacit agreement, where applicable, in accordance with the national law of the Member States concerned, including their respective constitutional requirements. However, the Member State where the proposed registered office of the EGTC is to be located should have to formally approve the convention. While Member States should be able to apply national rules on the procedure for approval of a prospective member’s participation in the EGTC or to create specific rules in the framework of the national rules implementing Regulation (EC) No 1082/2006, derogations to the provision concerning tacit agreement after the six-month period should be precluded, except as provided for in this Regulation.”

the proposed EGTC’s registered office would be located approves formally the convention.⁶³ Indeed, difficulties in getting the approval of the competent authorities in the Member States represent one of the main present obstacles to the establishment of new EGTCs.⁶⁴

63. Regulation No. 1082/2006, Article 4 (3), 2nd-3rd sub-para.: “In the event of non-approval, the Member State shall state its reasons for withholding approval and shall, where appropriate, suggest the necessary amendments to the convention. The Member State shall reach its decision, with regard to approval, within a period of six months from the date of receipt of a notification in accordance with paragraph 2. If the Member State which has received the notification, does not raise an objection within that period, the participation of the prospective member and the convention shall be deemed to be approved. However, the Member State where the proposed registered office of the EGTC is to be located shall formally approve the convention in order to allow the EGTC to be established”.

64. Metis GmbH, ‘EGTC Monitoring Report 2012’, cit., 102. Another present challenge concerns hiring staff to work in EGTCs. Effectively, almost all the established EGTCs faced procedural problems in this regard, and the main difficulty was overcoming the local bureaucratic obstacles to hiring staff from the EGTC’s members to work in the structure. The legal situation of the staff of the EGTCs is clarified in the new regulation on the EGTC, where it is provided that the convention for the EGTC – and not the statute – will include provisions concerning the staff. Therefore, the members of an EGTC will be able to choose the applicable law to the recruitment and management of personnel. Regulation (EU) No 1302/2013, Recital 24: “The convention should, in addition to including a reference to the applicable law in general as laid down in Article 2 of Regulation (EC) No 1082/2006, also list the Union and national law applicable to the EGTC. In addition, it should be possible for that national law to be the law of the Member State where the organs of the EGTC exercise their powers, in particular in the case of staff that work under the responsibility of the director and are located in a Member State other than the Member State where the EGTCs has its registered office. 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.”; Recital 26: “Given the importance of the rules applicable to staff of EGTCs and of the principles governing the arrangements concerning personnel management and recruitment procedures, the convention, not the statutes, should specify those rules and principles. It should be possible for different options as to the choice of rules applicable to staff of EGTCs to be laid down in the convention. The specific arrangements concerning personnel management and recruitment procedures should be addressed in the statutes”; Regulation No. 1082/2006, cit., Article Article 8 2 (k): “The convention shall specify the rules applicable to the EGTC’s staff, as well as the principles governing the arrangements concerning personnel management and recruitment procedures”.

The Regulation on the EGTC, even after its reform, does not deal with problems specifically related to joint cross-border procurement.⁶⁵ However, the new regulation on the EGTC states that such instrument may be used in the future for the “joint management of public services”, with particular regard to services of general economic interest.⁶⁶ Overall, the EGTC might be the easiest and most innovative instrument in order to favour cooperation among Member States and central purchasing bodies in order to foster joint cross-border public procurement in the EU internal market.

6. Conclusions

The new Directive considers procurement as an instrument of economic policy and aims at enforcing public purchasing power. It does not only generally provide the possibility to perform joint procurement, but it offers specific models to be applied at national and European level. The introduction of new models of European joint procurement could foster cross-border participation and require to find the way to tackle the problem of the persisting differences among Member States’ national procurement systems, as well as solutions to overcome legal, language barriers for the participation of economic operators and the subsequent correct performance all over Europe. New joint procurement strategies, through the use of electronic tools, especially by central purchasing bodies (CPBs), might change significantly the perspective of public procurement, overcoming the traditional individual award procedure. The dif-

ferent models of framework agreements together with the possibility to define sets of different lots and of different conditions or to leave them to the second phase of competition permit the kinds of strategic sourcing which have otherwise been unknown in a single traditional award procedure. The analysis of the relevant market and of the different stakeholders’ strategies could make efficiency become the primary goal and permit also to pursue innovation and sustainable procurement.

Overall, the abolition of barriers, especially on a cross-border basis, to cooperation between contracting authorities and to participation of economic operators in award procedures, would favour the adoption of common standards and requirements for formats as well as processes and messaging in procurement procedures conducted using electronic means of communication and evaluation. This policy can be carried out effectively by CPBs, considering the high amount of the value of the contracts that can involve a considerable number of undertakings. They could use the most innovative e-procurement platforms and assure translations, whenever the language can be a significant barrier to cross-border procurement. Equally, joint procurement presents an opportunity to introduce greater scrutiny within procurement systems, providing ways to apply more objectivity in selecting suppliers, supporting better governance and assuring the quality of the performance required.⁶⁷

A professional complex organization, such as a CPB, might better resist the pressures of powerful lobbies on procuring entities and even on governments to act in their narrow interest. The high professionalism of such organizations, linked with transparency connected with the use of electronic tools and electronic archives, that allow comparison of prices, performances, quality, and customer satisfaction, might better counteract such pressures. Collaborative procurement has the potential to foster competition by crushing car-

65. Regulation (EU) No 1302/2013, Recital 25: “This Regulation should not cover problems linked to cross-border procurement encountered by EGTCs.”

66. Council of EU, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1082/2006’, Recital 8: “While Regulation (EC) No 1082/2006 allows for bodies established under private law to become members of an EGTC provided that they are considered as being bodies governed by public law as defined in Directive 2004/18/EC of the European Parliament and of the Council, it should be possible to use EGTCs in the future to jointly manage public services with a particular focus on services of general economic interest or on infrastructure. Other private or public law actors should also be able, therefore, to become members of an EGTC. Consequently, ‘public undertakings’ as defined in Directive 2004/17/EC of the European Parliament and of the Council, and undertakings entrusted with the operation of services of general economic interest, in fields such as education and training, medical care, social needs in relation to health care and long-term care, childcare, access to, and reintegration into, the labour market, social housing and the care and social inclusion of vulnerable groups, should be covered as well”.

67. Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 7. G.M. RACCA, ‘Collaborative procurement and contract performance in the Italian healthcare sector’: Illustration of a common problem in European procurement’, above fn. 10.