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COLLECTION

DROIT ADMINISTRATIF
ADMINISTRATIVE LAW

30

Les principes des contrats publics en Europe

Principles of public contracts in Europe

Sous la direction de
Stéphane de LA ROSA
Patricia VALCÁRCEL FERNÁNDEZ

Avec la collaboration de
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CHAPTER 2
Principles of joint cross-border public contracts and transnational effects

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1. – The complex identification of transnational public contracts

The transnational perspective on public procurement and public contracts permits to highlight different aspects of interest[1]. It doesn't seem possible to propose a unique and general definition of "transnational public contract" as well as, going back conceptually, those of "transnational law", "transnational administrative law" and more generally "transnational administrative situations"[2].

While the term "transnational law" can refer to different legal orders or systems of laws, it has been referred also to a "methodology"[3]. It seems to involve a plurality of sources, subjects, and legal processes. A transnational

(1) M. Amilhat, "Classification of public contracts in the context of national laws", in this book.

(2) As well known, in 1956, Philip Jessup (P. C. Jessup, *Transnational Law*, 1956) theorized the expression "transnational law", using it to refer to "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories". Jessup proposed that "transnational law" should involve – and at the same time question – multiple legal sources and actors across borders and legal regimes. See P, Zumbansen, "Transnational Law", J.M. Smits (eds), *Elgar Encyclopedia of Comparative Law*, Elgar, Cheltenham, 2006, p. 738. Cf.: S. Kalantry, R. Hancock, "Transnational law as a framework for law clinics", *Jindal Global Law Review* 11, 2020, pp. 251-270; L. Backer, "The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders", *BYU Journal of Public Law*, 2016, Vol. 31 (1), pp. 1-53; M. Audit, S.W. Schill, "Transnational Law of Public Contracts: An Introduction", M. Audit, S.W. Schill (eds), *Transnational Law of Public Contracts*, Bruxelles, Bruylant, 2016, pp. 3-20; S. W. Schill, "Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization", *Riv. Trim. Dir. Pub.*, 1, 2014, pp. 1 s; S.W. Schill, "Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization", *NYU Law School Jean Monnet Working Paper JMWP*, 5, 2013.

(3) See P. Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism", *Transnational Law & Contemporary Problems*, 2012, pp. 305 et s.: "Transnational law constitutes a methodological shift in legal theory – an attempt to bridge the experience of legal pluralism in the nation-state with that of the emerging transnational space "Transnational Law"

legal approach has been referred to "how actors and instruments contribute to providing order to social relations in administrative contexts"[4].

This seems to fit when referring to "transnational contracts", whose role and notion cover a wide range of phenomena. It has been noted that, unlike contracts that link parties across jurisdiction, conventionally labelled "international" contracts and subject to private international and procedural law, "transnational contracts and their law abstract from national references to an even greater extent", or we might say a different extent[5].

A transnational effort can originate from a project or endeavor of harmonization intended for transboundary use, as it happened, for private and commercial law, with the Vienna Convention for the International Sale[6], the UNIDROIT Principles[7] and the Principles of European Contract Law (PECL)[8]. The *lex mercatoria* has been considered to be the most sophisticated exponent of this "transnational" development[9], together with other regimes that recently stepped up including the *lex sportiva*[10], *lex digitalis*[11] and *lex financiaria*[12].

As noted, the study of transnational contracts in the administrative setting goes further than the classical definition of transnational law as regulating "actions or events that transcend national frontiers"[13]. The "transnationalisation" of administrative law[14], in the sense of a widely regulatory

(4) S.W. SCHILL, "Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization", *supra*, note 2, p. 23.

(5) K. HENDRIK ELLER "Transnational Contract Law", P. ZUMBANSEN (eds), *The Oxford Handbook of Transnational Law*, 2021, p. 519.

(6) The United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted by the United Nations Conference on Contracts for the International Sale of Goods, held at Vienna from 10 March to 11 April 1980.

(7) The UNIDROIT Principles of International Commercial Contracts (UPICC) constitute a non-binding codification of the general part of international contract law, adapted to the special requirements of modern international commercial practice. The latest edition of the UNIDROIT Principles published in 2016 consists of 211 Articles in 11 Chapters, covering the following topics: General Provisions, Formation and Authority of Agents, Validity, Interpretation, Content, Third Party Rights and Conditions, Performance, Non-performance, Assignment of Rights, Transfer of Obligations, Assignment of Contracts, Limitation Periods, Plurality of Obligors and of Obligees. See R. CARANTA, "Are the Principles of European contract law relevant for public contracts?", in this book.

(8) The Principles of European Contract Law (PECL) were drafted by an international commission chaired by Ole Lando, See O. LANDO, "European Contract Law", *American Journal of Comparative Law*, 31, 1983, p. 653. See R. CARANTA, "Are the Principles of European contract law relevant for public contracts?", in this book.

(9) K. HENDRIK ELLER, "Transnational Contract Law", *supra*, note 5, p. 520.

(10) A. DUVAL, "Lex Sportiva: a playground for transnational law", *European Law Journal*, 19, 2013, pp. 822-842.

(11) L. VIELLECHNER, "Responsive legal pluralism, the emergence of transnational conflicts law", *Transnational Legal Theory*, 6, 2015, 312-332.

(12) K. HENDRIK ELLER, "Transnational Contract Law", *supra*, note 5, pp. 513-530.

(13) P.C. JESSUP, *Transnational Law*, *supra*, note 2., p. 2.

(14) P. ZUMBANSEN, "Transnational Law", *supra*, note 2, p. 743.

science[15], explains the raising importance of public-private cooperation and of public contracting as a form of supranational governance[16]. Delving into the role of the actors and instruments in public contracts law as part of a transnational legal approach provides a framework for understanding how this field of administrative governance "is shedding its domestic ties and is opening up towards normative influences beyond state-centered conceptions of public law"[17]. Moreover, the impact of international trade agreements and the rules on procurement, public contracts and domestic law demonstrate how non-state instruments and rules are geared towards breaking open the territorial limitations of markets for public contracts[18].

They do not only "transnationalize" the award and execution phase of public contracts but also plays a role in strengthening the impact of such rules and principles able to affect both "the implementation phase of public contracts and the rights and procedures of parties to public contracts"[19].

In a different perspective, public contracts appear exposed to a growing number of soft-law instruments, whose impact is no less transformative than binding international commitments, such as the United Nations Commission on International Trade Law (UNCITRAL), or the Model Law on Public Procurement and the OECD Principles[20].

Concerning public procurement and public contract domain, it is necessary to consider the impact of European Union Directives and the principles on procurement and the related case law of the Court of Justice, all pursuing the aim of European integration. The goal of integration requires a special consideration when examining the transnational effects of public procurement and

(15) See A. AMAN, *The Democracy Deficit*, New York University Press, 2004.

(16) S.W. SCHILL, "Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization", *supra*, note 2, p. 24, according to which transnational law on the administrative sphere "does not only cover trans-border aspects of administrative relations, such as the involvement of foreign interests or foreign laws, but encompasses administrative law and administrative relations in an all-encompassing way, including where no trans-border element is obvious, but is present in how a specific domestic legal norm came about or is applied, for example, by borrowing from a foreign legal system".

(17) M. AUDIT, S.W. SCHILL, "Transnational Law of Public Contracts: An Introduction", *supra*, note 2, p. 9.

(18) L. FOLLIOT-LALLIOT, "From the Internationalization of Rules to the Internationalization of Public Contracts: How International Instruments Are Reshaping Domestic Procurement Systems", M. AUDIT, S.W. SCHILL (eds), *Transnational Law of Public Contracts*, Bruxelles, Bruylant, 2016, pp. 23-44; J. I. SCHWARTZ, "International Protection of Foreign Bidders Under GATT/WTO Law: Plurilateral Liberalization of Trade in the Public Procurement Sector and Global Propagation of Best Procurement Practices", M. AUDIT, S.W. SCHILL (eds), *Transnational Law of Public Contracts*, Bruxelles, Bruylant, 2016, pp. 79-106.

(19) M. AUDIT, S.W. SCHILL, "Transnational Law of Public Contracts: An Introduction", *supra*, note 2, p. 10.

(20) *Ibid.*, p. 12.

contracts in the European Union, especially when such effects are outside the scope of the directives.

It is necessary to consider that not all the EU Member States assign the same meaning to the term "public contract". While usually it is used as a synonym for "administrative contract" or, more broadly, "public law contract", the case-law of the Court of Justice of the European Union might serve as gap-fillers and guide the interpretation also of transboundary public contracts[21].

2. – Transnational effects of public procurement and public contracts

A research on transnational public contracts may usefully highlight all the aspects that are not entirely covered by the European Directive provisions on public procurement, which let national choices to regulate cross-border legal effects of public contracts in different countries.

As well-known, any European Procurement directive require 27 different implementations of the Member States. The different models of implementation and the wideness of gold plating mechanism determine different approaches of different national procurement systems.

The Procurement Directives address mainly the award phase, so it's even more difficult to choose or combine different rules concerning the execution phase of public contracts.[22] In some legal systems the execution of public contracts is ruled by public law, whether in others by private law, and also the jurisdictions are different. Thus, the analysis of transnational effects in the execution phase is even more complex than in the award phase.

The transnational effects of public contracts have to assure "the application of mandatory public law provisions" and "determine the applicable provisions of the national laws" of the countries involved[23]. 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[24]. The Directives aim

(21) The difficulties of finding a common definition of "public contract" are examined by M. Amilhat, "Classification of public contracts in the context of national laws", *Ius Publicum Network Review*, 2/2019.

(22) G. M. Racca, "The role of third parties in the execution of public contracts", L. Folliot-Lalliot, S. Torricelli (eds), *Controle et contentieux des contrats publics – Oversight and remedies in public contracts*, Bruxelles, Bruylant, 2017, pp. 415-448; G. M. Racca, R. Cavallo Perin, G. L. Albano, "Competition in the execution phase of public procurement", *Public Contract Law Journal*, 2011, Vol. 41, No. 1, pp. 89-108.

(23) Dir. 2014/24/EU, art. 39(1) and (4).

(24) Sanchez-Graells, "Is joint cross-border public procurement legally feasible or simply commercially tolerated? A critical Assessment of the BBG-SKI JCBPP Feasibility Study", *E.P.P.P.L.R.*, 2017, p. 16.

to prevent an intentional distorted use of the National rules that implement the Procurement Directive in the different Member States but may represent a limit on the possible application of multiple laws in the awarding and execution of transnational public contracts. Should all this ever be proved, it might be a case of intentionally avoiding mandatory public law provisions[25].

Choosing the provisions of one Member State does not prevent adding further provisions governing the selection and the award, according to the legal system in which the contract will be executed (*e.g.* the anti-mafia certificate which is required only by Italian legislation). The joint procurement cooperation strategies might define templates that include clauses compliant with different National provisions and providing transparency for the traceability and the effectiveness of public spending.

Cross-border purchasing makes it possible to consolidate public demand in multiple jurisdictions, allowing public agencies to deliver innovative and higher quality goods and services to their citizens[26]. As noted, the Union aims at reducing disparities between the levels of development of the various areas and to improve the least favored ones, by paying particular attention to the cross-border regions[27]. Although several effective mechanisms for cross-border cooperation already exist at inter-governmental, regional and local level, the EU still considers that "legal barriers (especially those related to health services, labour regulation, taxes, business development), and barriers linked to differences in administrative cultures and national legal frameworks, are difficult for the programmes alone to address"[28].

The factors that influences the size and functioning of the cross-border procurement market are mainly related to the language of publication (*e.g.*, publishing the tender in English increased the chances of a direct cross-border award) and to territorial characteristics of the countries involved, as existing regional cross-border markets appear also to favor cross-border procurement: around 40 % of cross-border procurement usually take place within 500 km between contracting authority and successful bidder[29].

(25) R. Cavallo Perin, G. M. Racca, "European Joint Cross-border Procurement and Innovation", G. M. Racca, C. R. Yukins (eds), *Public contracting and innovation: lessons across borders*, Droit Administratif / Administrative Law Collection, Bruxelles, Bruylant, 2019, pp. 93-131.

(26) *Ibid.*, p. 119; G.M. Racca, S. Ponzio, "La scelta del contraente come funzione pubblica: i modelli organizzativi per l'aggregazione dei contratti pubblici", *Dir. Amm.*, XXVII, 1, 2019, pp. 33-82.

(27) Article 174 of the Treaty on the Functioning of the European Union.

(28) EU Commission, Proposal for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context, COM/2018/373 final – 2018/0198.

(29) EU Commission, *Study on the measurement of cross-border penetration in the EU public procurement market*, March 2021, which analyses the size and characteristic of the cross-border procurement market in the EU in the period 2016-2019. It also emerges that companies mainly participated in domestic public tenders rather than in cross-border procurement. Participation in cross-border procurement seemed to have a marginal role in the companies' public procurement activities, as only a small

These issues have also been evidenced in the recent "Proposal for a Regulation on a mechanism to resolve legal and administrative obstacles in a cross-border context", which stressed, as an example, that the 2014 Procurement Directives contains 19 instances where minimum standards apply, as in the case of setting specific time limits, thus creating 19 potential occasions where cross-border procurement can be particularly difficult, as certain Member States will apply different rules than others[30]. This means that in a transnational contract perspective all these issues must be taken into account and addressed.

Despite several financing (mainly Interreg) and legal instruments (mainly EGTCs) for cross-border cooperation, so far, they have not been sufficient to resolve legal border obstacles throughout the EU[31]. While the scope of the proposed Regulation covers only common-border regions, based on the evidence gathered under land borders experience, this model might be applied also on a vast scale, covering any possible cooperation – also in term of transnational contract – between Member Stated located in different areas of the EU.

3. – Different objectives, and similar principles of joint cross-border procurement: European and Transatlantic experiences

Joint cross-border (intended also among non-neighboring States) procurement sums up different complexities of procurement and of the execution of the contracts with effects in different countries. As well known, the European experience of the procurement Directives had the goal to open the EU internal market to the undertakings, thus providing the possibility for them to participate to the award procedures published by the procuring entities of different Member States. As recently evidenced, the cross-border participation in the award procedures of economic operators of different Member States has been

portion of companies participated in cross-border tenders (20.5 %). These findings were confirmed by contracting authorities and entities, which stated that they mainly received bids from domestic companies. In addition, the success rate of companies participating in domestic procurement was much higher than that of companies participating in cross-border procurement.

(30) *E.g.*, the standstill period is of 10 days in UK (art. 87, *Public Contracts Regulations*), 11 days in France (art. R. 2182-1, *Code de la Commande Publique*), or even 35 days, as in Italy (art. 32, *Codice dei contratti pubblici*).

(31) To reduce the complexity, length and costs of cross-border interaction, the EU Commission has proposed a mechanism to apply, for a common cross-border region (*e.g.*, France and Spain), in a given Member State, the law from the neighboring Member State (*e.g.*, the French law) if applying its own law (*e.g.*, the Spanish law) would present a legal obstacle to implement a joint project (which might be an item of infrastructure or any service of general economic interest). See EU Commission, *Proposal for a Regulation of the European Parliament and of the Council on a mechanism to resolve legal and administrative obstacles in a cross-border context, supra*, note 28.

quite rare, as it reaches around the 3.5 % and little more for multinational companies based in different countries[32].

The possibility to reverse the perspective and to favor the aggregation of cross-border public demand came out more recently when it became clear that cross border participation of economic operators in a different country was very difficult and limited for legal and language barriers. The 27 different national procurement systems derive, for the award phase from the implementations of the Directives and differs, even more deeply, for what concerns the execution of the contract.

At first the Procurement Directives aimed at legitimizing a doubtful UK National practice of joint procurement and of wide framework agreements similar to the US model of the IDIQ (Indefinite Deliver, Indefinite Quantity) contracts, and similar forms of National Public-Private cooperation[33]. Only in 2014 some explicit provisions tried to overcome the difficulties of joint cross border procurement and a related set of rules have been settled, nonetheless the complexity of the issues raised requires considering the principles that might apply too.

Joint cross-border procurement is a choice let to the contracting entities, but it is significant that the Directive prohibits (the Member States) prohibiting it[34].

This represents one ambitious innovation of the European Directives on public procurement, overcoming the traditional coincidence of the procuring entity that buys for itself and that buys only within a single country[35].

(32) EU Council Conclusions, Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy, Brussels, 25 November 2020; EU Commission, Making Public Procurement Work in and for Europe, COM(2017) 572 final, 3 October 2017, emphasizing that: "Contracting authorities are rarely buying together, as only 11 % of procedures are carried out by cooperative procurement [...] Although not all types of purchases are suitable for aggregation, overall low aggregation rates suggest lost opportunities". EU Commission, Study on the measurement of cross-border penetration in the EU public procurement market, *supra*, note 29, highlighting that in 2016-2019 direct cross-border procurement (i.e. procurement concerning companies located in a different country than the contracting authority) represented only 4.1 % of the total public procurement for contracts below EUR 200 million and 5.5 % for contracts above EUR 200 million. A relevant role in the cross-border public procurement market is played by large firms: they won 69.5 % of cross-border procurement in the same period.

(33) S. Arrowsmith, "The past and future evolution of EC procurement law: from framework to common code?", *Public Contract Law Journal*, Spring 2006, Vol. 35, No. 3, International Procurement Law (Spring 2006), pp. 337-384. See Y. Marique, "Interactions between principles and machinery in English public contracts. Accountability maybe, but no clarity", in this book. Cf.: C. R. Yukins, "Are IDIQs inefficient? Sharing lessons with European framework contracting", *Public Contract Law Journal*, Spring 2008, Vol. 37, No. 3 (Spring 2008), pp. 545-568.

(34) Dir. 2014/24/EU, art. 39(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".

(35) G.M. Racca, C. R. Yukins, "Introduction. The Promise and Perils of Innovation in Cross-Border Procurement", G. M. Racca, C. R. Yukins (eds), *Joint Public Procurement and Innovation:*

The Procurement Directives encourage such forms of cooperation and allow the contracting entities freedom to choose them and to pursue shared goals[36]. The provision that "member States shall not prohibit" cross-border procurement implies a European support for such forms of cross border cooperation, probably in consideration of the limited cross-border participation of undertakings in the procurement of different Member States[37]. Such provision implies that National contracting entities should be free to establish cross-border horizontal cooperation without the necessity of an International Treaty, as it was before. The EU Directive tries to overcome some of the complexities and the legal barriers to such possibility, nonetheless many issues remain uncertain, and the limited experiences still leaves open several issues.

The EU and the National principles on the award phase of procurement and on the contract execution thus might have specific applications in addressing the cases of joint cross border procurement. Sometimes it might be required a choice or a combination of rules and principles of different Member States. Sometimes it might occur an amplification of some principles such as transparency, favor for participation, a strengthening of debriefing of the choices.

As well known, the cross-border interest of a procurement implies the application of the EU principles also below threshold[38]. This happens when a contracting entity of one Member State just wants to award a procurement for its own territory and according to its own legislation, so any problem of transnational effect can be excluded. The application of EU principles is to favor the participation of economic operators of the cross-border country, that normally is very little, so also below threshold the automatic exclusion of abnormally low offers is forbidden[39].

Lessons Across Borders, *Droit Administratif / Administrative Law Collection*, Bruxelles, Bruylant, 2019, pp. 1-27.

(36) EU Commission, *Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market*, 2011. The document recognizes how "cross-border cooperation between contracting authorities from different Member States could contribute to the further integration of procurement markets, encouraging the defragmentation of European markets across national borders".

(37) See EU Commission, Study on the measurement of cross-border penetration in the EU public procurement market, *supra*, note 29.

(38) ECJ, Judgment of the Court (Fourth Chamber) of 15 May 2008, *SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v. Comune di Torino*, Joined cases C-147/06 and C-148/06, ECLI:EU:C:2008:277. The ECJ has developed a set of principles and standards for the award of public contracts which apply also to contracts below the thresholds. See ECJ, case C-59/00 of 3 December 2001, Bent Mousten Vestergaard v. Spøttrup Boligselskab; case C-264/03 of 10 October 2005, Commission v. France, esp. paragraphs 32 and 33.) The ECJ stated explicitly that "*although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty*" (Bent Mousten Vestergaard case, paragraph 20).

(39) ECJ, Judgment of the Court (Second chamber) of 4 June 2020, *Asmel societá consortile a r.l. v. A.N.A.C. – Autorità Nazionale Anticorruzione*, case C-3/19; ECJ, 19 December 2018, case C-216/17, *Autorità Garante della Concorrenza e del Mercato, Coopservice Soc coop arl v. Azienda Socio-Sanitaria Territoriale della Valcamonica – Sebino (ASST)*, ECLI:EU:C:2018:1034; ECJ, 2 June 2016, *Dr Falk Pharma GmbH v. DAK-Gesundheit*, ECLI:EU:C:2016:399; See ECJ, 22 October 2015, C-185/14, *"EasyPay" AD, "Finance Engineering" AD v. Ministerski savet na Republika Bulgaria, Natsionalen osiguritelen institute*, ECLI:EU:C:2015:716; ECJ, 26 March 2009, *SELEX Sistemi Integrati SpA v. Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)*, case C-113/07 P, ECLI:EU:C:2009:191; ECJ, 11 July 2006, *FENIN v. EU Commission*, case C-205/03 P, EU:C:2006:453.

It is evident that the stimulus to participation would rise if two cross border contracting entities would join their demand and award a joint procurement thus permitting to win a single lot to an economic operator (that will have to execute the contract in both Countries) or favoring the temporary association or any other form of cooperation among suppliers. In similar cases many transnational issues related to the performance should be addressed in the contract documents and also EU and National principles might help to address the performance of the same or similar contract or the call off from the same framework agreement.

The horizontal public-public cooperation among contracting authorities from different Member States might serve as a legal basis for establishing a system of joint cross-border procurement superior to the individual award procedure of any contracting authority acting alone. The rationale behind the aforesaid provisions on joint and cross-border purchasing is connected, on one hand, to European principles regarding the development of the common market and the protection of competition through the aggregation of demand side and, on the other, to the public interest in the cooperation among central purchasing bodies (or individual contracting authorities) for overcoming the territorial, linguistic, and legal limits existing at national levels[40].

Cross-border procurement also poses challenges that cross the Atlantic, as already said, and which requires shared capacities and strategies. Cross-border procurements in the U.S. and in the EU face common issues of policy, competencies, conflicts of law, jurisdiction and remedies[41].

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(40) Dir. 2014/24/EU, recital No. 73. See EU Commission, *Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities (public-public cooperation)*, Brussels, SEC(2011) 1169 final, October 2011, p. 21. See also G.M. RACCA, "Joint Procurement Challenges in the Future Implementation of the New Directives", F. LICHÈRE, R. CARANTA, S. TREUMER (eds), *Modernising Public Procurement: the New Directive*, DJØF Publishing, Copenhagen, 2014, pp. 225-254. The use of a central purchasing body is a form of public-public cooperation, with reference to which the EU Court of Justice has already had occasion to rule on the risks that may result from collusion among public entities: ECJ, 14 October 2004, *EC Commission v. Kingdom of the Netherlands*, case C-113/02, excluding in some cases: CGCE, 11 July 2006, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. EC Commission*, case C-205/03, § 26; ECJ, 26 March 2009, *Selex v. EC Commission – Eurocontrol*, case C-113/07 P, § 102. In these cases, the Court held that "in order to assess the nature of that purchasing activity, we should not separate the activity of purchasing goods from the subsequent use made of them, and that the economic or not next use of the income of the product purchased necessarily determine the character of purchase".

(41) D. E. SCHOENI, C. R. YUKINS, "Principles of Public Contracts in The United States of America", in this book.

The experience to date in cross-border procurement proves that it may significantly improve transparency, integrity, and efficiency, and encourage the emergence of more effective contract rules as well[42]. The voluntary choice of cooperation among contracting entities and mainly professional agencies provides the opportunity for administrative cooperation, as they may define their way forward. A further understanding of how jurisdiction rules can be reconciled will help resolve pressing issues beyond joint procurement and how to use tender evaluation to encourage innovation.

This type of cross-border cooperation is emerging around the world. In the United States, it is commonly referred to as "cooperative purchasing", with major differences, as public purchasing power in the EU seems to have become a lever of industrial policy as Europe moves to support integration through the growth of SMEs, sustainability and innovation[43]. In the U.S., more pragmatically, procurement is used as lever for gaining more efficiency and savings, including across borders of the US States, but without Europe's market integration goals[44]. What is interesting to underline is that apart from the integration goal, the other European principles on procurement are very similar to the US rules applied in the formation phase of contracts. There is a high uniformity even though they do not consider them principles but just "common best practice rules" to obtain "best value for money" and define the risk allocation among the parties. Also in the US national cross border procurement, there is not a goal of integration but just the goal of efficiency and integrity. At federal level, a uniform system of contract administration reduces transnational costs and improve predictability[45]. Compared to the transatlantic experiences, the goal of completing the procurement provisions on contract administration in Europe becomes quite clear as long as the objective of improving cross border procurement is seen as a priority in the EU. This might favor also the future experience with UK that will no longer be bounded to the Directives but will probably continue to apply the same "principles" and rules regardless of the lost goal of European integration[46].

(42) G. M. Racca, C. R. Yukins (eds), Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally, Droit Administratif / Administrative Law Collection, Bruxelles, Bruylant, 2014.

(43) L. Lebon, "Chapitre 1. Les principes de l'économie circulaire appliqués aux contrats publics", in this book.

(44) R. Cavallo Perin, G. M. Racca, "European Joint Cross-border Procurement and Innovation", *supra*, note 25, pp. 93-131.

(45) D. E. Schoeni, C. R. Yukins, "Principles of Public Contracts in The United States of America", in this book.

(46) S. Arrowsmith, "The implications of Brexit for public procurement law and policy in the United Kingdom", *Public Procurement Law Review*, 2017,1, pp. 1-33; S. Arrowsmith, "Reimagining public procurement law after Brexit: seven core principles for reform and their practical implementation", Working Paper, *SSRN*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523172 (Part 1) and http://ssrn.com/abstract=3672421 (Part 2); S. Arrowsmith, "Constructing rules on exclusions (debarment) under a post-Brexit regime on public procurement: a preliminary analysis", Working Paper, *SSRN*, http://ssrn.com/abstract=3659909. Cf.: C. R. Yukins, "Brexit and procurement: a US perspective on the way ahead", *Public Procurement Law Review*, 2017, 1, pp. 71-75.

3.1. – The cross-border procurement models

As recalled, different models for cross-border cooperation are explicitly provided by the Directive: first, contracting authorities can use public contracts awarded by contracting authorities of different Member States; second, a contracting authority may delegate another one to carry out its own procurement procedure; third, contracting authorities from different Member States can set up joint entities established under national or EU law such as the European grouping of territorial cooperation (EGTC).

The role of cooperation between contracting authorities in devising transnational public contracts becomes essential to define each party's responsibilities as well as relevant national provisions on contract execution and the applicable European and/or national laws and principles[47].

Moreover, the European rules of international private law on conflict of laws ("Rome I") may apply, allowing for the choice of a different law to be applied in the execution phase of the contract, which is beyond the scope of the application of European directives[48]. When considering cross-border situations, Member States have to define the effects of transnational contracts, such as third-party effects of assignment of claims. The current uncertainty as to the applicable law creates a higher legal risk in transnational public contracts, increasing risk of inconsistency in the choice of the national forum for dispute resolution[49]. Addressing all these aspects might avoid competition between

(47) Recital 73 of the Procurement Directive states that the rules provided by the same Directive should determine the conditions for cross-border utilization of CPB 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 of the Council of 17 June 2008 on the law applicable to contractual obligations (the "Rome I Regulation"). See F. S. Menniti, N. Dimitri, L. Gitto, F. Lichere, G. Piga, "Joint Procurement and the EU Perspective", G. Piga, T. Tatrai (eds), *Law and Economics of Public Procurement Reforms*, Routledge, 2018, pp. 121-122.

(48) R. Cavallo Perin, G. M. Racca, "Administrative Cooperation in the Public Contracts and Service Sectors for the Progress of European Integration" F. Merloni, A. Pioggia (eds), *European Democratic Institutions and Administrations*, Torino, Giappichelli, 2018, pp. 265-296.

(49) As the Rome I Regulation does not cover the question of third-party effects of assignment of claims, on 12 March 2018, the European Commission published a proposal for a new Regulation on the matter which seeks to reduce existing legal uncertainty through the adoption of EU-wide, uniform conflict-of-laws rules. The Proposal would help solving the issue of assignment of claims also in case of cross-border/transnational public contracts: even if, in line with the principles of equal treatment and transparency, the successful tenderer cannot – without reopening the contract to competition – transfer the contract nor the related judicial rights to another operator, merely internal reorganizations of the successful bidder such as takeovers, mergers and acquisitions or insolvency, do not automatically require to ri-assign the contract (Dir. 24/2014/EU, wh. no. 110 and art. 72, par.1, let. d) ii) and may actually pose the question of third-party effects of assignment of judicial claims against the contracting authority. Unfortunately, the Proposal is still on-going. See EU Commission, *Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments*

different legal system frameworks and fostering legal integration. This might require harmonizing both tender documents and contract clauses in a way to outline "terms and conditions" running parallel with contract execution according to different national laws and also in order to promote efficiency, transparency, accountability and integrity in public contracting by means of cross-border interoperability and exchange of data in the execution of transnational public contracts[50].

The cross-border procurement strategies may be implemented through a joint award or use of the centralized activities offered by a central purchasing body from a different Member State. In the first case, the cooperation might require defining a set of shared clauses applicable in each country, *e.g.* on mandatory exclusion grounds, thus enhancing harmonization and requiring stricter requirements or finding the minimum common denominator.

Such models of cooperation work on an exclusively voluntary basis and require adequate capacity to meet specific shared strategies. In this context, since cross-border procurement covers contracting entities from different Member States and local agencies, it requires procurement professionals able to manage not only their respective procurement systems but also any applicable rule and principle of the countries involved in the cross-border procurement agreement. Indeed, cross-border procurement poses significant challenges deriving from the diversity of their regulations and practices and requires adequate support to develop such capacity[51].

Another possibility is to use centralized purchasing activities of a different Member State. This model requires the purchasing activity to publish in a contract notice the possibility (also non-mandatory) that contracting authorities from different Member States might call-off from a lot, either directly or after a mini-competition. In this case, the central purchasing body might act as an intermediary[52]. In other cases, the purchasing entity may act as a wholesaler to resell goods and services to contracting entities from different Member States, even though few central purchasing bodies in the EU are acting in this

of claims Brussels, 12.3.2018, COM(2018) 96 final, 2018/0044 (COD), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0096&from=EN.

(50) 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", D. Dragos, R. Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?, European Procurement Law Series*, Vol. 4, Djøf Publishing,, Copenhagen 2012, pp. 373-395.

(51) EU Commission, *Making Public Procurement work in and for Europe, supra*, note 32, p. 7. See R. Cavallo Perin, G. M. Racca, "Administrative Cooperation in the Public Contracts and Service Sectors for the Progress of European Integration", F. Merloni, A. Pioggia (eds), *European Democratic Institutions and Administrations*, Torino, Giappichelli, 2018, pp. 265-296; P. Cossalter, "The principles of public-public cooperation", in this book.

(52) R. Cavallo Perin, G. M. Racca, "European Joint Cross-border Procurement and Innovation", *supra*, note 25, p. 120.

way so far.[53] The Directive leaves the Member States the choice to determine the type of centralized purchasing activity to be drawn from their contracting entities – *i.e.* using centralized activities of CPBs acting as wholesaler or intermediary. Surprisingly enough, it seems that all the Member States implemented the Directive with a broader scope to allow both approaches, except Italy. Italian implementation allows its contracting entities to use purchasing activities from a CPB from another Member State only when it is acting as wholesaler. Such restrictive implementation does not ban agreements for joint cross border cooperation but limits the options when buying from a framework agreement of a different Member State, and consequently, a reciprocal basis principle could limit the cross-border opportunities to cooperate[54].

A recent ECJ decision underlined that when a framework agreement is to be awarded, the tender documents should clearly specify the contracting authorities that may benefit from the agreement and the maximum amount of purchases to be covered by the subsequent contracts[55]. Although the case focused on the provisions of the former Directive 2004/18, the Court's conclusion likely would be the same under the current Directive 2014/24, which repealed and replaced Directive 2004/18 with effect from April 2016 and which includes similar – though more detailed – provisions on framework agreements. In case of joint cross-border procurement both the requirements can be respected, and the award can be based on the principles of a legal system that can thus be effective in another Member States, requiring the application of a national principles for the execution for a certain amount required by one of the listed possible beneficiaries of the framework agreement awarded in another Member State. Also, the remedies for the award should follow the EU and National principles of the awarding entity, while the subsequent challenges on the execution should apply normally (but not necessarily) rules and principles of the Country where the execution take place.

As mentioned, another significant innovation in terms of administrative co-operation regards the possibility for contracting authorities from different Member States to set up joint entities established under national or EU law, such as the European Grouping of Territorial Co-operation

(53) I. Locatelli, "Process Innovation Under the New Public Procurement Directives", G. M. Racca, C. R. Yukins (eds), *Public contracting and innovation: lessons across borders*, Droit Administratif / Administrative Law Collection (eds), Bruxelles, Bruylant, 2019, pp. 31-63.

(54) G. M. Racca, "Central Purchasing Bodies in Italy: Reluctance and Challenges", M. Comba, C. Risvig Hamer (eds), *Central Purchasing Bodies* – Vol. 11, European Procurement Law Series, Edward Elgar, Forthcoming.

(55) ECJ, 19 December 2018, *Antitrust and Coopservice Soc. coop. arl v. ASST Sebino et al.*, case C-216/17, ECLI:EU:C:2018:1034. The case involved a request for a preliminary ruling under Art. 267 TFEU concerning the decision of a regional healthcare authority to accede to a contract for environmental services (classified as a "framework agreement" within the meaning of EU law on public procurement) concluded by another healthcare authority without a new public tendering procedure.

(EGTC), as it will be noted below, or other legal entities that could act as CPBs at the European level[56].

3.2. – *European Grouping of Territorial Cooperation (EGTC)*

The possibility of creating European Grouping of Territorial Cooperation (EGTC) among bodies governed by public law might fit administrative cooperation for the purpose of joint cross-border procurement and transnational contracts. Even more challenging might be the cooperation, not only among traditional contracting entities, but instead among central purchasing bodies located in different Member States, as provided in the Procurement Directives[57]. It might be the legal form for setting an EU Central purchasing body that award framework agreement for the different member States participating to it. In the emergency experience such a CPB would have been of great utility.

EGTCs favor the cooperation of public administrations located in different countries to meet "common economic interests" that might also entail transnational contracts. According to the European Union law, the EGTC is a subject with legal personality set up to promote cross-border cooperation at a transnational or interregional level[58]. In that event, "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"[59]. Nonetheless, the transnational effects of a contract awarded in one country and having effects in another will be possible.

Territorial and linguistic challenges in the diffusion of such cooperative models have led to the creation of heterogeneous national and regional

(56) Dir. 2014/24/EU, recitals Nos. 71 and 73. See EU Commission, Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities (public-public cooperation), *supra*, note 40, p. 12, where it distinguishes between cooperation for the performance of tasks of public interest in the proper sense and assigned activities that would require a competitive tendering within the market.

(57) R. Cavallo Perin, G. M. Racca, "European Joint Cross-border Procurement and Innovation", *supra*, note 25, p. 110.

(58) Dir. 2014/24/EU, art. 39(5).

(59) All approval authorities adopted the original EGTC Regulation (EC) 1082/2006/CE of 5 July 2006; but only 23 of the 54 approval authorities would have adopted the EGTC Regulation as amended by the Regulation (EU) 1302/2013 by December 2017. Since the introduction of the EGTC in 2006, 69 EGTCs were founded in the EU with various local, regional and national authorities as well as other members. Currently there are 68 EGTCs as one closed in 2017. See EU Commission, *Assessment of the application of EGTC regulation*, Final report, April 2018. See also: EU Commission, *European Territorial Cooperation. Building Bridges Between People*, 2011.

frameworks and the degree of detail in national implementation rules still differs considerably[60]. Administrative integration among transnational territorial levels has been hindered by the complexity of the national legal framework for the establishment and membership of the EGTC, and by Member States' tendency to maintain sovereignty on territorial policies, which have so limited the application[61].

Some include extremely technical guidance such as task descriptions, approval procedures and provisions for EGTC staff, or registration procedures in their Member States. Other provisions focus on selective criteria to help EGTCs set-up in the territory of the approval authority. Athough the amendment of the original EGTC regulation has considerably facilitated the performance of EGTCs, there is still room for further clarification and legal certainty of such rules and the relevant principles to apply[62].

Concerning the specific Agreement on cross-border health cooperation signed by France and Spain for the constitution of the European Grouping of Territorial Cooperation regarding the Hospital de la Cerdanya, it is specified that the applicable law also for public procurement is the Spanish law and the law of the autonomous community of Catalunya; the French rules and principles is also applicable, when necessary, in relation to the subject matter and the entities involved[63].

4. – Relevant experiences of transnational public contracts

A relevant experience to promote demand aggregation in different Member States and the transnational effects of a joint cross-border procurement was provided by the HAPPI Project (Healthy Ageing – Public Procurement

(60) R. Cavallo Perin, G. M. Racca, "European Joint Cross-border Procurement and Innovation", *supra*, note 25, p. 119.

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

(62) EU Commission, Assessment of the application of EGTC regulation, Final report, *supra*, note 59, p. 10.

(63) According to art. 9 of the Convention on cross-border health cooperation and the constitution of the European Grouping of Territorial Cooperation Cooperation (EGTC) of the Cerdanya Hospital: "Le droit applicable pour l'interprétation et l'application de la présente convention est le droit de l'État et de la communauté autonome espagnols, sans préjudice de l'interprétation hermeneutique du droit communautaire applicable et du droit français quand son intégration est nécessaire en raison de la matière ou des sujets affectés". According to art. 1.3 of the Statutes of the EGTC: "La passation des marchés publics de biens et de services est assujettie aux règles du droit espagnol qui réglementent la passation des marchés des groupements européens de coopération territoriale ainsi que, le cas échéant, aux reglements du droit communautaire". See Marta Franch, in this book.

of Innovation Project[64]. Before the implementation of the Directives, in the HAPPI project a highly innovative scheme in the healthcare sector was enforced and managed based on a consortium agreement among European partners, procurement experts and academic institutions with the objective of awarding EU joint procurement of innovative solutions for active and healthy ageing persons. The choice of French law for the organizational model (the *Groupement de commandes*) permitted to overcome the first difficulty in the cooperation of five Countries. French law was chosen also for the award procedure of a framework agreement composed of different lots. The contract document provided that the choice of the law regulating the execution of the contract was left to the national partners and each one decided to apply its own national legal system. Nonetheless, the effects of the application of a contract awarded under French law in Italy, for example, required to address the transnational effects to avoid the risk of conflicts of laws. Different situations had to be addressed: for instance, the requirements of the tenderers to comply with the different non mandatory provisions included in the national implementations of the Directives. The French provisions could have resulted into the choice of a supplier not compliant with the Italian rules. The Italian agency should have been then received a supply from a non-compliant supplier according to national law. One might also notice that the agreement underlying the joint procurement might have indicated French law as the applicable law also for the execution of the contract, thus simplifying the award procedure but also providing a great effort of harmonization of provisions[65].

Regarding cross-joint procurement in the EU, it is also possible to refer to the possibility that a public entity participates as supplier in the procurement of a contracting authority in another country[66]. In this case, the transnational effects might be evidenced in the award and execution of the procurement. This possibility has been admitted by the ECJ, which has allowed the participation

(64) See the detailed information at: http://www.masterseiic.it/happi/; European Innovation Partnership, HAPPI Project: Joint Transnational EU Tenders, at: https://ec.europa.eu/eip/ageing/public-procurement-platform/aha-innovative-solutions/5-happi-project-joint-transnational-eu-tenders_en.

(65) The project was referenced in the Feasibility Study Concerning the Actual Implementation of a Joint Cross-border Procurement Procedure by Public Buyers from Different Member States prepared for the EU Commission by the BBG and Ski (published on 20/03/2017) and by the Comunication of the EU Commission, Making Public Procurement Work in and for Europe, *supra*, note 32, p. 4: "in the HAPPI project, innovative solutions for healthy ageing have been procured jointly by contracting authorities in several Member States", recalling that "more than 20 healthcare organisations from France, Italy, Luxembourg, Belgium or Netherlands purchased HAPPI solutions".

(66) ECJ, Judgment of the Court (Second Chamber) of 13 January 2005, *Commission of the European Communities v. Kingdom of Spain*, case C-84/03. According to the Court, it is not correct to exclude agreements concluded between public authorities and other public bodies from the scope of the EU Directives on Public Procurement. The ECJ stated that for there to be a public contract it is sufficient that "the contract was concluded between a local authority and a person legally distinct from it".

of public bodies in tenders as fitting in the notion of "economic operator"[67]. As the ultimate goal of the European framework is to open the market as far as possible in respect of the principle of fair competition, contracts concluded between several public administrations, also among different Member States, are also feasible[68].

For example, the transnational effects of a framework agreement awarded in France or Poland and the call-off done by an Italian Hospital would have to address different issues as in the choice of the supplier, which might be done according to national law without any harmonization effort. Thus, whenever provided, the possibility of a direct effect would be the acceptance of the full selection rules, *e.g.* of Poland, for what concerns the selection grounds. This possibility might open to a further example of transnational effects of public contract[69].

A wider notion of "transnational public contracts" also emerges from the analysis of the different public and private actors playing a role in transforming public contracting both sides. In most cases, economic operators do not have enough negotiating power to impose the terms of a public contract, except for exercising influence on the content of public contracts through lobbying activities or industry organizations efforts or the development of model contracts. Still, there also situations in which private parties may be able to persuade the

(67) The EU law defines the notion of economic operators as: "any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market" (Art. 2, par. 1, No. 10 of the EU Directive No. 24/2014). Any entities, "public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are 'legal persons' in all circumstances" (Dir. 2014/24/EU, wher. 14).

(68) See the CoNisma case: ECJ, Judgment of the Court (Fourth Chamber) of 23 December 2009, *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v. Regione Marche*, case C-305/08. The case concerned the exclusion of an inter-university consortium (formed by several Italian universities and Ministries) from the tender called by the Marche Region for the award of a service on the acquisition of marine seism stratigraphic surveys, the execution of core drilling and the taking of samples at sea. The referring court asked the ECJ whether non-profit entities which are not necessarily present on the market on a regular basis (*e.g.*, universities and research institutes), as well as groupings (or consortia) thereof, may participate in public procurement and whether an interpretation of the national legislation, which provides for the exclusion of such entities from such participation, is contrary to the EU on public procurement. On this point, the ECJ confirmed that the European rules allow bodies governed by public law (including consortia between universities), falling within the concept of economic operator set out in the Directive, to participate in tenders for the purpose of offering services on the market.

(69) See also: Conseil d'État, Assemblée, 30/12/2014, 355563, *Publié au recueil Lebon*, Concerning the possibility for consortia of municipalities such as, in the French Law, the "établissements publics de coopération intercommunale" (EPCI) to participate and to be awarded of a public procurement contract to meet the needs of another public person (in this case, the "Département de la Vendée") as long as the principle of competition is safeguarded. In particular, according to the Conseil d'État, the price proposed by the territorial authority or the public cooperative establishment must be determined by taking into account all the direct and indirect costs contributing to its formation, without the public authority benefiting, in order to determine it, from an advantage arising from the resources or means allocated to it in respect of its public service missions and provided that it can, if necessary, justify this by its accounting documents or any other appropriate means of information.

contracting authority to make advantageous concessions, that would usually not be in line with the government's policy.

An example might be the case involving the capacity of the French State and public entities to validly enter into an arbitration agreement with the American company Walt Disney in the contracts related to the construction of the Euro Disney Park in France. The US investor requested the insertion of an arbitration clause in the agreement to avoid the risk of having disputes before the French courts. Consequently, the French parliament enacted a specific law to authorize the arbitration clause for the investment project, despite the French rule that prevents public bodies from submitting to arbitration, but only to national courts. This is an example of transnational public contract where cooperation concerns a public authority (the French State) in connection with a private company having its registered office in another country (the U.S.)[70].

These concerns have once again emerged and challenged the idea of "technological sovereignty" in relation to the public investments foreseen by the post-pandemic Recovery Plans for the digitalization of the public administrations in the EU. It is well-known that EU public institutions still largely rely on non-European contracts for the supply of services and infrastructures, impacting on the possibility of the Union to develop autonomous digital infrastructures and exposing citizens to the treatment and use of their data by foreign jurisdiction (*e.g.* the Cloud Act in the United States)[71]. The participation of consortia between national and foreign companies to the national tenders for the award of national cloud services might lead to criticalities in the resulting "transnational" public contracts, due to the possible application of non-domestic regulations for the management and control of data, as mentioned[72]. The challenges of developing strategies for digital autonomy at a national level in a transnational perspective could be overcome through the empowerment of European initiatives towards the convergence of data and digital governance models to allow for the management, access and control of data belonging to EU citizens and businesses[73].

(70) M. AUDIT, S.W. SCHILL, "Transnational Law of Public Contracts: An Introduction", *supra*, note 2, p. 15. See also: M. AUDIT, "Arbitrage international et contrats publics en France", in M. AUDIT (ed), *Contrats publics et arbitrage international*, 2011, pp. 115-121.

(71) The Clarifying Lawful Overseas Use of Data Act or Cloud Act (HR 4943) is a United States federal law enacted in 2018 with the approval of the Consolidated Appropriations Act, 2018, PL 115-141, Division V.

(72) In Italy, the partnerships between Tim and Google, between Amazon and Fincantieri (71.6 % controlled by Cassa Depositi e Prestiti, an Italian investment bank under public control) and between Microsoft and Leonardo (30 % owned by the Ministry of the Economy) for participation in the mentioned cloud tenders are noteworthy.

(73) The European Commission has recently proposed the birth of a European cloud initiative within the second pillar of the Strategy "A European strategy for data", among which the project "Gaia-X". See

As recalled, the perspective on "transnational public contracts" concentrate on horizontal situation and let aside Treaties and Governmental agreements, as they rise different questions.

5. – JOINT CROSS-BORDER PUBLIC PROCUREMENT AND THE COOPERATION PRINCIPLES FOR TRANSNATIONAL SUPPLY CHAINS IN THE HEALTH EMERGENCY

Cross-border and transnational procurement allows public purchasers to diversify their supply chains, which sharply reduces the risk that those supply chains will downfall – or concomitantly, that prices will become out of control – when local or global emergencies or natural disasters strike, as inevitably they do[74].

The spread of Covid-19 pandemic required not only domestic efforts to manage public procurement, but also represented a "stress test" for cooperation in the management of supply chain, especially by regional and global international organizations[75]. During the emergency, the supply of the personal protective equipment (PPEs) failed due to interruptions in the supply chain and similarly for drugs, medical devices and human resources and also due to the mis-coordination and the reversal of the principle of competition not among the suppliers but among public buyers at national, regional and global levels[76]. Some emphasized that States should be risk-averse in making choices that may affect population mortality and morbidity; on the contrary, the ongoing pandemic emergency called for costly and straightforward solutions that have challenged the level of democratic accountability[77]. So, new possible issues of compliance with national rules and principles might occur.

The European Union was deeply affected by the emergency and a national tendency to closure had to be addressed by the European institutions.

EU Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data*, Brussels, 19.2.2020, COM(2020) 66 final.

(74) G.M. RACCA, C. R. YUKINS, "Introduction. The Promise and Perils of Innovation in Cross-Border Procurement", *supra*, note 35, p. 15.

(75) S. VAN HECKE, H. FUHR, W. WOLFS, "The politics of crisis management by regional and international organizations in fighting against a global pandemic: the member states at a crossroads", *International Review of Administrative Sciences*, January 2021.

(76) L. FOLLIOT LALLIOT, C. R. YUKINS, "COVID-19: Lessons learned in public procurement. Time for a new normal?", *Concurrences*, 2020, 3, pp. 46-58; G. L. ALBANO, "Homo homini lupus: on the consequences of buyers' miscoordination in emergency procurement for the COVID-19 crisis in Italy", *Public Procurement Law Review*, 2, 2020, pp. 213-219.

(77) S. ROSE-ACKERMAN, "La décision publique, l'expertise et le droit III. Time and Virus", in www.chemins-publics.org, 19/07/2021.

The EU together with the Member States, has taken actions to tackle the destructive impact on the supply chain in the healthcare sector though the Joint Procurement Agreement (JPA) initiative[78]. The JPA was in place as a mechanism of collaborative procurement between the EU Commission and the Member States for the joint purchasing of medical goods and equipment for responding to cross-border health threats. The JPA seeks to avoid duplication of procurement procedures at national level and thus competition between buyers for the sourcing of the supplies that they may all need, and yet be needed in different amounts and at different times. Such mechanisms of coordination, correctly addressed and managed by expert CPBs teams, might allow to face the supply chain derangement with a public coordinated sourcing and specific case-by-case decisions by the public authorities on how to distribute the volumes for those who most need them, according to the principles of solidarity and social cohesion[79]. The Agreement is not an international treaty in the sense of the Vienna Convention, but precisely an executive act of budgetary forecasts of the EU which reserves any disputes to the exclusive jurisdiction of the ECJ[80]. It applies the EU financial regulation and not the European directives on procurement but share their guaranteeing approach to protect the principles of transparency, proportionality, equal treatment, and non-discrimination.[81] Nonetheless, in this case the procurement will be executed not by the EU institutions but in the Member State, with the consequent possible issues on the applicable principles.

During the Coronavirus outbreak, the EU Commission launched several JPA calls for tender, but the procedure resulted slow and difficult to be managed by the DG Health, with a scarce experience of procurement, thus the outcomes resulted unsatisfactory[82]. Despite the JPA being adopted by all 27 Member

(78) The JPA has been signed by Italy on 16 October 2014. As of 30 March 2020, it has been signed by 27 EU countries and the UK. See R. Cavallo Perin, G. M. Racca, "European Joint Cross-border Procurement and Innovation", *supra*, note 25, p. 116; T. Kotsonis, "EU procurement legislation in the time of COVID-19: fit for purpose?", P.P.L.R., 2020, 4, pp. 199-212.

(79) On this topic see G. Sdanganelli, "Il modello europeo degli acquisti congiunti nella gestione degli eventi rischiosi per la salute pubblica", *DPCE online*, 2, 2020, pp. 2323-2346.

(80) The Agreement is based on the Commission Delegated Regulation (EU) No. 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No. 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (now Regulation (EU, Euratom) 2018/1046). The JPA is an agreement between the Commission and the participating Member States which implements a provision of a legislative act, namely, Article 5 of Decision 1082/2013/EU. Moreover, Articles 272 and 273, Treaty on the Functioning of the European Union (TFEU), which explicitly provide for the possibility of electing the jurisdiction of the Court of Justice in respect of agreements to which the Union is a party and also in relation to disputes between member states concerning the subject matter of the Treaties.

(81) Article 160, Regulation (EU, Euratom) 2018/1046. It is required that the rules and principles applicable to public contracts awarded by Union institutions, such as the European Commission in the case of the JPA, comply with the rules set out in Directive 2014/23/EU (Recital 96; Article 161).

(82) The procedures have been conducted in accordance with the strict conditions stated in the Regulation (EU, Euratom) 2018/1046. The first joint procurement tender for PPE under the JPA failed. On

State, such a model and in general emergency procurement have come under scrutiny. The transnational effects of the execution were hardly experienced as the award procedure at first didn't receive any offer, manifesting the poor capacity in the sector.

Thus, a proposal to amend the JPA has been advanced. This proposal would introduce an "exclusivity clause" to reduce the risk of internal competition between the EU and the Member States for the purchase of the same drugs or vaccines through parallel procedures or negotiations. This is a significant change from the current JPA, which does not preclude participating countries from negotiating bilaterally in parallel to the joint initiative and allowing several countries to form alliances placing national interests ahead of the common EU interest in the procurement of PPEs and medicinal products. However, this clause might be counterproductive because it could discourage participation of some countries to the to the JPA and requires a very high capacity in the negotiation as the result of such procedure will be the only chance to face the emergency. Moreover, countries with high purchase power and the capacity to directly negotiate in the market and obtain advantageous prices and conditions might not accept such cooperation if mandatory[83].

For the EU vaccine strategy, Advance Purchase Agreements (APAs) between the EU Commission, on behalf of the member States, and EU and non-EU vaccine manufacturing companies have been signed. These contracts might be considered transnational public contracts, and should need to allow for effective fulfilment of public and private interest on both sides[84]. The issue of the

March 12, 2020, a notice on TED was published indicating that lot No. 1 (eye protection) and lot No. 2 (respiratory protection) were not awarded due to "*no tenders or requests to participate were received or all were rejected*". Six countries apparently opted out: Bulgaria, Denmark, France, Lithuania and Portugal. Finland. On March 17, 2020, the Commission has launched a tender for additional categories of personal protective equipment for eye and respiratory protection with 25 Member States participating. Producers made offers covering and even exceeding the quantities requested by the Member States that take part in the procurement. On 17 March 2020, the Commission launched a tender for ventilators and respiratory equipment with 25 Member States participating while on 18 March, the Commission launched a new public procurement for laboratory equipment testing kits with 19 Members States. On 8 April 2020, the Commission, DG Health and Food Safety announced the intention to award a contract for the supply of laboratory equipment for diagnosis containing 6 lots on sample collection swabs, sample transport boxes, detection/extraction kits, reagents, laboratory machinery and other equipment. See the information and data available on https://ted.europa.eu/udl?uri=TED:NOTICE:119976-2020:HTML:IT:HTML&tabId=1&tabLang=en and https://ec.europa.eu/commission/presscorner/detail/en/ip_20_523. See S. Smith, "COVID-19 and the EU joint procurement agreement on medical countermeasures", *P.P.L.R.*, 4, 2020, pp. 124-128.

(83) EU Commission, Proposal for a Regulation of the European Parliament and the Council on serious cross-border threats to health and repealing Decision No. 1082/2013/EU, Brussels, 11 November 2020 COM(2020) 727 final 2020/0322 (COD).

(84) The "European Vaccine Strategy" has been launched by the EU Commission on 17 June 2020. See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1103. The EU Commission oversees managing a central single procurement procedure on behalf of the Member States for signing Advance Purchase Agreements ("APAs") with successful vaccine manufacturers. It is foreseen that the APAs

effects of such contracts in the national legal systems and the related national principles is still under evaluation, especially for what concerns the limits of the possibility of parallel negotiations in time of scarcity of the supplies.

Also, the transatlantic experience of Covid-19 has shown criticalities in the global supply chain management. In the U.S., different States responded very differently to the pandemic, based in part on their organizational structures and preparations for the disaster. To help states better prepare, a "maturity model" has been elaborated to assess state procurement systems, in preparation for future catastrophes. A recent study suggested that increased centralized governance and cooperation among federal States in the U.S. in procurement might allow better response in future supply chain disruptions. Cooperative purchasing, also in past experiences, enabled coordination, improved leveraging of the volume of the state's purchasing power and provided for more efficient application of contracting expertise to a difficult market situation.[85] The Covid-19 pandemic has demonstrated how large-scale and multi-structured supply chains originated by private organizations are increasingly acquiring a transnational role, especially when they are aimed at the production of goods and services of "public" interest to be jointly purchased by national and regional buyers, for example the healthcare supply chain of PPEs during the pandemic, or also in the field of ITC services for the public sphere, as it will be noted below[86]. Transnational and transatlantic supply chains and the qualification of the relevant suppliers might facilitate

should provide that access to vaccine doses will be allocated to participating Member States according to the population distribution.

(85) National Associations of State Procurement Officials (NASPO), *Assessing State PPE Procurement During COVID-19: A RESEARCH REPORT*, March 2021, available at: https://www.naspo.org/wp-content/uploads/2021/03/2021_COVIDReport_FINAL.pdf. More details of the debate available at: https://publicprocurementinternational.com/2021/04/06/naspo-study-of-state-procurement-in-the-pandemic-key-lessons-learned/. The study was based on over 100 hours of interviews conducted by the academic research team among which: Professors Robert Handfield (North Carolina State University), Zhaohui Wu (Oregon State University), Andrea Patrucco (Florida International University), Christopher Yukins (George Washington University) and Thomas Kull (Arizona State University), procurement staff, suppliers, and state officials. For a comprehensive analysis of the NASPO Model see J.B. Kaufman, "Cooperative Purchasing: A US Perspective", G.M. Racca, C.R. Yukins (eds), *Joint Public Procurement and Innovation: Lessons Across Borders*, Droit Administratif/Administrative Law Collection (eds), Bruxelles, Bruylant, pp. 65-91.

(86) In the United States private e-commerce platforms such as Amazon.com or Walmart.com are entering the market for lower-value public contracts thanks to the efficiency they ensure, even in the emergency period. See Precisely, the U.S. Congress included provisions to allow for the testing of an innovative purchasing method: the "Amazon Amendment" or "Amazon.gov"; Section 846 of the National Defense Authorization Act of 2018 (2018 NDAA) established rules for the use of e-portals for the purchase of commercial off-the-shelf (COTS) items that require an advanced level of customization not available through standard solutions. They are, however, evident that the criticalities connected to such choice. In this regard, see P. McKeen, "The Pursuit of Streamlined Purchasing: Commercial Items, E-Portals, and Amazon", G. M. Racca, C. R. Yukins (eds), *Joint Public Procurement and Innovation. Lessons Across Borders, Brussels*, 2019, pp. 373-386.

facing future emergencies and reduce the undesirable effects of future and even more difficult health and/or environmental crisis.

Such private value chains often bring together multiple suppliers in decentralized networks administered through contract governance, which constitute a regulatory landscape that almost resembles a legal order[87]. Functionally, private governance in the supply chain regimes "combine elements of legislative, administrative, and adjudicatory power" that the qualification as "private" becomes "overly reductive, not only because value chains have real-life ('public') repercussions but because contract serves as a forum of competing values and discourses beyond efficiency (social, environmental, integrity considerations)"[88].

The emergency has highlighted the need for resilient supply chains, as scarcity of many different categories of healthcare materials can shut down our hospitals and our economy. Such supply chains must be understood not only as a stockpile, but as a "network of stockpiles" characterized by transparency, flexibility, independence, and equity in the distribution of medical devices. Thus, supplying chain can be considered as a common good to be addressed for the protection of human life and public value[89]. Indeed, as one of the critiques to the transnational legal approach is that has accelerated the collapse of the private/public dichotomy in favor of the first, transnational public contracts and the public sphere might regain their regulatory role of private supply chain that, otherwise, would develop into "self-validating practice" and creating their own structure and sources of legitimacy[90].

6. – Conclusions

As recalled, different categories and types of transnational effects of public contracts can emerge, nonetheless the limited experience of such forms

(87) G. Gereffi, Global value Chains and Development. Redefining the Contours of 21st Century Capitalism, Cambridge University Press, 2018.

(88) K. Hendrik Eller, "Transnational Contract Law", *supra*, note 5, p. 522; J.M. Smith, "Private Law in a post-national Society. From ex post to ex ante governance", M. Maduro, K. Tuori, and S. Sankari (eds), *Transnational Law, Rethinking European Law and Legal Thinking*, Cambridge University Press, 2014, pp. 307-320.

(89) See R. Handfield, D. J. Finkenstadt, E. S. Schneller, A. Blanton Godfrey, P. Guinto, "A Commons for a Supply Chain in the Post-COVID-19 Era: The Case for a Reformed Strategic National Stockpile", *The Milbank Quarterly*, 2020, 98, pp. 1058-1090; J. Tosun, S. Koos, J. Shore, "Co-governing common goods: Interaction patterns of private and public actors", *Policy and Society*, 2016, 35:1, pp. 1-12; M. Bauwens, N. Mendoza, A. Iacomella, *Synthetic overview of the collaborative economy. Report by Orange Labs and P2P Foundation*, 2012. On common goods and the need to distinguish between public goods see J. B. Quilligan, "Why Distinguish Common Goods from Public Goods?", D. Bollier, S. Helfrich (eds), *The Wealth of the Commons. A World Beyond Market & State* Amherst, NY, Levellers Press, 2012, pp. 73-81.

(90) K. Hendrik Eller, "Transnational Contract Law", *supra*, note 5, p. 522.

of cooperation doesn't permit yet to clearly define the complete set and the precise consistency of the applicable principles. The goal is just to underline different perspectives opened by the challanges of cross-border and transnational cooperation through public procurement and the effects on the separate or combined application of rules and principles of different countries.

The EU integration principle, as evolving after the emergency, might become a lever to increase joint transnational procurement and contracts for Europe, contracted by the EU institutions, or by network of contracting entities, mainly CPBs, that might know the market and efficiently coordinate the purchasing activities, pursuing also common industrial policy goals, for the benefit of the citizens.

The European supply chain, the favor for innovative SMEs, the development of EU platform for public contracts, the sustainability goals can undoubtedly be reached also through a joint cross-border cooperation and transnational cooperation in procurement and in the subsequent prompt and efficient execution of contracts in the different countries where they must be applied. Such evolution would provide a strategic value for the next emergencies to face around the world.