SHORT ARTICLES

CROSS-BORDER PROCUREMENT PROBLEMS AND TRANSNATIONAL ENTITIES

*Lydia Lebon**

Abstract

This paper addresses the matter of transnational entities, especially in the field of joint cross-border procurement. In this regard, if Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts implicitly allowed for joint cross-border public procurement, Directive 2014/24/EU on public procurement unequivocally advises this form of cooperation. Among the transnational entities emphasis is given to the European grouping of territorial cooperation, which seems to be the most convenient legal structure to welcome joint cross-border procurement operations. But the use of the EGCT might raise some legal questions. Eventually, it seems that the joint cross-border public procurement operation is a complex architecture and the purpose of this paper is to highlight some issues and obstacles and to demonstrate that the European Union law is far from being thorough in addressing them.

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* Senior Lecturer, University of Bordeaux Montaigne

1. Introduction

This paper[1] addresses the matter of transnational entities, especially in the field of joint cross-border procurement. In this regard, if Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts implicitly allowed for joint cross-border public procurement[2], Directive 2014/24/EU on public procurement unequivocally advises this form of cooperation[3].

The purpose of the provisions of the directive is indeed to facilitate cooperation between contracting authorities and central purchasing bodies from different Member States[4]. At the same time, joint cross-border public procurement contributes to enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers. The actual implementation of joint cross-border public procurement projects has further policy objectives since it would "allow buyers deriving maximum benefits from the potential of the internal market in terms of economies of scale, reduced transaction costs, and risk benefit sharing"[5]. These objectives will

[1] This paper is a working paper presented in the workshop "A la recherche du droit administratif transnational" in Spetses, September 2016, at the annual reunion of the EGPL, workshop organised by Professors J.-B. Auby, O. Dubos, G. della Cananea, T. Perroud and S. Torricelli.

[2] See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240.

[3] See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242.

[4] The directive emphasizes in recital (69) that "centralised purchasing techniques are increasingly used in most Member States".

[5] See Recital (73), Directive 2014/24/EU.

thus be fulfilled after the implementation phase, but in anticipation to these provisions, several initiatives can be listed, such as the HAPPI project[6], the German–Dutch–Austrian cooperation in hospital procurement[7], or the MEDEV[8]. If the health field seems to be particularly favourable to joint cross-

[6] The Healthy Ageing Public Procurement of Innovations (HAPPI) is a collaboration of 12 purchasing bodies and innovation experts from 8 Member States (France, UK, Germany, Italy, Belgium, Luxembourg, Austria and Spain), which is supported by the European Commission. The consortium's aim is to identify, assess and purchase innovative and sustainable health products, services and solutions, which will improve ageing well. So far, the partners have developed and purchased over 150 innovative medical solutions with the help of their procurement strategy. It comprises early market studies and communication of the tender to a multitude of companies including SMEs. The procurement procedure is designed and conducted by central purchasing bodies from different Member States. On this project, see the policy brief n° 21, *How can voluntary cross-border collaboration in public procurement improve access to health technologies in Europe?*, J. Espín, J. Rovira, A. Calleja, N. Azzopardi-Muscat, E. Richardson, W. Palm, D. Panteli, *World health organization*, (2016). A legal study on the feasibility of this project has been conducted by Professor G.M. Racca, from the University of Turin. See S. Ponzio, *Joint procurement and innovation in the new EU directive and in some EU-funded projects*, Ius pub. 24 (2014).

[7] The German Purchasing Association GDEKK, which since 1998 acts as a central non-profit purchasing body on behalf of 75 municipal hospitals in Germany, extended its geographical scope to also include public hospitals in Austria and university hospitals in the Netherlands. Despite the legal differences in health- related procurement, it is believed that through further economies of scale, cost reductions can be achieved for all participating bodies in this enhanced European cooperation for health procurement. The association set up a professionalized procurement system, which includes defining common procurement needs, market analysis and establishing quality criteria.

[8] The Medicine Evaluation Committee (MEDEV) was established in 1998 as a standing working group of the European Social Health Insurance Forum. Today, MEDEV represents the drug experts and pharmacologists of national social insurance organizations and HTA agencies in 18 EU Member States. The principal purpose of MEDEV is to provide the national health insurance organizations and other competent bodies with timely analyses of drug-related trends and innovations at both national and European level. While it focuses mostly on HTA, national exchange of experience and information also relates to the definition of parameters for cost–benefit analyses and international price analyses. The group also follows cross-border procurement initiatives. Particular attention was given to the early dialogue with companies developing orphan medicinal products, the Method of Coordinated Access to Orphan medicinal products (MoCA). This dialogue has mainly covered clinical study issues but has also addressed some novel procurement models.

border procurement[9], other scientific disciplines can be registered, like in maritime research, with the Joint Programming Initiative Healthy and Productive Seas and Oceans[10].

In any case, there certainly is a growing demand in this regard. The changing European Union framework is thus expected to facilitate cross-border cooperation between contracting authorities and help clarify the applicable law and responsibilities of the different parties involved.

Recital (73) of Directive 2014/24/EU reminds that "[j]oint awarding of public contracts by contracting authorities from different Member States currently encounters *specific legal difficulties concerning conflicts of national laws* (…)[11]. Contracting authorities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding public contracts".

The Commission intended to remedy such difficulties with the adoption of new rules and the offer to expand cooperation, by allowing to use cross-border and transnational entities. Directive 2014/24 thus aims at getting public buyers to think from a "*European perspective*"[12]. Some provisions of Directive 2014/24

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[9] See the Policy brief n° 21, aforementioned, p. 7: "all these initiatives in the health field can be explained because of the characteristics of the markets for health products have dramatically changed since the 1990s and globalization has had a significant impact on the nature of the supply chain. A series of high-profile industry mergers has reduced competition in many medicines markets. National health systems, on the other hand, have in several cases become more decentralized in relation to procurement. Cross-border collaboration in the field of public procurement is often put forward as a promising strategy to address some of the existing imbalances and challenges of the health technologies market".

[10] See http://www.jpi-oceans.eu/joint-public-procurement. The Joint Programming Initiative Healthy and Productive Seas and Oceans (JPI Oceans) is established in 2011 as a coordinating and integrating strategic platform, open to all EU Member States and Associated Countries who invest in marine and maritime research. JPI Oceans covers all European sea basins with 21 participating countries and provides a long-term integrated approach to marine and maritime research and technology development in Europe. The project has received funding from the European Union's Horizon 2020 research and innovation programme.

[11] See Recital (73) of Directive 2014/24, aforementioned.

[12] See the complete analysis of A. Sanchez Graells, *Collaborative Cross-Border Procurement in the EU: Future or Utopia?*, 3, Upphandlingsrättslig Tidskrift – Proc. L. J. 11-37 (2016), see especially p. 14. The author refers to the European

should therefore come under scrutiny and this paper's purpose is to address these elements, but more precisely to study these issues from a French law point of view, and more accurately, from a French *public* law point of view. The French legal framework presents interesting features underlining the potential complexity of these projects. First, there is the fact that public procurement is a public discipline and as such, traditionally avoids all contacts with conflicts of law rules[13]: the European Union law plays an important part in changing this premise[14], especially in the public procurement field.

Moreover, there is the distinction between civil courts and administrative courts, a distinction that has to be taken into account.

In light of the above, the study will be divided in five parts.

Section 1 will briefly present the scope of the analysis that concentrates on procurement involving contracting authorities from different Member States.

Sections 2 and 3 will respectively address the issues, both legal and political, that may be raised by these possibilities.

Section 4 will eventually focus on a specific transnational entity which is specifically addressed by the 2014 Directive and appears to be the adequate instrument to aggregate these authorities[15]: the European Grouping of Territorial cooperation referred to in this paper as the EGTC.

Section 5 will briefly mention the national provisions of implementation, in French law, albeit not very enlightening.

Commission Draft Proposal for an action plan on cooperative procurement of 8 October 2015, on file with author, where the Commission justifies the use of joint cross-border procurement, because it forces the buyer to think "Europe" rather than "local".

[13] See the PhD. thesis of Professor M. Laazouzi which refers to an "avoidance" behaviour, M. Laazouzi, *Les contrats administratifs à caractère international* (2008), in the introduction, where he mentions, in French, the "évitement".

[14] Not that it is EU's intent to do so, but the distinction public/private law does not have the same meaning in EU law. See L. Azoulai, *Sur un sens de la distinction public/privé dans le droit de l'Union européenne*, Revue trimestrielle de droit européen 842 (2010).

[15] See Public buyers save money with cooperative procurement, available at http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=9013&lang=fr

2. The scope of the analysis: procurement involving contracting authorities from different Member states

As stressed out by the European Commission[16], "public purchasers, such as cities, public administrations, universities and hospitals often purchase goods and services on their own, failing to take advantage of the economies of scale that could be achieved by purchasing them jointly with other public bodies (also called "cooperative procurement")[17]. Indeed, it appears that "On the supply side, higher value contracts motivate more companies to submit bids which increases competition among enterprises. This leads to substantial savings through cooperative procurement when compared to individual purchases. In reaction to these findings, centralised purchasing and joint cross-border procurements have been facilitated by the new EU public procurement legislation which EU countries had to transpose into national legislation by 18 April 2016"[18].

The new Directive 2014/24/EU thus encourages cases other than domestic ones. In the domestic cases, all public sector entities remain in one and the same Member state. This means that they are subjected to the same set of legal rules and the cooperation between contracting authorities or between contracting authorities and central purchasing bodies[19] may develop within one member state, that is to say within one legal system.

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[16] See at this address: http://ec.europa.eu/growth/toolsdatabases/newsroom/cf/itemdetail.cfm?item_id=9013.

[17] The Commission gives the example of hospitals buying body scanners individually, when they could make a larger order through a central purchasing body which would help them better cope with rising healthcare costs.

[18] *Ibid*. See the data on public procurement with the aggregation indicator, at EU Commission, Public procurement indicators on the 2015 period, available at this address,http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm#maincontentSec3. The aggregation indicator measures the proportion of procurement procedures with more than one public buyer. For example, for France, in 2013, the aggregation rate was of 5% and 6% in 2015 which is an "unsatisfactory" rate. Out of 28 member States, only 11 member States have a satisfactory rate of aggregation, that is to say superior or equal to 10%.

[19] As Recital (69) reminds us, "The central purchasing bodies are responsible for making acquisitions, managing dynamic purchasing systems or awarding public contracts/framework agreements for other contracting authorities, with

The cases that would interest us here would be cases where there is a cross-border element on the public side, that is to say, whenever the central purchasing bodies and/or contracting authorities are from different Member States[20].

Such cases create conflicts of laws situations, where the courts are faced with a choice of laws from different Member states. The outcome depends on which jurisdiction's law will be used to resolve each issue in dispute. For instance, there can be a cross-border collaborative procedure between central purchasing bodies, the cross-border element being that of the location of these central purchasing bodies in different Member States. Only one of the central purchasing body will then administer the framework agreement, which is the instrument considered as an efficient procurement technique[21]. Despite contracting authorities from the other Member State having a domestic relationship with their own central purchasing body, the framework agreement will be administered by the central purchasing body from another State. Also, the contracting authorities from one Member State will enter arrangements with suppliers (even domestic ones) that might also be subjected to the laws of the Member State where the central purchasing body administering the framework is located.

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or without remuneration. They should be able to act as wholesalers by buying, stocking and reselling or, secondly, they should be able to act as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities. Furthermore, rules should be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, as between the central purchasing body and the contracting authorities procuring from or through it. Where the central purchasing body has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

[20] This paper only addresses the cases between EU member states, even if other issues could potentially be raised with the involvement of non-EU countries.

[21] See Recital (60) of Directive 2014/24/EU: "the instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as it is". The contracting authorities for whom a framework agreement is concluded should be able to use it for individual or repetitive purchases.

Articles 37 to 39 of Directive 2014/24 deal indeed with centralised, joint and cross-border procurement. The Directive clarifies in Recital (73) that the purpose of those rules is to determine the conditions for cross-border use of Central purchasing bodies and designate the *applicable public procurement legislation*. This set of rules is complementing the conflict of law rules of Regulation (EC) Nº 593/2008 of the European Parliament and the Council, Rome I[22]. Article 39 (2) also states that "A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State".

These provisions of Directive 2014/24 are thus supposed to stimulate the cross-border collaborative public procurement, and to provide conflicts of laws rules that address all issues derived from such exercises. However, as other scholars have pointed out[23], a few problems may remain and the conflicts of law rules established by the Directive do not prevent from legal issues.

3. Legal issues

It seems that most buyers are reluctant to be involved in cross-border public procurement projects, especially because of the complex legal architecture that might be involved. If the Directive was supposed to provide rules to help establish these projects, one can only agree with this suspicion of complexity when you consider all the legal issues that might be raised by these projects. First, there might be issues regarding coordination of laws, especially in Member states where public procurement entails *public laws*: these aspects will be addressed in section 2.1. Another important issue will be related to legal remedies that can be offered to claimants and the possible discrepancy between two

[22] Regulation (EC) n° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 4.7.2008, Official Journal of the European Union, L 177/6.

[23] See the much more thorough study of A. Sanchez Graells, A. *Collaborative Cross-Border Procurement in the EU: Future or Utopia?*, cit. at 12, 11-37. The author's conclusion is that "the legal deficiencies of the rules laid out in Articles 37 and 39 of Directive 2014/24 make it legally impracticable, if not completely impossible, to implement cross-border collaborative procurement—particularly if central purchasing bodies are involved, and in the absence of a new wave of international agreements between EU Member States".

Member states: this issue is studied in section 2.2. Eventually, we will address in section 2.3. the limits to contracting that are mentioned in the directive provisions, those limits requiring some interpretation.

3.1. Coordination of public laws

First, regarding conflicts of law issues, the directive refers to Rome I regulation[24]. This regulation is supposed to fill the gaps when there is the need to determine "the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation". However, there was a scholarly debate, especially in France, as to whether administrative matters are included in this regulation or not. Indeed, the regulation scope is about contracts in « civil and commercial matters » and specifically rules out « contracts in revenue customs or *administrative matters* »[25]. In French law, as a public procurement contract is considered an administrative contract by the legislator's classification[26], it would be excluded from the Regulation's scope. However, the European conception of administrative matters, which is an autonomous conception, is also a restrictive one[27].

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[24] See recital 73, "new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting authorities and enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers. Those rules should determine the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation, including the applicable legislation on remedies, in cases of cross-border joint procedures, *complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and the Council*". Emphasis added.

[25] See article 1 of the Rome I regulation, "This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters".

[26] See article 2 of the so-called «MURCEF» Law.

[27] It combines a personal criterion with a material one. See, ECJ,14 October 1976, LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol, Case 29-76. See § 4, *although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the convention, this is not so where the public authority acts in the exercise of its powers",* about the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

Furthermore, some think the contracts in administrative matters would still be submitted to the 1980 Rome I convention, on the law applicable to contractual obligations[28]. In any case, both regulations stress the importance of freedom of choice regarding the applicable law. For some scholars, the Rome I rules are also appropriate to determine the applicable law, to the extent that if the applicable Member State law has not been chosen by the parties, or if the choice of law clause is invalid, the criteria of Regulation (EC) n° 593/2008 shall be applied to determine which Member State law is applicable[29].

There could be an issue of coordination of the administrative law that controls relationships between public authorities or entities and the public or (private) contract law applicable to the relationships between contracting authorities and suppliers. Article 39(3) of Directive 2014/24 subjects centralised purchasing activities by a central purchasing body located in another Member State to *the law of the Member State in which the central purchasing body is based*[30]. But as other scholars have pointed out[31], it is also "the law applied to the call-offs carried out by the contracting authority of the other member state. This means that

[28] S. Lemaire, *Le règlement Rome I du 17 juin 2008 et les contrats internationaux de l'administration*, Actualité juridique du Droit administratif 2042 (2008).

[29] See Book IV of the Research network on EU administrative law, quoted by A. S. Graell, about the applicability of Rome I regulation to the EU contracts: the scholars think that the Rome I provisions are appropriate to be applied *mutatis mutandis* to EU contracts even when not directly applicable: not all EU contracts may be qualified as contracts in "civil and commercial matters", but some may be qualified as contracts in "revenue, customs or administrative matters" in the sense of Article 1(1) of the Rome I Regulation. *However there is no reason why the criteria set out in the rules of the Rome I Regulation would not be appropriate to determine the applicable law even in these cases'*. See the Book IV, Contracts, of the ReNEUAL Model Rules on Administrative procedure, p. 177, available online.

[30] See article 39 (3), "The provision of centralised purchasing activities by a central purchasing body located in another Member State shall be conducted in accordance with *the national provisions of the Member State where the central purchasing body is located*. The national provisions of the Member State where the central purchasing body is located shall also apply to the following: a) the award of a contract under a dynamic purchasing system; b) the conduct of a reopening of competition under a framework agreement; c) the determination pursuant to points (a) or (b) of Article 33(4) of which of the economic operators, party to the framework agreement, shall perform a given task."

[31] See. A. Sanchez Graells, A. *Collaborative Cross-Border Procurement in the EU: Future or Utopia?*, cit. at 12, 31.

the contracting authority and/or the central purchasing body would be operating under a *foreign public procurement law*". As pointed out, this can be a problem because "they don't usually have *jurisdiction* to do so"[32]. Indeed, public law of a State usually is intended for the public entities of this State[33]. In France, for instance, if it is admitted that a French public entity can implement a foreign law[34], the award of public contracts is one of the public policy rules. It is indeed part of the "règles impératives de droit public" which is a key notion in the administrative case law and has recently been used in important cases[35]. These questions about the public laws coordination certainly contribute to make the international administrative contracts legal system commonplace.

One can wonder if it really is a problem? Indeed, one can assume that the differences between domestic procurement rules are limited, now that the European Union legislation is so important on the matter. Subsequently, the contracting authority would actually be implementing the national measures of transposition. However, if the commonality is important in this area, it might not avoid all differences. It is also quite a shift of perspective to consider the public law rules as "interchangeable" rules[36], at least from a French point of view.

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[32] I*bid*.

[33] See S. Cassese, "Until a few decades ago, both administrative systems and administrative law developed in the specific context of the nation-State. The legal environment that favoured the development of administrative systems and administrative law was a national government, which was run by a political body called the "State". Public administrations were conceived of as belonging to national communities, and as being structurally dependent upon national governments. Administrative law was thus fundamentally *State* law". See S. Cassese, *Global Administrative Law* (2015).

[34] See F. Brenet, *Contrat administratif international et droit international privé*, Actualité juridique du Droit administratif 1144 (2015). It certainly is a long way since the idea that to a judge, there is only one law, the law of the judge's jurisdiction. See the famous comment of the *Commissaire du gouvernement* Barbet in the *Habid Bechara* case, see CE, 11 january 1952, Sieur Habib Bechara, *Revue juridique et politique de l'Union française* 292 (1952).

[35] Especially about the administrative control over an international arbitral award. See below Section 2.3 about the limits.

[36] Professor M. Laazouzi speaks of the «substituabilité» of public procurement rules. M. Laazouzi, *La spécificité des contrats publics internationaux*, 3 Revue des contrats 545 (2014).

Eventually, article 39(4) establishes that in case of joint cross-border procurement, "[u]nless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement...". What would be the nature of this agreement between the participating contracting authorities?

It wouldn't be *per se* a European Union act, it would not be an international agreement, it would be a transnational agreement between contracting authorities but required by the European Union law[37]. It would be part of a transnational administrative law which premices can be identified with the works on global administrative law and international administrative law[38].

According to article 39(5), the agreement shall determine: '(a) the responsibilities of the parties and the relevant applicable national provisions; [and] (b) the internal organization of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts'[44]. But what if the agreement does not provide these elements? The Directive does not answer this question and does not provide any solution if there is no choice of law by the agreement. Besides, in some states, there might be an issue of jurisdiction to conclude this agreement. In France, for example, among the contracting authorities, are the municipal authorities, yet the jurisdiction for local authorities to contract with other authorities is relatively new. The international jurisdiction of the municipal authorities had to overcome the hurdle of the State sovereignty and the idea that the State only can conclude agreements with foreign authorities. A 1992 law has allowed this possibility for municipal authorities, a legal

[37] See in the French literature, for a study distinguishing these international contracts of the administration with transnational agreements, M. Audit, *Les conventions transnationales entre personnes publiques*, LGDJ (2002).

[38] S. Cassese, *Le droit administratif global: une introduction,* Droit administratif (2007), 7. See S. Cassese, *Global Administrative Law*, cit. at 33 and the references mentioned in footnote 6. See the work of K. Neumayer, *Le droit administratif international*, Revue générale de droit international public 492 (1911). Dr. A. Sanchez speaks of a "trans-EU public law", See A. Sanchez Graells, *Collaborative Cross-Border Procurement in the EU: Future or Utopia? ,* cit. at 12, 34.

framework since strengthened by different legislations, especially a 2008 law[39].

3.2. Applicable legislation on remedies

The original proposal of the Commission for a Directive[40] provided that "Decisions on the award of public contracts in cross-border public procurement shall be subject to the ordinary review mechanisms available under the national law applicable. In order to enable the effective operation of review mechanisms, Member States shall ensure that the decisions of review bodies within the meaning of Council Directive 89/665/EEC (…) located in other Member States are fully executed in their domestic legal order, where such decisions involve contracting authorities established on their territory participating in the relevant cross-border public procurement procedure"[41]. Such a mechanism provided unprecedented rules of conflicts of jurisdictions, especially for States like France: it would have been the first step towards creating a recognition and enforcement of foreign decisions mechanism for the administrative judge[42].

The final version of the text is not as daring in this regard, for this provision eventually disappeared. Furthermore, the final version is not as thorough regarding the remedies.

The Directive clarifies in Recital (73) that the purpose of those rules is to determine the conditions for cross-border use of Central purchasing bodies and "designate the applicable public procurement legislation *including the applicable legislation on*

[39] See the Law n° 95-114 of February 1995, called the "loi d'orientation pour l'aménagement et le développement du territoire (LOADT)". See also the Law of n° 99-553, June 1999, called the "loi d'orientation pour l'aménagement du territoire " and the Law n° 2004-809 of August 2004, "loi relative aux responsabilités et libertés locales". Eventually there is the law n° 2008-352 of 16th april 2008, "loi visant à renforcer la coopération transfrontalière, transnationale et interterritoriale". We will see in Section 4, that the latter allowed the transposition of the EGTC provisions.

[40] See the Proposal for a Directive of the European Parliament and of the Council on public procurement, COM/2011/0896 final.

[41] See article 38 § 9 of the Proposal aforementioned.

[42] The provision stated that the "Member States shall ensure that the decisions of review bodies (…) located in other Member States are *fully executed*". Emphasis added. Such a control mechanism has been developed by and in favour of the administrative court's over an arbitral award. See Conseil d'État, Assemblée, 9 november 2016, *Fosmax LNG*, req. n°388806.

remedies, in case of cross-border joint procedures". We may assume that the applicable legislation on remedies would be that of the Member state where the central purchasing body is located. This seems not to cause any problem for the suppliers or contracting authorities located in that Member state: to them, it won't be different than in a domestic case. But it will be different for suppliers and above all for contracting authorities from another Member state. This means that a Contracting Authority could be sued in another Member State; that is, the State where the Central Purchasing Body is located (the 'home' State from the point of view of purchase) which is also the State where the legislation is applicable.

What about remedies brought to the jurisdictions of the Contracting Authority applying foreign rules? The national judge would have to apply the law of the Member state where the central purchasing body is located. In some states, this might be legally impossible, or at least, it might raise some issues. For example, in France, if it is a foreign law that is applicable to the contract, private or public, more specifically if the contract does not involve any French *public* law, then the administrative judge has no jurisdiction for legality control[43]. In the *Tegos* case, the *Conseil d'Etat* links its jurisdiction to the applicable legislation, and not the other way around. At best, the judge checks the respect of general principles of public procurement and the transparency rule[44].

What about remedies for disappointed bidders or for third parties? Can we imagine a situation where a disappointed bidder in one Member State would be able to have a remedy against a national contracting authority operating under a framework agreement from another central purchasing body, a remedy that they wouldn't have had, had they been in a domestic situation? This would create a reverse discrimination that each State has to handle. One can object that remedies are now quite the same in every country, because of the commonality of the European law. But for some remedies, it is not that obvious. For example, in France, there was an evolution in this regard for third parties, but only quite recently. Disappointed bidders do have a remedy

[43] See Conseil d'État, 19 November 1999, *Tegos*, n° 183648.
[44] Conseil d'État, 29 June 2012, *Sté pro2C*, n° 357976.

against the contract since the *Tropic*[45] case which is already ten years old[46]. But all third parties only do have this remedy since the *Département de Tarn-et-Garonne*[47] case, from 2014.

3.3. Limits

However, there are limits: a first one is of course that cross-border collaboration in procurement is not supposed to infringe on the European Union competition law. Another limit is specifically mentioned by article 39. This provision states that contracting authorities should not make use of the possibilities for cross-border joint procurement for the purpose of circumventing *mandatory public law rules,* in conformity with Union law, which are applicable to them in the Member State where they are located. What are those *mandatory public law rules* [48]?

And what use is the clarification that these mandatory public law rules have to be "in conformity with Union law"? To answer the latter, we can think about a reminder of the European Union law's primacy. To answer the former, we can relate to the notion of "overriding mandatory provisions", from article 9[49] of Rome I regulation, a concept that "should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively"[50]. According to article 9, the overriding mandatory provisions "are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective

[45] See Conseil d'Etat, Assemblée, 16 July 2007, *Société Tropic travaux*, n 291545.

[46] The *Tropic* case was an anticipation of the transposition of Directive 2007/66/EC of the European Parliament and of the Council directive 2007/66/CE of 11 december 2007 amending council directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. This Directive was then transposed with the Ordonnance n° 2009-515 of 7 May 2009.

[47] See Conseil d'Etat, Assemblée, 4 April 2014, *Tarn-et-Garonne*, n° 358994.

[48] See also Recital (41): "Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy".

[49] Regulation (EC) n° 593/2008 of the European parliament and of the council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[50] See regulation Rome (EC) n° 593/2008, recital (37).

of the law otherwise applicable to the contract under this Regulation".

Directive 2014/24/EU states that "Such rules *might include*, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies"[51]. In French Law, it certainly reflects the notion of «règles impératives de droit public» used in the *INSERM* decision[52] clarified by the *Sté Fosmax* case[53], about the administrative court's control over an arbitral award. In the *INSERM* decision, the Tribunal des Conflits[54] decided that "a challenge against an arbitral award rendered in France on the basis of an arbitration agreement contained in a contract concluded between an entity of French public law and a foreign company, which contract has been performed on the French territory and which concerns the interests of international trade, is to be brought before the court of appeal where the award is rendered pursuant to article 1505 of the Code of Civil Procedure even if the contract is to be characterized as administrative according to French domestic law". The Tribunal however added that "the situation is different where a recourse brought under the same circumstances implies that the award be reviewed according to French mandatory rules of public law on the occupation of the public domain or *according to the rules governing public expenditure that are applicable to public procurement,* to public partnerships or to the delegation of public services, as such agreements are subject to a mandatory administrative regime that is of public policy"[55]. A recourse with respect to those contracts is subject to the jurisdiction of the administrative court. It might come as a little

[51] See Recital (73).

[52] See, Tribunal des conflits, 17 May 2010, *INSERM*, n° 3754, see F. Brenet et F. Melleray, *Droit administratif*, 2010, comm. 122. See also S. Boueyre, *Les règles impératives du droit public, vues comme des lois de police*, 1 Journal de l'arbitrage de l'Université de Versailles - Versailles University Arbitration Journal 4 (2014).

[53] Conseil d'État, Assemblée, 9 November 2016, *Sté Fosmax LNG,* n° 388806. On this case, see. F. Brenet, *Contrôle de la juridiction administrative – Le contrôle du juge administratif sur les sentences arbitrales internationale*s, Droit administratif, 3, (2017).

[54] The *Tribunal des conflits* is the jurisdiction empowered to settle a conflict of jurisdiction between civil and administrative courts.

[55] Conseil d'État, Assemblée, 9 November 2016, *Sté Fosmax LNG,* n 388806. Emphasis added.

tricky to reconcile the will to establish collaborative cross-border procurement under a foreign law and this caution about circumventing mandatory public law rules which seems to have a comprehensive meaning[56].

4. Political issues

Political issues have to be addressed though these issues are intertwined with legal issues aforementioned. The main consequence will be that a contracting authority of a Member State could be sued in front of the courts of the Member State which procurement law is applicable by virtue of the location of the central purchasing body. This raises legitimacy and democratic issues.

For instance, and it is quite a traditional question whenever transnational cases are created, there might be accountability issues[57]. Public procurement involves purchasing actions with public funds, and protection of public funds is a fundamental principle, it is a constitutional goal from a French point of view and quite a sensitive issue lately[58]. Indeed, there must be some kind of a link, some kind of a connection between public expenditure and public interests, that is to say, national interests. Every time there is a call-off, the suppliers will be paying rebates or fees to the central purchasing body. For contracting authorities located in other member states this will imply a transfer of rents or implicit payments to the central purchasing body located in the other country.

Furthermore, the arguments for this type of procurement is to allow buyers deriving maximum benefits from the potential of

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[56] Professor Brenet describes them as «*les règles les plus essentielles du droit public, celles qu'il faut protéger à tout prix car elles sont au cœur de notre système juridique*», which can be roughly translated as "the most fundamental rules of public law, the ones that we have to protect at any cost, as they are deeply rooted in our legal system". See, F. Brenet, *Contrôle de la juridiction administrative – Le contrôle du juge administratif sur les sentences arbitrales internationales*, 3 Droit administratif (2017).

[57] See J.-B. Auby, *La globalisation, le droit et l'Etat*, (2010) on the accountability issues.

[58] The presidential election campaign highlighted that the use of public expenditure is quite a main concern for the French people who expect more transparency in the public policy.

the internal market in terms of economies of scale, reduced transaction costs, and risks benefit sharing. We concur with the statement that there might be questions as "to where the financial burden lies, and who actually benefits from any economic efficiencies derived from centralisation and (cross-border) collaboration"[59]. Nevertheless, there seems to be an increasing leaning towards these cross-borders procurement solutions[60] that justifies finding rules that must address these gaps.

If the directive considers "other entities established according to the Union law", thus allowing the establishment of legal entities which could act as central purchasing bodies at the European level, it is the European Grouping of Territorial Cooperation (EGTC) that is presented as the appropriate instrument for establishing joint entities.

5. The EGTC

The European Grouping of Territorial Cooperation is a European structure that embodies the idea of transnationality (4.1); it thus appears as the perfect structure to aggregate joint cross-border procurement (4.2).

5.1. A transnational entity

The cross-borders cooperation instruments originally came exclusively from the Council of Europe. The European Union's awareness on this subject came later, despite the EU framework offered at first not being entirely consistent with the purpose of the cooperation: the European Union law thus offered the frame of the European Economic Interest Grouping (EEIG), which introduces a legal instrument designed to minimise the legal, fiscal and psychological difficulties that natural persons, companies, firms and other bodies face in cooperating across borders[61]. But the EEIG was quickly outshone by another

[59] See A. Sanchez-Graells, *Collaborative Cross-border Procurement in the EU: Future or Utopia*?, cit. at 12.

[60] http://www.weka.fr/actualite/appel-doffres/article/ville-paris-sengage-groupement-commandes-transnational-31410/. See https://ec.europa.eu/health/preparedness_response/joint_procurement/jpa_signature_en

[61] See Regulation (EEC) N° 2137/85, the European Economic Interest Grouping.

instrument, the European grouping of territorial cooperation (EGTC)[62].

The EGTC is the European legal instrument to facilitate and promote cross-border, transnational and interregional cooperation. Indeed, developing transnational projects at regional and local levels used to be complex and lengthy, often requiring the negotiation of bilateral treaties by national governments. European groupings of territorial cooperation (EGTCs) were first introduced with Regulation n° 1082/2006[63] to promote inter-regional working. EGTCs are legal entities set up to facilitate cross-border, transnational or interregional cooperation in the European Union (EU).

It is a legal entity and as such, allows regional and local authorities and other public bodies from different member states, to set up cooperation groupings with a legal personality to deliver joint services. This instrument was initially limited to the implementation of territorial cooperation programs or projects co-financed by the Community through the European funds. The EGTC is a perfect example of a cross-border structure.

As of today, there are about 63 EGTCs registered at the Committee of Regions portal[64]. Changes to Regulation (EC) N° 1082/2006 have also been made to allow more extensive use of EGTCs to contribute to better policy coherence and cooperation between public bodies without creating an additional burden on national or Union administrations[65]. This instrument favours the establishment of cooperative groups at European level and invested with legal personality, also in the public procurement sector. However, the regulation does not provide any rule that

[62] See Recital (4) of the Regulation (EC) N°1082/2006: "The existing instruments, such as the European economic interest grouping, have proven ill-adapted (…)".

[63] Regulation (EC) N°1082/2006 of the European parliament and of the council of 5 July 2006 on a European grouping of territorial cooperation (EGTC).

[64] See https://portal.cor.europa.eu/egtc/CoRActivities/Pages/welcome.aspx.

[65] See Regulation (EU) n° 1302/2013 of 17 December 2013 amending Regulation (EC) n° 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.

would cover problems linked to cross-border procurement encountered by EGTCs[66].

5.2. The perfect instrument to aggregate joint procurement

It is the 2014 directive that specifically advises the EGTC to foster cooperation among Member States in order to set a joint public procurement at a European level[67]. The EGTC can indeed be convenient as it precisely allows to avoid the use of international treaties. In France, this was a true revolution that allowed local entities to contract with other entities *or Member states*, without the need of an international treaty[68]: it is an exception to the principle that no agreement can be concluded between a local authority and groupings or a foreign State[69]. The main advantage of the EGTC is that it is an effective mechanism to reduce the "bureaucratic burden of the territorial cooperation"[70]. Regarding public procurement, and more precisely, collaborative cross-border procurement, the EGTC could either be used to coordinate purchasing groups or as a central purchasing body for its members or for other contracting authorities.

Article 39 (5) of Directive 2014 refers to this possibility and indicates that, in these cases, the choice of applicable law to the joint procurement by decision of the competent body of the joint entity is limited to (a) the national provisions of the Member State of the EGTC's registered office, or (b) the national provisions of the Member State where the joint entity is carrying out its

[66] See recital (25) of Regulation n° 1302/2013, "*This Regulation should not cover problems linked to cross-border procurement encountered by EGTCs*".

[67] See article 39(5), "Where several contracting authorities from different Member States have set up a joint entity, i*ncluding European Groupings of territorial cooperation* under Regulation (EC) N° 1082/2006 of the European Parliament and of the Council or other entities established under Union law, the participating contracting authorities shall, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the following Member States". Emphasis added.

[68] See the Law n° 2008-352 of 16th April 2008 *visant à renforcer la cooperation transfrontalière, transnationale et interterritoriale* aforementioned.

[69] According to article L. 1115-4 of the *Code géneral des collectivités territoriales*, local authorities can't conclude agreement with groupings or a foreign State, with the exception of allowing the creation of an EGTC.

[70] A. A. Martínez, *Towards a New Generation of Cooperation of Territorial European Groupings, New Programming Period and Lessons Learnt*, European Structural and Investment Funds Journal (2014).

activities. This choice of law can be determined on a project-specific or a temporary basis. This is a simplification especially for joint cross border procurement. The first part of the provision relates to the rule of article 8 of the 2006 regulation[71].

But, we have to take into account the provisions from article 15 of the 2006 Regulation. This provision deals with jurisdiction, and states that «Third parties who consider themselves wronged by the acts or omissions of an EGTC shall be entitled to pursue their claims by judicial process». Article 15 (2) states that "Except where otherwise provided for in this Regulation, Community legislation on jurisdiction shall apply to disputes involving an EGTC. In any case which is not provided for in such Community legislation, the competent courts for the resolution of disputes shall be the courts of the Member State where the EGTC has its registered office". Furthermore, this provision states in the 3rd paragraph that "Nothing in this Regulation shall deprive citizens from exercising their national constitutional rights of appeal against public bodies which are members of an EGTC in respect of a) administrative decisions in respect of activities which are being carried out by the EGTC, b) access to services in their own language and c) access to information. In these cases the competent courts shall be those of the Member State under whose constitution the rights of appeal arise". The simplification is quite challenged here.

The solutions might be found within the national measures of transposition, but as for French law, if the Directive has been implemented by an *Ordonnance* of July 15th 2015, the implementations provisions are not really enlightening in this regard. Indeed, national provisions don't provide much enhancement or clarifications on this matter[72], at least, from a French law perspective.

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[71] See article 8 of Regulation 2006: "An EGTC shall be governed by a convention concluded unanimously by its members. According to Article 8 2. (e) The Convention shall specify "the law applicable to the interpretation and enforcement of the convention, which shall be the law of the Member State where the EGTC has its registered office".

[72] See article 29 of the Ordonnance, about the transnational collective entities, which is quite laconic.

6. National provisions of implementation

The European Union law led to the adaptation and reconfiguration of French law in public procurement. The provisions about public procurement are set out by the *Ordonnance* of 15th of July and the decree implementing this *Ordonnance*[73].

The possibility to establish collaborative procurement is henceforth organised at article 28 of the *Ordonnance*. It is an option for all buyers, whether they are contracting authorities or public entities. According to this article, especially in the paragraph 4, a "groupement de commandes" allows coordination among different entities, allowing to award a contract to an economic operator as a result of a single tender procedure. Article 29 of the ordonnance is about "transnational joint entities", such as European grouping of territorial cooperation. In keeping with a trend of the main concerns of public policy[74], these provisions help to satisfy the objective of pooling resources. The implementation provisions do not provide further explanations about this option.

The scholars unanimously welcomed the clarification and simplification brought by the reform[75], but as of today, as we know it, there are not many studies analysing the effects of these provisions. Only time will tell if the hurdles aforementioned can actually be overcome.

7. Conclusion

Legal barriers are not the only obstacles to cross-border procurement and there might be several levels of complexity with the addition of a joint cross-border procurement procedure. Language barriers, exchange rates, strong domestic competition,

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[73] The Ordonnance of the 15th of july 2015 and the Décret d'application of the 25th march 2016 are the provisions implementing the European directive. See *Ordonnance n° 2015-899, 23 juill.et 2015 relative aux marchés publics,* Journal officiel 24 juill. 2015, p. 12602, See, the décret d'application *n° 2016-360, 25 mars 2016 relatif aux marchés publics,* Journal officiel 27 mars 2016, texte n° 28.

[74] The main concerns are the pooling of resources, the innovation and the digitisation. See S. Braconnier, F. Olivier, N. Sultan, *L'environnement juridique des nouvelles politiques publiques locales,* Contrats et marchés publics (2016).

[75] See the special issue of the *Actualité juridique du droit administratif,* 32 (2015).

lack of experience with foreign tenders and administrative are among the elements that can be quoted and have not be studied here[76]. From a French point of view, the few elements mentioned highlight the fact that public procurement might trigger some changes on the use of conflict of laws and/or jurisdictions rules for the administrative judge. It certainly shows that analyses on these issues might flourish. Transnational entities might be generated by these legal structures, and among them emphasis is given to the European grouping of territorial cooperation, which seems to be the most convenient legal structure to welcome joint cross-border procurement operations. But the use of the EGCT might raise some legal questions, as presented in section 5. The joint cross-border public procurement operation is indeed a complex architecture and the purpose of this article was to highlight the issues and obstacles and to demonstrate that the European Union law is far from being thorough in addressing these obstacles. These gaps show that the European Union law may not have sorted out all the difficulties involved with the collaborative cross-border procurement[77]. They can be interpreted

[76] See E. Menđušić Škugor, *EU procurement reform - the case of Croatia*, Public Procurement Law Review (2017): "with respect to Croatia, it is also likely that the specifics of the Croatian procurement market are off-putting for foreign bidders.Croatia has a specific type playing field for public procurement as several major players, mostly Croatian publicly-owned companies, dominate the sector. The strict and highly formal tender documentation, the use of the Croatian language, difficulties in obtaining prior information on vital aspects of the tender procedure, expensive remedies and a risk of corruption, are not traits for attracting investors".

[77] A feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States has quite recently been published. See the *Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, published on the 20th March 2017 available here: http://ec.europa.eu/DocsRoom/documents/22102/. It seems that the study admits that "the legal framework dealing with JCBPP is still in progress and that the regulatory approach towards the complex theme of JCBPP has not wholly settled yet in all its details". The study even states that "the relevant legal provisions on the EU level show some gaps, are not always fully coherent and definitely pose a number of interpretational problems of their own". It relies on the Member States, and eventually on the European Court of Justice to deal with these questions: "Just as in other areas of EU harmonisation legislation, a number of questions will have to be dealt with by the Member State's legislation and jurisdiction, but may eventually also need answering by

as a shortcoming of the European Union law; but it is also a hint that we are here indeed confronted with the intricacies of transnational law.

the European Court of Justice". See p. 111 of the study.