



CPB PROJECT



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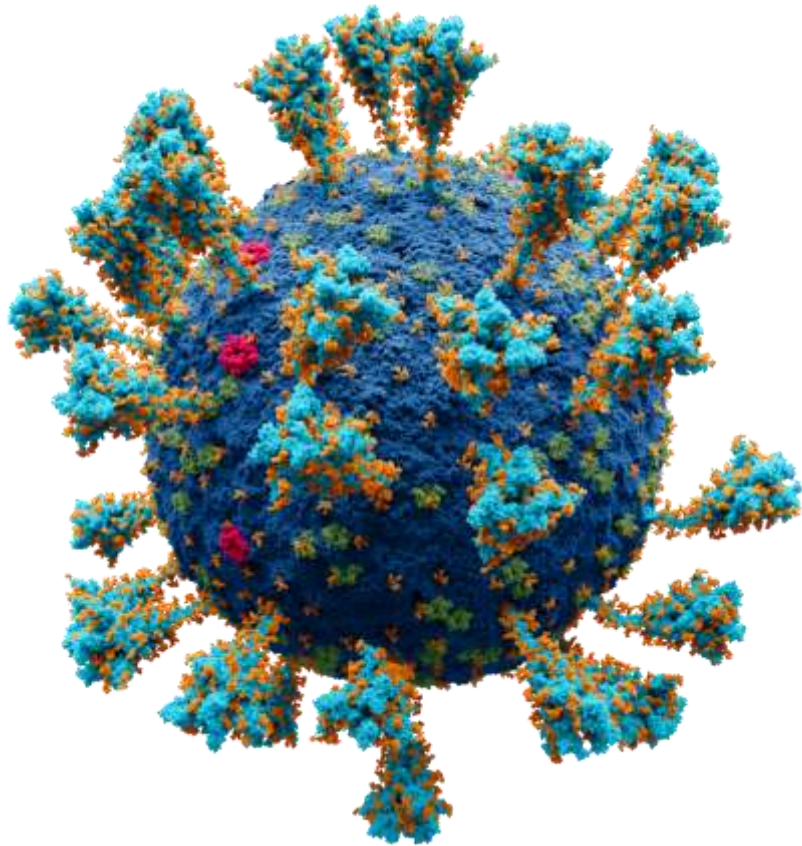
Juridical Considerations on Joint Cross-Border Procurement More Shadows than Lights

Public Procurement Conference – Centralization and New Trends

University of Copenhagen

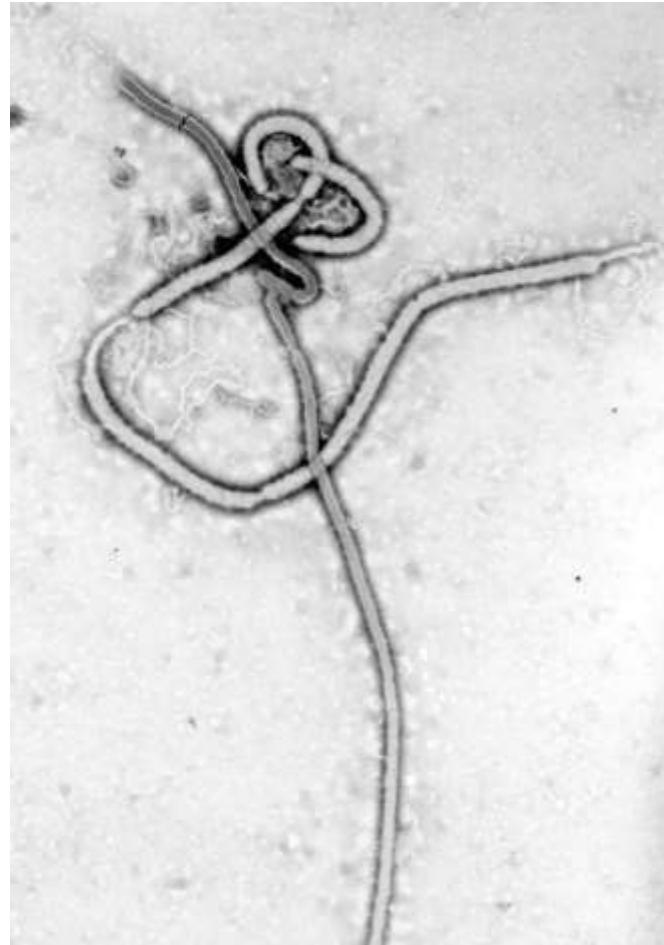
Copenhagen, April 26th 2023

SARS-CoV-2 virus



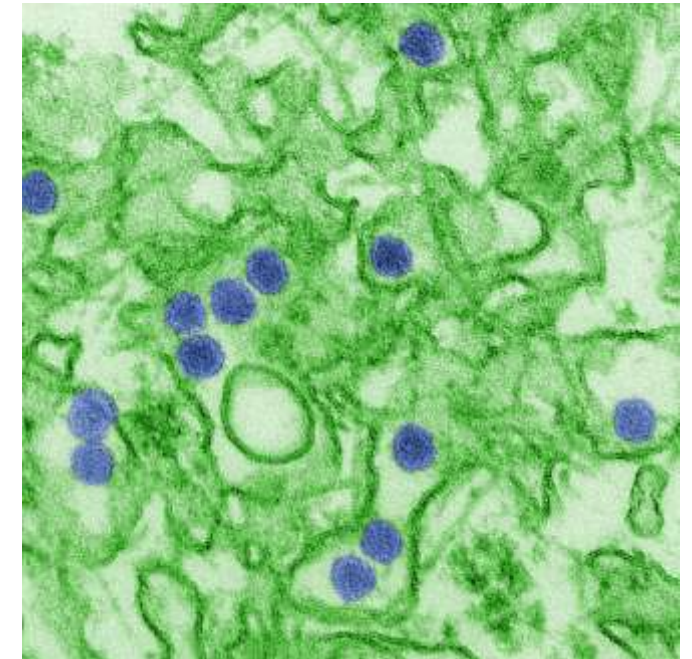
Di Alexey Solodovnikov (Idea, Producer, CG, Editor), Valeria Arkhipova (Scientific Consultant) – Opera propria. Scientific consultants: Nikitin N.A., Doctor of Biological Sciences, Department of Virology, Faculty of Biology, Lomonosov Moscow State University. Borisevich S.S. Candidate of Chemical Sciences, Specialist in Molecular Modeling of Viral Surface Proteins, Senior Researcher, Laboratory of Chemical Physics, Ufa Institute of Chemistry RAS Arkhipova V.I., specialization in Fundamental and Applied chemistry, senior engineer, RNA Chemistry Laboratory, Institute of chemical biology and fundamental medicine SB RAS, CC BY-SA 4.0, <https://commons.wikimedia.org/w/index.php?curid=104914011>

Ebola virus



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Zika virus



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Management of H1N1 influenza

P7_TA(2011)0077

European Parliament resolution of 8 March 2011 on evaluation of the management of H1N1 influenza in 2009-2010 in the EU (2010/2153(INI))

(2012/C 199 E/02)

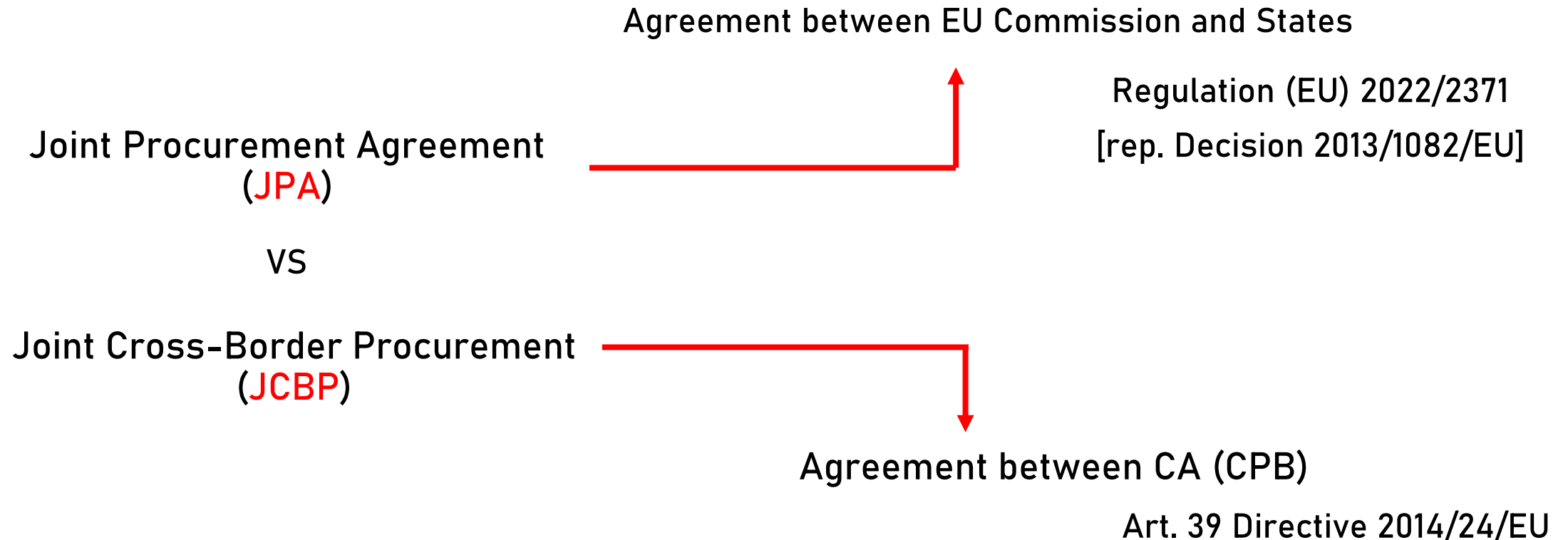


- V. whereas, due to the early acquisition of vaccines and systematic vaccination strategies, especially among the most vulnerable groups, the EU was the best prepared region in the world; whereas, however, considerable differences emerged between the preparedness of EU Member States and the lack of genuine cooperation weakened the EU's overall preparedness,
- W. whereas the limited cooperation among Member States, especially the lack of joint public procurement of vaccines, the lack of joint stockpiles, the lack of a solidarity and brokerage mechanism between Member States, and the absence of prior purchase agreements in several Member States were the main factors undermining the EU's better preparedness,

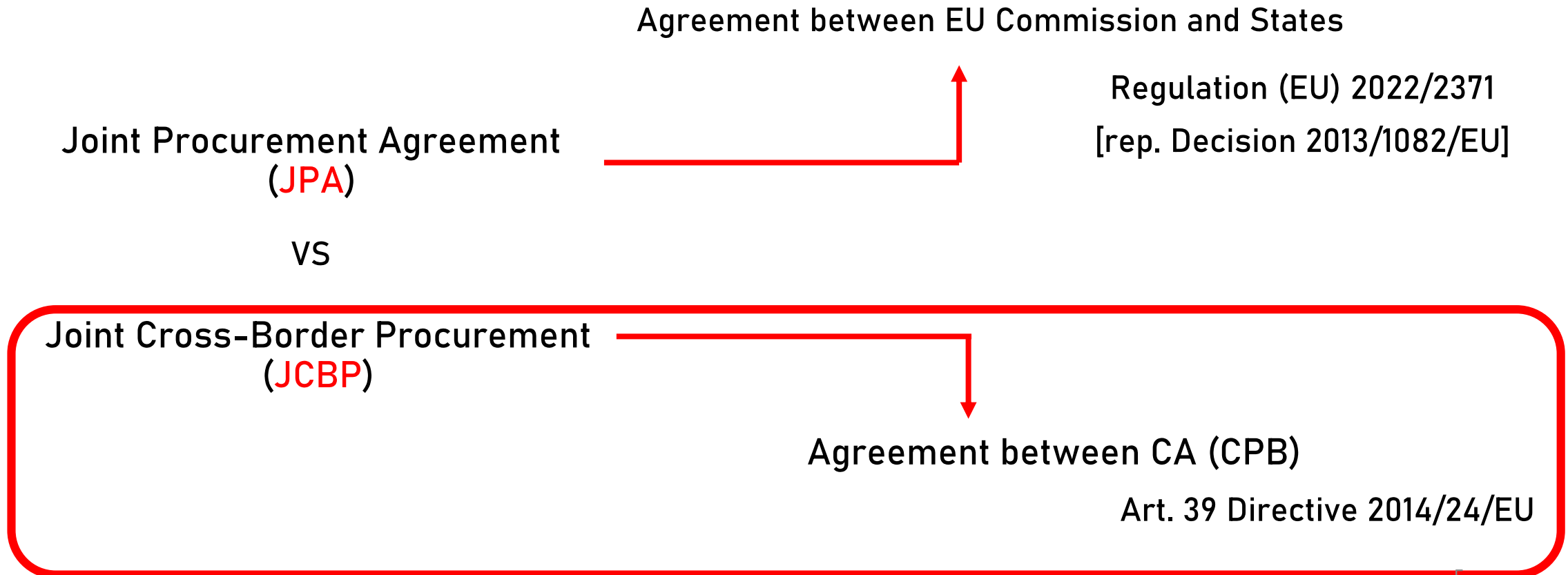
Cooperation

1. Calls for the prevention plans established in the EU and its Member States for future influenza pandemics to be revised in order to gain in effectiveness and coherence and to make them sufficiently autonomous and flexible to be adapted as swiftly as possible and on a case-by-case basis to the actual risk, based on up-to date relevant information;
4. Requests that special attention be paid to preparation between sectors within the framework of co-operation between Member States on the Health Security Committee;

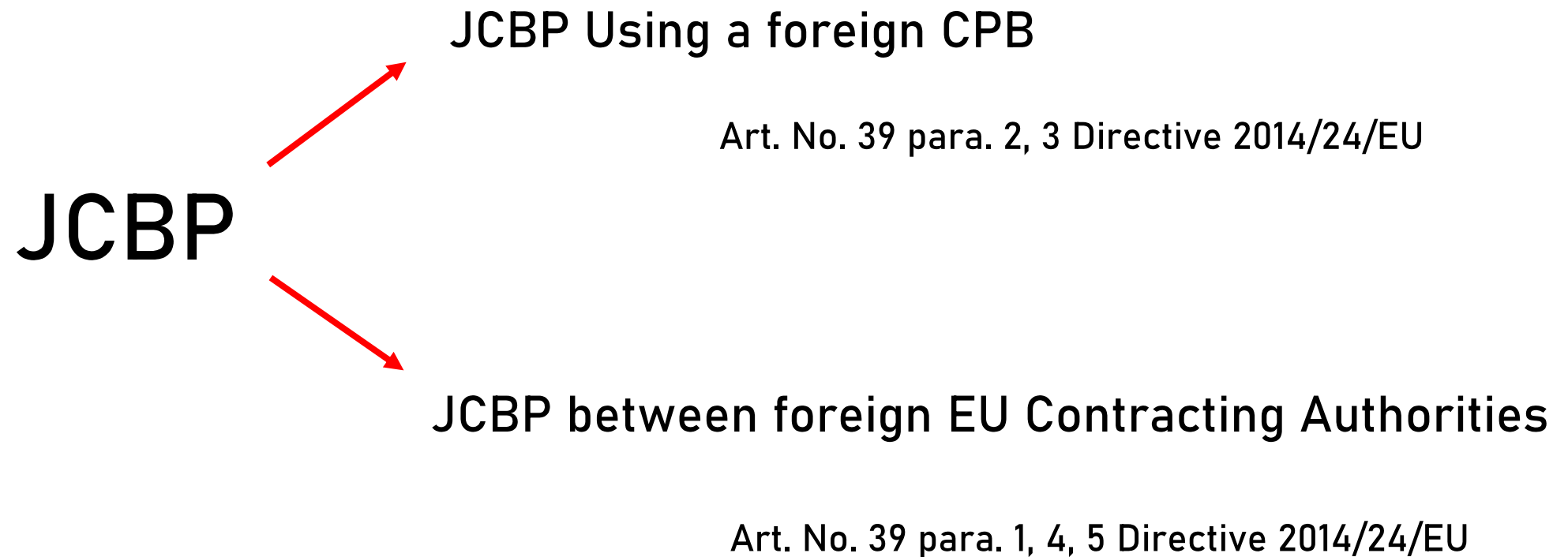
Two cooperative juridical instruments: the procurement side



Two cooperative juridical instruments: the procurement side



Two different (sub)procedures of JCBP



JCBP Using a foreign CPB

Art. No. 39 para. 2, 3 Directive 2014/24/EU

EU Countries shall not prohibit their contracting authorities from **using centralised purchasing activities offered by foreign CPB** located in another EU State



The applicable law is the foreign CPB's law

I.e. the national law of the EU Country in which the CPB is located

(Rationale: to uniform the applicable legal framework)



The foreign (national) CPB's law is also applicable to:

- a. the award of a contract under a dynamic purchasing system
- b. the conduct of a re-opening of competition under a framework agreement (FA)
- c. into a FA, in the choice of the economic operator that will perform a particular task



In any case, UE States may delimit the scope of action of activity of the foreign CPB in these two different activities:

1. the acquisition of supplies and/or services intended for contracting authorities or
2. the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities

JCBP between foreign EU Contracting Authorities



Art. No. 39 para. 1, 4, 5 Directive 2014/24/EU

Contracting authorities (2+) from different EU Countries act together to conclude the JCBP



The use of JCBP should not be used to take advantage of a broader foreign discipline than the national one

By creating a third joint entity that acts in the name and on behalf of the individual member contracting authorities (e.g. EGTC)

By acting among themselves without creating a third joint entity



it is necessary to allocate responsibilities of the tender procedure between the parties

the agreement must regulate precisely:

- the responsibilities of the parties;
- which national provisions must be applied;
- the internal organisation of the procedure for awarding contracts (e.g. choice of specific procedure, e-proc platform, implementation)

1. this is decided by an international treaty signed by the States of the respective CA
2. or by an agreement signed by the individual CA

Emerging aspects of the JCBP

Theoretical complexity

Article No. 39 of Directive 2014/24/EU outlines an instrument that, **only at a first glance**, might appear functional for the achievement of the objectives set

In fact there is:

Need for **compatibility between the applicable regulations** and those of the various EU States

Need to find a **satisfactory agreement** for all parties involved

Application difficulty

Difficulty in achieving a **satisfactory understanding for all parties involved, on the practical level**, concerning:

- (the type of tender procedure)
- the language of tender document and contract
- the choice of the e-proc platform
- the correct identification of the of the value and/or the maximum quantity subject to the JCBP framework agreement

(see CJEU C-23/20, *Simonsen & Weel A/S*; CJEU C-216/17, *Antitrust e Coopservice*)



JCBP, Implementation Difficulty, and Discretionary Power

The provisions of Article No. 39 Directive 2014/24/EU seem to conflict with the objective of the EU legislator to achieve public interest through the cross-border satisfaction of different EU States' public administration needs

theoretical complexity + practical difficulties = contracting authorities to prefer the use of other tender procedures than the JCBP

JCBP is a procedure **difficult to implement**, **not suitable in the case of urgent purchases**, and that suffers from **difficulties resulting from the discretionary powers** reserved to the participating contracting authorities

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the **large margin of discretion** given to the administrations involved, if implemented in a complex and difficult context, may lead to behaviour ascribable to the **defensive administration phenomenon**

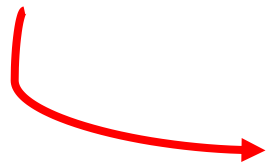
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JCBP, Defensive Administration, and CPBs

The **defensive administration** reflects the complexity degree of the JCBP, which necessarily **requires deep process management skills** to transform this complexity to turn this complexity from a risk into an opportunity



implementing the **JCBP is not a piece of cake**



Only a few administrations internally possess staff with specific administrative, procurement management (EU and national), and strategic vision skills



The technically most prepared administrations are doubtless the **CPBs**



Concluding Reflection: How to Light Up the Shadow?

1. **Article 39 Directive 2014/24/EU** turns out to be an **inefficient rule** (Law and Economics persp.)
 - It does not maximise collective welfare (as it is hardly applied, and only by CPBs)
 - It does not reduce transaction costs (in the face of internal complexity)
 - It produces negative externalities (e.g. defensive administration)

2. Considering that the situation to be regulated is (very) complex, it might be useful to **intervene on the provision of Article No. 39 Directive 2014/24/EU**
 - detailing in more depth the perimeter within which the participating administrations can act
 - narrowing (not eliminating) in this way the area of discretion attributed to the parties, thus reducing possible situations of defensive administration
 - focusing on the **principle of the result of administrative action** (as set out in Art. No 1 of new Italian Public Procurement Code)

3. It might be useful to **promote the training of the public servants**
 - rethinking the system of incentives (economic, but not only) that push civil servants to take the right choices, however risky they may be
 - promoting the use of already existing instruments through which EU managerial training is boosted



Thank you for your attention