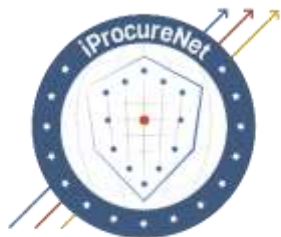


IPROCURENET: JCBPP IN SECURITY SECTOR

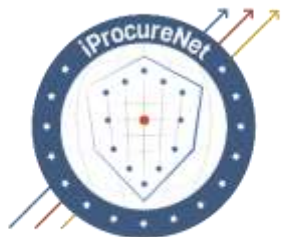


Innovation by developing a European Procurer
Networking for security research services



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Innovation by developing a European Procurer
Networking for security research services



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IPROCURENET IN A NUTSHELL

- iProcureNet aims to create an **ecosystem** of procurers, prescribers, legal advisors and other key stakeholders of security procurement, to
 - share and analyse **procurement trends and needs**;
 - develop **common and standardised practices** from the technical, legal and financial perspectives, and
 - open pathways for **joint procurement**.

100000

Project starting 1 May 2019

and lasting 3 years

10 partners from 10 member states

4 of which 4 are procurement agencies

1,5M€ budget

199 person-months

FACTS AND FIGURES

THE IPROCUENET CONSORTIUM



CHALLENGES TO JCBPP



LEGAL CHALLENGES

Different national regulatory standards.

Fragmented rules on EU level.



ECONOMIC CHALLENGES

Unease of suppliers towards joint procurement due to lack of experience and lower prices



TECHNICAL CHALLENGES

Different technical standards



PRACTICAL CHALLENGES

Different national priorities.

Lack of knowledge on other countries' practices and investment needs



AWARENESS & INFORMATION

Difficult access to innovation alongside daily duties

Lack of awareness of existing solutions and of joint procurement

Types of JCBPP under Art 39:

- a **joint entity**, incl. European Groupings of territorial cooperation (Art 39 (5), Directive 2014/24);
- using **centralised purchasing activities** (para 2-3); or
- operating based on an international agreement or a **mutual agreement** - an *ad hoc* JCBPP (para 4).

ART 39 OF
CLASSICAL
DIRECTIVE

Types of JCBPP

LEGAL ISSUES OF JCBPP VIA CPB



**SUITABILITY &
COMPETENCY OF CPB**



CHOICE OF LAW

SUITABILITY & COMPETENCY OF CPB FOR JCBPP

- Type of purchase:
 - Pilot projects: mainly *ad hoc*
 - Over-the-counter products: CPBs
- Competency of CPB under national law
- Conflicting approach to CPB under the two directives: Classical and Defence
 - E.g., as a *European public body*, the European Border and Coast Guard Agency **Frontex** can function as a CPB in the meaning of the Defence and Security Directive (Art 1 (18)).

■ Definition of CPB

- **Classical Directive:** A central purchasing body (CPB) is a contracting authority that provides centralised purchasing activities and possibly purchasing related support services—e.g. infrastructure, advice, preparatory activity, etc—on a *permanent* basis (art.2(1), pp.14 and 16).
- **Defence and Security Directive:**
 - no mention of *ancillary purchasing services* or support services
 - No requirement of *permanency*.

WHAT IS CPB?

Classical vs
Defence and
Security
Directive

- **Defence and Security Directive:**
either a contracting authority (entity) or a *European public body* can act as a CPB.
- **Classical Directive** does not refer to that type of establishment.
- **Currently no transnational CPB for the security sector.**
 - Organisations like EDA, OCCAR and NSPA are established for the defence sector. Frontex's powers are limited to the function of protecting the Schengen borders.

WHO CAN BE
CPB?

Is there a CPB for
security sector?

CHOICE OF LAW IN JCBPP



Collaboration



**Procurement
procedure**



**Review of
procurement**



Public contract



**Contractual
dispute**

Classical Directive:

- JCBPP by a **joint entity** follows the law of the registered office or the place of carrying out the activities of that entity (Art 39(5)).
- JCBPP by a central purchasing body (**CPB**) is subject to the national law of the CPB (Art 39(3))
- *Ad hoc* collaboration: as **agreed by the collaborators** (Art 39 (4))

Defence and Security Directive: no guidance.

- *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. [including 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.*

- No problem when a CPB conducts the whole procurement.
- However, if collaborators actively participate in parts – e.g., award public contracts via mini-competitions, they have to apply foreign law.
 - Is that legal?
 - Is that feasible?
 - Is that (efficiently) reviewable?

RESULTS FOR FRAMEWORK AGREEMENTS

**In JCBPP via CPB,
pro-active
collaborators
need to follow
foreign law.**

- The Defence and Security Directive contains no similar restrictions, accepting *i.a.* subjecting parts of JCBPP steps to collaborators' domestic law.
- *E.g.:* framework agreement.
 - More flexibility, less problematic review.

NATIONAL LAW RULING PUBLIC CONTRACT AWARDED IN JCBPP

- No specific regulation for contracts awarded in JCBPP by CPB.
 - Does reference to *provision of centralised purchasing activities* include contract performance stage?
 - If yes, application of the CPB's national law to contractual relations between a collaborator and a contractor of third countries, can lack legal clarity.
 - Dispute resolution is subject to additional difficulties.
 - If no, there are no default rules, should the collaborators fail to agree on applicable contract law.

APPLICABILITY OF THE ROME I REGULATION

What if
contracting
authority
intended to
award an
administrative
contract?

- Rome I Regulation is designed for solving conflict of law disputes concerning civil law contracts and does not apply to administrative matters (Art 1 (1)).
 - Applicability is determined autonomously of national legal systems and consistently with the Brussels I Regulation!
 - Administrative contracts are excluded from the scope of Rome I Regulation, wherefore application of R I R to French public procurement contracts or other contracts classified as an instrument subject to public law has been questioned.

As a first rule, the applicable law is determined for particular types of contract, *e.g.* sales or service contracts (Art 4 (1) of R I R).

When the contract is of no such type, the contract must be governed by the jurisdiction of the party delivering the **characteristic performance** (Art 4 (2)).

Exceptionally, another jurisdiction can apply if it is clear from all the circumstances of the case that the contract is “**manifestly more closely connected**” with that a country (Art 4(3)).

Can exceptional Art 4(3) of the Rome I Regulation apply?

- The importance of approaching **a single transaction as an entirety** rather than having parts of a transaction subject to different laws can be a factor justifying the exception.
- However, in itself, public sector participation in a contract would not necessarily indicate to a close connection with the respective jurisdiction – the influence is determined on a case-by-case basis.

PUBLIC
CONTRACT AS
EXCEPTION
UNDER ROME I
REGULATION?

Can Art 4(3) of
the Rome I
Regulation
apply?

A contract for the sale of goods by auction is subject to the *law of the country where the auction takes place* (Art 4(1)(g)).

- Rationale of the rule:
 - *in order to avoid application of an unforeseeable law*. Having a *closer connection to the place of the auction*, application of the law of the latter to the contract by auction is *more predictable*.
 - “*for the convenience and the economy of the auctioneers*”.

NATIONAL LAW APPLICABLE TO AND THE PLACE OF REVIEW OVER JCBPP

Review of JCBPP under Directive 89/665/EEC.

- Any interested economic operator can **initiate review proceedings** due to an alleged violation of public procurement law by a contracting authority, **in the Member State where the contracting authority is situated** and the Member State is liable to provide such option (Art 1 (1) 4th paragraph of Remedies Directive).
- Member States must ensure that any decisions of review bodies are effectively enforceable upon contracting authorities (Art 2 (8)).
 - In a JCBPP situation, this can sometimes lead to *the review body having to apply foreign law.*

If a collaborator conducts a part of a JCBPP under a foreign law – *e.g.*, with a CPB as the lead buyer -, the review body ~~must apply that law.~~

- Is the review body vested with the right to apply foreign ~~law?~~
 - Even if entitled, is it capable?
 - Is the harmed economic operator capable of finding legal representation rapidly enough?
 - If not, the review system may fail to offer sufficiently **speedy and efficient** remedies as the Directive requires.

CAN REVIEW
BODIES
APPLY
FOREIGN
LAW?



Gaps in the regulation create *legal uncertainty* and *reduce the speed or efficiency* of review over JCBPP procedure.

- To solve the controversy, the directives would need to guide the Member States to implement necessary changes in their review systems. For instance:
 - to establish the **competency of review bodies** in cases of JCBPP;
 - specify which of collaborating contracting authorities must be the party to review proceedings in JCBPP cases;
 - establish if and how can a review body **summon a foreign contracting authority** into the review proceedings etc.

NEED FOR
DIRECTION
REGARDING
REVIEW OVER
JCBPP

Gaps in
regulation create
uncertainty

CONCLUSIONS ON CHOICE OF LAW IN JCBPP

- **Gaps in EU legislation** concern default choice of law rules in JCBPP. In case of CPBs, such gaps restrict the choices for collaboration and may inhibit the use of JCBPP.
- The possibility of **efficient remedies** for economic operators via review in JCBPP needs attention.
- Addressing these issues on the level of **directive** or *via guidance* from the Commission would greatly serve legal certainty and support the further development of JCBPP.

THANK YOU FOR YOUR ATTENTION!

On the same topic:

- Mari Ann Simovart, “Choice of Law Applicable to Joint Cross-Border Public Procurement by Central Purchasing Bodies or under Occasional Collaboration Agreements” [2021] UrT , <https://urt.cc/reportage/choice-of-law-applicable-to-joint-cross-border-public-procurement-by-central-purchasing-bodies-or-under-occasional-collaboration-agreements-2/>
- Mari Ann Simovart, Jozef Kubinec, “Pathways for (quasi-) institutionalised joint cross border public procurement in the security sector - is there a will and a way?” P.P.L.R. 2023 , 3, 157 -170