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Choice of law applicable to joint cross-border public procurement by central purchasing bodies or under occasional collaboration agreements[1]

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1 Introduction

An innovative way of procurement and a strategic tool of using purchasing power, joint, *a.k.a.* aggregated or collaborative cross-border public procurement (JCBPP) can be a promising mechanism of efficient purchasing. At the same time, JCBPP is not without its challenges (Recital 72 of Directive 2014/24/EU[2]), including legal complexity of collaboration projects together with the lack of coherent legal framework on the EU level.[3]

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2 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 094 28.3.2014, p. 65) – the *Classical Directive*.

3 Council of the European Union. Proposal for a Directive of the European Parliament and the Council on public procurement – Cluster 6: Aggregation of demand, 6907/12, 28.02.2012, available https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206907%202012%20INIT (February 5, 2021), 15 - 16; European Commission. Support of the internal market policy for growth: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States. Written by BBG and SKI. December 2016 (hereinafter BBG and SKI 2016), available https://op.europa.eu/en/publication-detail/-/publication/85572a0c-f102-11e7-9749-01aa75ed71a1/language-en/format-PDF (February 5, 2021), 12; B. Heuninckx. The law of collaborative defence procurement in the European Union, Cambridge: Cambridge University Press, 2016. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/mil/detail.action?docID=4732921, 218; B. Heuninckx. Aggregated Procurement under Directive 2014/24/EU: Lessons from the Defence Sector, 27 P.P.L.R. 2018, 189; B. Heuninckx and S. Arrowsmith. The Law of Public and Utilities Procurement: Regulation in the EU and UK, Vol II, 3rd Ed-n, Sweet & Maxwell, Thomas Reuters, 2018, 15-176 – 15-177; G. M. Racca & C. R. Yukins, Introduction: The Promise and Perils of Innovation in G. M. Racca, C. R. Yukins (eds), Cross-Border Procurement, in Joint Public Procurement and Innovation: Lessons Across Borders, 2019 - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486897 (February 9, 2021), 1, 7, 9, 11-12, 14; A Sanchez-Graells. The emergence of trans-EU collaborative procurement: a "living lab" for European public law. P.P.L.R. 2020, 1, 16-41, 31.

Among the legal issues, choosing or identifying the national law that is going to govern different stages or parts of a collaborative procurement, is of obvious critical importance for the whole enterprise. The conflict-of-law topic has a wide dimension, containing the following unknowns:[4] what law applies to a JCBPP *procedure* and to relationships between collaborating authorities; where is the competent review body for in proceedings initiated with regard to actions conducted in the course of JCBPP; what law applies to and which court or other review body has the power to decide over matters concerning jointly awarded public contracts? The presence of two or more contracting authorities of different domiciles in a JCBPP situation adds layers of complexity to possible conflicts of law issues, some of which have as of current no clearly foreseeable solution.

In order to highlight such conflicts, part 2 of the article firstly introduces the legal framework for conducting a JCBPP procedure under Directive 2014/24/EU (the Classical Directive) and Directive 2009/81/EC[5] (the Defence and Security Directive).[6] Further, the article analyses the choices of law applicable to contractual relations in JCBPP, looking at the collaborating agreements between the contracting authorities, and at contractual relationships based on the awarded public contracts (part 3), as well as the choice of law and the place of review over JCBPP (part 4). This article is based on the excellent legal research on the topic of EU law on JCBPP published by well-known authors such as S. Arrowsmith[7], B. Heuninckx[8], G. Racca and C. Yukins[9], C. Risvig Hamer[10], A. Sanchez-Graells[11] et al.

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4 Heuninckx adds another item to this list, namely *the decision made by a contracting authority to procure through a specific central purchasing body or jointly with other identified contracting authorities* – Heuninckx 2016, 39-40; Heuninckx 2018, 204 ff.

5 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216 20.8.2009, p. 76).

6 The rules of JCBPP are to a large extent similar to the Classical Directive under the Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243–374) and conclusions of this article apply to both. Concessions subject to the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1–64) might be less likely to be offered in JCBPP and are therefore excluded from the scope of this article, as are collaboration projects regarding procurements outside of the scope of the directives' regulation.

7 S. Arrowsmith. The Law of Public and Utilities Procurement: Regulation in the EU and UK, Vol I, 3rd ed-n. Sweet & Maxwell, Thomas Reuters 2014, 5-48 – 5.52; Heuninckx and Arrowsmith, 2018, 15-172 – 15-183.

8 Heuninckx and Arrowsmith 2018; Heuninckx 2018; Heuninckx 2016; Heuninckx 2008.

9 Racca & Yukins 2019

10 C. Risvig Hamer in M. Steinicke and P. L. Vesterdorf. EU Public Procurement Law. Brussels Commentary, C.H. Beck – Hart – Nomos 2018, 509 – 515.

11 A. Sanchez-Graells. Collaborative Cross-border Procurement in the EU: Future or Utopia? UrT 2016 no 1, https://www.urt.cc/sites/default/files/UrT%20Sanchez-Graells.pdf (February 10, 2021); Sanchez-Graells 2020.

In addition, information is collected from the earlier published feasibility study[12] and the research conducted in the course of *iProcureNet,*[13] a Horizon 2020 project for facilitating JCBPP in the field of internal security.

2 Issues related to national laws applicable to a JCBPP procedure

2.1 General legal framework of conducting JCBPP procedure

Directive 2014/24/EU is the first to refer to the possibility of joint cross-border public procuring, and to briefly regulate that in Art 39. Dr. A. Sanchez-Graells describes such normative framework as fragmented in some and uncertain in other aspects, and even raises questions with regard to the legal basis of the regulation in the light of the primary EU law.[14] Unfortunately, one has to agree with this criticism.

According to the Directive, three means can be used to conduct a JCBPP: procurement by a (foreign) central purchasing body (CPB) (Art 39 (2)-(3)), based on an occasional collaboration agreement (Art 39 (4)) or conducted by a specially created entity (Art 39 (5)). Whereas Art 39 (5) defines the law applicable to procurement carried out by a designated joint entity, the latter type of cooperation in my opinion offers significantly less concerns with regard to the choice of law and is excluded from this article. Overall, the regulation on the choice of national law applicable to a JCBPP procedure is rather concise in the Classical Directive and. Art 39 (3) subjects centralized purchasing activities and related activities to the law of the Member State where the central purchasing body is located. Further, for cases of collaborative procurement based on an occasional agreement between contracting authorities, Art 39 (4) (a) obliges the contracting authorities to enter into an agreement on the relevant applicable national provisions. Meanwhile, the Directive regrettably lacks any default rules for occasions where contracting authorities would fail to enter into such agreement,[15] thus in effect putting the liability for creating a legally feasible environment for a JCBPP project entirely on the collaborators.

The Defence and Security Directive provides no specific guidance on JCBPP. However, the lack of regulation does not take away the option to conduct JCBPP

[12] Primarily, BBG and SKI 2016.
[13] https://www.iprocurenet.eu/ (February 10, 2021).
[14] Sanchez-Graells 2016, *passim;* Sanchez-Graells 2020, 17, 27, 31-33.
[15] Sanchez-Graells 2020, 23-24, 30 - 31.

according to the Defence and Security Directive.[16] On the contrary, due to the significant accumulation of experience in and research concerning JCBPP in the defence sector, Dr B. Heuninckx has advised to use that experience as guidance for enhancing the currently fragmented and incomplete regulation of the Classical Directive.[17] On the other hand, while conducting procurement subject to the Defence and Security Directive, following the provisions of Art 39 of the Classical Directive as guidance can be an option as well because that would create the presumption that the joint procedure is also compatible with the Defence and Security Directive.[18] Other options of cooperation or similar forms of cooperation based on different principles of liability and choices of law could be possible in JCBPP under the Defence and Security Directive as well, but conformity of such different arrangements would require review and a case-by-case approach. Following, the article will point to some of the difficulties caused by the potential conflicts of law in JCBPP conducted by a CPB or under a collaboration agreement.

2.2 National law applicable to procedures of JCBPP conducted by a CPB

According to the Classical Directive, when a CPB conducts a JCBPP for foreign contracting authorities, the law of the Members State of the CPB applies to the procurement procedure (Art 39 (3)). Further, the following are subject to the national law of the CPB as well: (a) the award of a contract under a dynamic purchasing system (DPS); (b) the reopening of competition under a framework agreement; (c) when a framework agreement is concluded with several economic operators, the determination of which of those performs a given task (points (a) or (b) of Article 33(4)). Given the nature of central purchasing activities and the regulation of Art 37 (2), an argument can be made that in fact, any steps of purchasing activity conducted by a CPB should be subject to the national law of the CPB's home State.[19] Application of such rules naturally makes sense, in particular as far as the concerned steps are carried out by the CPB itself.

However, the situation becomes a bit more complicated if pursuant to Art 37 (2) 3rd subparagraph, instead of the CPB another contracting authority actually

[16] Commission notice on guidance on cooperative procurement in the fields of defence and security (Defence and Security Procurement Directive 2009/81/EC), C/2019/3290, OJ C 157, 8.5.2019, p. 1–9, 1; Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive, COM/2016/0762 final.

[17] Heuninckx 2018, 190; Heuninckx and Arrowsmith 2018, 15-176 – 15-177. On a thorough overview and analysis of organization and specific legal issues of collaborative defence procurement see Heuninckx 2016 and Heuninckx 2018.

[18] Commission notice C/2019/3290, 2.1.

[19] Risvig Hamer 2018, 512.

carries out and bears the liability for some parts of the JCBPP. Despite being conducted by another entity operating in a different jurisdiction, the national law of the CPB still seems to apply.[20] On the one hand, there are positive examples of contracting authorities successfully following the law of another country.[21] On the other hand, application of a foreign national law to the procurement can create difficulties for contracting authorities. Besides the added responsibility and increased administrative burden, application of a foreign law by a contracting authority could in fact be regarded „illegal as the application lacks a 'legal basis' or 'competence', from an administrative law perspective ".[22]

It is therefore probable that a contracting authority interested in using the services of a foreign CPB in order to carry out a JCBPP under the Classical Directive, is in reality forced to leave the execution of the whole procedure to the CPB. Thus, the legal feasibly of using a CPB for the conclusion and administration of framework agreements and dynamic purchasing systems where the other participating contracting authorities could directly engage as well, is actually somewhat limited.[23] The existing legal framework together with the possible mandatory norms of domestic public law can thus create a situation where in some jurisdiction, it may not be possible for a public authority to successfully carry out a part of JCBPP procedure, *e.g.*, to award a public contract based on a framework agreement entered into by a foreign CPB under foreign public procurement law.

Furthermore, should a contracting authority be able and competent to conduct such steps of procurement independently under the terms of foreign public procurement law, that can lead to a rather problematic situation when an economic operator instigates review proceedings with regard to such steps – see below in part 4.

In light of the above, the current regulatory framework with regard to the applicable national laws under the Classical Directive seems to make some types of collaboration with a CPB legally controversial.[24] For contracting authorities, it can be complicated to arrange a collaboration with a CPB of an "intermediary" type (Art 2 (1) point b) where the contracting authority itself would be liable for conducting some final parts of the procurement, such as awarding a contract under a framework agreement or a DPS. The situation is legally more feasible in cases where an "intermediary" CPB conducts all or most of the parts of the JCBPP itself. Similarly, the use of a "wholesaler" CPB (Art 2 (1) point a) where

[20] Risvig Hamer 2018, 511; Heuninckx 2016, 195; Heuninckx 2018, 209.

[21] BBG and SKI 2016, 27.

[22] Ignacio Herrera Anchustegui. Collaborative Centralized Cross-Border Public Procurement: Where Are We And Where Are We Going To? https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3052159 (February 9, 2021), 14. Similar concerns are referred to in BBG and SKI 2016, 27, 59.

[23] Herrera Anchustegui, 15.

[24] A thorough analysis of various ways of conducting JCBPP via CPB and the related legal risks is provided in Sanchez-Graells 2016, *passim*.

the contracting authority simply receives products purchased by the CPB, is less complicated.

The Defence and Security Directive does not contain restrictions similar to the above and seems to accept the scheme where parts of a JCBPP are conducted by a contracting authority according to its own domestic law. That can concern for instance, awards of contracts based on a framework agreement, or awards of contracts under a DPS. In such cases, the collaborating authorities have to establish a common understanding on combining the rules of the concerned two or more national legal frameworks and communicate these rules clearly to the economic operators in procurement documents.

3.2 National law applicable to procedures of JCBPP based on a mutual collaboration agreement

Under the EU legal framework, contracting authorities are free to engage in an *ad hoc* cross-border cooperation – to conduct a JCBPP based on mutual agreement, in order to jointly award a public contract, operate a framework agreement or a DPS. The nature of *ad hoc j*oint procurement projects can take a variety of forms, ranging from coordinated procurement through the preparation of common technical specifications, to jointly conducting a procurement procedure either by acting together or by authorising one of the contracting authorities as a leading buyer with the management of the procedure on behalf of other collaborators.[25]

According to Art 39 (4) of the Classical Directive, unless the necessary elements of the cooperation have been regulated by an international agreement between the concerned Member States, the participating contracting authorities must conclude an agreement that determines the terms and nature of the collaboration, including the national laws applicable to the cooperation, the procurement procedure(s) and the awarded contract. Such rules must not only be agreed between the collaborators but should also be published in the procurement documents (Art 39 (4) 3rd subparagraph).

The agreement must concern not only the initial award procedure of the public contract but also any future acts such as possible awards of public contracts under the framework agreement or based on a DPS. This is especially relevant in a collaboration where some contracts are going to be awarded by contracting authorities from different Member States. Together with indicating the law governing the joint procurement procedure(s), Heuninckx[26] advises to establish the national law applicable to the resolution of disputes relating to such procedures, and the competent jurisdictions for the latter – see more on that subject in part 4 below.

[25] Heuninckx 2018, 193; Proposal 6907/12, 14.
[26] Heuninckx 2018, 211.

As the procurement directives lack any default rules in this respect, existence of such an agreement is in fact vital.

In the course of the legislative procedure leading to the Classical Directive, a proposal to regulate the occasions where the participating contracting authorities have failed to determine the applicable national public procurement rules in their internal agreement, was considered. In such cases, it was proposed to determine the applicable national procurement rules "on the basis of objective connection factors … inspired by the rules of international private and economic law." The main principles proposed were the following: (i) where a single contracting authority is acting on behalf of the others, the national rules of this contracting authority prevail; (ii) when the procurement procedure is conducted jointly, the applicable procurement rules are determined on the basis of the main place of the contract performance, such as the location of works or the place of provision of supplies and services; (iii) should the application of the first two rules prove to be impossible, the national rules of the contracting authority with the largest share of the costs would apply.[27]

Regrettably, these logical proposals did not end up in the Directive. However, it seems advisable for collaborators to agree on and follow the same rules in a JCBPP voluntarily, with possible variations for cases where some of the collaborators conduct some independent parts of the joint procedure. For instance, parties may want to consider subjecting mini-competitions based on a framework agreement to a national law of the contracting authority actually conducting the mini-competitions even if that would be different from the law applying to the procedure of awarding the framework agreement. At the same time, establishing the same guidelines either in the way of soft law or mandatory norms would certainly benefit the legal certainty.

3. National law applicable to contractual arrangements in a JCBPP

3.1 Application of Rome I Regulation to contractual relations in JCBPP

Recital 73 of the Classical Directive indicates that unless the terms of a public contract establish otherwise, the national law applicable to a public contract would be determined according to the rules of the Regulation (EC) No 593/2008 of the European Parliament and the Council (the Rome I Regulation).[28]

[27] Proposal 6907/12, 18-19.

[28] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008, p. 6–16.

As an instrument of private international law, application of Rome I Regulation can also be relevant towards collaboration agreements. Unfortunately, this seems to present some possible challenges in a JCBPP situation.[29]

In order to resolve any conflict of law situation based on the Rome I Regulation, it is first necessary to establish applicability of that instrument to the concerned case. While the Rome I Regulation is designed for solving conflict of law disputes concerning civil law contracts where the parties have not exercised their autonomy to select the national law governing the contract, it does not apply to administrative matters (Art 1 (1)). In JCBPP, the legal nature of both cross-border collaboration agreements and of public contracts can vary, making it crucial to establish applicability of Rome I Regulation to a particular contract. Drawing the line between civil matters that are subject to the Regulation, and administrative matters that are not, according to Recital 7 of the Regulation must be done autonomously of national legal systems[30] and consistently with the Brussels I[31] Regulation.[32] An autonomous interpretation can regard public contracts as civil law contracts (as they are also considered to be in many Member States) indeed leading to applying the Rome I Regulation in order to solve any conflict of law issue.[33] Administrative contracts on the other hand are excluded from the scope of Rome I Regulation. For instance, there can be uncertainty over the qualification of the French public procurement contracts that the French law classifies as an instrument subject to public law. Application of Rome I Regulation to such contracts has been questioned.[34]

Furthermore, solutions to conflict of law situations in cases where the Rome I Regulation is applicable, may not necessarily as be clear and uniform as one would wish in order in the interest of legal clarity. As a rule, unless otherwise agreed by the contracting parties, the law applicable to a contract should be determined in accordance with the rule specified for the particular type of contract.[35] Rome I Regulation provides specific rules for certain common contract types such as sales

[29] On the same topic – Sanchez-Graells 2020, 26-27.

[30] MüKoBGB/Martiny, 8. Aufl. 2021, Rom I-VO Art. 1 Rn. 6.

[31] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 12, 16.1.2001.

[32] C-272/18, Verein für Konsumenteninformation versus TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG, ECLI:EU:C:2019:827, p 36; A. Dickinson, E. Lein (Ed-s). The Brussels I Regulation Recast. Oxford University Press, 2015, 1.75. On differences between applying those two instruments – id, 1.76-1.79; T. Deskoski and V. Dokovski. Lex Contractus for Specific Contracts under the Rome I Regulation. Iustinianus Primus Law Review, vol. 10, no. 1, 2019, p. 1-12.

[33] MüKoBGB/Martiny, 8. Aufl. 2021, Rom I-VO Art. 1 Rn. 6.

[34] Dickinson, Lein (2015), 2.19. Also: O. Remien. Public Law and Public Policy in International Commercial Contracts and the UNIDROIT Principles of International Commercial Contracts 2010: A Brief Outline. - Uniform Law Review, vol. 18, no. 2, 2013, pp. 262-280, 265-266.

[35] Recital 19 of the Rome I Regulation; MüKoBGB/Martiny, 8. Aufl. 2021, Rom I-VO Art. 4 Rn. 4.

or service contracts (Art 4 (1) of Rome I Regulation). Where the contract cannot be categorised as one of such types specified in Art 4 (1) or where it can fall within more than one specified types, and there is no direct agreement and the choice of law is not "demonstrable by reasonable certainty", the applied jurisdiction must represent the party delivering the characteristic obligation or the most important performance (Art 4 (2)), *i.e.*, the contract is governed by the law of the country where the party required to effect the „characteristic performance" of the contract has his habitual residence.[36] If the applicable law cannot be determined on the basis of the domicile of the party providing the characteristic performance, it should be governed by the law of the country with which it is "most closely connected", taking into account, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.[37] As a rule, the general closest connection test should be the test of the last resort.

However, as an exception to the above-described rules, Art 4(3) of Rome I Regulation provides an option to apply the "closest connection" test where the specific circumstances of the case as a whole so justify, in order to provide a fair result: [38] *[w]here it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply*. In the case of dispute over law applicable to either collaboration agreements or public contracts (framework agreements) awarded in a JCBPP project, the above described rules may be applied.

3.2 Law applicable to collaboration agreements

Both in the case of an occasional collaboration and in JCBPP led by a CPB, the collaborating parties need to establish legal relations pertaining to their collaboration. Unlike in the case of occasional joint procurement under the Classical Directive, such an agreement is not legally mandatory under either of the directives. However, reaching such agreement it is advisable and in fact, unavoidable *inter alia* due to the lack of any default regulation. The experience of collaborative cross-border defence procurement has shown that most delays in such programmes are due to an inefficient preparation phase. [39] An efficient framework for cooperation can reduce such obstacles and delays.

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[36] Deskoski and Dokovski, 4; O. Lando and P. A. Nielsen. The Rome I Proposal. Journal of Private International Law, vol. 3, no. 1, April 2007, p. 29-52, 35; Rome I Regulation, Recital 19.

[37] Id, Recital 21.

[38] MüKoBGB/Martiny, 8. Aufl. 2021, Rom I-VO Art. 4 Rn. 4, 294, 295-297; Z. Tang, Law Applicable in the Absence of Choice: The New Article 4 of the Rome I Regulation. *The Modern Law Review*, Vol. 71, No. 5, Sep., 2008, pp. 785-800, 797.

[39] Heuninckx 2016, 201; Heuninckx 2018, 210.

In the case of an occasional collaboration, the Directive obliges the collaborators to enter into an agreement on the applicable law (Art 39 (4) (a)) but there are no default rules on the choice of law in the Directive for occasions where the collaborators should fail to reach such an agreement or should the interpretation of the agreement be questionable. For instance, it is not clear if collaborating authorities are free to choose that the national law of a third, unrelated Member State applies to the collaboration between themselves. Differently from the proposal submitted in the course of the Classical Directive's legislative proposal,[40] the directive itself does not restrict this choice to the laws of the collaborative contracting authorities' countries only. However, domestic laws of the collaborators may prohibit choosing the law of a Member State which has no connection with the particular JCBPP. Also, the act of relying on a non-related jurisdiction can raise suspicions of the intent to circumvent some mandatory national law norms. Therefore, choosing a third country legislation should as a rule be avoided or at least approached with caution.

The legal nature of a relationship between collaborating contracting authorities can vary due to different national laws governing such cooperation and the concerned legal authorities. Thus, a collaboration agreement can be of some form of transnational contract or an administrative arrangement, and the law governing it would depend on the nature of the contracting authorities concerned – public international law, administrative law or private contract law.[41] In any case, the collaborating parties must initially establish the basic nature of their legal relationship, agree on the jurisdiction to be applied to their collaboration and the place of review over possible mutual disputes between the collaborators.

If the parties have not agreed on the applicable national law, it can be determined with the help of Rome I Regulation when the agreement is of private law nature. As shown above, in such cases, the applicable law will most probably be determined on the basis of the place of characteristic performance as the collaboration agreement probably does not correspond to any of the types of contracts for which Art 4 of the Rome I Regulation sets specific conflict of law rules. Probably, the characteristic performance or the "centre of gravity"[42] of the collaboration agreement will point to the law of the Member State of the CPB or the lead buyer. However, situations cannot be excluded where the parties' equal efforts and active input as well as different places of simultaneous collaboration make determining the place of characteristic performance difficult or impossible. If the place of characteristic performance is impossible to establish (Art 4(4) of Rome I Regulation) or when the contract as a whole indicates to another close

[40] Proposal 6907/12, p. 16.
[41] Heuninckx 2018, 210.
[42] Tang 2008, 795.

connection (Art 4 (3)), the applicable law can be subject to such exceptional close connection to another Member State. In conclusion, in the interest of clarity, providing a clear agreement as to the national law applicable to the collaboration between authorities in JCBPP is vital.

3.3 National law applicable to public contracts awarded in JCBPP.

Naturally, the choice of law applicable towards a public contract can have critical and very practical consequences for the contract management, with possible impact on *e.g.,* the interpretation of delivery terms; enforceability of penalties, warranties and any remedies under the contract law in the case of malperformance or a failure to perform *etc.* Primarily, the question of what law applies to a contract should of course be settled by the contracting parties based on the principle of party autonomy. In procurement practice, this usually means establishing the applicable law by the contracting authority in the contract documents. However, should the parties in a cross-border situation for any reason fail to make that choice, it is necessary to find a default answer to the choice of law question from an applicable legal instrument.

As was mentioned above, Recital 73 of the Classical Directive leads to look for guidance in the Rome I Regulation which can be applied to private law contracts, even though questions may arise if the concerned contract should be classified as a public law instrument. (On the applicability of the said Regulation to public contracts see in part 3.1 above.) According to the Rome I Regulation, the first rule on the path to finding the appropriate law applicable to a contract is related to the types of contract and the place of characteristic performance of the concerned contract – Art 4 (1) (a) and (b) or Art 4 (2). Based on these rules, the law of the party of the seller's or service provider's residence or of residence of other contracting party the delivers the characteristic performance of the contract, would apply.

However, in a public procurement situation, such a conclusion cannot be considered to be in harmony with the rationale of public contracting at all. In a typical procurement setting, the contracting authority is the one to prepare and draft the terms of a public contract. Such terms that are either a part of or strongly intertwine with the terms of the concerned procurement documents published in the course of the award procedure. Application of rules of any other legal system to a contract that was prepared with another set of rules in mind, would lead to unexpected results that are not in harmony with the intent of the drafter and in the case of public procurement, can essentially be in conflict with the terms of the very same award procedure. The person of the other contracting party and its domicile are not even known at the time of preparing the procurement. Thus,

the contract would have been prepared by applying unknown and unforeseeable legal system.

As was shown above, Art 4(3) of the Rome I Regulation also provides an exceptional rule for cases where it is "manifestly" clear that the contract has a close connection with a country other than those based on the characteristic performance test. In itself, public sector participation in a contract would not necessarily indicate to a close connection with the respective jurisdiction – rather such influence must be decided on a case-by-case basis.[43] However, it can be argued that the contract being awarded on the terms published in the course of a procurement procedure would amount to a case where the awarded contract is "manifestly more closely connected" to the law under which it was awarded.

In fact, by way of analogy, submission of a public contract to the same national law as was applied to the award procedure seems to be in harmony with the rationale behind the Rome I Regulation with regard to auctions conducted under private law. Differently from an ordinary contract of sale which, unless otherwise agreed by the parties, is to be governed by the law of the country of the seller's habitual residence (Art 4 (1) (a) of the Rome I Regulation), any contract for the sale of goods by auction is subject to the law of the country where the auction takes place (*Id*, (g)). This rule is justified in order to avoid application of an unforeseeable law.[44] Because a contract by auction has a closer connection to the place of the auction, application of the law of the latter is more predictable. Furthermore, it has been referred to that the same law applying to all of the contracts awarded at an auction regardless of the places of residence of the contracting parties, is justified "for the convenience and the economy of the auctioneers".[45] Not unlike an auction, a procurement procedure leads to an award of a contract to a previously unknown contracting party who as a rule has no way at all or only a limited option to influence the terms of the contract other than those included in the bid.

Other circumstances, such as the contract in question having a close relationship with some other contract[46] or the place of contract performance can be an indicator of close connection for the purpose of Art 4 (3) as well.[47] The importance of approaching a single transaction as an entirety rather than having parts of a transaction subject to different laws has been mentioned as a factor as well.[48] Therefore, it can be argued that the procurement procedure is more closely connected to the place of the contract award, *i.e.,* the Member State of the contracting authority.

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[43] MüKoBGB/Martiny, 8. Aufl. 2021, Rom I-VO Art. 4 Rn. 339.
[44] MüKoBGB/Martiny, 8. Aufl. 2021, Rom I-VO Art. 4 Rn. 157, 158.
[45] Tang 2008, 790.
[46] Recitals 20-21.
[47] MüKoBGB/Martiny, 8. Aufl. 2021, Rom I-VO Art. 4 Rn. 335; Tang 2008, 798.
[48] Tang 2008, 798 - 799.

The above-described uncertainty with regard to applicable law is unfortunate given that the purpose of the Rome I Regulation in fact was to establish legal certainty through foreseeable conflict-of-law rules.[49] In such a situation it is imperative that, the national law applicable to the public contract must be agreed on by the collaborators and clearly established in the contract documents in a JCBPP. There can be different options for that choice, for example:

– a public contract can and often must be subject to the same law as the award procedure. In a JCBPP, that can mean the law of the CPB or the lead buyer. Depending on the domestic legal system of the contracting authority, this can be either administrative law or private contract law. For example, in the practice of collaborative defence procurement contracts, the parties often (even though not always) determine that the private contract law of the place where the programme management entity is located applies to the awarded contract. [50] This is a good solution when a CPB purchases supplies as a wholesaler or, when the CPB or the lead buyer conducts the entire JCBPP procedure and enters into the public contract itself. In the case of a JCBPP conducted by a CPB, that choice would also follow the rationale of Art 39 (3) of the Classical Directive that subjects the entire procurement procedure to the national law of the CPB's Member State. In the case of a joint contract award according to Art 39 (4) of the Classical Directive the applicable law should be the national law of the lead purchaser.

– A public contract awarded as a result of a JCBPP can be subject to the national law of a contracting authority other than the CPB or the lead buyer, if that contracting authority actively participates in performing the public contract. For instance, this option can be particularly feasible in long-term, reoccurring or complex interactive contractual relationship with the economic operator. In such a case, the CPB or the lead buyer must award the public contract on terms subject to another jurisdiction that can admittedly create some practical difficulties but can however be overcome.

– A combination of both variants is a possibility. For example, a framework agreement can be subject to the CPB's or the leading buyer's national law while any public contract entered into based on the same framework agreement would be subject to the national laws of the respective contracting authorities. Earlier JCBPP practice provides successful examples of such combinations.[51]

[49] Recital 16 of Rome I Regulation.
[50] Heuninckx 2018, 209.
[51] BBG and SKI 2016, 24, 53-54.

> – And finally, unless this is excluded by the national law that the collaborating authorities must follow, it is possible to subject the public contracts to some internationally recognized soft law instrument outside of any national law. International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts (PICC)[52] could be an example,[53] as could other similar instruments of soft law such as PECL[54] or DCFR.[55] In fact, it is notable that comments to PICC Art 3.1.1 are in fact illustrated with examples of cases focusing on public contracts.[56] In a JCBPP setting, resorting to an instrument that has been drafted on basis of and incorporates the internationally recognized principles of *lex mercatoria (*PECL, PICC etc*),* might be a justified solution, in particular where multiple parties of different national backgrounds are involved. The advantages of such choice would be dealing with a modern, updated legal instrument on the one hand, and applying a ""neutral" system of law" on the other.[57]

Together with the choice of law, procurement documents and public contracts awarded in JCBPP must indicate the competent court or other review body that will solve matters related to the contract. Naturally, it is reasonable to tie this to the choice of applicable material law. Another option would be to resort to using international arbitration. For instance, under most collaborative defence procurement contracts, disputes are to be resolved by arbitration, often on the basis of *ad hoc* rules.[58]

Simultaneously, there clearly is a strong need for further legislation of these issues[59] or at least for additional guidance on interpreting the existing regulations by the European Commission in the form of an interpretative notice.[60] Otherwise, the Classical Directive does not serve the purpose of promoting JCBPP as it was set out to do.

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[52] UNIDROIT Principles 2016 – https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 (Feb 7, 2021).
[53] Remien 2013, 266-267.
[54] https://www.trans-lex.org/400200/_/pecl/ (Feb 7, 2021).
[55] https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf (Feb 7, 2021).
[56] UNIDROIT Principles 2016, p. 126-127.
[57] Lando and Nielsen, 33.
[58] Heuninckx 2018, 209.
[59] Heuninckx 2018, 190.
[60] Sanchez-Graells 2020, 37.

4 National law applicable to review procedures and the place of jurisdiction in JCBPP

In addition to the regulation of material law, EU legislation establishes a system of remedies that any procurement activity of contracting authorities under the Classical Directive is subject to pursuant to Directive 89/665/EEC[61] (the Remedies Directive), and any procurement activity governed by the Directive 2009/81/EC must be subject to review under Title IV of the said Directive. In essence, the rules introduced under Title IV of Directive 2009/81/EC, are to a large extent similar to the provisions of the Remedies Directive.[62] Enforcement of the review over JCBPP is largely without differences from review over an "ordinary" procurement by a sole contracting authority or a jointly conducted procurement by entities of the same Member State. However, specific difficulties can arise with regard to the jurisdiction and enforcement.

For instance, national review systems can run into difficulties on occasions where a contracting authority conducts only a part of a procurement procedure and must follow some other Member State's national law upon doing so. For instance, activities described in Art 39(3) 2nd subparagraph of the Classical Directive – the award of a contract under a dynamic purchasing system, reopening of competition and award of contracts under a framework agreement – are subject to the national law of the CPB even when carried out by a sole contracting authority of another Member State. Thus, in a review procedure against such contracting authority, the national review body would also have to enforce the national law of the CPB's country.

At the same time, it is not clear if a review body in the Member State of the CPB or of the concerned contracting authority must conduct such review proceedings. There are controversial approaches to this issue in legal literature. On the one hand, it has been suggested that review proceedings over the award of a public contract under a framework agreement entered into by a foreign CPB, would be subject to a competent domestic court of the country where the CPB is located,[63] referring to Recital 73 of the Classical Directive as a source for the conclusion.

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[61] Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) (OJ L 395 30.12.1989, p. 33).

[62] See also, M. Steinicke in Steinicke and Vesterdorf 2018, 1364 ff; C. Ginter and M. Simovart in Steinicke and Vesterdorf 2018, p 1384 ff. Some provisions are adapted to the domains of defence and security – European Commission. Brussels, 30.11.2016 SWD (2016) 407 final. Commission Staff Working Document. Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security, 15.

[63] Heuninckx 2018, 195-196; see also – Anchustegui, 14.

Recital 73 of the Classical Directive in fact mentions the need to establish new rules on cross-border joint procurement and *those rules should determine [i.a.] … the applicable legislation on remedies.* Indeed, in the course of the legislative process leading to the Classical Directive, a proposal by the Council of the EU recognized the conflicts of jurisdiction that review procedures related to JCBPP can lead to and proposed a wording for the respective articles in the directive in order to overcome such difficulties.[64] Regrettably, the proposed rules did not become a part of the directive and as enforced, either the Classical Directive or the Remedies Directive contain no specific review provisions for cases of JCBPP. Any review procedures in the case of JCBPP are therefore subject to the general terms and conditions as established under the Directive 89/665/EEC or, in the case of a defence or security procurement, to the remedies' regulation established under the Directive 2009/81/EC. In the absence of specific regulation, it has also been found that the choice of law governing the procurement process includes the law of that same jurisdiction governing remedies and that furthermore, the Directive expects that any foreign review decisions be enforced by Member States, which presumption might not necessarily succeed in practice.[65]

On the other hand, the remedies system established pursuant to the Directive 89/665/EEC, entitles any interested economic operator to 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).[66] Member States must ensure that any decision taken by a review body is effectively enforceable, *i.e.* contracting authorities can be forced to follow such decisions (*Id*, Art 2 (8)). The Defence and Security Directive establishes similar rules in Art 55 (2) and Art 56 (8). Thus, in the above-described case scenario, actions by a contracting authority are subject to review by the domestic review body of that same contracting authority who would in turn have to apply the foreign national law of the CPB.

The problem is that while review bodies are competent to oversee actions of and enforce its decision upon contracting authorities under its own national jurisdictions, they may not necessarily have either the competence or the practical ability to judge issues according to a law of another Member State. This can be especially true of review bodies other than courts. For instance, under the

[64] Proposal for a Directive of the European Parliament and of The Council on public procurement, /* COM/2011/0896 final – 2011/0438 (COD) */ – https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0896 Art 38; Proposal 6907/12, 15-20.

[65] Sanchez-Graells 2020, 27.

[66] Generally on the remedies' system – Ginter and Simovart in Steinicke and Vesterdorf 2018, 1385, 1387, 1390.

Estonian Act on Public Procurement[67] (§ 185 lg 1), the competency of the Public Procurement Review Committee who decides all public procurement matters in the first instance, is strictly limited to solving matters pertaining to the same Act on Public Procurement.[68]

Even when the court or the review body is competent to enforce foreign law in a case of review over a JCBPP, added legal complexities can make the process more burdensome and hence more time consuming. Besides the material law issues, this can involve questions as to the rules on evidence and burden of proof about the content of foreign laws, or the extent of review in further proceedings.[69] Speedy and effective review is however of crucial importance in matters of public procurement.[70] In the outcome, without specific guidance and rules with regard to initiating and conducting review of JCBPP, the efficiency of otherwise well-functioning national review systems may suffer, failing to offer economic operators participating in JCBPP sufficient protection.

In order to solve the issues related to the review and the choice of law, some of the earlier projects had established the competency of review bodies by agreements between contracting authorities and by published contract terms.[71] For instance, in a collaboration between Austrian and Danish central purchasing bodies, the tender documents stated that the competent review body for any disputes concerning the award procedure of the framework agreement was the Austrian Federal Administrative Court and for disputes arising from individual contracts out of the mini-tender, the respective Austrian or Danish Court.[72] This may however not necessarily be an enforceable option as being out of the competency of the collaborators. The review system in public procurement and the rights of economic operators in relation to review options are established by national laws implementing the directive.[73] According to the Directives, a contracting authority conducting a procedure or a part of it (such as awarding a contract based on a framework agreement) should as a rule bear liability under the procedural laws of its own Member State in front of the domestic review body. In the interest of clarity, the tender documents can and certainly should inform the interested parties of the proper place of review, however no tender documents can change the law which establish such competent review bodies. Changing the general terms of a review system or basic procedural rights of interested economic

[67] Riigihangete seadus [Public Procurement Act] RT I, 08.07.2020, 8.
[68] M. Simovart, I. Pilving, C. Ginter in M. Simovart, M. Parind. Riigihangete seadus. Kommenteeritud väljaanne, Tallinn 2019, 1038 – 1040.
[69] M. Prek and S. Lefevre. The EU Courts as "National" Courts: National Law in the EU Judicial Process. Common Market Law Review 54: 369-402, 2017, 370.
[70] Ginter and Simovart 2018, 1385 ff.
[71] BBG and SKI 2016, 46, 53.
[72] *Id,* 53.
[73] Ginter and Simovart 2018, 1386.

operators with an agreement between contracting authorities cannot change the legislation – at least not under all the concerned jurisdictions.

In light of the above-described opposing approaches, the possibility of review and enforcement of remedies in cases specific to JCBPP seems to be as of current deficiently regulated.[74] Such gaps in the regulation can leave upcoming review situations subject to significant legal uncertainty and can reduce the speed or efficiency of review of such cases. In order to overcome that controversy, the directives should oblige the Member States to implement necessary changes in their review systems. Some examples of such procedural issues that seem to need answers include for instance, the competency of review bodies to decide cases of JCBPP based on foreign law, default rules to indicate which of the collaborating authorities is the party to the proceedings in cases of review over JCBPP, as well as providing if and how can a review body bring collaborating contracting authorities from other Member States into the proceedings.

5 Conclusions

This article refers to a number of gaps in the legislation on the EU level, concerning conflict of law issues relative to JCBPP. There is a lack of default rules for establishing the national law that would govern JCBPP procedures in cases of *ad hoc* cross-border collaboration, public contracts awarded in JCBPP and collaboration agreements for conducting JCBPP by contracting authorities from different Member States. Also, the competence of courts or review bodies to judge matters concerning procedures in JCBPP need attention on the EU level. as well as to agreements of collaboration. In particular, this concerns the enforcement of review over procedural steps that a collaborating contracting authority conducts pursuant to the national laws of another Member State. Addressing these issues on the level of directive or via guidance from the Commission would create a significantly clearer and more certain legal environment for JCBPP and thus serve the actual purposes that regulating JCBPP was meant to do.

[74] The same: Anchustegui, 14 - 15; BBG and SKI 2016, 18, 105, 107, 110; Heuninckx 2018, 195-196; Sanchez Graells 2020, 20, 26.