

**THE RELEVANCE OF PROMOTING COLLABORATIVE AND
JOINT CROSS BORDER PUBLIC PROCUREMENT FOR BUYING
INNOVATIVE SOLUTIONS¹**

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1. INTRODUCTION

The ultimate aim of this work can be explained in a few words: to highlight the leading role that public procurement can play in encouraging innovation, and how this role can be boosted exponentially through the promotion of joint cross-border procurement, or at least of collaboration between different member States.

Taking into consideration the specificity of the object of the purchase: Innovation, as we will try to explain, it can be specially useful in order to promote it at maximum the joining of efforts of contracting authorities from different MS.

With this in mind, it seemed appropriate to analyse beforehand how innovation has found a currently palpable niche in the setting of public procurement law. Moreover, given the stated perspective, a basic overview is provided of the possibilities of cross-border cooperation which are gradually coming to light, paying particular attention to those offered by current EU public procurement law. On the basis thereof, we shall explain a number of those aspects considered particularly relevant for enhancing the results of cross-border innovation procurement. Lastly, mention will be made of a number of successful join or collaborative cross-border innovation procurement experiences that have been conducted, with a view to ascertaining the drawbacks they entailed and some of the lessons that can be gleaned from them.

2. THE PUBLIC PROCUREMENT OF INNOVATIVE SOLUTIONS AS A PUBLIC STRATEGY: THE IMPORTANCE OF “DEMANDING” INNOVATION BY THE PUBLIC SECTOR

It is known the good image that accompanies the idea of "Innovation", which is usually linked to positive achievements in many aspects such as efficiency, productivity or competitiveness. In fact, it is considered an indispensable ingredient to make real the longed for sustainable growth. Indeed, innovation is acknowledged as the key driver of economic growth, thus governments try to promote it, both in the public and in the private sector, by using diverse mechanisms.

On that basis, the European Union placed innovation at the heart of the Europe 2020 Strategy, by means of the emblematic Innovation Union initiative. The aim was structuring an exhaustive strategy for knowledge-based innovation and turning Research & Innovation into a priority for all EU countries, that must strive to develop innovation policies.

However, as has been suggested, there exists many instruments to promote innovation policies and until recently the trend of public policies developed in this area were based on the promotion of innovation through the use of instruments that acted on the supply-side (e.g.: subsidies) and not from the side of a demand previously defined by public sector.

Nevertheless, with regard particularly to innovation, various studies carried out, have shown that “public demand” is a major potential source of innovation, that can spur innovation even better than many other instruments that had been playing a more important role in public innovation policies. EDLER and GEORGHIU have reminded that in the 1970s and first 1980s, a number of empirical studies explored the meaning of public procurement for innovation. These studies compared R&D subsidies and state procurement contracts without direct R&D procurement. They concluded that, over longer time periods,

public procurement triggered greater innovation impulses in more areas than did R&D subsidies also analysed the quantitative and qualitative meaning of state demand for innovation and concluded that procurement policy “is a far more efficient instrument to use in stimulating innovation than any of a wide range of frequently used R&D subsidies”. And similar conclusions were reached in more recent analysis³.

The above evidences were sharply in contrast to the low weight that until recently had public procurement in public policies on innovation. For many years the potential offered and challenges posed in using public procurement for buying innovation have been largely downplayed as an element to promote innovation by the public sector⁴. With a few exceptions, public procurement has been ignored on this purpose, both conceptually and in practice. It has been argued that the introduction of more stringent competition regulations across the European Union has proven a major factor in the declining use of this instrument⁵.

The relevance of promoting innovation from the demand side has now been taken up. This is important, because as a claimant, it will be the public sector the one that will decide, the one that will impose, on the private sector what it wants to acquire, what it seeks

³ EDLER, JAKOB; GEORGHIOU, LUKE; “Public procurement and innovation—Resurrecting the demand side”, *Research Policy* 36 (2007), pp. 949-950. These authors, explain that in a more recent survey of more than 1000 firms and 125 federations, over 50% of respondents indicated that new requirements and demand are the main source of innovations, while new technological developments within companies are the major driver for innovations in only 12% of firms. An analysis of the Sfinno data base collecting all innovations commercialized in Finland during between 1984 and 1998 shows that 48% of the projects leading to successful innovation were triggered by public procurement or regulation.

⁴ EDLER, JAKOB; GEORGHIOU, LUKE; “Public procurement and innovation (...), p. 949.

⁵ EDLER, JAKOB; GEORGHIOU, LUKE; “Public procurement and innovation (...), p. 950.

to achieve, what it will buy⁶.

Among those instruments available to stimulate innovation by the public sector, in the last years, public procurement has been revitalized as a really wealthy tool. It has become a useful piece on the innovation policy at European and national level. It was acknowledge that public procurement may have a large potential to achieve the fixed target, since it has a significant weight in the EU economy. In view of the significant weight of public procurement in the EU economy -around 18% of GDP- the capacity of European Public Administrations to act on innovation from the demand side is by no means irrelevant.

In other words, public demand, when oriented towards innovative solutions and products, has demonstrated to act as a big potential to improve delivery of public policy and services, often generating improved innovative dynamics and benefits from the associated spillovers. From that perspective (demand side), public procurement should be the key element to promote innovation policies. It can be said that public procurement has become part of the public innovation policies.

The leading role acquired by Innovation in this setting is in line with the “strategic conception of public procurement”. “Strategic procurement”, occurs when the demand for certain technologies, products or services is encouraged in order to stimulate the market⁷. For some time now, the view of public procurement as a mere instrument in the hands of the public sector for the acquisition of goods and services has been outdated. Little by little, and thanks to its importance in the economy, evidence is coming to light of this sector's potential for promoting different types of public policies, such as environmental, social and

⁶ CUETO ÁLVAREZ DE SOTOMAYOR, LUIS; GARRIDO MORENO, JUAN MANUEL; *Compra Pública Innovadora. Fundamentos e instrumentación*, INAP, 2013.

⁷ EDLER, JAKOB; GEORGHIU, LUKE; “Public procurement and innovation (...), p. 953.

gender policies, and now also those linked with innovation⁸.

The EU has shown a firm commitment towards promoting this strategic vision of public procurement, an approach that has gradually been reflected in different European documents. At policy level, it began to take shape clearly in the Directives of 2004 and has been consolidated and intensified in the Directives of 2014. It has been normally assumed that Public procurement can serve to follow multiple objectives, and promoting innovation is potentially one of them.

With regard to innovation, public procurement can play a relevant role, not so much through ordinary purchases to achieve standard products, but through the purchase of new technologies and innovative products, services or processes. From this point of view, public procurement of innovation is a demand-side instrument and can be defined as the purchase “of a not-yet existing product or system whose design and production will require further, if not completely novel, technological development work”⁹. In this context, the needs whose satisfaction is sought are predefined by the public sector (by the contracting authority) by listing functional requirements that should offer the demanded product. Meanwhile the realization and design of the innovative result are on the hands of the awardee of the contract launched to get the precise innovation. The two principal reasons for the use of this policy tool are to satisfy and improve the supply of public services and to meet certain political goals by stimulating demand in different areas, such as transport, energy, environment, health, education, information and communications, where public authorities have strong social responsibilities. The public demand of innovation in those

⁸ PERNAS GARCÍA, JOSÉ (editor); *Contratación Pública estratégica*, Thomson Reuters Aranzadi, Cizur Menor (Navarra), 2013; MEDINA ARNÁIZ, TERESA, “Comprando para asegurar nuestro futuro: la utilización de la contratación pública para la consecución de los objetivos políticos de la Unión Europea”, *Observatorio de los contratos públicos 2010*, Civitas, Madrid, 2011, pp. 90 y ss.

⁹ ASCHHOFF, BIRGIT; SOFKA, WOLFGANG; “Innovation on demand—Can public procurement drive market success of innovations?”, *Research Policy* 38 (2009), p. 1236.

areas has a great potential to stimulate de develop those markets¹⁰.

The demand approach becomes fundamental because in public procurements is the public sector who “decides”, who “imposes” what is going to be bought. So the potential of the “public DEMAND” in certain economic sectors, -e.g.: healthcare, transport services, new technologies, Information & Communication Technology (ICT), education, sustainable construction, water and waste challenges, etc., where the public sector has relevant responsibilities, and constitutes one of the greatest buyers, is indisputable¹¹.

At the same time, buying innovation helps to create jobs and boost the competitiveness of European industry and SMEs.

The potential of Procurement innovation is really high to stimulate sustainable growth and wellness.

As some EU documents have highlighted¹², with Europe’s economy facing serious challenges the imperative to find innovative and sustainable solutions to stimulate the market is higher than ever before. The demand for innovative solutions through public procurement can make an important contribution to this challenge.

¹⁰ ASCHHOFF, BIRGIT; SOFKA, WOLFGANG; “Innovation on demand (...), p. 1236.

¹¹ EDLER, JAKOB; GEORGHIOU, LUKE; “Public procurement and innovation (...), pp. 949–963.

¹² <http://www.innovation-procurement.org/about/>

3. ORIGIN AND DEVELOPMENT OF THE IDEA OF USING PUBLIC PROCUREMENT AS AN INSTRUMENT FOR FOSTERING INNOVATION IN THE EU.

3.1. Innovation in EU soft law. Key milestones and the promotion thereof with the approval of the Europe 2020 strategy

The conviction that, in addition to serving for acquiring goods and services, public procurement can serve to foster important objectives linked to public policies, is a notion that is now firmly consolidated in EU legislation.

In particular, the Directives of 2014 on public procurement constituted an important step in this direction by clearly leaving an opening for the possibility of stimulating environmental and social objectives through contracts concluded by the public sector. Notwithstanding, references therein to innovation were scant, and the need to foster research and development was only alluded to tentatively. In a more direct manner, Directive 2004/18, in recital 23 and article 16.f), included two generic references to innovation, wherein it was simply determined that pre-commercial public procurement was excluded from its scope of application.

However, after the Lisbon European Council of 2000, the European institutions started to devote special attention to innovation. Its relevance is underscored as a crucial factor in being able to maintain the social economic development and well-being in an increasingly competitive setting which has to address many challenges.

Among other objectives, the aforesaid Lisbon Strategy (development plan for improving EU competitiveness for the period 2000-2010) already alluded to the increase in opportunities to encourage innovation through public procurement. Its

guidelines were specified or defined by the Barcelona Research Council in 2002, where the challenge was set to increase public expenditure in this setting up to 3% of the GDP by 2010, a goal which was never reached.

Since then, the Commission has gradually succeeded in promoting innovation with a view to converting it into one of the fundamental social values that member States need to foster. Worthy of note in this regard is the approval of different documents appearing in what is known as EU soft law, and which have provided substantial support for the new setting. So, in addition to the EU's Lisbon Programme, a number of different documents have been approved, including the following:

1°) The 2003 Communication from the Commission: "Investing in research: an action plan for Europe". In this document it was highlighted that in 2001, the level of research investment in the EU was 1.9% of GDP compared to 2.7% in the US and 3% in Japan. This gap was considered to could have worrying consequences for the long-term potential for innovation, growth and employment creation in Europe. So the Action Plan set four main sets of actions to change this situation. One of the actions was, precisely, to redirect public resources towards research using the possibilities offered by Community frameworks such as public procurement rules.

2°) The Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: More Research and Innovation -Investing for Growth and Employment: A Common Approach, Brussels, COM(2005) 488 final.

3°) The Aho Group Report: Creating an Innovative Europe (2006). This Report was elaborated by an Independent Expert Group on R&D and Innovation appointed following the Hampton Court Summit. At the Hampton Court Summit

on 27 October 2005, Heads of State and Government decided to give higher priority to the key issues on which Europe needs to act to address the challenges of globalisation. First among these issues were research and innovation. The Commission asked a small group of four high-level experts, to assess the situation and make proposals to boost Europe's research and innovation performance. In the report public procurement is mentioned as some of the ways to foster innovation.

4°) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe, Brussels, COM(2007) 799 final (14.12.2007)

5°) The *Lead Market Initiative* (2008-2011), launched by the EU to seek the leadership of its companies in six markets classified as crucial for the development of the European economy. This initiative was committed to using public procurement as one of the tools available for achieving said leadership. More specifically, it encouraged Public Procurement of Innovation in either of its two modalities: Pre-Commercial Procurement (*PCP*) or Public Procurement of Innovation (*PPI*).

6°) *Europe 2020* (the successor to the Lisbon strategy) and its well know initiative, Innovation Union: turning ideas into jobs, ecological growth and social progress (COM (2010) 546 final), addresses the implementation of swifter, more effective standardisation in the use of public procurement as an interesting approach for encouraging innovation.

7°) The “Horizon 2020, Research and Innovation framework programmes” (COM (2011) 808 final), adopted on 30 November 2011.

In relation to “Europe 2020 Strategy”, innovation is clearly high on its agenda. The document highlights how the economic and financial crisis demonstrated the European economy's structural weakness and gave rise to a sharp deterioration in the social and economic setting. Hence the Strategy's objective is to ensure that economic recovery is supported by a set of reforms aimed at constructing solid foundations for growth and the creation of jobs within the European Union up to 2020, taking into account the long-term challenges posed by globalisation, the strain on limited resources and an ageing population.

If we analyse the perspective from which, in this Strategy, future growth is considered within the framework of the EU, it is easy to see that the pursuit thereof goes hand in hand with innovation. This is conceived as the plan for intelligent, sustainable growth drawn up by the European Commission for the coming decade, and established therein are the basic lines of action for the next ten years, aimed at achieving comprehensive development which will enable the Union to recover its status as a world leader.

As regards public procurement, the Europe 2020 Strategy calls for it to be employed to:

a) Improve framework conditions for business in those markets where the public sector is a prominent purchaser to innovate, making full use of demand policies.

b) Encourage the change towards being a more resource-efficient economy (e.g. with low carbon emissions) fostering the widespread use of ecological public procurement.

c) Help to support the business setting, in particular for innovative SMEs.

In short, research and innovation play a key role in the Europe 2020 Strategy. One

of its mantras would be reflected by the phrase “From the idea... to the market”, stressing the need for closer relationships with operators and firm support for achievable projects, to prevent hundreds of millions of European euros invested through research subsidies from failing to produce marketable results, as has been the case to date. That is why it is said that the aim with this approach is to oust the subsidy model in favour of a model based on demand through public procurement. It is not a case of vilifying the subsidy model until its demise, rather of resizing it, combining its use, in those cases where it may be more appropriate, with the fostering of innovation from the demand side.

3.2. The strengthening of the CPI through Directive 2014/24/EU

The entire process summarised here is consolidated in the package of EU Directives on public procurement approved in 2014. In the so-called classic Directive (Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, on public procurement, repealing Directive 2004/18/EC), (hereinafter, Directive 2014/24/EU) the European Institutions clearly feel that public procurement can play a highly relevant role in stimulating innovation, so much so, that it is *“of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy. In this context, it should be recalled that public procurement is crucial to driving innovation, which is of great importance for future growth in Europe”*.

It is worthwhile recalling that recital 47 of Directive 2014/24/EU expressly provides that: *“Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative products, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in*

terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth”.

The ultimate aim consists in attempting to meet what had been set as a target in 2010, but which back then was not achieved; i.e., increasing spending on Research and Development (R&D) up to 3% of the EU's GDP by 2020. Compliance with this objective could also be help through the use of public procurement. It is widely believed that, in addition to being a good thing *per se*, owing to the improvement it can entail for the provision of public services, it will also improve citizens' quality of life and, at the same time, also make it possible to create 3.7 million jobs, as well as to increase the annual GDP by around 800 billion euros by 2025.

The foregoing would also help the EU to recover its status as a world leader on both economic and social levels.

This is how we can assert that the promotion of entrepreneurial innovation through public procurement has become a key objective, particularly as of the approval of the 2014 Directives.

References to innovation now abound in Europe's principal text on public procurement; if we simply count the times that the word innovation is cited in the Directive, we will see that it is mentioned around 70 times.

This work is not a treatise aimed at studying public innovation procurement in all its facets. Hence, in addition to the foregoing, from the Directive we shall now only draw attention to two further aspects.

The first, the efforts that the Directive itself makes to provide a concept of innovation, which is amply endorsed in article 2.1.(22) of the same.

Directive states that: “*innovation*’ means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational

method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth”.

If we analyse the concept of innovation proposed by the Directive, we can see that not only does it refer to something that previously did not exist and which is created from scratch (either a product, service or process), but also to something which already existed and which is significantly improved upon. Furthermore, that which has already been designed but which has yet to reach the market, or has done so in a limited manner, could also be considered innovative.

Besides the concept appearing in the Directive, if we conduct a general study of “innovation” in the academic-scientific setting, we discover that it alludes to a broad, complex phenomenon subject to analysis from multiple different stances, levels and perspectives. Perhaps this is why myriad definitions have been put forward as to what should be understood by “innovation”, without it being easy to pinpoint one that is sufficiently broad and comprehensive for the scientific community to agree to accept it as being sufficiently all-embracing of all the elements it needs to cover.

In this work, and owing to the material setting affected by public procurement (namely, the acquisition of goods and services in the framework of the public sector), the concept of innovation that interests us will be that traditionally linked to industrial development, the economy, markets and technology. Notwithstanding this, owing its particular impact in the sphere of the public sector, we cannot fail to mention the expansion undergone by the concept of innovation, opening up to issues of a social nature. Indeed, the social is an aspect or perspective that has been incorporated more recently into innovation, giving rise to the notion of “social innovation”¹³. Although linked to the public sector, from

¹³ CONEJERO PAZ, ENRIQUE y REDONDO LEBRERO, JUAN CARLOS; “La innovación social desde el ámbito público: Conceptos, experiencias y obstáculos”, *Gestión y Análisis de Políticas Públicas, Nueva Época* – nº 15, enero-junio 2016.

the perspective of the procurement conducted by the public sector, it is logical that the definition of this notion taking shape in the Directive be based, as we have pointed out, on the classic conception of the term, linked to industrial development, the economy, the markets and technology¹⁴.

In any case, the definition of innovation appearing in the Directive of 2014 fits in well with the classic idea of innovation, which, as we have seen, is employed in the academic-scientific setting.

The second of the aspects appearing most clearly in Directive 2014/24/EU, the firm intent to promote innovation procurement, lies in the provision of a new procurement procedure especially conceived for this end. In its basic aspects, it is regulated under the guise of “innovation partnership”, in Article 31, and the application thereof will be particularly appropriate when the aim is to promote the so-called Public Procurement of Innovative Solutions (PPI).

4. PROEMIO: WHAT ARE WE TALKING ABOUT WHEN WE TALK ABOUT “JOINT PUBLIC PROCUREMENT”?

On the other hand of the coin, joint, aggregated and collaborative public procurement strategies –in a broad sense- has been increasingly used in last years. In fact, improving their practice and solving the different and no trivial problems that their implementation shows, is one of the main challenges for the public procurement regulation in the immediate future.

¹⁴ KÖHLER, HOLM-DETLEV; GONZÁLEZ BEGEGA, SERGIO; “Elementos para un concepto sociológico de innovación”; *EMPIRIA. Revista de Metodología de Ciencias Sociales*, nº 29, septiembre-diciembre, 2014, pp. 67-88; ALBORNOZ, MARIO; “Indicadores de innovación: las dificultades de un concepto en evolución”, *Revista CTS*, nº 13, vol. 5, Noviembre de 2009, pp. 9-25; CILLERUELO CARRASCO, ERNESTO; SÁNCHEZ FUENTE, FRANCISCO; ETXEBARRIA ROBLED, BEGOÑA; “Compendio de definiciones del concepto «innovación» realizadas por autores relevantes: diseño híbrido actualizado del concepto”, *Dirección y Organización*, Núm. 36, Octubre 2008, pp. 61-68.

As graphically summarised in recital 59 of Directive 2014/24/EU, there is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers. The aim, to a large extent, is to obtain economies of scale, including lower prices and transaction costs. However, it does not stop there, but furthermore contributes to other important objectives. It may favour transparency and contribute to the much demanded and necessary integrity of public procurement. It also could serve to stimulate greater professionalism in management of public procurement, identification of the best purchasing possibilities or the most suitable design of what is being purchased. It could also contribute to a higher participation and turnout in the procedures convened; and likewise encourage sustainability by promoting more and better environmental standards, as well as intensify the development and generation of innovative solutions that are essential nowadays¹⁵.

Likewise, fostering joint procurements is part of the Europe 2020 Strategy key initiatives. It is believed that, in many ways, its objectives can be better attained if the public procurers join or coordinate their efforts. In this regard, current Directives emphasize the importance of joint public procurement as an instrument to contribute, as well, to the achievement of the European strategic goals and, therefore, have tried to improve the legal framework.

But the first to be clarified is “*the toolkit available to contracting authorities willing to engage*”¹⁶ in centralised, joint, collaborative or coordinated procurement procedures. And at this point a conceptual clarification must be made, because current Directives do not completely polish up definitions, and the literature on those “joint or

¹⁵ CAVALLO PERIN, ROBERTO; RACCA, GABRIELLA: “La cooperazione amministrativa europea nei contratti e servizi pubblici”, in *Riv. italiana di dir. pub. com.*, f. 6/2016, 1457 e ss.

¹⁶ SANCHEZ-GRAELLS, ALBERT: “Collaborative Cross-border Procurement in the EU: Future or Utopia?” To be presented at the workshop on ‘*Collaborative Efficiency in Government: The Trend, The Implications*’ ECPR Joint Sessions, Scuola Superior Sant’Anna and University of Pisa, 24-28 April 2016.

cooperation strategies” in the field of public procurement is still too scarce. There is no a general and commonly accepted and closed list of the possibilities that should be included in the concept. Neither exists a general and commonly accepted concept for identifying the different categories that could be included in the list.

In many institutional documents and academic articles are used terms such as “collaborative procurement”, “cooperative purchasing”, “joint public procurement”, “coordinated procurement”, “aggregated purchase”, “pooled purchasing”, “alliance purchasing”, “bundled purchasing”, “collective purchasing”, “combined purchasing”, “mutual purchasing”, “shared purchasing”, etc. There is a large variety of terminology in use, and although it is possible to recognize some patterns in the usage and meaning of it, in general, the expressions are used without properly clarifying the scope of each of them.

Within the EU boundaries, it must be cited the LEAP GPP Toolkit, elaborated by Local Authority Environmental Management and Procurement Project. This instrument contains a definition of “joint procurement”, and the description of different models and types. According to this, the three cumulative elements that have to be present in a joint procurement are:

- a) The combining procurement actions of two or more contracting authorities;
- b) The voluntary behaviour of the contracting authorities implied to contribute to the procurement process;
- c) Only one tender published on behalf of all participating authorities.

In particular, the “Toolkit D”, explains, “Joint procurement” (JP) “means combining the procurement actions of two or more public authorities. The key defining characteristic is that there should be only one tender published on behalf of all participating authorities”.

This concept of JCBPP is also reflected in a very recent EU document: “*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”, published in March 2017.

However, as explains TÜNDE TÁTRAI, this definition could lead to serious misunderstandings and the European Commission should not take it as a point of reference in the interpretation of joint procurement in Europe¹⁷. I agree with this author who defends that there are different types of “joint public purchasing” whose differences are mainly determined by trust, commitment, intensity of communication or willingness or facility to work together.

Thus, in the broad concept of “joint procurement” we can find many varieties, among them, permanent joint procurement organisations e.g.: Centralised Purchasing Bodies who acts on behalf of a number of different public authorities; singular contracts concluded by a contracting authority on behalf of a number of different public authorities; or many contracts launched by different contracting authorities but after having defined common elements, etc.

This broad way of understanding the idea involved in the term “joint procurement” is present in Directive 2014/24/EU, and clearly follows from its Recital 71, second paragraph, when explains that: *“Joint procurement can take many different forms, ranging from coordinated procurement through the preparation of common technical specifications for works, supplies or services that will be procured by a number of contracting authorities, each conducting a separate procurement procedure, to situations where the contracting authorities concerned jointly conduct one procurement procedure either by acting together or by entrusting one contracting authority with the management of the procurement procedure on behalf of all contracting authorities”*.

It is especially common when talking about joint or collaborative public purchases to highlight the advantages that may entail. The most typical advantages or benefits

¹⁷ TÜNDE TÁTRAI; “Joint public procurement”, Published online: 10 March 2015, ERA Forum (2015) 16:7–24; DOI 10.1007/s12027-015-0374-3, p. 10.

associated to purchases in which are involved multiple public bodies are: payment of lower prices; reducing transaction costs; administrative cost savings; reduced workload; achieving greater quality in final products and services; sharing new knowledge and risks; being part of critical mass; standardising public demands; promoting the creation of networks to share experiences and pooling expertise, etc. In sum, interesting achievements that can contribute to maximize the efficiency of the buying power in the public sector.

Besides, the development of “joint public procurement strategies” –in the broad meaning we refer- is thought to be one of the ways in which the pursuit of the economic and horizontal or secondary goals can be more easily attained. Furthermore, when the “joint public procurement strategy” involved contracting authorities from different UE member States, EU moves forward to the real Internal Market integration –because participating public buyers have to think more openly than when they act with a “local” perspective¹⁸-.

But, at the other end of the scale, there exist important limitations, difficulties or disadvantages that must be taken into consideration when thinking about “joint public procurement strategies”. In particular, in cases of “joint cross border public procurement strategies”. Characteristic disadvantages linked to “joint public procurement strategies” are set-up costs; co-ordination costs; losing flexibility and control, for instance, less flexibility in the requirement to conform to the specifications and material terms of the base contract; supplier resistance, for instance from local, small or disadvantaged suppliers; or, even, anti-trust issues¹⁹. Regarding in particular the experiences of Joint Cross Border Public

¹⁸ SANCHEZ-GRAELLS, ALBERT; “Collaborative Cross-border Procurement in the EU: Future or Utopia?” To be presented at the workshop on ‘*Collaborative Efficiency in Government: The Trend, The Implications*’ ECPR Joint Sessions, Scuola Superior Sant’Anna and University of Pisa, 24-28 April 2016.

¹⁹ HELEN WALKER, MICHAEL ESSIG, FREDO SCHOTANUS AND TIMO KIVISTÖ; “Co-operative Purchasing in the Public Sector”; *Public Procurement. International Cases and Commentary*, (Edited by Christine Harland, Jan Telgen, Khi V. Thai, Guy Callender, and Katy McKen) Routledge 2007, pp. 325–342. Print ISBN: 978-0-415-39404-8. eBook ISBN: 978-0-203-81525-0. DOI: 10.4324/NOE0415394048.ch22, pp. 579-580.

Procurement strategies, we cannot ignore the relevant legal and linguistic problems that could emerge.

Recital (73): Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties concerning conflicts of national laws. Despite the fact that Directive 2004/18/EC implicitly allowed for cross-border joint public procurement, 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. In order to allow contracting authorities to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority, those difficulties should be remedied. Therefore 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. (...)”.

It will depend on many factors, such as the joint or collaborative structure that is adopted, that can be intensified or minimized some advantages or disadvantages.

In any case, the choice of the concrete formula and the organizational structure that it adopts will depend on different variables. It is not the purpose of this contribution to analyse the whole spectrum of possibilities and their regimes. On the contrary, the purpose of this study is much more modest. It simply consists in emphasizing the importance or the opportunity of intensifying the use of “Joint Cross Border Public Procurement strategies”, in the different existing formulas, from the more to the less intense ones, in the field of the public purchase of innovation.

5. THE DIRECTIVE 2014/24/EU AND THE INCREASING OPPORTUNITIES FOR JOINT CROSS-BORDER PUBLIC PROCUREMENT.

The importance of the public sector's purchasing power capacity could be expanded through the establishment of cross-border purchasing networks for the implementation of coordinated strategies. It can be achieved by creating a broad cooperation at EU level, among contracting authorities from different Member States, to buy together, to launch coordinated contracts, or to create networks to define benchmark and best practices, as means for establishing a significant intermediary and reference for private operators from the side of public demand. As we will try to explain this can be significantly relevant regarding the buying of innovative solutions.

In this regard, Directive 2014/24/EU has opened up new opportunities, not only for occasional collaborations to aggregate some types of procurements among national contracting authorities, but also for cooperation between contracting entities from several Member States that wish to carry out joint procurement.

Nevertheless, these techniques entail certain risks that need to be analysed in order to limit their use and to carefully consider when to resort to aggregation or coordination, or to design techniques to prevent such risks and minimise them. For example, an excessive concentration, either of demand or supply, may lead to collusive practices, restriction of competition, or may adversely affect access of SMEs to the market.

On the other hand, leaving aside the specific case of the creation of the so-called central purchasing bodies, it is clear that a basic element of joint procurement or aggregation of purchasers is the coordination of the different parties, to accept diverse formulae. Thus, coordination can be articulated either through consensus of the several contracting authorities, on common elements, such as procurement technical specifications that need to be included in every individual procurement procedure used by each

contracting authority; or by jointly designing a single procurement procedure, managed by just the one contracting authority on behalf of the others.

The use of demand aggregation or the aggregation of purchasers internationally is interesting from several points of view. This study intends to highlight the important role it can play in boosting Public Procurement of Innovation; however, we need to first look at how the Directive 2014/24/EU provides for internationalisation of joint purchase.

From the point of view of our analysis, there are two precepts in the Directive that have a direct relationship with joint purchase, which we need to look at. On the one hand, there is Article 38 (“*Occasional joint procurement*”) and on the other hand, Article 39 (“*Procurement involving contracting authorities from different Member States*”)²⁰.

With regard to occasional joint purchasing, Article 38 emphasises the need for regulating the joint responsibility that arises from the implementation of certain specific procurements. In particular, the precept expressly accepts two possibilities, namely that the procurement procedure is jointly carried out in its entirety or that only certain parts of the same are carried out jointly. As indicated, the Directive focuses on clarifying the scope of such joint responsibility of the participating contracting authorities for fulfilling their obligations pursuant to the Directive. The solution is clear, the said joint responsibility is directly related to participation in the procedure and therefore, if the procurement procedure is jointly carried out in its entirety, then all contracting authorities concerned shall be jointly responsible regardless of how the procedure is administered or managed. However, if the procurement procedure is jointly carried out in part, then the joint responsibility will affect only the parts that have been jointly implemented. It thus follows from the above that

²⁰ RACCA, GABRIELLA; PONZIO, SILVIA; “Nuovi modelli organizzativi per il “joint procurement” e l’innovazione dei contratti pubblici in Europa”, en *Compra conjunta y demanda agregada en la contratación del sector público: un análisis jurídico y económico*, Thomson Reuters Aranzadi, Cizur Menor (Navarra), 2016, pp. 373-406; PONZIO, SILVIA; “Joint Procurement and Innovation in the new EU Directive and in some EU-funded projects”, *IUS PUBLICUM*, F. 2/2014.

each contracting authority will be responsible for fulfilling its obligations for the procedures or parts it conducts in its own name and on its own behalf.

To illustrate the above, if several contracting authorities jointly prepare and award just the one procurement procedure, then they will be jointly responsible for any irregularity or contravention of the Directive committed during such procedure. On the other hand, if a procedure is jointly developed but each party later conducts its own part and some parties default the provisions of the Directive while others do not, e.g.: some do not fulfil the required advertising principles for the procedure while the remaining parties do so, then only the parties violating the Directive, and not others, will be responsible for such default, regardless of whether they had collaborated in the definition of the basic terms of the procurement model followed. To conclude, whenever several contracting authorities act jointly, they respond jointly and whenever each party acts separately, they respond individually.

With regard to procurement involving contracting authorities from different Member States, Article 39(1) expressly states that the contracting authorities from different Member States may act jointly in the award of public contracts by using one of the methods provided for in the Article. As can be seen, the perspective that prevails is that of the contracting authorities or contracting entities, whose right to acquire products, works and/or services through contracting authorities from other European States is upheld.

The said entitlement is significantly buttressed through the ban imposed on Member States, and referred to in section 2 of the same article, according to which a Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State. But the fact that prohibition is not permitted does not imply that clarifications cannot be made. Therefore, national law can opt to specify that its contracting authorities can only resort to centralised purchasing activities carried out on a permanent basis for the procurement of supplies and/or services destined for contracting authorities, or for awarding public contracts or signing framework agreements for works, supplies or services intended for contracting authorities.

As stated in recital 73 of the Directive, this general authorisation is justified as a response to the specific legal difficulties that arise due to the lack of a minimum harmonisation among national laws. Once again the aim is to maximise the internal market potential in terms of economies of scale and risk-benefit sharing, especially for innovative projects that have a higher risk than that reasonably borne by a single contracting authority.

The authorisation is not unconditional. In fact, the Directive prohibits use of any methods (provided for cross-border joint procurement) to circumvent mandatory public law rules, which in conformity with Union law are applicable to them in the Member State where they are located. As an example, we may cite the provisions on transparency and access to documents or specific requirements for traceability of sensitive supplies such as substances that are hazardous or harmful to health or the environment.

In regard to the methods used, the Directive mentions the following: (a) the joint award of a public contract; (b) the conclusion of framework agreements; (c) the administration of dynamic purchasing systems and (d) the award of contracts based on a framework agreement or on the dynamic purchasing system in accordance with the provisions of Article 33(2)(3) and (4) of the Directive.

Another outstanding novelty is the provision concerning the hypothesis that several contracting authorities from different Member States incorporate or establish a common legal entity, (of the type European Grouping for territorial cooperation) whose actions may include cross-border procurement.

In all these cases, the European legislator is essentially concerned about which Law governs each of these new forms of cross-border cooperation and the protection mechanisms that shelter the economic operators.

The Directive provides different guidelines in this regard. Hence, in the case of implementation of centralised purchase by a central purchasing body the national provisions of the Member State where the central purchasing body has its registered office shall apply. The same solution is applied among other cases, to the award of a contract through a dynamic purchasing system.

In any of the four methods for articulating cross-border joint purchasing listed above (joint award of a public contract; framework agreement; administration of dynamic purchasing systems; and the award of contracts based on a framework agreement or on the dynamic purchasing system), the Directive requires the participating contracting authorities to have an agreement in place that determines both the responsibilities of the parties and the relevant national applicable provisions, as well as internal organisation of the procurement procedure, in particular, concerning its management, the distribution of works, supplies or services to be purchased and the conclusion of contracts.

Kindly note the different solution envisaged for the provision of centralised purchasing by a central purchasing body -in which case the applicable legislation is always that of the Member State where such body is located. In the case where several contracting authorities from the different Member States purchase jointly, these States must conclude an agreement that defines, among other issues, the applicable national rules, which may be from any of the respective Member States. In the former case, the Directive imposes the solution while in the latter case it lets the parties decide.

Finally, when setting up a joint legal entity, the participating contracting authorities must choose between applying the national rules of the Member State in which the joint legal entity has its registered office or the national provisions of the Member State where the joint legal entity is carrying out its activities.

However, although the current legal picture is much better than the previous one, it is not enough. As have stressed in detail SÁNCHEZ GRAELLS in a recent paper²¹, having a close look at the provisions included in the Directive, it is clear the legal framework is not sufficient and don't cover all the potential legal dimensions that can derive from the

²¹ SANCHEZ-GRAELLS, ALBERT; "Collaborative Cross-border Procurement in the EU: Future or Utopia?" To be presented at the workshop on '*Collaborative Efficiency in Government: The Trend, The Implications*' ECPR Joint Sessions, Scuola Superior Sant'Anna and University of Pisa, 24-28 April 2016.

relationships emerged from the Joint Cross Border Public Procurement.

Besides, It is usual when talking about Joint Cross Border Public Procurement to emphasise only its advantages, but it should not be forgotten that the available data prove that the experiences about it are quite heterogeneous, and there exists no good experiences, as well.

I share this sceptical view. But difficulties must not become an insurmountable wall. And at least, with regard the buying of “innovation”, -so is taking into account the specificity of the object of the purchase-, it is specially relevant the joining of efforts of contracting authorities from different MS. It should be one of the areas where Joint Cross Border Public Procurement would have a greater application, and regarding legal difficulties there is clear evidence that they are being overcome acceptably. So is, in spite of barriers, public authorities have the power and the duty to promote innovation through cross-border joint public purchase as well. Not acting does not solve problems and difficulties, but only favours competitiveness in the long term.

For instance, in a scenario of cross-border procurement by using Joint procurement without being involved Central purchasing bodies- it is particularly interesting the case of awarding jointly a public contract. Tendering a unique procedure could be considered the perfect situation in a Joint Cross Border Procurement scheme. But sometimes precisely because of some of the aforementioned difficulties, -significantly the legal ones-, contracting authorities from different Member States instead of giving up promoting one singular tender prefer to renounce to prepare an unique tender but going ahead with another formula less intense of cooperative or coordinated public procurement. As it will be explained, there are examples of buying innovation projects, where contracting authorities involved choose to promote “at the same time” separate procurement procedures with common elements and common organization. PAPIRUS Project is an example of what we can call “coordinated procurement”.

6. COLLABORATIVE OR JOINT CROSS BORDER PUBLIC PROCUREMENT FOR BOOSTING INNOVATIVE SOLUTIONS

6.1. Introduction: new strategic approach to innovation

In any case, in spite of difficulties, it can be appreciated the interest of the European Commission to encourage the potential of “joint” “cooperative” “collaborative” cross border public procurement. There are different reasons why the European Commission pays attention to this perspective. On one hand, the reach for the economic goals of the Europe 2020 strategy, but also the willness of furthering the single market integration. It is a fact that cross-border purchases help buyers to approach public procurement from a European perspective.

Alongside this, some of the benefits from Joint Cross Border Public Procurement applied to innovation are: a) pooling resources and experiences; b) sharing risks that are typically associated with any innovation activity so that they are manageable for each party; and c) better identification of opportunities.

In brief, the European Commission underlines the desire of the EU to adopt a new strategic approach to innovation, and in this approach, collaboration of public purchasers lies at the heart.

The aggregation of public purchasers with similar market profiles but located in geographically dispersed (local, regional, national or international) areas, may be particularly decisive when launching public procurement of innovation projects (PPI projects). One of the objectives sought to enhance procurement via joint purchase instruments is precisely that of stimulating innovation and internationalisation, in order to obtain technologically advanced and innovative products and services at better prices. Hence, joint international collaboration will significantly increase management efficiency of the public actors that have been attributed competencies in areas of great relevance to the

citizens. The public sector must take advantage of synergies if it wants to extract maximum performance from the innovative potential of the private sector.

As stated by the European Commission in its Communication of 2010 on the Innovation Union, given the scale and urgency of the societal changes and the scarcity of resources, Europe cannot afford any longer the current fragmentation of effort and slow pace of change demanded by society. Therefore, efforts and expertise in the field of research and innovation must be pooled together because this contributes to the generation of a greater critical mass. Conditions that facilitate breakthroughs to rapidly find their way to the market must be created right from the beginning, so that such innovations can quickly provide benefit to citizens and increase competitiveness. The Commission has also identified the fields that particularly need large innovative developments and these are the ones where the greatest societal challenges lie: population ageing, climate change effects and the reduced availability of resources.

Moreover, if we focus just on stimulating innovation, one cannot overlook the fact that one of the great incentives for companies to increase their innovative efforts lies in the size of the market in which they will be able to sell their new products or services. The bigger the market, the more business opportunities will be considered, and greater the interest for achieving satisfactory innovation. This is especially so for new products and/or services whose real demand is still unknown. Market uncertainty and the suspicion that it might be too small for marketing purposes are elements that adversely affect development of innovative products or services. Therefore, the creation of larger markets may be a relevant incentive for arousing the interest of economic operators to participate in projects to buy innovation. Simultaneously, from the point of view of the public sector, generate the said economies of scale, to lower prices payable by the contracting entities.

In this regard, the European Commission, after taking note of the positive experiences of several Member States that supported innovation in pre-commercial procurement through the Small Business Innovation Research (SBIR) programme, has reached the conclusion that this type of approach could be applied more widely and furthermore be combined with joint procurement between different contracting entities,

thereby creating several much larger markets, which would greatly boost innovation and new innovative enterprises, especially SMEs, which are the predominant business fabric in Europe.

However, the potential benefits from the aggregation of purchasers applied to innovative purchase go even further. Other advantages provided by pooling resources and experiences derived from joint public procurement, especially at the international level (of most interest to the object of this study), lie a) in sharing risks that are typically associated with any innovation activity so that they are manageable for each party; and b) in better identification of opportunities. In this case, networking by entities interested in boosting PPI may help uncover potential opportunities for the aggregation of demand in the innovation sector.

It is highly desirable that contracting authorities interested in innovation policies assess the possibility of associating and coordinating with other entities in order to implement this type of projects through aggregation of their demands.

The European Commission, in its aforementioned Communication of 2010, underlines the desire of the EU to adopt a new strategic approach to innovation. In this approach, the aggregation of public purchasers occupies a central location. In fact, the initiative presented by the Commission, which is framed within the scope of the Europe 2020 strategy, seeks to improve innovation conditions in all stages of innovation and development and is furthermore an initiative that is also expected to have a positive impact on employment, growth and social progress in the Union.

In order to help channel this type of joint procurement, the Commission undertook to provide guidance in accordance with the public procurement Directives and to examine the opportunity to introduce additional rules to facilitate achievement of a true cross-border scope. To that end, the new Directive 2014/24/EU (as mentioned in the earlier section), contains new rules for cross-border joint procurement that allow contracting authorities to take full advantage of the internal market potential.

So, if we agree on this approach, the next step consists in identifying some

manners, mechanisms, measures, patterns or guidelines to facilitate the launching of JCBPP for buying innovation.

6.2. Spurring institutional channels where to achieve information, exchange experiences and provide support (economic, legal, etc.)

The European Commission has provided significant and increasing support for innovation procurement since 2009, which includes, joint cross-border innovation procurement.

The type of support can be divided into two broad categories:

a) The direct economic support via **Funds**. EU Programmes and in particular the European Structural and Investment Funds and Horizon 2020 offer interesting funding opportunities to promote joint innovation public procurement – including both PPI and PCP –.

b) The Indirect support via measures such as:

The **Procurement of Innovation Platform**, an online platform composed by a website, a procurement Forum and a Resource Centre, that helps public authorities, procurers, policy makers, researchers and other stakeholders harness the power of Public Procurement of Innovation (PPI) and Pre-Commercial Procurement (PCP).

The **Public Procurement of Innovation Award** aimed to recognise successful public procurement practices used to purchase innovative, more effective and efficient products or services²².

The European Assistance For Innovation Procurement (EAFIP), that supports

²² <http://www.innovation-procurement.org/award/>.

public authorities to sign more and better innovation procurements across the EU²³. This initiative focuses on promotion of the benefits of innovation procurement, as well as training and assistance to public procurers with a concrete interest in implementing innovation procurements. The initiative is focus on some public sectors, such as construction, housing and community amenities; health and social protection; education, recreation, culture and religion; environment; public order, safety and defence; exploration, extraction, production, transport and distribution of energy such as electricity, gas, heat, oil, coal, other solid fuels; transport services such as railway, urban railway, tramway, trolleybus, bus services, airport and port related activities; water; etc.

In addition, there are very interesting channels to help public buyers to get involved in this type of purchases. These channels help to generate useful “networks” that contribute to identify common interests and possible partners, and to share the experiences of buyers, what can help to promote good practices and avoid the bad ones or common inconveniences²⁴.

6.3. Elements for success of the PPI, particularly within the framework of joint international procurement

The successful launch of innovative public procurement depends largely on following a set of stages or steps prior to starting the procurement procedure or items related to the same. Some of them are also relevant from the point of view of joint purchasing, which is why attention is later focused on them in this study. As examples of steps required prior to the start of the procurement procedure, we will be discussing

²³ <http://cafip.eu/>.

²⁴ ALHOLA, KATRIINA; SALO, MARJA; ANTIKAINEN RIINA; BERG ANNUKKA; “Promoting Public Procurement of Sustainable Innovations: Approaches for effective market dialogue”, *Global Public Procurement Theories and Practices*, (Editor: Khi V. Thai), Public Administration, Governance and Globalization book series, (PAGG, volume 18), p. 60.

preliminary market consultations, identification and planning of purchasing needs and provision of prior information to the market through the so-called early demand maps. And finally, in view of its special relevance, the support of multidisciplinary technical groups to the contracting entity will also be considered as an element of the procurement procedure.

A) Technological and market surveillance, as instruments for identifying and effectively planning purchase needs

Whatever the objective of the joint purchase and especially in the case of innovative purchase, each of the participating public entities should program or schedule their own needs as an individual contracting body, i.e. it must clearly define beforehand, the products and services that will be procured jointly.

A good planning tool worth having is technological and market surveillance. Technological surveillance involves follow-up of progress made within a technological context and the new solutions generated. However, market surveillance involves monitoring and analysis of the various operators in a given market, such as competitors, suppliers and customers.

Without prejudice to each entity having to perform the aforementioned individual planning, the identification of opportunities can be considerably improved with greater connection and data pooling between the different public sector entities. This collaboration will lead to better planning of procurement. Hence, the promotion of such contacts between public authorities from different countries can be especially fruitful when each of them stays abreast with developments in their nearby markets and shares the news and benefits from these markets with other bodies that would not receive this information immediately. The implementation of joint international procurement can serve to encourage the creation of more or less stable networks to this end.

B) The preparation of early demand maps

After gathering all the information mentioned in the two previous stages (preliminary consultations and technological and market surveillance), the public sector

would be in a better position to design and prepare the specific tendering procedures. In this regard, it should not be overlooked that the PPI framework also contains another key instrument called the "early demand map" for this preparatory phase. These maps are intended to provide anticipated information on the needs of the public purchaser to the market, which will allow private economic operators to focus their R&D activity on such needs. Thus, the early demand maps present two essential characteristics. On the one hand, they require contracting entities to plan their purchases sufficiently in advance and, on the other hand, they allow companies to plan their investments by knowing the real business opportunities offered by the public sector. In short, the early demand map is an incentive to business investment and can stimulate economic growth and creation of employment. And in this case too, the aggregation of efforts can improve effectiveness and results.

C) Preliminary market consultations

As it was explained, the role of public demand is really important to stimulate innovation. But not only demand as such, but also the interaction between demand and supply can have crucial implications for innovation dynamics. EDLER and GEORGHIOU have echoed a range of studies that revealed that a major tool to foster systemic innovation policy is the organisation of a discourse between users, consumers and others affected by innovations in order to articulate and communicate needs, preferences and real demand to the market. Furthermore, the scale and characteristics of demand in a given location have been recognised as major determinants of the competitiveness of locations and their innovation dynamic²⁵.

PPI requires technical expertise and an insight into the market that the public purchasers often do not have. Hence, one of the first needs of the public sector when it wants to undertake a PPI contract is that of contacting those who can provide such

²⁵ EDLER, JAKOB; GEORGHIOU, LUKE; "Public procurement and innovation (...), p. 950.

information, i.e., operators in the respective market specialised independent authorities or experts, etc.

In the case of joint innovative procurement, this need increases significantly, since such aggregation of purchasers presumably involves markets in several countries, which even today can have very different characteristics, even though we are talking about the same subject (for example, think of the telecommunications market, which is very different in Britain than in Greece).

These consultations, which have to be carried out prior to formal start of procurement procedures, are normally articulated through a "technical dialogue" referred to in Directive 2004/18/EC in its recital 8 according to which *“before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition”*.

Directive 2014/24/EU devotes its Article 40 to improve this issue.

Public authorities aim to achieve a wide range of information through the contacts provided about the market capacities in which they carry out the contract; the state-of-the-art, science or technology; or the type of solutions available in the specific sector. These discussions can also help to define the technical specifications in terms of performance or functional requirements of the contractual services, which then become the object of the contract; to determine the criteria that would be more suitable for awarding the contract to be announced; or to ensure that the economic operators get to know the fields that are of interest to the public sector for future procurements and their requirements.

Information obtained from the preliminary market consultations will be used to plan, design and develop the procurement procedure.

The wider the scope of the public sector call and the greater the participation, especially from the private innovative sector, the greater will be the interest and usefulness of the consultations.

The organisation of these consultations should not be very complex in joint international innovative procurement. The best operational approach would be to hold a prior consultation in each of the participant countries and that each consultation be managed by the public authority or contracting public authorities of the respective country. However, depending on the case and the market characteristics, it might perhaps be more appropriate to hold a single international consultation or several consultations in the one country.

Even though these consultations were possible until now, there was no regulation governing how they should be carried out. Given that reference to the market consultations are made in the articles of Directive 2014/24/EU and not just in one recital and that the aim is to boost and promote innovative procurement, the transposition laws should at least provide certain applicable guidelines in this respect.

In accordance with Article 41 of Directive 2014/24/EU, all contacts made between the public and private sector as a result of these consultations must be inspired on the principles of transparency and equal treatment and non-discrimination of the participants, so as not to distort competition in future tenders whenever economic operators that were also present in the technical dialogue participate.

It is demonstrated that when these queries are made the desired innovation is achieved more quickly.

In international projects, as will be discussed later, these consultations are usually carried out in the different countries involved, particularly with economic operator in the sector.

D) The support of multidisciplinary technical groups

In order to ensure smooth running of innovative procurement, it is important to have a team of independent experts with multidisciplinary training and sufficient technical expertise in several areas, such as legal, technical, economic or project management. In this regard, it is recommended that the contracting authority have the support of a

multidisciplinary technical group throughout the contracting procedure and even for drafting the procedure. The group's mission will be to advise the contracting entity or entities on the different technical-innovative issues connected with the subject matter of the contract.

These multidisciplinary technical groups are even more important in many cases of joint international public procurement because of the coordinated nature of the contracts. It is advisable that the group or committee be unique and common given the coordinated nature of the purchase. It should be composed of a balanced number of members appointed in accordance with the proposals made by each public entity involved in the call for tender or tenders. Hence, there will be one or more tenders depending on whether the various entities convene a single procurement procedure or each one carries out its own procedure, albeit coordinated with the rest, for technical-innovative aspects. Obviously, if it is a case of a central purchasing body located in a Member State other than that of the contracting authority, then the applicable provisions will be the national provisions of that Member State (Article 39(3) of Directive 2014/24/EU). If, like in Spain, there are no regulations envisaged in this regard, then in such a case, parties should reach a consensus on the establishment of a multidisciplinary technical support group for the various purchases to be carried out.

If the mentioned multidisciplinary technical group is established, then the entities involved in the procurement shall decide on the specific functions to be assigned to this group, as well as the governing guidelines or rules of operation, for example, the working language, the exact number of members, the procedure for carrying out the meetings, the meeting venue or venues, etc.

7. INNOVATIVE SMES: THE NEED TO ACCOMODATE THEM IN JOINT CROSS BORDER PUBLIC PROCUREMENT PROCEDURES

This paper has so far highlighted the benefits of joint purchases or aggregation of purchasers for boosting innovative public procurement. However, these techniques can also pose some relevant risks that need to be taken into account in order to take the necessary

measures to minimise them. It would be appropriate to now focus on one such risk, namely; the possible exclusion of innovative SMEs from these contractual procedures.

Directive 2014/24/EU is well aware of these problems and first admits the strong aggregation trend of demand shown by public purchasers from various States in view of the advantages discussed hereinabove. It then advocates the need for careful monitoring of their implementation *“in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs”*. This concern is clearly in line with one of the main reiterated aims of the Directive, namely; to facilitate and promote participation of SMEs in public procurement, in line with the Commission’s Communication *Small Businesses Act for Europe*, and even proposes adaptation of public procurement to the needs of SMEs.

Paradoxically, despite their smaller size in relation to other companies or thanks precisely to the same, SMEs manifest a spirit and entrepreneurial dynamism that highlight their capacity to adapt to the economic environment. Their great potential for technology and knowledge innovation in turn is a decisive contribution to economic growth and social sustainability. In Spain, as well as in other countries, the innovative technological offer linked to ICTs in many fields is led by innovative SMEs that confer a high added value on to our business fabric. Their high degree of flexibility and speed when adapting to changes demanded by the market from time to time, play a major role in innovation and adaptation of new technologies.

In Europe, SMEs and the self-employed stand out within the business fabric for their quantitative and qualitative importance. Studies show that it is precisely these companies and entrepreneurs that are one of the main drivers of the economy given their capacity to generate employment and potential for creating value.

In order to respond to and alleviate as far as possible, the risks referred to in the specific case of instruments for aggregation of purchasers, one of the measures that should be boosted is the aforementioned interrelationship between the different business sector operators, especially the relationship between innovative SMEs and larger firms. On the

other hand, the creation of networks between innovative SMEs may encourage cross-border cooperation through which a greater effectiveness and scope can be achieved in the development and improvement of instruments to support innovation.

8. ANALYSIS OF CASES

Below are two cases which we found particularly interesting in response to the various aspects covered hereinabove. We are also aware of other interesting scenarios like the project HAPPI -*Healthy Ageing - Public Procurement of Innovations*-, or the project epSOS -*European Patients Smart Open Services*-, but in order to avoid unnecessary repetitions, we felt it was appropriate to focus attention on just two of them, and therefore we have chosen one example from each of the two PPI modalities, i.e., one example of pre-commercial public procurement and another on public procurement of innovative technology.

8.1. The DECIPHER Project

The DECIPHER project (*Distributed European Community Individual Patient Healthcare Electronic Record*)²⁶, i.e., shared clinical record of patients in the European Union), was an innovative public procurement project, in the pre-commercial modality, that was promoted and co-funded by the EU and included within the European Commission's seventh framework programme (FP7). It had a budget of € 900,000. The project started in February 2013 and ends in March 2017.

The project aimed to develop a mobile application that allows citizens to securely access their health data when they move to other countries. The application should be flexible and compatible with the different infrastructures, standards and interfaces that each health system uses, as well as fully comply with the laws and regulations that guarantee

²⁶ <http://www.decipherpcp.eu/>.

security and privacy of data access. The project started in February 2013 and had a term of three years.

Several countries, namely: Spain, Italy, United Kingdom and Finland are participating in the project. Spain participated through the Department of Health of the Catalanian Government, via the TicSalut Foundation, which acted as the tendering organisation, and the Catalanian Quality and Health Assessment Agency (AQuAS), which coordinated the pre-commercial public procurement process and performed project evaluation.

This pre-commercial public procurement (PCP) was structured into different phases as shown in the following diagram:

The first phase, called Phase 0 (or exploratory phase), was based on an open tender process in which any company could participate. After concluding the Phase 0 tender process, the proposals received were evaluated and the best 9 proposals were shortlisted to participate in Phase 1. Companies or consortia which progress to this new phase (Phase 1) would receive a maximum of €25,000 each to develop a design proposal for the solution in 3 months. After completing Phase 1, all proposals from participants were re-evaluated and the 6 best designs were selected to participate in the next phase (Phase 2). The solution proposals that survived this phase received a maximum funding of €52,500 each to develop a prototype in a maximum period of 6 months.

Prototypes were evaluated again at the end of Phase 2 to select the three that best answered the needs identified by the health system to participate in the following phase (Phase 3), where each participant received €120,000 to test the prototypes developed during a period of 9 months. Projects would then enter in the last phase (Phase 4), which corresponded, to marketing of the product or service.

In total 16 bids submitted by 22 organizations from 7 countries. Nine bidders were awarded and entered Phase 1 of DECIPHER PCP. Six bidders prepared their prototypes in Phase 2. Three bidders entered Phase 3.

An international consortium of entities from all participating countries (Spain, Finland, Italy and the United Kingdom) was created to implement this project. In particular, the consortium was comprised of four public sector healthcare authorities (Catalonian Quality and Health Assessment Agency/Spain, ESTAV Center/Italy, TicSalut/Spain and CMFT-TRUSTECH/United Kingdom; the latter three were the authorities that were buyers of PCP DECIPHER) and of three other additional organisations (ANCI Innovazione/Italy, Barcelona Digital Center Tecnològic/Spain and VTT Technical Research Center of Finland). These additional organisations contributed to the DECIPHER project by providing support to technically define the subject of this PCP, as well as by evaluating tender bids and the development of solutions.

However, as has been indicated earlier, project coordination and evaluation of the technologies developed, as well as the overall innovation process, was managed by the Catalonian Agency AQuAS, on behalf of all the contracting entities that participate in the project. It was the sole 'Contracting Entity' that represents the consortium and it acted with the support of a "Procurement Committee", chaired by the Director of AQuAS. This Committee, in turn, was supported by an "Expert Committee" comprised of:

A) External experts appointed by the "Contracting Entity" drawn from among patients, health professionals, experts in e-health and/or mobile solutions and investment experts related to these matters.

B) Experts appointed by the procurement entities of PCP DECIPHER.

C) Technical experts appointed by the "Contracting Entity" at the behest of the PCP DECIPHER consortium. These in turn are members of one of the PCP DECIPHER consortium partners. Procuring entities are excluded from the expert committee.

This project was considered to be a big step forward for the configuration and organisation of international joint public procurement models and processes. This was the first time ever that several European public health administrations have formed a consortium in conjunction with technology suppliers, to define the technological solutions required to address the needs of health systems.

In order to stimulate participation of SMEs, the tendering specifications included some measures that can be viewed as favourable for such promotion. In particular, the participation of entities similar to the temporary joint ventures (termed Grouping of Tenderers) was envisaged. This is so because *any natural or legal person (including duly registered non-profit entities such as, for example, universities), can participate, either individually or as a group or association that encompasses several tenderers that is temporarily created precisely to participate in PCP DECIPHER and to assume responsibility for the implementation of the contracts awarded within the framework.*

Moreover, it was permitted a high amount of subcontracting in each phase of the procedure, i.e., up to a total of 49% of the services to be executed.

Prior to implementation, a “*Market Consultation Day, DECIPHER Pre-Commercial Procurement process*” was organised. This contributed to raising awareness about the contractual process and was attended by some sixty-company representatives from different countries. Attendance at the event was free and companies specialised in healthcare technologies and R&D centres were invited to participate. The objective was to inform companies present about the scope of the project, the pre-commercial public procurement process that was being developed, and the needs and requirements of the IT application that had to be developed.

Another issue of great interest that the DECIPHER project highlights is the one related to the applicable law and competent jurisdiction for resolving any conflicts that could arise.

With regard to the applicable law, the bidding specifications expressly stated that the entire procedure of PCP DECIPHER would be governed by Spanish law. Moreover, since this was a pre-commercial public procurement that meets the requirements of EU Law (namely, that the award is directed towards R&D services paid in full by the contracting authority and that risks and benefits are shared between the public purchaser and the winning companies, and furthermore, that the innovative solutions are far better than those available in the market), the contract was outside the scope of the European Directives, as

well as of the Spanish TRLCSP (Consolidated text of the Public Sector Contracts Act); that is to say, it was an excluded contract. However, as the specifications indicated, in accordance with the provisions of Article 4(1)(r) of the TRLCSP, the principles of publicity, competition, transparency, confidentiality, equality and non-discrimination, and that of the most advantageous economic proposal, were guaranteed throughout the procedure. They also clarify that the competitive procedure (particularly, although not exclusively, the decisions on exclusion of tenderers and the award of the framework agreements and contracts) would be subject to Spanish Administrative Law, and of special relevance in this case is the Common Administrative Procedure Act. However, any decisions, issues and/or discrepancies concerning the performance of the contracts, once awarded, would be subjected to the general Spanish Civil Law, with special relevance in this regard to the Spanish Civil Code.

As can be seen, the DECIPHER specifications applied the doctrine of detachable acts according to which contract preparation and award was governed by Administrative Law, while contract effects, compliance and extinction were subject to Private Law.

In regard to the competent jurisdiction for resolving any conflicts that could arise, the DECIPHER specifications began by asserting the exclusive jurisdiction of the Spanish courts, which was construed as accepted upon mere submission of the proposals by the candidates.

In coherence with the applicable Law, the specifications further clarified, that the selection of contractors was the competence of the Administrative jurisdiction, in particular, the Administrative Chamber of the High Court of Catalonia, with prior appeal for review before the Regional Minister of Health of the Government of Catalonia.

In contrast, any dispute or claim related to the implementation of the Framework Agreement or with the contracts concluded between the “Contracting Entity” and the contractor would fall under civil jurisdiction, in particular, with the civil courts (courts of first instance of Barcelona).

One of the problems presented by the exclusion of the PCP contracts from the TRLCSP, along the terms expressed in its Article 4(1)(r), was regarding the jurisdiction that must be considered competent to deal with any arising conflicts. In this regard, a solution other than that stated in the DECIPHER specifications and which we feel is more in line with the public nature of the activity being carried out, was based on the understanding that the PCP contracts concluded by public entities, when fulfilling some of their public specific competence functions, are special administrative contracts, and hence are the competence of the administrative jurisdiction, even during the implementation phase.

8.2. The PAPIRUS Project

The other project to which we want to pay attention to is the so-called PAPIRUS Project (*Public Administration Procurement Innovation to Reach Ultimate Sustainability/Innovation in Hiring Public Administration to Achieve Maximum Sustainability*)²⁷. It was a project co-financed by the European Commission whose duration was from October 2013 to October 2016.

The development of this project aimed to introduce innovative solutions in the construction sector. Specifically, its objective was to promote the use of new materials and possibilities capable to generate of Zero Energy consumption, both in new buildings and in rehabilitated buildings. That is, the goal was to achieve environmentally sustainable construction.

The EU's concern for this area is understood if we realize that urban buildings are responsible for 40% of energy consumption in Europe. This consumption accounts for about a third of the carbon dioxide emissions in the continent. This consumption accounts for about a third of the carbon dioxide emissions in the continent. In view of these figures,

²⁷ <http://www.papirus-project.eu/>.

it has seemed appropriate to promote public action aimed at improving them so as to reduce significantly the emissions of greenhouse gases in the coming years, both in new buildings but also in the rehabilitation of buildings. The European objective is to achieve a reduction of emissions between 80% and 95% by 2050. In this goal, the involvement of Public Administrations will have a clear role.

In this project there were four countries involved, Spain, Italy, Norway and Germany. The contracting parties were: in Spain, Sestao Berri 2010 S.A, (Urban regeneration agency of Sestao); in Italy, ATC Torino (Territorial Agency for housing in the province of Turin); in Norway, Oslo Kommune (City of Oslo); and in Germany, the Landratsamt Enzkreis (Municipality of Enzkreis). Each of the participating parties chose one or several buildings to be built or rehabilitated using the new innovative technologies provided by contractors for the different fields of construction required. The type of buildings to which the innovations were applied was very different. In Spain was promoted the construction of two buildings included in the social housing system. In Italy these technologies were applied to the rehabilitation of a social housing building. In Norway, to build a nursing home. Finally, in Germany it was promoted to the rehabilitation of an educational building.

Due to legal difficulties it was decided to launch four procurement procedures. PAPIRUS is an example of “coordinated public procurement” in four pilot sites in four European countries (Spain, Germany, Norway and Italy). So it was not a model of joint procurement in the narrow sense of the expression.

Each of the contracting authorities promoted its own contract, with its documentation, publication, their respective award, etc. Each tender procedure was performed in the respective national language and in English. The PAPIRUS partners launched at the same time four Open Procedures in the four countries involved. The tender documents of each procedure were adapted to the particularities of each procuring entity’s national legislation as well as the technical requirements of each case study.

Notwithstanding, relevant aspects were established on a consensual basis and were, therefore, common to the four contracts. Thus, the identification of the issues in which innovations were looked for; the definition of functional specifications that should be satisfied through the awarded companies; the award criteria of the contracts; or the moment in which the contract procedures were launched, (it was desired these moments were as close as possible), etc. For instance, the award criteria were prepared by a “Joint Cross-Border Evaluation Team” (JCBET), composed of members from the four pilots and the project coordinator Tecnalía. The (JCBET) had also an important role in the evaluation of the bids. The composition of the JCBET was aligned with the national regulations of each contracting entity.

As far as the thematic fields were concerned, the five that were chosen were related to the following functionalities: the reduction of energy losses through the opaque envelope of buildings (for example, super-insulation); The reduction of energy losses in winter and solar gains through the window in summer (e.g.: smart window); The development of technologies that provide good quality natural lighting (e.g. technologies for the use of natural lighting); The proposal of thermal energy storage solutions that increase thermal comfort and change the maximum heating and cooling loads (e.g. materials and solutions for storage of thermal energy); And, finally, the development of lightweight prefabricated panels with low CO₂ emissions (for example, the industrialized internal partition with minimal thickness, high thermal and acoustic insulation and low carbon footprint).

As regards the buildings to which these innovations will be applied, they were very different in each country. In Spain was promoted the construction of two buildings of official protection; In Italy these technologies were applied to the rehabilitation of a social housing building; In Norway to build a nursing home; And in Germany to the rehabilitation of an educational building.

In spite of the fact that, as mentioned above, each of the entities convened its own contract, in this case an international consortium was also created. It was integrated by seven members from five different countries: Tecnalía Research Innovation Foundation

(Spain) as Technical expert and, in addition, as general coordinating entity of the project; Oslo Kommune (Norway), Landratsamt Enzkreis (Germany), ATC Torino (Italy), Getica Srl (Italy) and Sestao Berri 2010, S.A. (Spain), who acted as public buyers; and ASM Centrum badan i analiz rynku sp. ZOO. (Poland), which is an expert in outreach.

In addition to the various meetings and contacts between the parties involved in the project, a number of preliminary market consultations took place. One in Brussels and others in the four countries involved. More than 200 representatives of interested companies attended to these meetings. In those events the companies were able to know the characteristics of the project; The needs that were wanted to be satisfied; Express their concerns (for example, the difficulties of SMEs to participate in these contracts); Or even promote ideas on evaluation criteria to be considered in subsequent tenders, etc.

As regards the Law applicable to contracts, unlike the previous case, in this case four different contracts were launched, -although with some important common characteristics as mentioned above-, for instance the applicable Law was in each case the one of the country where the contract was launched. Therefore, four different legislations were applied: Spanish, Italian, Norwegian and German.

As regards the promotion of SME participation, the four contracts launched included the possibility that different companies, associated or temporarily consorted, could submit a joint offer. Likewise, it was also allowed a considerable margin to subcontract part of the works and services, although in this case, the specific percentage was established by each contracting entity, so it was not the same in all contracts.

As mentioned before, there were five thematic areas addressed by this project. This resulted in the identification of five different lots. Each of the contracting authorities decided the lot or lots that would include in the particular contract that would launch. This decision was made depending on their economic availabilities and on the specific characteristics of the constructions to which the innovations would be applied. For example, in the case of Spain, the contract included only two lots: a) Solutions to reduce

energy losses through buildings opaque envelope; b) Solutions to reduce energy losses in winter and solar gains through window in summer.

The type of the contract was diverse from one country to another. Thus, each contracting authority configured its contract depending on the scope of the activity to be assumed by the awarded bidder. In Spain, it was conceived as a service contract that had as its object the purchase of products and the operations of installation of such products. In Germany as a public works contract that also had as its object the acquisition of products and their installation. In Italy, as a public supply contract excluding the installation and placement of materials. Finally, in Norway it was conceived as a public supply contract, which aimed at the purchase of products and operations for its installation.

A very low number of offers were submitted in all four countries, but not for all lots. This contracts with the huge interest and participation in the five market events beforehand. One bidder' groups formed, no actual international participation was detected. There were presented: Torino: 3 offers; Oslo: 4; Germany: 10; Spain: 6. But twelve offers had to be excluded. As a result of the few offers Torino and Oslo launched new tenders for some lots.

All but one contract awarded after the PAPIRUS coordinated tender have been executed smoothly and reliably. One of the companies awarded by Sestao Berri (Spain) had a financial crack, so they proposed the cession of the contract to another company, which could fabricate, supply and install the same product.

The project coordinator of PAPIRUS Project, Tecnalía, prepared a really useful document explaining the main characteristics of the project. It also included a section about "lessons learned" where it is explained that PAPIRUS partners faced and overcame quite a lot of obstacles and barriers during the innovative procurement process.

In the pre-tender stage the main difficulties lay in finding a common ground for the coordinated tender in four different countries. Besides, the preparation of common tender documents was very challenging because of the differences in national law and in practice regarding public procurement among the four participating countries. In spite of

the EU legislation (Directives), national legislations were found out to be a barrier for joint procurement.

The preparation of the coordinated tender was the most time-consuming and challenging phase of this project. The PAPIRUS consortium not only established convincing tender documents and manageable means of awarding the offers, but also created a climate that aimed to facilitate cross-border procurements and the participation of SME and bidder's consortia. Still, despite all the efforts the participation in the tender was disappointing, and many bids had to be excluded.

The consortium drew the some conclusions from the low number of bids:

a) The tender documents were too demanding, the requirements were not specified clear enough and included too many criteria, particularly award criterion; the bidders were discouraged and not ready for this kind of justification package they had to provide; b) Involve all important actors from an early stage, like end-users, technical and legal experts, policy makers, officials; c) Too many award criteria and requirements disrupt the focus of really important objectives and the functionality required; d) PPI requires subjective award criteria; mathematical formula limit the freedom to propose different innovative solutions.

Future implementation of PPI by the different partners.- Encouraged and motivated by the results and lessons learned of the PAPIRUS project the four partners who are public procurers will definitely use PPI for further suitable procurements in the future – not only in the construction sector.

9. CONCLUSIONS

At this point, we can offer a final conclusion. As a general consideration, the first idea that must be highlighted is that Joint or collaborative public purchases –which broad meaning we have explained in this chapter- may entail relevant advantages that can contribute to maximize the efficiency of the buying power in the public sector.

There also exist limitations, difficulties or disadvantages that must be taken into consideration when launching JCBPP Projects. However, taking into particular consideration the specificity of the object of the purchase: Innovation, to stimulate maximum expected results the joining of efforts of contracting authorities from different MS can be specially useful.

There already exists quite interesting experiences in launching JCBPP for buying innovation, but research and practice on this topic is still too scarce. In any case, improving the preparation of these projects, learning from the experience and, in particular, solving the legal problems for their implementation, are some of the main challenges vis-à-vis the regulation on public procurement in the immediate future.

There is no perfect model of collaborative purchasing, and buyers should identify and choose the coordination or collaboration strategies that best suits to each case, but according to the experiences carried out up to the moment, there are evidences that JCBPP can be a very effective tool to boost better innovative solutions.

The benefits associated to the Innovation makes it worth gamble for the intensification of the JCBPP in this field.