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# THE EMERGENCE OF TRANS-EU COLLABORATIVE PROCUREMENT: A 'LIVING LAB' FOR EUROPEAN PUBLIC LAW

Albert Sanchez-Graells\*

## Abstract

Trans-EU collaborative procurement is a fertile 'living lab' for the observation, theorisation and critical assessment of developments in European public law. This paper maps the emergence of this novel type of cross-border administrative collaboration and scrutinises the new rules of Directive 2014/24/EU, which evidence the tension between promoting economic co-operation across borders within the internal market and the concern to respect the Member States' administrative autonomy. The paper critically assesses the EU legislative competence in this area, extracts consequences for balancing trans-EU collaboration with 'mandatory public law requirements' at Member State level and proposes minimum functional guarantees to be expected in the implementation of trans-EU collaborative procurement.

## Keywords

European public law, trans-EU public law, public procurement, collaborative procurement.

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\* Professor of Economic Law, University of Bristol Law School. [a.sanchez-graells@bristol.ac.uk](mailto:a.sanchez-graells@bristol.ac.uk). Comments welcome. I am thankful to my colleagues in the International, European and Human Rights Research Primary Unit at the University of Bristol Law School for a fruitful discussion on the seminal ideas explored in this paper. Different versions of this paper were then presented at the Law School of the University of East Anglia and the Scuola Superiore Sant'Anna in Pisa. I am grateful to Sebastian Peyer, Giuseppe Martinico and Marta Simoncini for arranging those seminars and discussing previous drafts, and to all participants for their comments and feedback. I am also grateful to the Collegio Carlo Alberto of the University of Turin for the Visiting Fellowship that allowed me to finish this article, including its presentation at a final workshop at the Faculty of Law of the University of Turin. I am particularly thankful to Francesco Costamagna, Roberto Caranta and Mario Comba for their support and useful discussions. I am also indebted to Stephen Weatherill, Valentijn De Boe, Akis Psygkas, John Coggon and Baudouin Heuninckx for additional feedback and comments, as well as to Ardavan Arzandeh and Anatoli Tsakalidou for guidance on specific issues. I am also grateful to the editors and reviewers for additional suggestions on how to improve the paper. Despite all this input, I am solely responsible for any remaining errors, and all opinions expressed in this paper are my own. Full disclosure: I provided legal advice in an experimental cross-border joint procurement project for the purchase of paper carried out by an Italian and a French CPB. The analysis in section VI is informed by that practical experience.

## I. INTRODUCTION

Despite being an increasingly standard topic for comparative law research,<sup>1</sup> EU public procurement law tends to go generally unnoticed and rarely features in discussions of emerging trends in EU administrative law and their conceptualisation.<sup>2</sup> Procurement is commonly seen as a specialized and narrow set of procedural EU public law that mainly concerns a vertical relationship between the EU as keeper of the internal market and the public administrations of the Member States as the addressees of procurement rules—with a relatively minor aspect of horizontal collaboration involving information exchange and monitoring.<sup>3</sup> This horizontal element is however strongly mediated by the European Commission and, given the Member States' resistance to its development,<sup>4</sup> it falls short of establishing a 'true' or fully-functioning network of procurement authorities.<sup>5</sup> Thus, public procurement tends not to be seen as an interesting case of *composite* EU administration because its practice and its instrumentalisation for policy delivery (e.g. concerning green, social or innovation procurement) remain fragmented and constrained to domestic settings, with even the procurement of the EU Institutions being subject to a separate set of rules than those applicable to the Member States.<sup>6</sup> At first sight, then, public procurement could look like barren ground for studies on the evolution of public law within the EU from a transnational perspective.

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Note: all websites last accessed on 25 September 2019.

<sup>1</sup> See, for example, the European Procurement Law Series co-edited by S Treumer and R Caranta (first published by DJØF and now by Edward Elgar) and the series linked to the project 'Public Contracts in Legal Globalization' under the coordination of B Auby (published by Bruylant), in particular R Noguellou and U Stelkens, *Comparative Law on Public Contracts* (Bruylant 2010). There are also a number of discrete works, such as D Fairgrieve and F Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy* (Hart Publishing 2011); and contributions to broader comparative endeavours, such as C Turpin, 'Public Contracts' in A von Mehren (ed), *International Encyclopedia of Comparative Law*, vol VII (Brill – Nijhoff 2008) ch 4. See also S L Schooner, 'Reflections on Comparative Public Procurement Law' (2013-2014) 43 *Public Contract Law Journal* 1. The topic is certainly not new; see G Langrod, 'Administrative Contracts: A Comparative Study' (1955) 4(3) *American Journal of Comparative Law* 325-364.

<sup>2</sup> The situation is not too different in the broader field of global administrative law, with the exception of some notable efforts to analyse (a) the regulation of the procurement carried out by international organisations, such as E Morlino, *Procurement by International Organizations. A Global Administrative Law Perspective* (CUP 2019) and B Heuninckx, 'Applicable law to the procurement of international organisations in the European Union' (2011) 20(4) *PPLR* 103, and idem, 'Forums to adjudicate claims related to the procurement activities of international organisations in the European Union' (2012) 21(3) *PPLR* 95; and (b) transnational public contracts as modes of regulation of public/private interactions, such as M Audit and S W Schill, 'Transnational Law of Public Contracts: An Introduction' in idem (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 3-20; and S W Schill, 'Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization' (2013) NYU Law School Jean Monnet Working Paper JMWP 05/13.

<sup>3</sup> For recent discussions within these parameters, see C H Bovis, 'Public Procurement Regulation' in H C H Hofmann, G C Rowe and A H Türk (eds), *Specialized Administrative Law of the European Union: A Sectoral Review* (OUP 2018) 476-508; S Díez Sastre, 'Organisational Forms and Structures of the Public Procurement Administration in the European Internal Market' in F Velasco Caballero and F Pastor-Merchante (eds), *The Public Administration of the Internal Market* (Europa Law Publishing 2015) 151-173. More broadly, see C Harlow and R Rawlings, *Process and Procedure in EU Administration* (Hart Publishing 2014) ch 6.

<sup>4</sup> For discussion on the rejection of a Commission's Proposal that would have created a true network of authorities, see P Cerqueira Gomes, 'A Lost Proposal in the 2014 Public Procurement Package: Is there any Life for the Proposed Public Procurement Oversight Bodies?' in G S Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar 2016) ch 7.

<sup>5</sup> The European Commission is, however, developing efforts towards creating networks for information exchange regarding large infrastructure projects and amongst public procurement review bodies.

<sup>6</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (OJ 2018 L 193/1).

My main purpose with this paper is to challenge that preconception of EU public procurement law by concentrating on the emerging practice and regulation of trans-EU collaborative procurement, which offer a fertile ‘*living lab*’<sup>7</sup> for the observation, theorisation and critical assessment of important developments that can offer lessons for the wider field of European public law.<sup>8</sup> By analysing the rules of Directive 2014/24/EU<sup>9</sup> that enable contracting authorities from different Member States to collaborate in cross-border joint procurement,<sup>10</sup> I seek to highlight the emergence of trans-EU public law as a new type of horizontal relationship between Member States within the EU’s economic and legal space.

Before proceeding to the detailed critical discussion, Section II places the emergence of trans-EU collaborative procurement in the broader context of the recent evolution of EU procurement law as it concerns collaboration between contracting authorities, first at a national level, and then from a transnational perspective. Section III then details the rules on collaborative procurement involving contracting authorities from different Member States in Directive 2014/24/EU. Against that background, I critically discuss the new rules on trans-EU collaborative procurement from the perspective of European public law. I claim that the rules show a hybrid approach between the emergence of a system based on European administrative networks<sup>11</sup> and a system of ‘conflicts law’ for horizontal public-public relationships.<sup>12</sup> In Section IV, I claim that this hybridity results from conceptual confusion and functional assimilation of, on the one hand, administrative action oriented towards policy delivery and, on the other, administrative action directly subjected to EU rules. Such confusion and hybridity affected the development of the new rules and raise issues concerning the EU’s competence for the adoption of the rules on trans-EU collaborative procurement in Directive 2014/24/EU.

I also argue that the de-regulation of trans-EU administrative relationships in the context of collaborative procurement shows a conflicted approach and a difficult equilibrium between, on the one hand, the facilitation of economic collaboration within the internal market and, on the other, the respect for Member States’ administrative autonomy in the regulation of their public sector. Section V deals with these tensions, mainly on the basis of the safeguard foreseen in Article 39(1)II of Directive 2014/24/EU, according to which contracting authorities shall not engage in trans-EU collaborative procurement ‘for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they

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<sup>7</sup> The expression is used as shorthand for a space of practice innovation and normative co-production. For related discussion, see K-H Ladeur, ‘The Emergence of Global Administrative Law and Transnational Regulation’ (2012) 3(3) *Transnational Legal Theory* 243-67.

<sup>8</sup> This emergence keeps important parallels with the broader phenomenon of cross-border collaboration within the EU. For discussion, see F Palermo, ‘The “New Nomos” of Cross-Border Cooperation’ in idem et al (eds), *Globalization, Technologies and Legal Revolution. The Impact of Global Changes on Territorial and Cultural Diversities, on Supranational Integration and Constitutional Theory. Liber Amicorum in Memory of Sergio Ortino* (Nomos 2012) 71-90. See also B Caesar, ‘European Groupings of Territorial Cooperation: A Means to Harden Spatially Dispersed Cooperation?’ (2017) 4(1) *Regional Studies, Regional Science* 247-54.

<sup>9</sup> Directive 2014/24/EU on public sector procurement (2014 OJ L94/65, occasionally, the 2014 Directive). It forms part of the 2014 Public Procurement Package (or the 2014 Package), which also comprises Directive 2014/23/EU on concession contracts (2014 OJ L94/1) and Directive 2014/25/EU on utilities procurement (2014 OJ L94/243).

<sup>10</sup> For an initial assessment, see C Risvig Hamer, ‘Regular Purchases and Aggregated Procurement: The Changes in the New Public Procurement Directive regarding Framework Agreements, Dynamic Purchasing Systems and Central Purchasing Bodies’ (2014) 23(4) *PPLR* 201. *Cf.* G Racca, ‘Joint Procurement Challenges in the Future Implementation of the New Directives’ in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing 2014) 225-54.

<sup>11</sup> For general discussion of this approach, see P Craig, ‘Shared Administration and Networks: Global and EU Perspectives’ in G Anthony et al (eds), *Values in Global Administrative Law* (Hart Publishing 2011) 81-116.

<sup>12</sup> For a general introduction to this approach, see C Joerges, P F Kjaer and T Ralli, ‘A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation’ (2011) 2(2) *Transnational Legal Theory* 153-65.

are subject in their Member State'. This creates a model that markedly diverges from the more general framework for cross-border collaboration through a European Grouping of Territorial Cooperation (EGTC),<sup>13</sup> which I use as a benchmark for the analysis of the procurement rules. I also advance arguments for a reconsideration of the (de)regulation of trans-EU collaborative procurement in the EU, at least by way of *soft law* issued by the European Commission, which could benefit from the learning derived from the different forms of experimental governance.<sup>14</sup>

On the basis of the uncertainties surrounding trans-EU collaborative procurement and the risks of race to the bottom that derive from the current (de)regulatory approach, I then sketch the main functional guarantees required in the implementation of trans-EU procurement projects to preserve the accountability and transparency of the mechanism, and to prevent an erosion of the rights of economic operators participating in these procedures (Section VI). I conclude with some of the lessons that the 'living lab' of trans-EU collaborative procurement and its embryonic regulation can offer to European public law generally (VII).

## II. EVOLVING EU PROCUREMENT LAW: INTRA-ADMINISTRATIVE, INTER-ADMINISTRATIVE AND TRANS-EU PROCUREMENT COLLABORATION

EU law has progressively set rather prescriptive rules on the award of public contracts,<sup>15</sup> which control the exercise of executive discretion by public buyers<sup>16</sup> with the aim of ensuring the effectiveness of the internal market fundamental freedoms and EU-wide competition for public contracts.<sup>17</sup> Given the transparency and procedural constraints they impose, the rules have at times been seen as too rigid and potentially preventing some forms of intra-administrative cooperation or delegation at domestic level. Their interpretation has progressively required the Court of Justice of the European Union (the CJEU)<sup>18</sup> to establish the conditions under which the EU procurement rules are not triggered by instances of administrative self-organisation (the *Teckal* or *in-house* providing doctrine),<sup>19</sup> administrative cooperation (the *Hamburg* doctrine)<sup>20</sup> and administrative delegation (the *Remondis* or *Hannover* doctrine).<sup>21</sup> This case law has been by and large consolidated in the 2014 Public Procurement Package,<sup>22</sup> which also introduced some additional flexibility for these forms of administrative self-organisation and collaboration and clarified that Member States are free to adopt decisions on self-organisation of their public

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<sup>13</sup> See E Evrard and A Engl, 'Taking Stock of the European Grouping of Territorial Cooperation (EGTC): From Policy Formulation to Policy Implementation' in E Medeiros (ed), *European Territorial Cooperation: Theoretical and Empirical Approaches to the Process and Impacts of Cross-Border and Transnational Cooperation in Europe* (Springer 2018) 209-27. For extended analysis of broader aspects of cross-border territorial cooperation, see the rest of that edited collection.

<sup>14</sup> See C F Sabel and J Zeitlin, 'Experimentalist Governance' in D Levi-Faur (ed), *Oxford Handbook of Governance* (OUP 2012) 169-84.

<sup>15</sup> S Arrowsmith, 'The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?' (2006) 35(3) *Public Contract Law Journal* 337-84.

<sup>16</sup> For general discussion, see the contributions to S Bogojevic, X Groussot and Jörgen Hettne (eds), *Discretion in EU Public Procurement Law* (Hart Publishing 2019).

<sup>17</sup> Case C-553/15 *Undis Servizi*, EU:C:2016:935, para 28; Case C-144/17, *Lloyd's of London*, EU:C:2018:78, para 33.

<sup>18</sup> This case law was developed in the context of preliminary references under Art. 267 TFEU, so the case law belongs to the Court of Justice *strictly speaking*. However, this article will make reference to the CJEU for simplicity, and to make it more accessible to non-EU readers.

<sup>19</sup> Case C-107/98 *Teckal*, EU:C:1999:562. The doctrine has been recently recast in *Undis Servizi* (n 17).

<sup>20</sup> Case C-480/06 *Commission v Germany*, EU:C:2009:357; Case C-386/11 *Piepenbrock*, EU:C:2013:385.

<sup>21</sup> Case C-51/15 *Remondis*, EU:C:2016:985.

<sup>22</sup> Above (n 9). The in-house and public-public cooperation exemptions are regulated in Art 12 and the exemption concerning the transfer of competences in Art 1(6) of Directive 2014/24/EU. None of them apply to the discussion in this paper as, first, Art 39(1) explicitly saves the possibility of resorting to Art 12 on a cross-border collaboration and, second, trans-EU collaborative procurement does not involve the transfer or delegation of competences.

sector and to promote public-public cooperation without having to comply with the EU procurement rules, provided that those forms of governance do not imply a significant level of interaction with the market.<sup>23</sup> Member States can also decide to centralise their procurement activities without such organisational decisions being caught by the EU procurement rules, as long as the centralisation is channelled through central purchasing bodies (CPBs). CPBs are dedicated to the provision of procurement services to other public sector entities.<sup>24</sup> CPBs are subjected to compliance with EU procurement law in the award of public contracts to economic operators, and contracting authorities using CPB services are deemed to have complied with otherwise applicable EU law obligations simply by using the services of the CPBs. More importantly, in what could be seen as a soft form of administrative delegation, contracting authorities can directly entrust CPBs with the provision of procurement services, including ancillary procurement services, without having to comply with any EU law requirements. Member States can even provide that certain procurements are to be made by having recourse to CPBs or to one or more specific CPBs. On the whole, thus, there is a rather developed corpus of rules applicable to public-public contracts (*lato sensu*, including what would domestically not be treated as contracts, but as conventions, delegations, or other sorts of instruments governed by public law) award of which does not require compliance with all the strictures of the EU public procurement rules.<sup>25</sup> This creates regulatory space for both intra- and inter-administrative collaboration in public procurement on national level.

Of more direct relevance to the core concentration of this paper, in recent years, administrative cooperation between public buyers has slowly started to acquire a *transnational* dimension as public buyers from different Member States sought ways to jointly award public contracts to support projects in their common interest or to achieve economic efficiencies.<sup>26</sup> Such transnational projects were surrounded by legal uncertainty, as the previous generation of EU procurement rules was silent on the issue. The uncertainty mainly concerned two aspects: first, the rules applicable to the public-public collaboration between entities of different Member States and, second, the ways in which collaborating entities could discharge their obligations under EU procurement law without duplication and without being seen as engaging

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<sup>23</sup> European Commission, *Commission Staff Working Paper on the Application of EU Public Procurement Law to Relations between Contracting Authorities*, SEC(2011) 1169 final.

<sup>24</sup> See Art. 37 Directive 2014/24/EU. Their ability to offer their services to private purchasers depends, to a large extent, on their domestic regulation and triggers legal issues that exceed the scope of this paper. For discussion, see I Herrera Anchustegui, 'Collaborative Centralized Cross-Border Public Procurement: Where Are We and Where Are We Going To?' in *Centralização Das Compras Públicas* (University of Lisbon forthcoming) <<https://ssrn.com/abstract=3052159>>; idem, 'Centralizing Public Procurement and Competitiveness in Directive 2014/24' (2015) 4(III) *European Law Reporter* 119; A Sanchez-Graells and I Herrera, 'Impact of Public Procurement Aggregation on Competition: Risks, Rationale and Justification for the Rules in Directive 2014/24', in R Fernández Acevedo y P Valcárcel Fernández (eds), *Centralización de compras públicas* (Civitas 2016) 129-163.

<sup>25</sup> W A Janssen, *EU Public Procurement Law & Self-organisation: A Nexus of Tensions & Reconciliations* (Eleven Publishing 2018); idem, 'The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach?' (2014) 10(5) *Utrecht Law Journal* 168-86.

<sup>26</sup> Such type of transnational collaboration has existed for a long time in the field of defence and security procurement, which is however subjected to a separate set of rules: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (2009 OJ L 216/76). See M Trybus, *Buying Defence and Security in Europe. The EU Defence and Security Procurement Directive in Context* (CUP 2014) and B Heuninckx, *The Law of Collaborative Defence Procurement in the European Union* (CUP 2017). See also the recent Commission notice on guidance on cooperative procurement in the fields of defence and security (Defence and Security Procurement Directive 2009/81/EC) (OJ 2019 C 157/1), with references to the regime in Article 39 of Directive 2014/24/EU.

in *forum shopping*, in particular in terms of their administrative or judicial review and the remedies available to economic operators participating in procurement procedures.

It is difficult to ascertain the extent to which cross-border joint procurement is taking place, as the existing sources of procurement information do not classify this activity in a separate category<sup>27</sup> and specific studies are rather limited in scope.<sup>28</sup> Informal exchanges of information in the context of an on-going research project showed that most Member States have no experience in cross-border joint procurement and that, those that do, have only participated in a handful of pilots. It is thus an area that represents a very small percentage of the total volume of procurement expenditure in the EU. However, there clearly is an emerging practice, of which some anecdotal evidence has entered the public domain.<sup>29</sup> Such anecdotal evidence also suggests slow take up,<sup>30</sup> with indications of legal difficulties paving the way.<sup>31</sup>

Some of the examples of transnational procurement within the EU known to pre-date the 2014 Public Procurement Package had significant legal peculiarities that addressed the first of the two sources of legal uncertainty mentioned above (i.e. the rules applicable to the transnational public-public collaboration itself) due to their regulation by international treaties between Member States e.g. regarding specific physical infrastructure,<sup>32</sup> or their development within specific EU legal frameworks dealing with the composite administration of e.g. the Eurosystem,<sup>33</sup> or concerning EU-wide policy mechanisms on preparedness for serious cross-border threats to health.<sup>34</sup> These were cases where EU procurement law could not be seen to

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<sup>27</sup> Indeed, it is not possible to search for this type of projects in the Tenders Electronic Daily (TED), which is the online version of the ‘Supplement to the Official Journal’ of the EU dedicated to European public procurement.

<sup>28</sup> BBG-SKI, *Report for the European Commission: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States* (2016) <<http://ec.europa.eu/DocsRoom/documents/22102/>>. For a critical assessment, see A Sanchez-Graells, ‘Is Joint Cross-Border Public Procurement Legally Feasible or Simply Commercially Tolerated? A Critical Assessment of the BBG-SKI JCBPP Feasibility Study’ (2017) 12(2) *European Procurement & Public Private Partnership Law Review* 97-111.

<sup>29</sup> This is an area where actual practice may be larger than reported practice, as it is likely that some projects are being kept confidential or, at least, not broadly discussed during their planning phase. However, it is difficult to substantiate any such claim, given the lack of reliable official sources of information. There is anecdotal but incomplete evidence on e.g. projects for the acquisition of environmentally friendly vehicles, such as a Paris-led project <[https://www.polisnetwork.eu/uploads/ModuleXtender/PublicEvents/401/1.\\_Frahtia-Levoir\\_-\\_Paris\\_on\\_EU\\_joint\\_clean\\_vehicle\\_procurement.pdf](https://www.polisnetwork.eu/uploads/ModuleXtender/PublicEvents/401/1._Frahtia-Levoir_-_Paris_on_EU_joint_clean_vehicle_procurement.pdf)> or a Copenhagen-led project within the context of the larger SPICE Project (Support Procurements for Innovative transport and mobility solutions in City Environment) <<http://spice-project.eu/wp-content/uploads/sites/14/2018/01/D-4-1-Best-practices-Common-Buyers-Group-v1.0.pdf>>.

<sup>30</sup> See T Tátrai, ‘Joint Public Procurement’ (2015) 16 *ERA Forum* 7-24.

<sup>31</sup> For example, in the field of joint health procurement between German and Austrian hospitals; see J Stalzer, ‘Do Austrian Courts Have Jurisdiction Over German Procurement Procedures?’ (*International Law Office Newsletter*, 22 March 2016) <<https://www.internationallawoffice.com/Newsletters/Projects-Procurement/Austria/Schoenherr-Rechtsanwlte/Do-Austrian-courts-have-jurisdiction-over-German-procurement-procedures>>.

<sup>32</sup> In this instance, the Brenner Tunnel, which is the object of a 2004 Austro-Italian international treaty <[https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA\\_2006\\_III\\_177](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2006_III_177)>.

<sup>33</sup> In particular, the *sui generis* procurement framework of the Eurosystem Procurement Coordination Office (EPCO), adopted by the European Central Bank through Decision of the European Central Bank of 17 November 2008 laying down the framework for joint Eurosystem procurement (ECB/2008/17), as amended by Decision (EU) 2016/21 of the European Central Bank of 23 December 2015 amending Decision ECB/2008/17 laying down the framework for joint Eurosystem procurement (ECB/2015/51). A consolidated version is available at <<https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:02008D0017-20160112&from=EN>>.

<sup>34</sup> Regarding the voluntary common procedure for the joint procurement of medical countermeasures, and in particular of pandemic vaccines, the EU has created a voluntary ‘Joint Procurement Agreement’ (JPA) by means of Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC (2013 OJ L 293/1); see in particular recital

control the collaboration between the public buyers, as it was either subjected to international public law or to a specific EU law framework. By contrast, a very small number of projects reflected what I will call ‘trans-EU collaborative procurement’ *stricto sensu*—understood here as collaborative procurement between contracting authorities from different Member States subject to the EU public procurement rules. These first instances of trans-EU collaborative procurement had the peculiarity of involving CPBs from different Member States<sup>35</sup> and raised important legal questions concerning the EU law requirements and limits applicable to the trans-EU collaboration. These questions concerned both the regulation of the relationship between those ‘foreign’ contracting authorities (some of which were private law entities structuring their collaboration through a purely private international agreement, thus not representing a strict case of public-public cooperation), and the ways in which they could collaboratively discharge their EU law obligations in tendering the joint contracts.<sup>36</sup>

That emerging practice of collaborative cross-border procurement shone a light on a regulatory lacuna. Even if this was a very niche type of administrative collaboration, and rather marginal in the context of EU public procurement practice (in terms of the volume of expenditure it channels), it attracted the attention of the European Commission during the revision of the 2004 rules—probably because it was seen to show promise as a lever to push the internal market for public contracts a step further,<sup>37</sup> as well as to unlock innovation in procurement.<sup>38</sup> As explained in recital (26) of the Commission’s 2011 Proposal,<sup>39</sup> the

[j]oint awarding of public contracts by contracting authorities from different Member States *currently encounters specific legal difficulties, with special reference to conflicts of national laws*. Despite the fact that [the 2004 rules] implicitly allowed for cross-border joint public procurement, *in practice several national legal systems have*

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(13) and Art. 5. See also European Commission, *Considerations on the legal basis and the legal nature of the Joint Procurement Agreement* (undated) <[https://ec.europa.eu/health/sites/health/files/preparedness\\_response/docs/jpa\\_legal\\_nature\\_en.pdf](https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_legal_nature_en.pdf)>. The detailed JPA is available at <[https://ec.europa.eu/health/sites/health/files/preparedness\\_response/docs/jpa\\_agreement\\_medicalcountermeasures\\_en.pdf](https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_agreement_medicalcountermeasures_en.pdf)>. The reference to the procurement rules applicable to the EU Institutions in the JPA needs to be updated to reflect the adoption of the Omnibus Regulation (n 6). For discussion, see N Azzopardi-Muscat, P Schroder-Bäck and H Brand, ‘The European Union Joint Procurement Agreement for cross-border health threats: what is the potential for this new mechanism of health system collaboration?’ (2017) 12(1) *Health Economics, Policy and Law* 43-59.

<sup>35</sup> Which were thus seeking transnational collaboration of procurement activities that already reflected a high degree of administrative cooperation and a pooling of buying power in each of their respective Member States.

<sup>36</sup> Sanchez-Graells (n 28).

<sup>37</sup> A Sanchez-Graells, ‘Collaborative Cross-Border Procurement in the EU: Future or Utopia?’ (2016) 3(1) *Upphandlingsrättslig Tidskrift* (Procurement Law Journal) 11-37.

<sup>38</sup> The pro-internal market rationale is oftentimes also coupled (or conflated) with arguments concerning the acquisition of innovation through procurement, or procurement innovation; see e.g. P Valcárcel Fernández, ‘The Relevance of Promoting Collaborative and Joint Cross Border Public Procurement for Buying Innovative Solutions’ (2017) 1 *Ius Publicum* 5. Similarly, S Ponzio, ‘Joint Procurement and Innovation in the New EU Directive and in Some EU-Funded Projects’ (2014) 2 *Ius Publicum* 7. The interest in using trans-EU collaborative procurement seems particularly strong in areas such as transport and healthcare. Respectively, see e.g. SPICE (n 29) White Paper ‘Procurement of Innovation: Obtaining Innovative Mobility Solutions by Applying a New Procurement Approach’ (2018) <<https://spice-project.eu/recommendations/>>; and J Espín et al, ‘How can voluntary cross-border collaboration in public procurement improve access to health technologies in Europe?’ (2016) *European Observatory on Health Systems and Policies OBS Policy Brief No 21* <[http://www.euro.who.int/\\_data/assets/pdf\\_file/0009/331992/PB21.pdf](http://www.euro.who.int/_data/assets/pdf_file/0009/331992/PB21.pdf)>.

<sup>39</sup> Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011)0896 final <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011PC0896>> (the 2011 Proposal).



*explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible.*<sup>40</sup>

This led to the introduction for the first time at EU level of explicit rules on procurement involving contracting authorities from different Member States, which was one of the main novelties of the 2014 Public Procurement Package<sup>41</sup> and is analysed in detail in the next section.

### III. CROSS-BORDER PROCUREMENT IN THE 2014 PROCUREMENT PACKAGE

This section discusses the core elements of Article 39 of Directive 2014/24/EU,<sup>42</sup> which regulates procurement involving contracting authorities from different Member States.<sup>43</sup> This provision has a clear enabling nature, in that it foresees that ‘contracting authorities from different Member States *may act jointly* in the award of public contracts’.<sup>44</sup> However, this is not unrestricted and such a facilitative approach to cross-border procurement is subject to the safeguard that collaboration cannot be sought with the purpose of avoiding domestic ‘mandatory public law provisions in conformity with Union law’ (as discussed in Section V), which places the participating contracting authorities under the onus of self-assessing the restrictions or impediments to any given type of collaboration and the compatibility of such restrictions with EU law.<sup>45</sup> In the absence of such impediments or restrictions, or in case they can be demonstrated to infringe EU law, the collaborating contracting authorities can opt between three main mechanisms.

The first mechanism is regulated in Articles 39(2) and (3) and concerns the possibility for the contracting authorities of a Member State to use the services of a CPB from a different Member State. In such cases, the Directive explicitly foresees that the provision of cross-border CPB services and the underpinning procurement will be subject to the national provisions of the Member State where the CPB is located, even if the ‘user’ contracting authority directly carries out some procurement activities, such as a mini-competition within a framework agreement. Thus, when a contracting authority decides to make use of the services of a CPB based in a different Member State, it is subjecting itself to the procurement rules of the CPB’s jurisdiction.<sup>46</sup> This is tempered by the possibility for Member States to limit the cross-border use of CPB services to those provided by wholesaler CPBs, which would then exclude the need for the ‘user’ contracting authority to engage with foreign procurement rules. This is, for example, the regulatory option chosen by Italy.<sup>47</sup>

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<sup>40</sup> Emphasis added. Note, however, that the final text of recital (73) of Directive 2014/24/EU softens the wording, as discussed in more detail in Section IV.C.

<sup>41</sup> Generally, on the reform, see R Caranta, ‘The changes to the public contract directives and the story they tell about how EU law work’ (2015) 52(2) CML Rev 391.

<sup>42</sup> See also C Risvig Hamer, ‘Article 39, Procurement involving contracting authorities from different Member States’ in M Steinicke and P L Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law* (Nomos-Hart-Beck 2018) 508-15.

<sup>43</sup> There are equivalent provisions for the utilities sector in Art 57 of Directive 2014/25/EU.

<sup>44</sup> Emphasis added.

<sup>45</sup> However, it is worth noting that not all Member States have transposed this provision, which can then result in different levels of self-assessment (as a result of different levels of awareness) by contracting authorities based in different jurisdictions. See Herrera Anchustegui (n 24) 17-23 and the contributions to S Treumer and M E Comba (eds), *Modernising Public Procurement. The Approach of EU Member States* (Edward Elgar 2018).

<sup>46</sup> There are uncertainties concerning the rules on remedies, in particular concerning jurisdiction. However, the issues are common with those of trans-EU collaborative procurement *stricto sensu*, so the considerations made in that regard are applicable here as well.

<sup>47</sup> Legislative decree of 18 April 2016, n. 50, enacting the Code on public contracts (Codice dei contratti pubblici), as amended (most recently by Law n. 55 of 14 June 2019); see Art 37, para 13.

The second mechanism is regulated in Article 39(5) and concerns setting up a joint entity, including a European Grouping of Territorial Cooperation (ECTG)<sup>48</sup> or other entities established under Union law, which carry out procurement activities in support of their main functions.<sup>49</sup> In these cases, by a decision of the competent body of the joint entity,<sup>50</sup> the participating contracting authorities shall agree on the applicable national procurement rules of either: (a) the Member State where the joint entity has its registered office; or (b) the Member State where the joint entity is carrying out its activities. Such choice may either be fixed in the constitutive act of the joint entity and apply for an undetermined period or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards. In this case, the rules in the Directive are also rather straightforward and only offer limited choice to the participating contracting authorities—although this could be slightly wider if the entity carried out its activities in multiple Member States.<sup>51</sup>

The third and more complex mechanism concerns ‘trans-EU collaborative procurement’ *stricto sensu*, as outlined in Section II. According to Article 39(4), several contracting authorities from different Member States may collaborate by means of different procurement instruments, such as jointly awarding a public contract, jointly concluding a framework agreement or jointly operating a dynamic purchasing system.<sup>52</sup> For simplicity, the discussion will be limited to the joint award of a public contract, although it will be applicable *mutatis mutandis* to collaboration by other means. For these cases, the Directive foresees that

Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, *the participating contracting authorities shall conclude an agreement that determines:*

- (a) *the responsibilities of the parties and the relevant applicable national provisions;*
- (b) *the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.*

... When determining responsibilities and the applicable national law ..., *the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective*

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<sup>48</sup> Under the rules of Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) (2006 OJ L 210/19), as modified by Regulation (EU) No 1302/2013 as regards the clarification, simplification and improvement of the establishment and functioning of such groupings (2013 OJ L347/303). A consolidated version is available <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02006R1082-20140622&from=EN>>. See also Report from the Commission to the European Parliament, the Council and the Committee of the Regions on the application of the Regulation (EC) No 1082/2006, COM(2018) 597 final.

<sup>49</sup> See L Lebon, ‘Cross-Border Procurement Problems and Transnational Entities’ (2017) 9(2) Italian Journal of Public Law 310-33.

<sup>50</sup> This seems to be creating some problems in practice. See e.g. the still unanswered written questions submitted to the European Commission by an Italian-Slovenian EGTC <<https://ec.europa.eu/futurium/en/institutional-matters/questions-directive-201424eu-article-39-comma-5>>. See also the proposed partial derogation from Art 39(5) of Directive 2014/24/EU in Art 8 of the Proposal for a Regulation of the European Parliament and of the Council on streamlining measures for advancing the realisation of the trans-European transport network, COM(2018) 277 final.

<sup>51</sup> It should be noted that this scenario creates less uncertainty concerning the applicable remedies rules, as the institutionalisation of the collaboration and the clear and explicit choice of jurisdiction should determine a single set of rules, which will follow the more general regulation of the procurement carried out by the joint entity.

<sup>52</sup> They can also use framework agreements or dynamic purchasing systems pre-set by some of them, under specific conditions of transparency applicable at the time of setting up those mechanisms.

*Member States.* The allocation of responsibilities and the applicable national law shall be referred to in the procurement documents for jointly awarded public contracts.<sup>53</sup>

In the absence of pre-existing regulation in an international agreement between the relevant Member States—of which there cannot be very many<sup>54</sup>—the implementation of trans-EU collaborative procurement is thus conditional upon entering into an explicit agreement regulating the internal organisation of the procurement, the responsibilities of the participating parties and the applicable national provisions, which are not necessarily limited to public procurement rules, but can also cover issues such as contract and tort law.

It is worth stressing that Article 39(4) does not provide default rules to determine the applicable law in the absence of explicit agreement between the participating authorities—which begs the question of the impact of an omission (particularly a partial one, where only a specific aspect of the collaboration and the underpinning procurement is not regulated) on the interpretation and effectiveness of the agreement itself. This contrasts with the approach followed by the European Commission in the 2011 Proposal,<sup>55</sup> which established that:

In the absence of an agreement determining the applicable public procurement law, the national legislation governing the contract award shall be determined following the rules set out below:

- (a) where the procedure is conducted or managed by one participating contracting authority on behalf of the others, the national provisions of the Member State of that contracting authority shall apply;
- (b) where the procedure is not conducted or managed by one participating contracting authority on behalf of the others, and
  - (i) concerns a works contract, contracting authorities shall apply the national provisions of the Member State where most of the works are located;
  - (ii) concerns a service or supply contract, contracting authorities shall apply the national provisions of the Member State where the major part of the services or supplies is provided;
- (c) where it is not possible to determine the applicable national law pursuant to points (a) or (b), contracting authorities shall apply the national provisions of the Member State of the contracting authority which bears the biggest share of the costs.

In addition to the creation of those—now lost—draft default rules, the 2011 Proposal also had the characteristic of treating the procurement rules of choice, or those applicable by default, as a unitary whole. Under the 2011 Proposal, the agreement between the participating authorities could only comprise the choice of ‘which national provisions shall apply to the procurement procedure’, bearing in mind that ‘contracting authorities may choose the national provisions of any Member State in which at least one of the participating authorities is located’. Thus, only procurement rules of one of the participating Member States would be at play.

In contrast to that unitary approach, under Article 39(4) of Directive 2014/14/EU, the choice of applicable national laws is only constrained by the mandatory connection between the Member State of origin of the rules and the nationality of any of the participating contracting authorities. Other than that, the latter seem to be given *carte blanche* to pick and

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<sup>53</sup> Emphasis added.

<sup>54</sup> See e.g. above (n 32). However, given that such agreements can take different forms, it is difficult to have a general overview. For another example concerning a German-Danish arrangement, see Risvig Hamer (n 42) 512, fn 10.

<sup>55</sup> Above (n 39), art 38(5).

choose between specific provisions, to the extent to which they can ‘allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective Member States’.<sup>56</sup> This in principle seems to cover the possibility that a participating contracting authority discharges a specific responsibility with subjection to its own domestic provisions, and a different responsibility under the rules of a different Member State, provided that the latter is connected to another participating authority. Even on the strictest interpretation of Article 39(4), which could justify a limitation of the choice of applicable law to that of a single Member State,<sup>57</sup> it would still be possible for a participating contracting authority to have to comply with a ‘foreign’ procurement law. However, given the rather apparent risk of a race to the bottom leading to the avoidance on the most stringent of the domestic regimes connected to participating authorities,<sup>58</sup> such dislocation or decoupling of responsibilities and applicable law is constrained by the limitation that ‘[c]ontracting authorities shall not use the means provided in this Article for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in their Member State’ (a point to which I will return in Section V).

The mechanism established by Article 39(4) may appear deceptively simple, as it seems to merely enable contracting authorities engaged in trans-EU collaborative procurement to establish their own rules by a simple agreement. However, the regulation of trans-EU collaborative procurement requires establishing three interlinked legal relationships: (A) the agreement regulating the relationship between the contracting authorities *inter se*; (B) the rules for carrying out of the procurement process, which will determine the interaction between the collaborating contracting authorities and economic operators interested in the contract; and (C) the contractual relationship between the chosen contractor and the collaborating contracting authorities, either collectively or separately.<sup>59</sup> Each of these merits additional consideration.

#### *A. Relationship between Contracting Authorities: Trans-EU Collaborative Agreements*

It may be surprising that, in the absence of applicable international agreements, Directive 2014/24/EU takes the position of enabling cross-border collaborative procurement on the basis of a simple agreement between contracting authorities, and that it does not foresee any rules or requirements concerning the nature and form of such an agreement, or the applicable transparency requirements. This (de)regulated space will catalyse the emergence of alternative forms of governance of trans-EU collaborative procurement within the ‘living lab’ of the EU’s economic and legal space. This is bound to create significant irritation in some jurisdictions with tight public law requirements applicable to the activity of contracting authorities, while it may work relatively smoothly in jurisdictions that take a more flexible approach or where

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<sup>56</sup> This wording indeed seems more open-ended than intermediate drafts that emerged during the legislative procedure, whereby the agreement between participating contracting authorities would have had to cover ‘the responsibilities of the parties *and the ensuing applicable national provisions*’ (emphasis added); Art 38(3)(a) of the consolidated version of the Presidency compromise text of 19 October 2012 2011/0438 (COD) <<http://data.consilium.europa.eu/doc/document/ST-14971-2012-INIT/en/pdf>>.

<sup>57</sup> As advocated by Risvig Hamer (n 42) 513.

<sup>58</sup> *Cfr* C Radaelli, ‘The Puzzle of Regulatory Competition’ (2004) 24(1) *Journal of Public Policy* 1-23.

<sup>59</sup> There is a fourth dimension, which concerns the unilateral decision of each of the contracting authorities to participate in the trans-EU procurement collaboration. However, this dimension is left outside the scope of the discussion on the assumption that it will be mainly governed by domestic law in each of the Member States, with the only constraint that mandatory public law rules potentially preventing participation in trans-EU collaborative procurement will be subject to a test of compatibility with EU law under Art 39(1)II, as discussed in Section IV. For discussion of this unilateral participation decision in the different context of defence procurement, as well as a fuller articulation of a model conceptualising these four relationships in the defence sector, see Heuninckx (n 26). For comparison of the defence and civil sectors, see *idem*, ‘Aggregated Procurement under Directive 2014/24/EU: Lessons from the Defence Sector’ (2018) 27(5) *PPLR* 189.

procurement has already ‘escaped public law’, in particular in the context of the activities of CPBs that largely operate as private legal entities.<sup>60</sup> This can create significant differences in the uptake of cross-border collaborative procurement across the EU and, from the perspective of EU administrative law, may end up favouring the consolidation of solutions based on the approach of the most permissive jurisdictions (such as the Nordic countries)—in particular if Article 39(1)II is used to challenge domestic rules applicable in less permissive jurisdictions, and thus fuels rather than prevents a race to the bottom (as discussed in Section V). Ultimately, given the impact that this approach can have on the administrative laws of (some of the) Member States, it is worth assessing whether the EU had competence to (de)regulate these cross-border interactions, as well as the competing logics behind this development (see Section IV).

### *B. Regulation of the Collaborative Procurement Process: Beyond Transparent Choices?*

It may also be surprising that Directive 2014/24/EU has adopted a rather flexible approach to the choice of applicable procurement law, as this is a decision of the collaborating contracting authorities that has an impact on third parties—that is, at the very least, on the economic operators participating in such tenders, although broader impacts cannot be excluded. The only explanation for this flexibility is that, implicitly, the system devised in Article 39(4) is based on a presumption of equivalence of domestic procurement rules in all EU legal systems—which would make procurement decisions compatible or even interchangeable, as they would be constrained by a similar set of public law principles and thus mutually-recognisable.<sup>61</sup> Given this presumption, the only requirement imposed by Article 39(4) concerns transparency of the chosen arrangements, to the extent that it requires that the procurement documents for jointly awarded public contracts refer to the allocation of responsibilities between collaborating contracting authorities and the applicable national law.

While this can be considered a reasonable approach after more than forty years of harmonisation of procurement law in the EU, where the successive generations of directives have been increasingly detailed and prescriptive,<sup>62</sup> there still remain important differences that may have been overlooked, in particular if *procurement practice* is taken into consideration. There is no need to enter into detail here, but suffice it to stress that recent CJEU case law demonstrates a significant level of disparity of the regulation of procurement at domestic level and its interaction with more general administrative law, which is leading to the emergence of a protective principle that seeks to prevent disadvantaging tenderers from other jurisdictions due to their lesser familiarity with the procurement practices of a given Member State.<sup>63</sup> Furthermore, language barriers can effectively exclude potential tenderers due to the simple fact of the procurement procedure being carried out in a different language—even if all substantive rules were identical to those they are familiar with. Both of these potential

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<sup>60</sup> Herrera Anchustegui, ‘Collaborative Centralized Cross-Border Public Procurement’ (n 24) 13; Sanchez-Graells (n 37) 34. See more generally C Knill, ‘European Policies: The Impact of National Administrative Traditions’ (1998) 18(1) *Journal of Public Policy* 1-28.

<sup>61</sup> Generally, see C Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2014) 257 ff. This goes beyond the more general presumption of compliance with the fundamental principles and values of EU law; see A von Bogdandy, ‘The Idea of European Public Law Today’ (2017) MPIL Research Paper Series No. 2017-04, 24, with reference to I Canor, ‘My Brother’s Keeper? Horizontal “Solange”. An Ever Closer Distrust among the Peoples of Europe’ (2013) 50 *CML Rev* 383.

<sup>62</sup> Arrowsmith (n 15).

<sup>63</sup> See in particular Case C-27/15 *Pizzo*, EU:C:2016:404; and Case C-171/15 *Connexion Taxi Services*, EU:C:2016:948. For discussion, see A Sanchez-Graells and C De Koninck, *Shaping EU Public Procurement Law: A Critical Analysis of the CJEU Case Law 2015–2017* (Kluwer 2018) 183-94 and 293-301.

disadvantages need to be taken into account in the formation and implementation of the agreements underpinning trans-EU collaborative procurement (as discussed in Section VI).<sup>64</sup>

Moreover, there is a second underlying presumption that is more difficult to bring to the surface, which concerns the coordination of potential administrative and judicial review of the procurement decisions adopted by the collaborating contracting authorities, as well as the cross-border executability of review decisions imposing remedies. It is remarkable that Directive 2014/24/EU is silent on these matters, in particular given that the 2011 Proposal contained explicit rules in that regard, which established that ‘[d]ecisions on the award of public contracts in cross-border public procurement shall be subject to the ordinary review mechanisms available under the national law applicable’<sup>65</sup> to the collaboration and, perhaps more importantly, foresaw that

[i]n order to enable the effective operation of review mechanisms, Member States shall ensure that the decisions of review bodies within the meaning of Council Directive 89/665/EEC located in other Member States are fully executed in their domestic legal order, where such decisions involve contracting authorities established on their territory participating in the relevant cross-border public procurement procedure.<sup>66</sup>

The absence of explicit regulation of remedies in Article 39 of Directive 2014/24/EU points to two further presumptions. First, that the choice of applicable law governing the procurement process includes the law of that same jurisdiction concerning procurement remedies.<sup>67</sup> Second, that ‘foreign’ administrative and judicial review decisions will be given effectiveness by the competent authorities of all Member States *motu proprio*. Both issues raise questions, as it is not entirely clear that rules affecting the rights of third parties—in particular in terms of jurisdiction—can be deactivated by the mere choice of a foreign law to govern the implementation of the trans-EU collaboration. It is also highly foreseeable that such approach will encounter significant judicial resistance in (at least) some Member States, which may well result in conflicts of jurisdiction or, ultimately, the ineffectiveness of review decisions with cross-border implications. These are thus important concerns that need further consideration at the stage of implementation of trans-EU collaborative procurement agreements (as discussed in Section VI).

### *C. Regulation of Contractual Execution: Do All Roads Really Lead to Rome?*

Finally, it may seem surprising that there is no explicit reference to the law applicable to the awarded contract, as Article 39(4) only contemplates the need to reach an agreement on the procurement procedure and applicable law *up to* the conclusion of the contract. It does not regulate the law applicable to the execution of the contract, despite the fact that the 2014 Public Procurement Package introduced rules concerning the execution phase.<sup>68</sup> The explanation for this approach is in recital (73) of the Directive, which indicates that the new rules on cross-border procurement should *complement* the conflict of law rules of the Rome I Regulation on

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<sup>64</sup> For related discussion in a closely-related field, see H C H Hofmann, ‘Transnational and Trans-Territorial Rule-Making. A Basic Framework’ (2013) 78 *Missouri Law Review* 423-42.

<sup>65</sup> Above (n 39), art 38(8).

<sup>66</sup> Above (n 39), art 38(9). Reference omitted.

<sup>67</sup> There is such an indication in recital (73), where it mentions that the ‘rules should determine the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation, *including the applicable legislation on remedies*, in cases of cross-border joint procedures’ (emphasis added). However, there is no such explicit mention in the text of the Directive and the sufficiency of the recital to create such a rule could be challenged; *cf.* Case C-215/88 *Casa Fleischhandel v BALM*, EU:C:1989:331.

<sup>68</sup> In particular, the modification and the termination of contracts, in Arts. 72 and 73 Directive 2014/24/EU.

the law applicable to contractual obligations.<sup>69</sup> The Directive assumes the applicability of the Rome I Regulation to the contracts awarded as a result of the trans-EU collaborative procurement process—which would create a system of free choice of law, supplemented by some default rules depending on the type of contract.

This runs counter to the authoritative view that the Rome I Regulation does not necessarily apply to public contracts in all Member States jurisdictions<sup>70</sup> because some of them have separate rules for public and private or civil contracts, which can determine the inapplicability of the law to contracts seen as dealing with ‘administrative matters’.<sup>71</sup> Moreover, public authorities do not always have the liberty of choosing the applicable law and must often follow a rigid national public law framework.<sup>72</sup> Whether this makes a big difference in substantive terms or not,<sup>73</sup> and whether the applicability of the Rome I Regulation or its material content would be desirable or not, is debatable.<sup>74</sup> Be it as it may, this is yet one more area of legal uncertainty that would require further thought. However, given that this is a rather separate issue and due to space constraints, I will not discuss it in more detail here.

The rest of the paper will solely be concerned with the other two legal relationships underpinning trans-EU collaborative procurement mentioned above (i.e. the agreement regulating the relationship between the contracting authorities *inter se*; and the rules for carrying out of the procurement process), and the discussion now moves to a critical assessment of the EU’s competence for intervention in this area. As mentioned above (III.A), given the impact that Article 39 of Directive 2014/24/EU can have on the administrative laws of (some) Member States, it is worth assessing the extent to which the EU had competence to (de)regulate this type of cross-border interactions, as well as the competing logics behind this development.

#### IV. SHAPING TRANS-EU PUBLIC LAW: A FRINGE EU COMPETENCE?

To recapitulate, the regulation of trans-EU collaborative procurement in Article 39 of Directive 2014/24/EU is based on two main functional pillars: first and foremost, freedom of choice or self-regulation by the participating contracting authorities, which is implicitly premised on presumptions of equivalence of their legal systems and a functional approach to mutual collaboration, mutual trust and mutual recognition of procurement decisions (Art 39(4)).<sup>75</sup>

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<sup>69</sup> Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (2008 OJ L 177/6).

<sup>70</sup> Indeed, it has been stressed that ‘not all EU contracts may be qualified as contracts in “civil and commercial matters”, but some may be qualified as contracts in “revenue, customs or administrative matters” in the sense of art 1(1) of the Rome I Regulation’; *ReNEUAL Model Rules on EU Administrative Procedure* (2014) 178.

<sup>71</sup> See Case C-49/12 *Sunico and Others*, EU:C:2013:545, para 40, referring to a ‘legal relationship based on public law ... involving the exercise of powers of a public authority’; F Garcimartín Alférez, ‘Rome Convention and Rome I Regulation (contractual obligations)’ in J Basedow et al (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 1553, 1554-55. See also M McParland QC, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (OUP 2015) 6-54 to 6-60. More generally, see J-B Auby, ‘Contracting Out and “Public Values”’: A Theoretical and Comparative Approach’ in S Rose-Ackerman, P L Lindseth and B Emerson (eds), *Comparative Administrative Law* (2nd edn, Edward Elgar 2017) 552-65.

<sup>72</sup> Herrera Anchustegui, ‘Collaborative Centralized Cross-Border Public Procurement’ (n 24) 7; see also V De Boe, ‘Cross-Border Joint Procurement: Great Expectations’ in Audit and Schill (n 2) 205, 209.

<sup>73</sup> P Craig, *UK, EU and Global Administrative Law. Foundations and Challenges* (CUP 2015) 469, fn 89, *cf* H C H Hofmann and J-P Schneider, ‘Administrative Law Reform in the European Union: The ReNEUAL Project and Its Basis in Comparative Legal Studies’ in Rose-Ackerman, Lindseth and Emerson (n 71) 650, 661.

<sup>74</sup> See e.g. *ReNEUAL Model Rules on EU Administrative Procedure* (n 70) 178; P Wautelet, ‘International Public Contracts: Applicable Law and Dispute Resolution’ (2013) <<https://ssrn.com/abstract=2687627>>. For parallel discussion concerning the law applicable to the contracts entered into by international organisations as a result of a procurement process, see Morlino (n 2) 261-87.

<sup>75</sup> Generally, on the logic of such a system in contexts other than procurement, see H Wenander, ‘Recognition of Foreign Administrative Decisions. Balancing International Cooperation, National Self-Determination, and

Second, an anticircumvention rule based on the need to ensure the effectiveness of ‘mandatory public law provisions in conformity with Union law’ to which the collaborating contracting authorities are subject in their Member States (Art 39(1)II). This reflects a tendency towards the regulation of this *niche* of European public law following the logic and functioning of administrative networks. However, in this section I argue that the system is hybrid and still has some remnants of the approach towards regulation based on ‘conflicts law’ initially followed by the Commission in its 2011 Proposal. Before discussing such hybridity (B) and its implications for the EU’s legislative competence (C), this section first maps the two different dimensions of administrative activity covered by EU public procurement law and policy.

#### *A. The Janus-faced Nature of EU Public Procurement Policy and Practice*

One of the peculiarities of EU public procurement law is that it applies in a field that encompasses two different dimensions of administrative action. On the one hand, it covers administrative action oriented towards EU internal market policy delivery, such as administrative activities concerning some aspects of the organisation of tenders for public contracts, the development of life cycle costing methodologies, or the participation in pan-EU databases such as e-Certis (i.e. the administration of procurement). On the other hand, EU public procurement law regulates direct administrative action simply and directly covered by the EU rules, that is the *act itself of purchasing* goods, works or services to satisfy the needs of the public sector—which is only of an instrumental nature and supports other areas of administrative action at domestic level (i.e. procurement as a commercial activity).<sup>76</sup>

To put it more clearly, this is an area where the ‘core’ EU policy concerns the consolidation and further development of the internal market for public contracts, which has traditionally been understood as preventing discrimination and ensuring EU-wide competition for public contracts.<sup>77</sup> More recently, an additional layer of policy has been activated at EU level, which concerns the promotion of green, social and innovative procurement. However, these two layers of policy are distinct in that, while the internal market policy is designed and mandated at EU level, any other policy delivered through procurement is, at best, a shared EU/national competence, or an exclusive policy area for the Member States. This is clear in the choice of legal basis for the procurement Directives, which are based in particular in Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union (TFEU)—to which I will return later (see sub-section C below). At the same time, this is an area where entirely domestic administrative action (i.e. the carrying out of procurement *itself*) is subjected to the EU rules, which have the public administration (*lato sensu*) of the Member States as their addressees. This contrasts with other areas of EU economic law, where the administration acts in the policy delivery dimension, but the activities that are subjected to EU law are generally

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Individual Rights’ (2011) 71 Heidelberg Journal of International Law (HJIL / ZaöRV) 755, 767-73. See also F Lafarge, ‘Enforcement of Administrative Decisions between Member States under EU law. From Exequatur to Automaticity?’ (2010) Draft EGPA paper <[https://www.utwente.nl/en/bms/pa/staff/marin/Marin\\_Lafarge.pdf](https://www.utwente.nl/en/bms/pa/staff/marin/Marin_Lafarge.pdf)>.

<sup>76</sup> The term ‘commercial’ instead of ‘economic’ is deliberately used here to avoid rehearsing the criticism of the CJEU case law that established that procurement is not in itself an economic activity for the purposes of the application of EU competition law; see Case C-205/03 P *FENIN v Commission*, EU:C:2006:453; and C-113/07 P *Selex Sistemi Integrati v Commission*, EU:C:2009:191. Revisiting this issue would exceed the possibilities of this paper. Suffice it to stress here that I take the view that procurement, in particular centralised and collaborative procurement, constitutes an economic activity. For extended discussion, see A Sanchez-Graells, *Public Procurement and the EU Competition Rules* (2nd edn, Hart Publishing 2015) 135 and ff; and A Sanchez-Graells and I Herrera Anchustegui, ‘Revisiting the Concept of Undertaking from a Public Procurement Law Perspective – A Discussion on *EasyPay* and *Finance Engineering*’ (2016) 37(3) *European Competition Law Review* 93-98.

<sup>77</sup> S Arrowsmith, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’ (2012) 14 *Cambridge Yearbook of European Legal Studies* 1-47.



those of economic operators (even if they can, of course, include public or publicly-owned entities). This results in a multi-layered situation where the domestic administrations of the EU Member States are both directly subjected to EU public procurement law and policy *and* form part of the (weak) composite administration of the EU in this area. When it comes to cross-border public procurement, the two dimensions become entangled.

Prior to 2011, EU procurement policy was oriented towards constraining the behaviour of the domestic administrations of the Member States in the *design* and *implementation* of procurement procedures. Competitive neutrality was the leitmotif of the rules, in the hope that ‘nationality/origin-neutral’ requirements and the pro-competitive orientation of the design of the tenders would facilitate cross-border competition for public contracts between (private) economic operators, thus resulting in cross-border trade and in a high penetration of intra-EU imports in the public sector.<sup>78</sup> This policy has traditionally proven elusive and its effects difficult to quantify,<sup>79</sup> and the successive reforms of the EU public procurement rules have permanently sought to *further* the level of procurement-related cross-border trade. In a subtle shift away from this *offer*-oriented policy, the 2011 Proposal included an additional element of cross-border public procurement policy by adding rules concerned with public *demand*. The logic and justification for such a change, or even whether it was a wanted change of approach or a ‘mere’ spillover from other drivers of regulatory reform (such as seeking to unlock further economic efficiency in procurement), could be debated. However, the undeniable fact is that, under the 2014 Public Procurement Package, the cross-border policy aimed at further developing the internal market for public contracts does not only concern the behaviour of the contracting authorities as *administrators* of the procurement procedure, but also their commercial behaviour as *buyers* and as economic agents susceptible of engaging in cross-border (public) law relationships themselves. That is, the 2014 Public Procurement Package is not only concerned with vertical relationships between the EU as regulator and the public administration of the Member States as addressees of the rules, but also establishes rules for the horizontal relationships between contracting authorities from different Member States.

Importantly, the nature of these relationships is also rather peculiar in that there are two types of horizontal aspects of EU public procurement law and policy. Firstly, there is a relatively ‘standard’ element of horizontal administrative cooperation,<sup>80</sup> which supports the delivery of the EU policy of undistorted competition for public contracts within the internal market. This mainly concerns information exchange and measures aimed at reducing the red tape associated with the participation in public tenders, such as measures supporting the use of the European Single Procurement Document (ESPD), the operation of the common database e-Certis, or certain reporting obligations to support the Commission in its review of the economic effectiveness of procurement policy. These horizontal relationships are however strongly mediated by the European Commission and only show the characteristic of a (proto)network of administrations,<sup>81</sup> as the system falls short of the intensity in the exchange

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<sup>78</sup> The Commission has undertaken several reports on this topic. The latest snapshot of the internal market for public contracts can be found in VVA/LE/JIIP’s Report for the European Commission, *Measurement of impact of cross-border penetration in public procurement* (February 2017) <<https://publications.europa.eu/s/koAp>>. A previous iteration, which was influential in the context of the 2011 Proposal for a new public procurement directive was carried out in Ramboll’s Report for the European Commission, *Cross-Border Procurement above EU Thresholds* (March 2011) <<https://publications.europa.eu/s/koAq>>.

<sup>79</sup> E.g. see the recent paper by two Commission economists, finding that ‘local’ bidders are over 900 times more likely to be awarded a contract than ‘foreign’ bidders, B Herz and X-L Varela-Irimia, ‘Border Effects in European Public Procurement’ (2017) MPRA Paper No. 80138 <<https://mprapaper.ub.uni-muenchen.de/80138/>>.

<sup>80</sup> Art 86 Directive 2014/24/EU.

<sup>81</sup> The reservations to classifying this as a proper instance of composite EU administration derive from the lesser relevance of information exchange and the low level of inter-administrative cooperation which are, however,

of information and policy coordination that characterises other areas of EU administrative law,<sup>82</sup> such as transport,<sup>83</sup> energy policy<sup>84</sup> or environmental protection.<sup>85</sup>

Secondly, ‘entirely commercial’ horizontal relationships between contracting authorities of different Member States of the type discussed in Section II are now covered by EU public procurement law and policy. At first sight, this seems to be an area strictly within the sphere of the administrative autonomy of the Member States, given that any decisions on their participation or abstention from trans-EU collaborative procurement primarily affect their economic interests, but have no *direct* role in delivering EU policy in this area. These horizontal relationships do not concern the administration of EU policy, even if they are influenced by such policy because they take place within the EU’s economic and legal space.

### *B. Implications in Terms of Regulatory Approach*

The two different natures and purposes of horizontal relationships in the area of EU public procurement law and policy seem to merit different regulatory approaches. While the more ‘standard’ (proto)network activity of exchange of information can be suitably regulated through informal and collaborative mechanisms subjected to EU administrative law requirements of sincere cooperation, mutual assistance and, in some aspects, mutual recognition; the regulation of the commercial horizontal relationships between contracting authorities of the Member States seems to require an alternative ‘conflicts law’ approach, and one which ensures respect for rules and requirements aimed at preserving the rights of third parties. This would ultimately be justified by the obligation to respect overriding mandatory provisions *even* under international private law.<sup>86</sup>

However, the logic, flexibility and informality underpinning the cross-border procurement regime established by Directive 2014/24/EU reflect the on-going transformation of trans-EU horizontal relationships through (or within) administrative networks—most notably, the direct contact and collaboration between the participating institutions rather than (outdated) formal international relations through diplomatic channels.<sup>87</sup> This informality and flexibility have been uncritically extended to an area where there is no networked or composite administration and where there is no delivery of EU policy. In contrast with other aspects of the delivery of EU procurement policy,<sup>88</sup> Article 39 does not aim to create a network or to facilitate collaborative policy implementation. It (simply) seeks to facilitate cross-border commercial relationships between the public sector entities (*lato sensu*) of different Member States.<sup>89</sup> Thus, the administrative cooperation dimension of such economic ‘partnering’ is not primarily geared towards the attainment of compliance with EU law, but rather simply aligned with the much more diffuse (further) consolidation of the internal market (for public contracts). The peculiarity is also that, from this perspective, the national administrations are the

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fundamental aspects of the growing procedural integration in ‘European administration’; see H C H Hofmann, ‘European administration: nature and developments of a legal and political space’ in C Harlow, P Leino and G della Cananea (eds), *Research Handbook on EU Administrative Law* (Edward Elgar 2017) 21-43.

<sup>82</sup> H C H Hofmann, G C Rowe and Al H Türk, ‘Synthesis and Assessment’, in idem (eds), *Specialized Administrative Law of the European Union: A Sectoral Review* (n 3) 613, 615-618.

<sup>83</sup> R Bieber, ‘Transport Policy and Trans-European Networks’ in Hofmann, Rowe and Türk (n 3) 286, 305.

<sup>84</sup> J-P Schneider, ‘Energy and Trans-European Networks’, in Hofmann, Rowe and Türk (n 3) 378.

<sup>85</sup> A M Latour and G C Rowe, ‘Environmental Protection’, in Hofmann, Rowe and Türk (n 3) 321.

<sup>86</sup> Art. 9 Rome I Regulation.

<sup>87</sup> Von Bogdandy (n 61) 8.

<sup>88</sup> See Art 86 of Directive 2014/24/EU.

<sup>89</sup> Along these lines, Herrera Anchustegui, ‘Collaborative Centralized Cross-Border Public Procurement’ (n 24).

addressees of EU public procurement law, which makes this difficult to fit into the model of ‘EU shared administration’.<sup>90</sup>

Ultimately, the tension between the two approaches of regulation of trans-EU collaborative procurement *qua* networked activity or its regulation under a ‘conflicts law’ approach is embedded in Article 39. In my view, while the 2011 Proposal mainly followed a ‘conflicts law’ approach, the final system enshrined in the Directive follows more closely the logic of an administrative network. Indeed, as mentioned in Section III, the 2011 Proposal included two clear aspects of a ‘conflicts law’ approach concerning explicit applicable law default rules in the absence of an explicit choice by the collaborating contracting authorities, as well as mandatory jurisdictional rules coupled with an obligation of cross-border recognition and enforcement of review decisions. By contrast, the rules in Directive 2014/24/EU seem much more flexible and follow a network-based logic. First, they omit any default applicable law rules and any mandatory jurisdiction requirements (which are, at most, implicit). Second, they introduce a constraint on self-regulation based on the ‘mandatory public law provisions’ of *all* Member States of the participating contracting authorities—which can only be avoided by excluding the concerned contracting authority(ies) from participation in the collaboration. Importantly, though, there is an explicit reference to the compatibility with EU law of such mandatory requirements (as discussed in more detail in Section V.B). Such anticircumvention safeguard runs counter to the network-logic of the rules and retains the character of a ‘conflicts law’ rule that hybridises the model.

It should not be surprising that this hybridisation of the regulatory model derives from the conflicting input by different EU Institutions involved in the legislative process.<sup>91</sup> While the Commission followed a rather pure ‘conflicts law’ approach in its 2011 Proposal, the European Parliament introduced significant changes, including the suppression of the explicit rules on default applicable law, jurisdiction and enforcement cooperation, as well as the introduction of the anticircumvention clause.<sup>92</sup> Given this ‘unplanned’ hybridisation of the Directive, the system in Article 39 creates some interpretive difficulties. Thus, the eventual dominance of a regulatory logic over the other will probably only result from future interpretation by the CJEU—which could have a rather deep effect by substituting the hybrid regulatory approach for a judicialized development of this aspect of EU public law. Regardless of this theoretical discussion, the hybrid approach to the regulation of horizontal interactions of a commercial nature between contracting authorities from different Member States raises some issues concerning the competence of the Union to (de)regulate this aspect of cross-border administrative activity.

### *C. Implications in Terms of EU Legislative Competence*

Indeed, the peculiar commercial nature of the horizontal relationships involved in trans-EU collaborative procurement raises some questions concerning the use of Article 114 TFEU as the main legal basis for this set of rules in Directive 2014/24/EU.<sup>93</sup> I accept that ‘express Treaty

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<sup>90</sup> This may, in the end, place trans-EU collaborative procurement in a rather small interstice between the emerging European public law and the still fuzzy ‘Europeanised’ domestic public law of the Member States; Von Bogdandy (n 61) 7.

<sup>91</sup> This is a pervasive phenomenon, as evidenced by the contributions to Ølykke and Sanchez-Graells (n 4).

<sup>92</sup> See Position of the European Parliament adopted at first reading on 15 January 2014 with a view to the adoption Directive 2014/.../EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC (COD(2011)0438) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TC+P7-TC1-COD-2011-0438+0+DOC+PDF+V0//EN>>.

<sup>93</sup> Arts. 53(1) (right of establishment) and 62 (freedom to provide services) TFEU are irrelevant for this discussion, as they are not concerned with inter-administrative relationships. Sanchez-Graells (n 37) 34.

authorization is [not] a condition precedent for competence to make norms regulating national administrative procedures ... [and] that such norms can be made pursuant to a power to make regulations or directives in the relevant area, and will be regarded as legitimate if they are integral to that regulatory regime'.<sup>94</sup> However, I argue here that implicit regulatory power in the context of legislative action based on Article 114 TFEU—which is already rather unspecific<sup>95</sup>—needs to be interpreted narrowly and that, in any case, a proper recognition of the commercial nature of horizontal relationships between contracting authorities involved in trans-EU collaborative procurement evidences that their regulation is not *integral* to the EU public procurement regime; which leads to the conclusion that *the EU competence to regulate trans-EU collaborative procurement is, at best, tenuous or weak*.

Article 114 TFEU does not provide a general competence for the regulation of the internal market.<sup>96</sup> As clarified by the CJEU,

... while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are *such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market*.<sup>97</sup>

The threshold for the valid use of Article 114 TFEU is thus, at least formally, set relatively high. This would have been reflected in the rather extreme drafting used by the 2011 Proposal, which indicated that '[d]espite the fact that [the 2004 rules] implicitly allowed for cross-border joint public procurement, *in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible*'.<sup>98</sup> However, at the end of the legislative process, recital (73) of Directive 2014/24/EU rather indicates that '[d]espite the fact that [the 2004 rules] implicitly allowed for cross-border joint public procurement, contracting authorities are still *facing considerable legal and practical difficulties in ... jointly awarding public contracts*'.<sup>99</sup> One cannot but wonder if the existence of 'considerable difficulties' in carrying out cross-border joint procurement—which is in and of itself necessarily a rather complex issue—would suffice to meet the threshold of negative direct effect on the internal market that would trigger the EU legislative competence of Article 114 TFEU,<sup>100</sup> as opposed to the (possibly exaggerated) 'legal impossibility' identified by the 2011 Proposal. Moreover, the reasons given for the need to overcome such legal difficulties seem only incidental to the functioning of the internal market, as recital (73) indicates that the goal is 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

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<sup>94</sup> Craig (n 73) 450.

<sup>95</sup> For in-depth discussion of Art. 114 TFEU as a legal basis, see S Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12(3) German Law Journal 827-864.

<sup>96</sup> *Ibid*, 829-30.

<sup>97</sup> Case C-358/14 *Poland v Parliament and Council*, EU:C:2016:323, para 32. See also Weatherill (n 95) 831-34, by reference to the previous statement of the consolidated case law in Case C-58/08 *Vodafone and Others*, EU:C:2010:321, para 32.

<sup>98</sup> Above (n 39) rec (26). Emphasis added.

<sup>99</sup> Emphasis added.

<sup>100</sup> It is worth noting that such issues of unclear or insufficient EU competence are pervasive across specialised sectors of EU administrative law; Hofmann, Rowe and Türk (n 82) 620.

authority'. This seems clearly aspirational, as well as based on a series of presumptions about the economic benefits of collaborative procurement that do not necessarily hold true.<sup>101</sup>

Be it as it may, however, this textual analysis would probably not suffice to move the CJEU to annul Article 39 of Directive 2014/24/EU, as the test of EU competence is certainly less than clear-cut and the CJEU does not always apply it strictly.<sup>102</sup> Moreover, from a practical perspective, it is worth stressing that a lack of EU competence for the regulation of trans-EU collaborative procurement would not necessarily result in its prohibition or its impossibility, as this would (again) become a matter unregulated at EU level (as was the case prior to the adoption of the Directive). In such a situation, Member States wishing to implement it would need to replicate a sort of ad hoc regulation similar to the one foreseen in Article 39(4), and Member States willing to prevent (or shape) it would most likely rely on mandatory public law provisions in a manner also similar to Article 39(1)II. Thus, a challenge of this aspect of the Directive is unlikely and a finding of lack of competence highly improbable.<sup>103</sup> Therefore, given that Article 39 will likely remain unchallenged, the core issue is to assess the extent to which EU law can erode domestic public law rules and the Member States' administrative autonomy with the aim of promoting economic co-operation across borders within the internal market. Therefore, it is necessary to reflect in more detail about the application of EU legislative competences in matters related to administrative or public law of the Member States.

In that regard, despite the novelty of Articles 6(g) and 197 TFEU dealing with administrative cooperation for the implementation of EU law, the EU does not have the competence to harmonise domestic administrative legislation, as clearly established by Article 197(2) *in fine* TFEU and as implicitly reiterated in the principle of administrative autonomy embedded in Article 291(1) TFEU.<sup>104</sup> In addition, it is worth stressing that the competences of the Union, even in connection to the functioning of the internal market, are not monolithic. A distinction needs to be made between competences related to the administrative action oriented towards the delivery of EU (internal market) policy and those related to 'simple' administrative activity within the economic and legal space of the internal market. In that regard, it has been rightly pointed out that the latter cases, and specifically the regulation of public procurement activities, are not the object of 'EU administrative powers or competence, but rather administrative powers of the Member States which exercise is partially subjected to a European discipline'.<sup>105</sup> Therefore, while Article 114 TFEU can be seen as the adequate legal basis for the regulation of administrative activity directly linked to the delivery of EU procurement policy—such as exchanges of information or the participation in common databases aimed at reducing red tape for participating economic operators—it is a much less adequate legal basis for the regulation of administrative activity that primarily seeks to satisfy the economic or commercial interests of the Member States in the way they channel their public expenditure. Therefore, concerning the commercial interactions implicit in trans-EU collaborative procurement, a harmonisation or de-regulation of the activities of the public administration at domestic level would be unjustified and not covered by Article 114 TFEU as a proper legal basis. This seems to be somehow acknowledged in Article 39(1)II of Directive 2014/24/EU,

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<sup>101</sup> Heuninckx (n 59), Sanchez-Graells and Herrera Anchustegui (n 24).

<sup>102</sup> Weatherill (n 95) *passim*.

<sup>103</sup> In particular in view of the previous experience in the context of procurement not covered by the EU rules underpinning the Case T-258/06 *Germany v Commission*, EU:T:2010:214.

<sup>104</sup> *Contra*, but with troubling conceptual confusion, see R Cavallo Perin and G M Racca, 'Administrative Cooperation in the Public Contracts and Service Sectors for the Progress of European Integration' in F Merloni and A Pioggia (eds), *European Democratic Institutions and Administrations. Cohesion and Innovation in Times of Economic Crisis* (Giappichelli-Springer 2018) 265-96.

<sup>105</sup> R Caranta, 'Le Competenze dell'Amministrazione Europea' in L De Lucia and B Marchetti (eds), *L'Amministrazione Europea e le Sue Regole* (Mulino 2015) 15, 26 (own translation from Italian).

which is bound to become the mechanism through which tensions between commercial interests and public law requirements are resolved. The next section discusses this in detail. The stringent approach to the (de)regulation of trans-EU collaborative procurement I advance in this paper is, ultimately, based on the weak EU competence for intervention.

## V. EU RULES ON TRANS-EU COLLABORATION: PENELOPE'S NEW SHROUD?

As discussed in the previous two sections, in the absence of international agreements, Directive 2014/24/EU allows contracting authorities from different Member States to enter into trans-EU procurement collaboration by means of a mere *agreement* where they are given significant freedom to self-regulate their collaboration. The Directive imposes few constraints on the choice of law applicable to the procurement procedure and remains silent on the jurisdictional competence to review these decisions. The high degree of freedom given to the collaborating contracting authorities seems solely subjected to the need to comply with 'mandatory public law provisions in conformity with Union law to which they are subject in their Member State'.

This section explores this latter requirement in more detail by critically assessing it by comparison to the more general framework for cross-border collaboration through a European Grouping of Territorial Cooperation (EGTC). The relevance of this benchmark is strengthened by the fact that Article 39(5) foresees trans-EU collaborative procurement through an EGTC as one of the options available to contracting authorities (see above, Section III). The comparison focuses on two main aspects: first, the different role given to Member States and to sub-national (administrative) units under each of the two regimes (A). Second, the position and protection of domestic 'public interest' under both regimes (B). This leads to a short reflection on the need to reconsider the (de)regulation of trans-EU collaborative procurement in the EU, and to provide it with an explicit framework (C).

### A. Member State Involvement and Trans-EU Collaboration

The rules on trans-EU collaborative procurement could jeopardise domestic administrative independence regarding the level and intensity of involvement of the Member State in the authorisation of the trans-EU collaboration, as well as the role of the State in such process. In the general framework for trans-EU collaboration by means of an EGTC, the role of the Member States is *decisive*. National entities willing to participate in cross-border collaboration through and EGTC have a duty to notify such intention to the Member State under whose law they have been formed.<sup>106</sup> The Member State then decides whether to approve the participation in the EGTC,<sup>107</sup> with the only constraints that denial of such authorisation needs to be based on one of the reasons foreseen in the EGTC Regulation and that there is a six-month time limit for the Member State to raise objections to the participation in the trans-EU collaboration—in which absence, the request for participation will be deemed approved.<sup>108</sup> Counterintuitively, perhaps, this system of inter-regional cooperation is clearly *Member State-centric*,<sup>109</sup> which can ensure a high degree of centralisation of the decisions concerning trans-EU collaboration (depending on the internal organisation and levels of sub-national devolution of competence of the relevant Member State). Moreover, given that the Member State can decide to reject a request to participate in an EGTC where it considers that 'such participation is not justified for reasons of public interest or of public policy of that Member State'<sup>110</sup> (as further discussed below in sub-section B), such centralisation or *ex ante* control can also concern the reasons and

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<sup>106</sup> Art 4(1) Regulation 1082/2006.

<sup>107</sup> Art 4(2) Regulation 1082/2006.

<sup>108</sup> Art 4(3) Regulation 1082/2006.

<sup>109</sup> Palermo (n 8) 81-83.

<sup>110</sup> Art 4(3)(b) Regulation 1082/2006.

the expected benefits of any such collaboration (in terms of a balance of public interest), as well as its alignment with public policy. This creates a system of checks and balances whereby Member States can impose different levels of constraint and different types of controls on the decisions of any sub-national units willing to enter into trans-EU collaboration.

In stark contrast with this system, Article 39(4) of Directive 2014/24/EU is silent on the role of the Member States. Other than in cases where they have decided to enter into international agreements regulating cross-border collaborative procurement, the Directive *seems to* empower the contracting authorities willing to collaborate to enter into similar agreements *motu proprio* by stating that ‘the participating contracting authorities shall conclude an agreement’. This is subject to the Article 39(1)II constraint that mandatory public law provisions need to be complied with, to the effect that, should a Member State require prior authorisation of any such trans-EU procurement collaboration, the contracting authority would be barred from entering into the required agreement in the absence of such authorisation. Given the mechanism applicable to the formation of EGTCs, I would find it difficult to accept that such a system of prior authorisation could be considered incompatible with EU law. Likewise, if Member States decided to subject trans-EU procurement collaboration to a pre-screening of compliance with mandatory public law requirements, or decided to enact rules or regulations determining the specific obligations that had to be complied with by contracting authorities seeking to participate in trans-EU procurement collaboration, that would also seem compatible with EU law, given its functional equivalence with the rules applicable to EGTCs.

Ultimately, thus, Article 39(4) cannot be seen to create any sort of ‘subjective right’ or ‘individual power’ on which contracting authorities can rely to enter into trans-EU collaboration agreements in cases where domestic rules do not allow for it.<sup>111</sup> Linking this to the regulatory approach discussed in Section III, this also seems the better approach in a setting where the contracting authority is not acting as a ‘procurement authority’ in the context of an EU administrative network—which could justify higher levels of autonomy and independence, as well as less rigidity in decision-making procedures. In this area, given that contracting authorities are seeking collaboration to pursue commercial (public) interests, it seems adequate to allow Member States to decide for themselves on the degree of decentralisation and flexibility they want to introduce in their own public sectors.

### B. ‘Public Interest’ and Trans-EU Collaboration

The other main area where the administrative independence of the Member States could be jeopardised concerns the potential erosion of domestic rules for the protection of the ‘public interest’. In that regard, it is notable that the general framework for cross-border collaboration through EGTCs allows for separate and potentially rather strict control by the Member States on the development of sub-national cross-border collaboration, given the *renvoi* to domestic laws and constitutional structures and the reliance on relatively open-ended concepts of ‘reasons of public interest or of public policy of that Member State’ to justify decisions blocking cross-border collaboration through EGTCs.<sup>112</sup> In the context of trans-EU administrative collaboration, whether these concepts merit a strict interpretation similar to that

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<sup>111</sup> There is an additional systematic argument here concerning the use of foreign CPBs under art 39(2) of Directive 2014/24/EU, which is drafted in very different terms that allow direct reliance by contracting authorities: ‘A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State’.

<sup>112</sup> Art 4(3)(b) Regulation 1082/2006. Palermo (n 8) 81-83; D Strazzari, ‘Harmonizing Trends vs Domestic Regulatory Frameworks. Looking for the European Law on Cross-Border Cooperation’ (2011) 4(1) European Journal of Legal Studies 179, 199-200. See also A M Russo, ‘Globalization and Cross-border Cooperation in EU Law: A Transnational Research Agenda’ (2012) 4(3) Perspectives on Federalism E1, E13.

derived from e.g. Article 36 TFEU or, conversely, should be used to afford a broader regulatory space to Member States on the basis of *inter alia* Articles 6(g) and 197 TFEU would deserve a lengthier analysis than I can undertake here. However, suffice it to say that such reasons of public interest or of public policy are not solely assessed by the entity that seeks cross-border collaboration, but *also or primarily* by a separate authority of that Member State. This creates two important legal effects. First, it allows Member States a significant degree of control before sub-national units enter into binding obligations. Second, it provides legal certainty to all other entities involved in the collaboration, as there is no question concerning the (domestic) legality of each other's participation.

By contrast, Article 39(1)II of Directive 2014/24/EU creates a mechanism that diverges both procedurally and substantively. First, as mentioned above (in sub-section A), Article 39(1)II seems to create a system of *self-assessment* of whether there are mandatory public law requirements that create obstacles to trans-EU collaboration. Given that contracting authorities wishing to enter into trans-EU collaborative procurement find themselves in a structural conflict of interest, this self-assessment is bound to result in a weak interpretation of these constraints, or an exceedingly optimistic assessment of measures implemented to remedy any shortcomings derived from the structure of the trans-EU collaborative procurement by the contracting authority itself.<sup>113</sup> This can create a latent risk of non-executability of procurement decisions in the jurisdiction concerned, which diminishes the legal certainty offered to other participants in the collaboration—as well as to third parties and, in particular, to economic operators tendering for those contracts.

Second, substantively and perhaps more importantly, the procurement-specific system also diverges from more general EGTC rules because Article 39(1)II seeks to prevent recourse to trans-EU collaborative procurement mechanisms 'for the purpose of avoiding mandatory public law requirements' of a given Member State.<sup>114</sup> This provision comes thus to operate as an escape valve to prevent excessive intervention by the EU public procurement rules in the domestic regulation of the activities of the public buyer. In particular, it imposes a limit on the (presumed) equivalence and mutual recognition of procurement decisions,<sup>115</sup> on the assumption that an element of 'public interest' encapsulated in such 'mandatory public law requirements' is not sufficiently preserved. It is thus clear that contracting authorities cannot seek to avoid domestic rules with the pretext of cross-border collaboration. EU procurement law cannot disapply such requirements in the public interest. Despite this apparent simplicity, the interpretation of this provision raises some additional difficulties. This is not least because the use of different terminology (i.e. 'public interest or public policy' vs 'mandatory public law

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<sup>113</sup> For a similar warning against forms of horizontal coordination prone to regulatory capture, see L Viellechner, 'Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law' (2015) 6(2) *Transnational Legal Theory* 312-332.

<sup>114</sup> The exact meaning of the word 'purpose' could be debated, as some may identify a subjective or intentional component in it, as well as exonerate situations where the *de facto* avoidance of mandatory public law obligations is either justified on the basis of competing *true* or *prime* objectives of the collaboration, or is the result of a concatenation of decisions about the structuring of the collaboration that a contracting authority could claim not have foreseen (or have been able to foresee) at the start of the project. This is not the only provision in Directive 2014/24/EU that creates similar difficulties. For in-depth discussion and advocating an objectified interpretation based on the effects of the administrative action, see A Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?' (2016) 18 *Cambridge Yearbook of European Legal Studies* 93-121. The problem goes beyond procurement law as well; see Opinion of AG Wahl of 6 February 2019 in case *Austria v Germany*, C-591/17, EU:C:2019:99, paragraph 72.

<sup>115</sup> By analogy, see F Merusi, 'Integration between EU Law and National Administrative Legitimacy' (2013) 2 *Ius Publicum* 1, 8-9.



requirements’) creates some difficulties for a functional alignment of the general rules applicable to EGTCs and those applicable to trans-EU collaborative procurement.

Additionally, in a difficult to understand legal technique, Article 39(1)II establishes that such mandatory public law requirements must be ‘in conformity with Union law’.<sup>116</sup> Surely, conformance with EU law is a general requirement that does not need explicit recognition. Therefore, some questions arise as to the likely interpretation of this provision.<sup>117</sup> This creates the potential for its use as a Trojan horse to erode domestic public law requirements that could be seen to ‘create difficulties’ for some activities indirectly linked to the promotion of the internal market for public contracts, or to not truly encapsulate a *sufficient* public interest—depending on how strict a proportionality analysis is applied in the judicial review of those requirements. The Directive offers very limited interpretive guidance when it simply states that acceptable constraints ‘might include, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies’.<sup>118</sup> The reference to rules on transparency and access to documents is particularly puzzling, as this is an area where domestic rules vary widely across Member States and where language issues *alone* can be particularly difficult to overcome.<sup>119</sup> Moreover, there are additional problems derived from e.g. the diversity of penalties allowed by the EU level regulation of procurement remedies that can become particularly difficult to accommodate—such as the imposition of fines on contracting authorities that breach procurement rules, which is certainly not common practice and can be difficult to accept in some jurisdictions.

A detailed assessment of these matters exceeds the scope of this paper, but it should be said that interpreting these rules from an internal market perspective will be rather complicated, as those are mandatory requirements ‘self-imposed’ by the relevant Member State and where contracting authorities can hardly claim to have subjective rights that are unduly constrained by those requirements.<sup>120</sup> Thus, any interpretation should take the starting point that the Member State had identified a valid reason in the public interest for the adoption of such requirements or constraints on administrative action. On the whole, given the weak EU competence for the regulation of trans-EU collaborative procurement and for ‘aggressive, pro-internal market’ interpretation of Article 39(1)II (see Section IV), I advocate an expansive interpretation of the latter provision so that, to the largest possible extent, the design and the implementation of agreements between collaborating contracting authorities takes into account mandatory public law requirements in all the jurisdictions concerned and ensure a maximum degree of *practical compliance* therewith.<sup>121</sup> I acknowledge that such approach can diminish the incentives for contracting authorities to engage in trans-EU collaborative procurement. However, from a normative position, I find this approach justified on the basic premise that

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<sup>116</sup> This expression is also used in Article 1(4) of Directive 2014/24/EU. A close equivalent expression—‘in conformity with the Treaties’—is used in Articles 9(1)(a), 12(1)(c), 12(2), 12(3)(c) and 17(1)(a) of Directive 2014/24/EU. The interpretive complications this raises from a systemic interpretation perspective exceed the possibilities of this paper.

<sup>117</sup> S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, Vol 1 (3rd edn, Sweet and Maxwell 2014) §5-48; Heuninckx (n 59) 194.

<sup>118</sup> Rec (73).

<sup>119</sup> For detailed analysis of the transparency rules as they apply to procurement in a broad range of EU jurisdictions, see K-M Halonen, R Caranta and A Sanchez-Graells (eds), *Transparency in EU Procurements. Disclosure Within Public Procurement and During Contract Execution* (Edward Elgar 2019).

<sup>120</sup> This makes it difficult to establish parallels with current tests under the ‘market access’ approach; see C Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 116 and ff.

<sup>121</sup> For discussion of similar issues, stressing the erosion of *ordre public* reservations in the context of global administrative law, see F Rödl, ‘Democratic Juridification Without Statisation: Law of Conflict of Laws Instead of a World State’ (2011) 2(2) *Transnational Legal Theory* 193-213.

any incentives for such projects should not come at the price of the erosion of existing guarantees encapsulated in mandatory public law requirements. In the end, if Member States want to shift the existing balance of interests implicit in those rules, they can always repeal or waive such ‘mandatory public law requirements’—although they would have to do so in a way that engages their domestic checks and balances to such a change of legislative tack. The object of the analysis in Section VI is thus to provide more details about the advocated expansive interpretation of Article 39(1)II of Directive 2014/24/EU. Before proceeding to such discussion, I will extract some preliminary conclusions concerning the need to reconsider the (de)regulation of trans-EU collaborative procurement in the EU, at least by way of *soft law* issued by the European Commission.

### C. The Need for an Explicit Trans-EU Collaborative Procurement Framework

The de-regulatory framework of Article 39(4) creates additional challenges because the agreement regulating cross-border collaborative procurement does not necessarily need to be published or disclosed to third parties. Indeed, Article 39(4) *in fine* only establishes that ‘[t]he allocation of responsibilities and the applicable national law shall be referred to in the procurement documents for jointly awarded public contracts.’ Therefore, other than an obligation to *replicate* some of the content of the agreement, participating contracting authorities seem able to keep the rest of their agreement confidential—subject only to domestic transparency and freedom of information rules, which would *perhaps* be triggered by Article 39(1)II (as discussed in the previous sub-section). This can create a significant level of opacity that would render trans-EU collaborative procurement the least transparent area of EU public procurement policy.<sup>122</sup> This could have significant negative impacts on the rights of third parties (in terms of e.g. administrative and judicial review) and more broadly in terms of public accountability, as tracing back the mechanisms of participation of a given contracting authority in a trans-EU collaborative project could become rather complicated.<sup>123</sup> Even if the flexibility and minimal requirements applicable to trans-EU collaborative procurement initiatives can facilitate regulatory experimentation,<sup>124</sup> this should not be at the expense of a robust transparency regime that allows for adequate accountability<sup>125</sup> and, importantly, for the clear identification and dissemination of good practice, so as to promote mutual learning and further experimentation. There is thus a need for an explicit and transparent framework, as the de-regulatory approach adopted by Directive 2014/24/EU falls short of ensuring adequate guarantees and may result in very patchy regulation derived from the unavoidable judicialization of the interpretation of the hybrid regulatory mechanisms created by Article 39.

It is worth noting that the European Commission has set the promotion of joint cross-border public procurement as one of its six strategic priorities in this area,<sup>126</sup> and signalled its commitment to ‘further raise awareness and promote good practice for joint cross-border

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<sup>122</sup> On par with the situation in the context of collaborative defence procurement, which faces exactly the same issue, as intergovernmental arrangements such as a Memorandum of Understanding to launch collaborative programmes are unpublished; see Heuninckx (n 59) 139 ff.

<sup>123</sup> This situation replicates the more general phenomenon of experimentation with new modes of administrative action in the EU legal space; Hofmann, Rowe and Türk (n 82) 628-29.

<sup>124</sup> Sabel and Zeitlin (n 14).

<sup>125</sup> For related discussion, stressing the relevance of experimentation regarding *more* rather than less transparency in administrative activity, albeit in the context of networked administration *proper*, see the interesting analysis by A Psygkas, ‘From the “Democratic Deficit” to a “Democratic Surplus”. Constructing Administrative Democracy in Europe (OUP 2017) 60-63 and 305-13.

<sup>126</sup> European Commission, *Public procurement strategy* (undated) <[https://ec.europa.eu/growth/single-market/public-procurement/strategy\\_en](https://ec.europa.eu/growth/single-market/public-procurement/strategy_en)>.

procurement'.<sup>127</sup> However, there are two main difficulties with this. The first one is simply empirical. Given the limited number of (publicly-known) trans-EU collaborative procurement projects, it seems difficult to identify and evaluate good practices in the yet underdeveloped living lab of cross-border procurement practice—in particular in the absence of enhanced transparency requirements and improved data collection. The second one is logical and concerns the Commission's own assessment of the barriers to a greater uptake of this type of joint cross-border procurement. As discussed in Section IV, it seemed like the Commission identified legal uncertainty as *the main* difficulty preventing cross-border procurement collaboration. By that logic, unless and until the legal framework is *truly and fully* clarified, the practical impact of the adoption of Directive 2014/24/EU will remain extremely limited. Thus, I suggest that the Commission would be well advised to concentrate its efforts, at least initially, in more closely observing the living lab of trans-EU collaborative procurement and using that learning to develop an explicit framework for trans-EU collaborative procurement, which it could easily do via *soft law* in the form of an interpretative notice. In the next section, I address the main elements for such a framework.

## VI. A SKETCH OF THE MAIN FUNCTIONAL GUARANTEES REQUIRED IN TRANS-EU COLLABORATIVE PROCUREMENT

Picking up on some of the themes in the previous discussion, this section discusses the main functional guarantees required for the preservation of basic values of transparency, accountability and judicial review in trans-EU collaborative procurement.<sup>128</sup> Ideally, such guarantees would derive from a general framework (even if in the soft law form of 'best practices' or guidelines issued by the Commission). In its absence, however, I argue that participating contracting authorities should strive to deliver the same guarantees in the agreements they conclude for the implementation of trans-EU procurement. These guarantees are not ranked in any order of importance, but simply discussed around the mentioned main goals of ensuring transparency, fostering accountability and subjecting trans-EU collaborative procurement to effective judicial review. This discussion does not attempt to be exhaustive.

### *A. Transparency and Access to Documents as Facilitators of Accountability*

It is rather telling that the Directive explicitly mentions domestic provisions on transparency and access to documents as likely mandatory public requirements that cannot be avoided by contracting authorities participating in trans-EU collaborative procurement (see Section V.B). In that regard, I submit that trans-EU procurement collaborations should be subjected to *all transparency and access to documents* rules applicable in the Member States of the participating contracting authorities. As such, this approach is likely to result in multiple publication of notices, in multiple disclosure or online publication of documents, and in subjection to the highest standard of disclosure amongst the rules on freedom of information and access to documents—for example, by accepting the disclosure of documents according to the least protective standard for otherwise protected information, such as commercially sensitive information. In addition, the relevant transparency and freedom of information rules should be complied with even if, in a specific jurisdiction (and in particular if it is in the jurisdiction of the applicable procurement law), the rules would not apply to a given contracting authority due to its domestic treatment of e.g. its private law statute or any other derogation from general rules. The prospect of such maximum disclosure may make the collaboration

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<sup>127</sup> European Commission, *Making Public Procurement work in and for Europe*, COM(2017)0572 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0572&from=EN>>.

<sup>128</sup> For useful, broader discussion, see also C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *European Journal of International Law* 187-214; and C Franchini, 'European Principles Governing National Administrative Proceedings' (2004) 68 *Law and Contemporary Problems* 183-96.

relatively unattractive to contracting authorities under lower transparency requirements, but any different approach would result in *de facto* avoidance of transparency rules in one or some Member States. Moreover, given that transparency requires online publication, distinguishing between *places* of publication of the information does not make much sense, as the information will circulate (or *rectius*, be globally available) once published.

This however raises the obvious issue of the language in which the trans-EU collaboration is carried out and the linguistic requirements applicable to the publication of the relevant documentation. This issue may have a much more prominent role in the context of trans-EU collaborative procurement than in other areas of European public law (e.g. in the activities of networks of administrations) because in this area there is no linguistic intermediation by the domestic authority that bridges any linguistic discrepancies between the common language used in the trans-EU collaboration (generally, English) and the domestic languages used by economic operators and third parties to interact with the domestic authority. The (online) availability of relevant documents in languages other than those in which a contracting authority would operate in a domestic procurement may comply with *formal* transparency requirements, but it would fail to ensure sufficient *material* transparency. Therefore, if not strict legality, I submit that good practice requires the translation of all documents involved in a trans-EU collaborative procurement project into all official languages of the Member States where the participating contracting authorities are located (which can multiply the number of languages in some cases, depending on the linguistic regime of sub-national contracting authorities). The only second-best alternative would be to consider that trans-EU collaborative procurement carried out entirely and exclusively in English could be an acceptable compromise, perhaps adding requirements for the publication of summaries of the main documents into the relevant languages.<sup>129</sup> However, this could clash with Article 3(3) of the Treaty on European Union, which requires the EU to respect its rich cultural and linguistic diversity and ensure that Europe's cultural heritage is safeguarded and enhanced.

### *B. Ensuring Effective Judicial Review and Procurement Remedies*

Along the same lines, I submit that trans-EU collaborative procurement should be premised on a principle of *maximum access to judicial review and cumulation of access to remedies*. Given that Directive 2014/24/EU is silent on the applicable remedies, a restrictive interpretation could lead to limiting the possibilities to challenge decisions in the jurisdiction of the contracting authority(ies) responsible for the specific aspect of the procurement procedure that was challenged, under that applicable law and, by implication, in that language. The problems derived from this restrictive approach are evident in that it raises the bar of challenging procurement decisions, can delocalise them in a way that significantly raises the cost of legal challenges, and also allows for *forum shopping* by the participating contracting authorities where the available remedies diverge across jurisdictions.<sup>130</sup>

To avoid this situation, at a minimum, participating contracting authorities should voluntarily subject themselves to the jurisdiction of all courts and review bodies of all their Member States. They could even accept the applicability of the most stringent remedies rules. However, this could end up generating situations where the court of a Member State needs to review a procurement decision subjected to the law of another Member State and use the

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<sup>129</sup> There would be some support for this on the basis of the rules in the Prospectus Regulation, which however require translation of a summary of the relevant documents. See Art 27 of Regulation 2017/1129/EU of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12.

<sup>130</sup> Along the same lines, see De Boe (n 72) 213-14.

remedies of the law of a third Member State.<sup>131</sup> This is, to put it mildly, not a very likely scenario as things stand. It must be recalled that, in the context of the Green Paper<sup>132</sup> and the consultation that preceded the adoption of the 2011 Proposal, ‘most respondents ... confirmed that their national law would not allow a contracting authority to be subject to a review procedure in another Member State’.<sup>133</sup>

The need to create specific rules on jurisdiction and mutual recognition of review decisions was evident in the 2011 Proposal (see Section III.B above). However, the irritation that rules such as those proposed in the 2011 Proposal could create in some Member States with tight rules on the jurisdiction of their administrative courts, as well as the negative impact they could have on the rights derived from the Remedies Directive<sup>134</sup> were probably behind the abandonment of the rules on jurisdiction and mutual recognition in the final text of the Directive. However, simply suppressing those controversial rules has not sorted out the problem and the legal uncertainties surrounding judicial review of collaborative cross-border procurement remain largely the same as prior to the adoption of Directive 2014/24/EU.<sup>135</sup> The European Commission could have fixed this problem by proposing a reform of the Remedies Directive, which was subjected to a review of its regulatory fitness and performance (REFIT) in 2013. However, in 2017, and despite repeatedly acknowledging that there is much needed clarification on the interplay between the Remedies Directive and the 2014 Public Procurement Package, the Commission decided that no legislative action was needed.<sup>136</sup> This perpetuates the practical legal difficulties and uncertainty—which, arguably, continue to haunt contracting authorities considering participation in trans-EU collaborative procurement.

As things stand, the implementation of trans-EU collaborative procurement comes at the unavoidable cost of the effectiveness of the system of procurement remedies, which is one of its few advantages over other areas of regulation of the internal market.<sup>137</sup> Moreover, it generates significant legal uncertainty.<sup>138</sup> It is impossible to predict the approach that domestic review bodies and courts will follow when they are asked to apply a ‘foreign’ procurement law, to seize jurisdiction against a ‘foreign’ public administration, to review (implicit) administrative acts supporting the decision to participate in trans-EU collaborative procurement, or to execute review decisions adopted in a different jurisdiction and under a different procurement law is simply unpredictable. However, it is not difficult to anticipate a

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<sup>131</sup> A further difficulty in terms of judicial review could derive from the subjection of the agreements between contracting authorities collaborating in trans-EU procurement projects to alternative dispute resolution mechanisms. However, this issue exceeds the possibilities of analysis of this paper and, in any case, given its more limited impact on the rights of third parties, I will not address it in any detail.

<sup>132</sup> European Commission, *Green Paper on the Modernisation of EU Public Procurement Policy*, COM(2011) 15 (27 January 2011).

<sup>133</sup> De Boe (n 72) 221, by reference to European Commission, *Synthesis of Replies to the Commission’s Green Paper on the Modernisation of EU Public Procurement Policy* (2011) 13 <<http://ec.europa.eu/DocsRoom/documents/18481/attachments/2/translations/>>.

<sup>134</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395/33), as amended. A consolidated version is available at <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0665:20080109:en:PDF>>.

<sup>135</sup> De Boe (n 72) 214 and 218.

<sup>136</sup> European Commission, Report on the Effectiveness of the Public Procurement Remedies Directives, COM(2017)028 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A28%3AFIN>>. See also A Sanchez-Graells, “‘If it Ain’t Broke, Don’t Fix It’? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts’ in S Torricelli & F Folliot Lalliot (eds), *Oversight and Challenges of Public Contracts* (Bruylant 2018) 495-534.

<sup>137</sup> S Weatherill, ‘EU Law on Public Procurement: Internal Market Law Made Better’ in Bogojevic, Groussot and Hettne (n 16) 21-50.

<sup>138</sup> De Boe (n 72) 225.

relatively high degree of judicial resistance and the ensuing likelihood of conflicts of jurisdiction,<sup>139</sup> as well as problems in the coordination of parallel claims in different jurisdictions, or even in different jurisdictional branches of the same Member State (e.g. in administrative and commercial or civil courts). Given full awareness of these difficulties, the decision by the European Commission not to review the Remedies Directive to coordinate it with the substantive rules of the 2014 Public Procurement Package is simply unacceptable.<sup>140</sup>

### *C. Additional Guarantees to Safeguard the Probity of the Procedure*

Finally, I submit that it is necessary to ensure cumulative compliance with the mandatory procurement rules that guarantee a ‘public interest’ on the probity and integrity of the procurement process (e.g. regarding the exclusion of economic operators, or rules on conflict of interest). The principle should be that an agent should not be able to take part in the collaborative procurement procedure if it could not take part if the procurement was subject to the rules of a different Member State amongst those of the participating contracting authorities. This applies to both economic operators and to the agents or employees of contracting authorities (e.g. members of evaluation boards, concerning the rules on conflicts of interest).

## VII. CONCLUSION

This paper has shown how the emergence of trans-EU collaborative procurement can serve as a useful ‘living lab’ for the observation, theorisation and critical analysis of new issues of relevance for the wider endeavour of construction and understanding of European public law. In these concluding remarks, rather than summarising the difficulties and shortcomings of the regulation of trans-EU collaborative procurement in Directive 2014/24/EU, I will recapitulate the main ideas that I consider to be of broader application.

A first idea would be that having a proper understanding of the purpose of the cross-border collaboration or administrative interaction that EU law may seek to regulate is of paramount importance, as this will determine the regulatory approach that should be followed and, more importantly, establish the extent to which the EU has competence to regulate such a phenomenon. Given that this type of phenomenon tends to emerge before its regulation—i.e., appear in an *extra legem* dimension of the EU legal space—it may be worth allowing for more time so that the experimentation in the living lab of transnational administrative relationships provides some valuable learning concerning the real difficulties, possible solutions and the impact on the rights of affected individuals and collectives. Skipping this step with the aim of fostering a preconceived type of trans-EU activity may result in inadequate regulatory design, incorrect or ineffective legal rules and, in the end, a mirage of having dealt with a regulatory need—as Directive 2014/24/EU could, at first sight, give the impression of having created a full and workable regulatory solution to the (perceived) problem of legal uncertainty concerning trans-EU collaborative procurement.

A second idea would be that the development of solutions for trans-EU problems should not come at the cost of the basic values of public law common to the legal traditions of the Member States, such as transparency, accountability and judicial review. In that regard, developing solutions that structurally imply an erosion of these principles can only result in problems down the line, as well as potentially create internal inconsistencies within European public law or, at least, de-regulatory tensions that may result in a permanent redesign of

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<sup>139</sup> For a practical example, see Stalzer (n 31). For reflections on the impact of judicial resistance on the development of EU public law, see Craig (n 73) 468.

<sup>140</sup> There are, of course, more reasons; R Caranta, ‘Remedies in EU Public Contract Law. The Proceduralisation of EU Public Procurement Legislation’ (2015) 8(1) *Review of European Administrative Law* 75-98.

solutions that are still in the early stages of their implementation—such as the tensions between trans-EU collaborative procurement and the more general regulation of cross-border collaboration through EGTCs.

A final idea is that the theoretical potential of the internal market should not guide regulatory activity, and that the development of European public law should remain in sync with the actual realities of the internal market and its (limited, *rectius* bounded) functioning. In that regard, the wilful ignorance of major practical difficulties, such as linguistic issues and the lack of an appropriate revision of the rules on procurement remedies, can only mar the effort of attempting the regulation of trans-EU collaborative procurement.

To try to end on a more positive note, perhaps a silver lining can be found in the fact that even defective regulation can provide a fertile living lab for the (re)design of European public law. Thus, one would hope that the emergence of any further experiences of contracting authorities willing to engage in trans-EU collaborative procurement under the regime of Directive 2014/24/EU will serve to improve its regulation in the next iteration of revision of the EU public procurement rules.