

**DO EUROPEAN PUBLIC BUYERS PURCHASE TOGETHER? AN ASSESSMENT OF  
JOINT CROSS-BORDER PROCUREMENT CONTRACTS PUBLISHED IN TED IN  
2017 AND BEYOND**

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## INTRODUCTION<sup>2</sup>

Cooperative procurement can take several different forms<sup>3</sup>, depending on the intensity of the collaboration between the buyers and the level of commitment<sup>4</sup>. It may cover a wide range, including: informed procurement through the sharing of information; the coordination of certain phases of the procurement procedure (e.g. market research, pricing); the preparation of common technical specifications for what will be procured by the buyers, each conducting a separate and parallel procedure; and situations where the contracting authorities jointly conduct one procurement procedure either by acting together or by entrusting one contracting authority with the management of the procedure on behalf of the others, for instance via a Central Purchasing Body (CPB).

Joint procurement activity might be performed by contracting authorities within the same country or from different Member States. A particular dimension of joint procurement is joint cross-border procurement, which implies contracting authorities or entities from different Member States ‘buying’ and awarding a contract together.

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<sup>2</sup> I would like to thank Samira Boussetta, Laura Broomfield, Cristian Danciu, and Isabel Da Rosa for their comments on this paper.

<sup>3</sup> See Recital 71 of Directive 2014/24/EU.

<sup>4</sup> J. Espín, J. Rovira, A. Calleja, N. Azzopardi-Muscat, E. Richardson, W. Palm, D. Panteli “*How can voluntary cross-border collaboration in public procurement improve access to health technologies in Europe?*” World Health Organization 2016 (acting as the host organisation for, and secretariat of, the European Observatory on Health Systems and Policies), Policy Brief 21.

The new European rules for public procurement have greatly clarified the applicable legislation<sup>5</sup>. For the first time, Directive 2014/24/EU<sup>6</sup> (hereafter referred to as the ‘Classical Directive’) and the Utilities Directive 2014/25/EU<sup>7</sup> explicitly contemplate the possibility of awarding public contracts through contracting authorities or contracting entities from different Member States by means of cross-border procurement collaboration. They do so by incorporating different cross-border modalities for public-public cooperation<sup>8</sup>: i) the use by a contracting authority of the centralisation services offered by a CPB located in a different Member State; ii) a general provision allowing joint collaboration by contracting authorities or entities located in different Member States; and iii) the creation of a joint legal entity pursuant to an agreement entered into by different contracting authorities.

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<sup>5</sup> See Article 39 of Directive 2014/24/EU and Article 57 of Directive 2014/25/EU.

<sup>6</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

<sup>7</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

<sup>8</sup> R. Cavallo Perin and G.M. Racca ‘European Joint Cross-Border Procurement and Innovation’; and I. Locatelli, ‘Process Innovation Under the New Public Procurement Directives’, both in G. M. Racca - C. R. Yukins (eds.) *Joint Public Procurement and Innovation. Lessons Across Borders*, coll. Droit Administratif/ Administrative Law Collection, Brussels, Bruylant, 2019.

Moreover, the European Commission promotes joint cross-border procurement in its dialogues with relevant stakeholders. A recent feasibility study<sup>9</sup> for the European Commission showed that aggregating demand in the case of joint cross-border procurement generates significant savings and other significant spill-over effects for buyers in terms of know-how exchange.

This procedure has a strong internal market dimension from the demand side. In fact, it implies that contracting authorities from (at least) two Member States pool demand and cooperate in the design of the call, its preparation, and the award of the contract. This also allows buyers to share the risk of procuring innovative solutions. However, it also generates positive effects on the supply side in terms of cross-border trade, although it may also have an impact on the structure of the market, which should be properly assessed on a case-by-case basis.

The objective of this article is to carry out a factual assessment of the cases of joint cross-border procurement recorded in 2017, the first year after the deadline for transposition of the Directive (April 2016) (and in any event, before the introduction of a modification in the standard forms<sup>10</sup> it was not possible to identify the relevant cases). This article provides the first comprehensive overview of joint cross-border procurement in the EU, allowing the discovery of the main features of projects and procedures used by buyers. It is very much

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<sup>9</sup> BBG-SKI, Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States, December 2016. Available at <http://ec.europa.eu/DocsRoom/documents/22102>.

<sup>10</sup> Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011, OJ L 296, 12.11.15.

about understanding what has happened: this is key to future improvements and can be useful for promoting better co-procurement in the era of cooperation.

This assessment of joint cross-border procurement is limited to cases of a contract being awarded, or a framework agreement being concluded, either jointly or via a joint entity, by several contracting authorities located in various Member States or via two foreign CPBs. Therefore, coordinated procurement implying several parallel procedures managed by buyers in different Member States is not covered here.

In terms of structure, the article is organised in 9 sections. Section 1 describes the data used for the analysis, while section 2 provides an overview. The subsequent sections cover an assessment of: contracting authorities/entities cooperating across borders (3); the value of the contract and type of procurement (4); the projects – what is purchased and why (5); elements of the procedure (6); level of competition (including cross-border) and SME participation (7); and cross-border procurement (8). The last section (9) describes the results of a survey of the objectives and challenges of buyers and looks at what happened beyond 2017. A conclusions section closes the article.

## **1. THE DATA**

The data used for the assessment are the contract award notices<sup>11</sup> (CANs) published in the Tender Electronic Daily<sup>12</sup> (TED) database<sup>13</sup>. TED data are published in open format at

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<sup>11</sup> See Article 50 of Directive 2014/24/EU.

<sup>12</sup> Tenders Electronic Daily, <http://ted.europa.eu>

<sup>13</sup> The Directives requires Member States to send data electronically to the Publication Office of the European Union (Article 50(2) of Directive 2014/24/EU). The format and the procedure for sending notices electronically as

the European Open Data Portal in two different formats and in different packages<sup>14</sup>. The standard forms<sup>15</sup> allow the buyer to explicitly identify joint cross-border procedures. They were being used by Member States as of 2017, and at this point in time data are available for that year only.

CANs relating to European Union (EU) institutions' procurement procedures that are open to agencies and institutions located in different Member States are not covered by this assessment. These procurement procedures are all based on the same legal instrument (the Financial Regulation<sup>16</sup>). The legal context in which the EU institutions and agencies operate cannot be compared with that of contracting authorities or entities conducting procurement at national level<sup>17</sup>, each under a different national legislation, albeit partially harmonised due to the effect of the transposition into national law of the Directives.

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established by the Commission are made available at <http://simap.europa.eu>, as referred to in Annex VIII(3)c of Directive 2014/24/EU so as to ensure publication in TED.

<sup>14</sup> <http://data.europa.eu/euodp/en/data/dataset/ted-1>

<sup>15</sup> S209

<sup>16</sup> Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the general budget of the Union, repealing Regulation (EU, Euratom) No 966/2012 (2012 Financial Regulation), OJ L 193, 30.7.2018. The last version of the Financial Regulation entered into force and is applicable from 2 August 2018.

<sup>17</sup> Although the EU institutions and national contracting authorities buy under different legal regimes, the market context is comparable as they both buy similar types of goods and services.

In addition, CANs concerning pre-commercial procurement are not included since public procurement Directives apply to public service contracts for research and development services only where specific conditions are met<sup>18</sup>.

Although the obligation to transpose the Directives into national legislation was set for April 2016<sup>19</sup>, transposition was still not complete by all Member States in 2017. The ongoing transposition of the public procurement package into national legislation has probably affected the implementation of this innovative procedure. The absence of transposition may have discouraged buyers potentially interested in testing this new procedure. However, in a few cases, contracting authorities or entities have taken part in joint cross-border procedures before the transposition of the relevant provisions of the Directives into national law. The same was noted in the feasibility study<sup>20</sup> referred to in Introduction above, which assessed four joint cross-border procurement projects, all implemented before transposition of the Directive into the respective legal system of the Member States.

The information published in TED notices often suffers from missing values and reporting mistakes (particularly in the form of nonsensically large values)<sup>21</sup>. However, nothing suggests that the data relating to joint cross-border procurement suffer more serious reliability concerns than that limited to national procurement procedures. On the contrary, the involvement of more buyers than in a traditional procedure suggests a higher degree of control deriving from the greater number of parties involved, and possibly a higher rate of

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<sup>18</sup> See Articles 14 of Directive 2014/24 EU and 32 of Directive 2014/25/EU.

<sup>19</sup> Respectively Articles 90(1) of Directive 2014/24/EU and 106(1) of Directive 2014/25/EU.

<sup>20</sup> See footnote 9.

<sup>21</sup> Public Procurement Indicators 2017, DG GROW <https://ec.europa.eu/docsroom/documents/38003>

compliance with the key elements of the procedure such as publication in TED and the correct indication of joint cross-border working. Furthermore, the involvement of buyers from different Member States creates an incentive to transmit the information to TED and to ensure the forms are filled in in full: this ensures that suppliers from all parts of the EU (including those coming from countries other than that of the lead buyer) can access the data on the call for tender (TED's home page has between 20,000 and 30,000 visits per day, and over 10 million annually, from the EU and abroad).

The assessment has been carried out on the basis of aspects made available via the CANs published in TED. The data available include many important issues such as: the type of procurement and the characteristics of the buyers pioneering this innovative procedure; key aspects of the procurement procedure (lots, use of framework agreements, award criteria used); the model of joint cross-border procurement used; the use of EU funding; and the level of competition.

Unfortunately, CANs do not provide comprehensive information on most relevant legal issues, such as the pre-award agreement between the buyers (or the international agreement between the Member States concerned), the contractual issues, and other relevant aspects of this specific form of public-public cooperation. Nonetheless, the information available is still very interesting in policy terms as it allows a very first comprehensive observation of the projects that have occurred in a recent year. This allows the uncovering of some previously unknown common characteristics of joint cross-border procurement procedures and projects.

To cover some specific aspects of the procedure, a small questionnaire was sent to a number of buyers. The responses obtained cover about 10 contracts awarded under the Classical Directive (more than half of the total of 17 that have been awarded).



## **2. OVERVIEW**

In total, in 2017 34 CANs were published concerning joint cross-border procedures involving buyers in different Member States. Clearly, the total number of CANs concerning joint cross-border procedures recorded is insignificant compared with the total of CANs published annually in TED (over 158,400 for all Directives). The number of cases reported is far too small to be a statistically meaningful sample of such a large universe. In terms of the value of procurement, the estimated value of tenders published in TED in 2017 reached 437.3 billion euros for the Classical Directive, and 545.4 billion euros if all Directives are considered. In 2017 the total value of all contracts awarded through a joint cross-border procedure amounted to 230 million euros, a small fraction of the total.

In 2017, 19 CANs concerned procedures for the procurement of goods, services or works based on the Classical Directive, while 15 were based on the opening up to competition of procurement by contracting entities operating in the energy, water, transport, and postal services under the Utilities Directive. No case concerned the application of defence procurement under the Defence and Security Directive 2009/81/EC<sup>22</sup>.

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<sup>22</sup> 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 work contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009 p. 76. In 2019 the European Commission published a notice on guidance on cooperative procurement in the field of defence and security, OJ C 157, 8.5.2019. The notice clarifies a range of options for cooperative procurement by two or more Member States.

Out of these 34 cases, five contracts were not awarded: two under the Classical Directive and three under the Utilities Directive. The reasons for non-award are known only in a couple of cases, both under the Utilities Directive: in one case, either no tender was received or all were rejected; in another case, the contracting entity decided to cancel the call as the minimum requirements provided in the invitation were not proportionate to the scope of the contract.

In addition, the total number of contracting authorities was extremely small relative to the total number of buyers operating in the EU, which is estimated at around 300,000. In total, in 2017, 65 different buyers used at least once a procedure involving one (or more) buyer from another Member State. In 2017 almost the same number of buyers were awarded one or more contracts under both the Classical Directive (32) and the Utilities Directive (29); some of them managed more than one procurement procedure, typically with the same buyers (some contracting entities were involved in up to four different procedures). However, some utilities also experienced joint cross-border procedures with different buyers' groups. All these cases indicate familiarity with handling this kind of procedure and a positive trade-off between the benefits obtained and the costs and complexities of the procedure.

Buyers from many Member States took part in joint cross-border contracts, with the UK, Ireland, and Germany leading the ranking. Overall, there was a good involvement of buyers from eastern Europe. Mediterranean buyers, as well as from Sweden and Luxembourg, did not take part in joint cross-border procedures in 2017: this absence may be for various reasons, such as legal ones (e.g. late transposition) and a lack of awareness of the new opportunities stemming from the Directives.

### **3. CONTRACTING AUTHORITIES AND CONTRACTING ENTITIES COOPERATING ACROSS BORDERS**

#### *Contracting authorities*

As previously indicated, 19 cases (17 awarded) concerned contracting authorities as defined by the Classical Directive, and 15 cases (12 awarded) concerned contracting entities under the Utilities Directive.

Most buyers were part of the national or State administration, while in only three cases were the relevant procedures managed by regional or local authorities. Local and regional bodies can be territorial and it may be more politically difficult to conduct cross-border procurement, and to have to justify to people in their region why their rates and taxes are not staying within the locality. It could also be that contracting authorities operating at national level have the skills and the structure to implement this kind of cooperation with a buyer from another Member State. However, the cases indicated that smaller buyers also seem to have the administrative capacity allowing them to manage this type of procurement, and an interest in doing so.

Regarding bodies governed by public law and operating under the Classical Directive, the main sector of activity was transport, accounting for 11 contracts awarded (and 2 non awarded). The main subsectors were all concerned: including maritime (three awards), railways, air traffic control, and river navigation (one award each), and construction of a bridge (two awards); the remaining five procedures concerned bus transport services, of which only two have not been awarded.

The most interesting cases are those not relating to the transport sector (see section 6). Regulatory bodies and buyers operating in the health sector were involved in two

procedures each; one related to the organisation of cultural activities, one to the procurement of vehicles. This shows that although most projects concerned the transport sector, joint cross-border has attracted buyers operating in different sectors.

#### *Contracting entities concerned*

Not surprisingly, out of the four sectors covered by the Utilities Directive, almost all buyers that ran a joint cross-border procedure came from the electricity sector and were concerned with assessing, developing, and building offshore activities to connect their respective grids. In fact, this is in line with the higher economic weight of the electricity sector amongst the sectors covered by the field of application of the Utilities Directive (which includes electricity, postal services, water, and transport).

#### *Size and composition of the buyers' groups*

Typically, the size of the buyers' group was small. Two thirds of the cases recorded involved only two contracting authorities or entities (see graph 1 below). This pattern was common to procedures conducted under both the Classical and the Utilities Directive. As expected, as the number of buyers increased, the number of cases reported decreased; this was likely to be related to the increasing complexity and coordination effort needed (including the preparation of the tender documents, travelling, translation/consolidation of documents, etc.) if a large group of buyers was associated with the procedure. As indicated in the cost-benefit analysis of the feasibility study<sup>23</sup>, the participation of a large number of buyers could lead to lower overall savings; moreover, the benefits deriving from economies

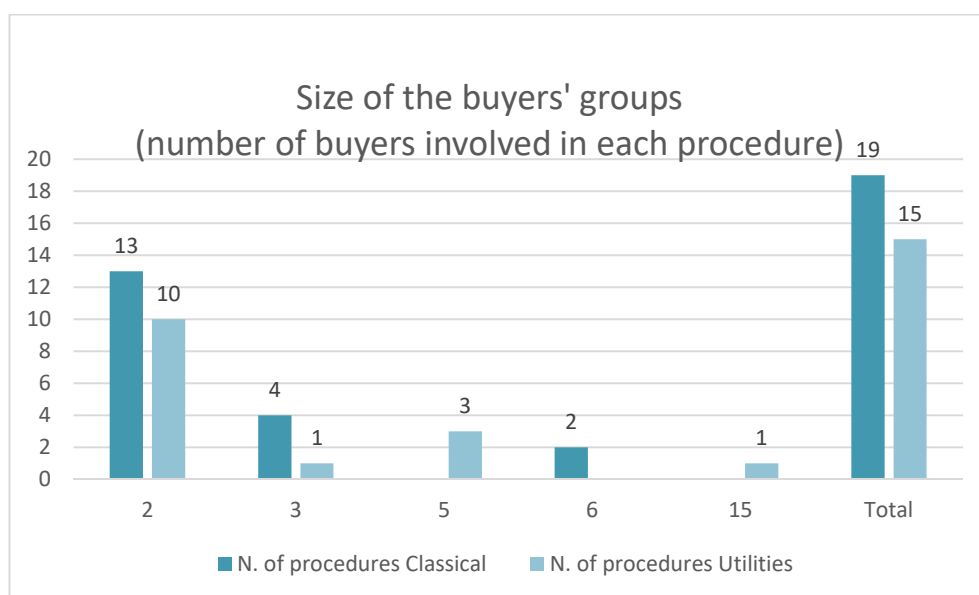
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<sup>23</sup> Op. cit. at footnote 9.

of scale are degressive – the positive effect per additional unit of volume gets smaller as more goods or services are purchased.

In a few extreme cases, the size of the buyers' group and the number of different Member States from which they originated was very high. The largest buyers' group included 15 contracting entities, and this was an exception. The largest buyers' groups under the Classical Directive were recorded in two different procedures, each including six different buyers (in one case consisting of cities and local/regional authorities from two different Member States; in another case including the bodies in charge of waterway management and navigation over the Danube river).

Graph 1:



Source: calculation based on TED data

In most cases, joint cross-border procurement projects included two buyers, each coming from a different country. Therefore, the distribution of the number of Member States ‘represented’ was largely concentrated in procedures managed by contracting authorities or entities from only two Member States. In two cases the number of nationalities of origin of the buyers stands out. In the first one, 15 contracting entities from eight different Member States decided to procure jointly. The object of the procurement was business and management consultancy and related services. In the second case, six contracting authorities from five Member States (Austria, Romania, the Slovak Republic, Croatia, and Bulgaria) jointly procured IT consulting services regarding the technical and operational specifications for the joint monitoring system of the Danube river. Interestingly, both procedures were carried out under Austrian law; in both cases, the offers could be submitted in English and this can be interpreted as signalling an intention by the buyers to invite foreign suppliers.

It often occurred that some members of the buyers’ group were from the same Member State; i.e. the number of different nationalities was generally lower than the total number of members of the group of buyers. Presumably, this allowed for a reduction in the coordination effort created by the need to deal with different procurement legislation, administrative culture, contract execution legislation and practice, etc. It also facilitated the creation of trust between different parties. It may also have had a negative impact in terms of one country claiming rights of control on the basis of having more contracting authorities involved, with the others having to fall into line. However, since participation in the buyers’ group was voluntary, there was a solution to such a risk (leaving the group).

With regard to cases under the Classical Directive, buyers from 15 Member States awarded at least one procedure (16 under the Utilities Directive). In general, very good participation by contracting authorities can be noted from eastern Europe. Contracting authorities from the Czech Republic, Slovak Republic, Hungary, and Poland awarded several calls; Bulgarian, Romanian, and Croatian buyers each awarded one.

The UK was the Member State most frequently ‘represented’ in CANs relating to joint cross-border procurement published in 2017; in practice, one or more contracting authorities from the UK took part in eight contracts. Except in one case, the UK contracting authorities were in partnership with an Irish one. Hence Ireland was the second most frequently represented Member State (seven CANs); Germany and the Slovak Republic followed with four contracts awarded.

In some cases, the same buying group ran several joint cross-border procedures. It should be remarked that not all procedures by such groups applied the same national procurement legislation (for instance, a buyers’ group awarded three contracts; in two cases, the procurement legislation was the English one; in another one the Irish). This seems to suggest some choices being made by the buyers, possibly with the aim of sharing the burden of handling the procedure as lead buyer.

Regarding the Utilities Directive, one or more German contracting entities took part in six procedures; Danish and Dutch ones in four each. Overall, a good number of procedures were reported involving contracting entities from eastern Europe (Poland, the three Baltic States, Bulgaria, the Slovak Republic, Hungary, the Czech Republic, and Slovenia).

#### **4. VALUE OF THE CONTRACTS AND TYPE OF PROCUREMENT**

The total value of joint cross-border contracts awarded in 2017 was 230 million euros. The average value of the contracts was above 7.9 million euros. The average value of contracts was larger in procurement under the Classical Directive than under the Utilities Directive, at 9.6 and 5.6 million euros respectively. In general terms, these values concern projects of a large size, which makes sense, as joint cross-border contracts imply the adding together of two or more markets. However, these average data are greatly affected by a few

large contracts. As pointed out earlier, the number of joint cross-border cases was very small, and an outlier can easily affect the average. Also, the data available refer only to one year, and not to an historical series.

Regarding the Classical Directive, two contracts valued below the EU threshold were awarded (135,000 euros was the lowest threshold for publication contemplated by the Directives for 2016-2017). They were awarded jointly by a Czech and a German local body for 43,900 euros for interpretation services and 60,000 euros for local transport services. This indicates that buyers from different countries have resorted to joint cross-border procurement for relatively small contracts (often services). At the other end of the distribution, the largest contract by value concerned a works contract: the construction of a bridge between the Slovak Republic and Hungary over the Danube for 91 million euros. It is interesting to point out that for purchases under the classical Directive, in half of the cases the value of the contract was below 400,000 euros and so smaller than for most common procedures for all procurement<sup>24</sup>.

With regard to the utilities, contracts varied over a narrower value range. The smallest contract amounted to 227,000 euros, and concerned engineering services for a compressor station as part of the Baltic Pipe Project. The two largest ones were around 22 million euros and concerned the procurement of supplies by a group of electricity transmission operators from Germany and the Netherlands.

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<sup>24</sup> The density function aggregated at EU level shows that the most frequent CANs are around 450,000 euros (op. cit. footnote 21).



Tables 1 and 2 below illustrate respectively the number of awards from joint cross-border projects, by type of procurement and the value of the contract awarded<sup>25</sup>. 71% of the total value of joint cross-border contracts awarded in 2017 resulted from contracts for general procurement, and the remaining 29% from purchases carried out by utilities. In 2017 the corresponding figures for all procurement in the EU were 89% (Classical Directive) and 9% (Utilities Directive)<sup>26</sup>. This shows that the weight of joint cross-border contracts of utilities published in 2017 was higher – in relative terms – than the weight of utilities’ contracts in total procurement. This might indicate a higher inclination on the part of utilities to procure with a foreign partner when subject to public procurement law.

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<sup>25</sup> Obviously, there was no value of the contract in the CANs for procedures cancelled or with unsuccessful procurement.

<sup>26</sup> These data are based on contract notices, i.e. calls, and are a good proxy for CAN. In 2017 the share of concessions and defence contracts in the total value of public procurement was 1% in each case.

Table 1: CANs concerning joint cross-border procedures by type of procurement, 2017

Procurement of	Number of procedures		
	Classical	Utilities	Total
Goods	7	5 <sup>27</sup>	12
Services	11 <sup>28</sup>	9 <sup>29</sup>	20
Works	1	1	2
Total	19	15	34

*Source: calculation based on TED data*

Table 2: Joint cross-border procedures, value of contracts awarded by type of procurement, 2017

Procurement of	Million euros		
	Classical	Utilities	Total
Goods	57.2	53.0	110.4
Services	14.0	6.6	20.6
Works	91.2	7.8	99.0
Total	162.4	67.5	230.0

*Source: calculation based on TED data*

<sup>27</sup> In two cases the contract was not signed, however; in one case as the procurement was unsuccessful; in another one the procedure was cancelled.

<sup>28</sup> Two of these procedures were cancelled.

<sup>29</sup> One procedure was cancelled.

In broad terms, the share in value terms of goods, services, and works in joint cross-border procurement via the Classical Directive was similar to that for total procurement. In joint cross-border cases, services represented 9% of the total<sup>30</sup>, works 56%, and goods 35%. With regard to contracts granted by utilities, in 2017 the share of services was 10%, works 12% only, and that of goods 79%. Therefore, utilities' contracts were highly concentrated in the purchase of goods in comparison with the data for all procurement (where the share of goods was three times lower, at 26%).

## **5. THE PROJECTS: WHAT IS PURCHASED AND WHY**

### ***5.1 A possible taxonomy of joint cross-border procurement projects***

The first point that stands out in the cases observed is that most of them related to projects aimed at improving the connection between different countries via a network, be it relating to transport (maritime, roads, etc.), an electricity cable or a gas pipe. Here, the cross-border procedure proves an excellent tool for transnational projects/tasks in a multi-administration environment. For instance, this applies in the case of waterway management of the Danube,

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<sup>30</sup> The provision of services in joint cross-border contracts is expected have some similar patterns to the sale of services from a provider located in another Member State. The latter depends on geographical proximity and language barriers; moreover, certain services are non-tradable as they cannot be produced and delivered in separate locations. See VVA Consulting, London Economics, Joint Institute for Innovation Policy (JIIP), study for the European Commission, Directorate General for Internal Market, Industry, Entrepreneurship, and SMEs, Measurement of impact of cross-border penetration in public procurement, Final Report, February 2017, <https://publications.europa.eu/en/publication-detail/-/publication/5c148423-39e2-11e7-a08e-01aa75ed71a1>.

which flows across several countries, and for which establishing a comprehensive monitoring system inevitably requires close coordination between different administrations. In other cases, the goods, works or services procured are necessary to carry out activities taking place at the border (e.g. this is the case for activities to aid navigation between two countries). In table 3 and graph 2 below, projects are classified under the heading ‘transnational projects’ and are characterised by an inherent geographical element. In all those cases, having separate tenders, in the event of delay or withdrawal of one of the tenders, would run the risk of making the purchase technically senseless<sup>31</sup>. Of course, separate tenders would have also multiplied the uncertainties and the administrative cost of the overall process.

Other reasons can push buyers to voluntarily aggregate demand across borders. Such cases are relevant in policy terms since they indicate a genuine interest in pooling demand and sharing knowledge. The buyers’ objectives are illustrated in section 10. In the following table 3, such projects are classified under the heading ‘*demand-pooling projects*’ involving foreign buyers.

Three further categories are worth including in a taxonomy of joint cross-border projects, as follows.

- 1) Defence projects for the purchase of weapons, munitions, and other war material. Although some of the objectives would essentially be the same as those relating to the purchase of non-military equipment (economies of scale, less

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<sup>31</sup> Op. cit. footnote 9.

duplication, lower maintenance and follow-up costs, better interoperability<sup>32</sup>), these projects imply cooperation at the level of the States. Furthermore, the overarching objectives of two States in procuring weapons jointly would be grounded on different pillars (solidarity, close historical relations, membership in a common alliance, etc.) from those concerning the purchase of non-military goods or services<sup>33</sup>. In 2017, no contract was recorded regarding procurement under the Defence Procurement Directive. However, the procurement activities of the Nato Support and Procurement Agency (NSPA)<sup>34</sup>, for instance, fall in this category.

2) Procurement of innovative solutions<sup>35</sup>. Here, cooperation between buyers from different Member States would also be led by risk sharing and sharing the cost of trials, or putting together specific resources (human or financial) to experiment, develop or evaluate innovations. Some of these features would be typical of these types of innovative projects only (e.g. risk sharing), while others would be common to any joint cross-border projects (sharing of know-how and resources). Furthermore, the individual purchase may be too small for companies to make the

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<sup>32</sup> European Commission, European Polical Strategy Centre, “*Joining Forces. The Way Towards the European Defence Union*”, EPSC Brief, 14 February 2019, [https://ec.europa.eu/epsc/sites/epsc/files/epsc\\_brief\\_defenceunion.pdf](https://ec.europa.eu/epsc/sites/epsc/files/epsc_brief_defenceunion.pdf).

<sup>33</sup> G.M. Racea and C.R. Yukins, ‘Introduction. The Promise and Perils of Innovation in Cross-Border Procurement’ in *Joint Public Procurement and Innovation. Lessons Across Borders*, coll. Droit Administratif/ Administrative Law Collection, Brussels, Bruylant, 2019.

<sup>34</sup> NSPA covers five areas. Systems procurement and Lyfe Cycle Management is one of them. <https://www.nspa.nato.int/en/organization/procurement/procurement.htm>

<sup>35</sup> OECD, Public Procurement for Innovation- Good practices and strategies, OECD Public Governance Reviews, 2017

effort of coming forward with innovative solutions. The HAPPI project<sup>36</sup> belongs to this category.

3) Projects to ensure access to health technologies, and the security of supply and availability of medical products<sup>37</sup>. The joint procurement of vaccines carried out by the Baltic States between 2015 and 2018 falls in this category<sup>38</sup>. The lessons learned over the years are significant and range from project management (stakeholder analysis, communication strategy, review of working group procedures, contract management) to procedural aspects (composition of the evaluation commission, market analysis, terminology and language, etc.). Further targets are being discussed in the working group concerned, and may include both medicines and medical devices. In addition, the joint procurement conducted by the Commission (under the Financial Regulation) on behalf of the Member States during the coronavirus pandemic was aimed at ensuring the security of supply<sup>39</sup>. In emergency situations, security of supply must be ensured. In such situations, the

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<sup>36</sup> HAPPI project (*Healthy Ageing Public Procurement of Innovations*, funded by the EU. It was aimed at establishing cooperation among health CPBs. The procurement of Citrix software conducted by BBG and SKI also applied the CPB model. See op. cit. footnote 9.

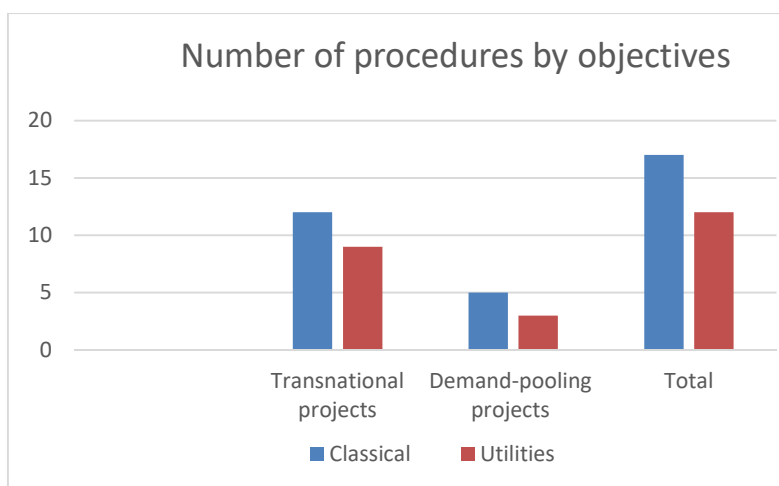
<sup>37</sup> Op. cit. footnote 4.

<sup>38</sup> Presentation by Medicines and medical devices department in the Health Procurement Group, Estonian Health Insurance Fund, October 2019. It covered BCG (2015), Rotavirus (2016), Pneumococcal (2017), and Rotavirus and Hexavalent (2018). The years refer to the publication of the contract notice and not of the contract award notice (which explains why no case was recorded in 2017).

<sup>39</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_523](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_523)

coordination of buyers becomes necessary<sup>40</sup> to avoid the market playing buyers against each other, leading to soaring prices and ineffective allocation of health equipment. Albano proposed to set up a ‘European (virtual) CPB’ aggregating demand at EU level in emergency situations. The outcome would likely be joint a cross-border procurement procedure.

Graph 2: Number of contracts awarded, by type of procurement, 2017



Source: calculation based on TED data

<sup>40</sup> G.L. Albano, “*Homo Homini Lupus: On the Consequences of Buyers Miscoordination in Emergency Procurement for the COVID-19 crisis in Italy*”, forthcoming in Public Procurement Law Review, 2020.

Table 3: Percentage of total value of contracts awarded, by type of procurement, 2017

Project classification by objective	Classical	Utilities
Transnational projects	60	21
Demand-pooling projects	40	79
Total	100	100

*Source: calculation based on TED data*

## 5.2 Transnational procurement projects

Regarding classical procurement, some relevant projects were as follows.

- A study to provide a comprehensive understanding of rail improvement opportunities at the Polish-Lithuanian border (services), taking into account the parameters of Rail Baltica<sup>41</sup>. The contracting authorities were the Lithuanian Ministry of Transport and Communications and Rail Baltica in Latvia, the latter

<sup>41</sup> Rail Baltica is a rail transport infrastructure project with the goal of integrating the Baltic States in the European rail network. The project includes five European Union countries – Poland, Lithuania, Latvia, Estonia, and indirectly also Finland. It will connect Helsinki, Tallinn, Pärnu, Riga, Panevėžys, Kaunas, Vilnius, and Warsaw.



operating as lead buyer. The contract was awarded to a Spanish engineering services firm after an open tender carried out under Latvian procurement law. Tenders could be submitted in English. Consequently, out of the seven offers received, six came from different countries. The project was co-financed by the EU.

- The Danube waterway monitoring system, whose development involved the award of a contract for IT consulting services regarding its technical and operational specifications. The procedure (competitive with negotiation) was carried out under Austrian procurement law and led by the Austrian partner of a group of six public authorities from Austria, Romania, the Slovak Republic, Bulgaria, Croatia, and Hungary partnering in the EU-funded FAIRway project<sup>42</sup>. To attract a large number of bidders, all procurement documents were prepared in English. Bids were accepted in English only. The tender was won by an Austrian SME.
- A bridge over the Danube between Komárom (Hungary) and Komárno (Slovak Republic). The Hungarian National Infrastructure Development Agency and the Slovak Road Administration awarded two open calls for tender, covering the construction works and engineering services. The applicable procurement legislation was Hungarian and both calls were won by Hungarian firms (in one case, by a consortium). All procurement documents were in Hungarian. The project was co-financed by the EU.
- The lighthouse authorities of the UK (including one buyer each from Scotland and England) and Ireland awarded three contracts to support navigation: floating aids,

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<sup>42</sup> Austria, the Slovak Republic, Hungary, Croatia, Bulgaria, and Romania joined forces in a common project (FAIRway Danube) to harmonise the level of service for hydrology, hydrography, and waterway maintenance and improve inland navigation transport. In this context, the parties set up a transnational Waterway Management System consisting of interoperable national systems, feeding a shared database with a minimum set of data (riverbed surveys, water levels, etc.).

maps, and weather-forecasting services. The procurement procedure varied (open procedure in two cases, competitive with negotiation in another one), as well as the award criteria (most economically advantageous tender in two cases, lowest price in another one), and the establishment of a framework agreement (or not), etc. The tenders were all run under English procurement law.

#### *Utilities Directive*

Most contracts awarded in 2017 concerned the integration of the European electricity system, with the aim of completing the European energy market. Interconnection also allows electricity to be exported to markets and users in other countries. Contracts included: the ‘Celtic Connector’ between Ireland and France; an investigation into a possible new connector between Belgium and the UK; and several procedures to connect grids between Denmark and Germany; the Netherlands and Germany; Denmark and Poland; and Finland and Estonia.

In particular, services were purchased for laying down cables and connectors (e.g. seabed surveys in relevant maritime zones, mine sweeping services, and engineering services). A few contracting entities were involved in several procedures, which seems to indicate a positive experience of those they had already managed previously.

Two further procedures related to the production, transport, and distribution of gas (one of them related to the construction of the Baltconnector pipeline<sup>43</sup>, a bi-directional natural gas pipeline linking Finland and Estonia. One of the utilities took part in several calls

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<sup>43</sup> The Baltic Pipe Project is a strategic gas infrastructure project with the goal of creating a new gas supply corridor in the European market. The project is being developed in collaboration between the Danish gas and electricity transmission system operator Energinet and the Polish gas transmission system operator GAZ-SYSTEM.

with buyers from different nationalities. All these projects were EU-funded and carried out with a negotiated procedure.

### **5.3      *Demand-pooling projects***

It is worth providing a short description of the object of these demand-pooling projects and procedure, as follows.

- Instrument landing systems (supplies), procured jointly by the German and Dutch traffic control operators. The procedure followed was competitive with negotiation, carried out under German law, and resulted in two contracts. Contractual law was Dutch and German.
- Organisation of cultural events (services) for the International Chemical Olympic Games 2018. The lead buyer was the University of Chemistry and Technology in Prague, buying together with Comenius University of Bratislava, and led by the Prague partner. The type of procedure was open; two bids were received. Bids had to be submitted in Czech only.
- Motor vehicles (supplies). A group of buyers including Paris, Bordeaux, Strasbourg, Brussels, and regional agency of Brussels procured jointly seven different types of electric or hybrid vehicles. The call was split into seven lots, which received between one and four bids each. The procurement procedure was carried out under French law and involved the establishment of a framework agreement. Bids had to be submitted in French.
- Blood testing reagent (supplies). The group of buyers was led by the Irish Blood Transfusion Service (IBTS) and included the UK National Health Service (NHS) and the Welsh Blood Service (WBS). The IBTS ran and administered the open call for a single supplier framework agreement. The NHS and WBS could then avail

themselves of the framework. Irish law was applied to the procurement procedure and to contract performance.

- Energy and related services (services) purchased by the UK NHS (therefore a CPB), which established a multi-supplier framework agreement to provide low-carbon energy-efficient infrastructure services and upgrades to public health facilities in Ireland. 12 bids were received in total. The contract was awarded to a large consortium of 10 suppliers from the UK (mainly) and Ireland.

Demand-pooling projects were therefore very few and concerned only goods or services. In 2017 they represented about one fourth of classic procedures, and one fifth of those of the utilities, indicating the predominance of transnational and geographical elements in joint cross-border procurement awards. However, in value terms the resulting picture is less straightforward. In fact, in value terms the share of demand-pooling projects in the total value of joint cross-border procurement projects was significantly higher. This indicates that, in general terms, demand-pooling projects concerned large contracts. The five procedures recorded varied between 1 million euros for the organisation of cultural event services in the Czech and Slovak Republics and seven lots awarded by several French (Paris, Strasbourg, Bordeaux), and Belgian (Brussels and a utility of Brussels) to purchase various types of electric and hybrid vehicles. The total contracts awarded amounted to over 28 million euros.

Overall, demand-pooling joint cross-border procurement has been used to purchase very different types of products and services, from relatively innovative ones (electric and hybrid cars in 2017) to more traditional services (organisation of an event, catering, etc). However, none of them concerned the purchase of off-the-shelf goods (i.e. mass-produced and readymade, and regularly available goods) even though could have been expected to generate further economies of scale by aggregating separate national markets.

All cases reported in 2017 were open procedures, and this is an obvious consequence of the procurement strategy chosen by the buyers, which was aimed at stimulating choice and competition. In fact, in some cases (on top of procedures taking place in the UK or Ireland) bids were often accepted only in English; likewise, in those cases, tender documents were available only in English. On the one hand, this was aimed at attracting bidders from the EU; on the other, it was necessary to prepare the tender specifications with all partners.

It is to be highlighted that none of the projects received EU funding, which follows from the fact that the projects concerned did not have a transnational nature. However, it also shows that the procurement responded to a need of the buyers, and therefore a relevant budget was allocated to it. Moreover, no procedure was challenged before a court and in general terms no buyer reported particular legal challenges. The main difficulties were related to drafting the terms of reference, or reaching internal agreement with the partners before the procurement itself.

The case under the Utilities Directive involved three large groups of Dutch and German companies seeking to purchase supplies (circuit breakers, insulators, and switches). The buyers' group included some subsidiaries.

## **6. ELEMENTS OF THE PROCEDURE**

Unfortunately, the information available in TED is rather basic and does not allow a deeper analysis of many aspects of the framework agreement or the legal relationship between the various parties involved i.e. the contracting authorities, suppliers, and CPBs as appropriate. Equally, CANs do not include information relating to international agreements or treaties between the Member States concerned providing for a special cross-border procurement regime or to the elements of joint procurement regulated through an agreement by the participating buyers.

In this respect, the parties contacted indicated that the main challenge was reaching an agreement among the participating authorities, setting out responsibilities and the budget share. This preparatory work, although necessary, added time to the procurement procedure. One case specifically concerning an NHS Foundation Trust and an Irish partner required the approval of an inter-governmental partnership and then a memorandum of understanding between the parties.

As already indicated, the Directives provide for alternative ways to implement joint cross-border procurement<sup>44</sup>. In 2017, almost all cases concerned the joint award of contracts or award of a framework agreement by two or more contracting authorities or entities. The CPB model was clearly mentioned in two cases only under the Classical Directive, both involving Irish and British contracting authorities. Some authors have highlighted the legal and administrative difficulties of implementing centralised joint cross-border procurement, i.e. using a foreign CPB<sup>45</sup>. Some further cases are known, beyond the two reported for 2017, as highlighted in the feasibility study already referred to<sup>46</sup>.

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<sup>44</sup> G. M. Racca, "Joint Procurement Challenges in the Future Implementation of the New Directives", in F. Lichère – R. Caranta – S. Treumer (ed. by) *Modernising Public Procurement: the New Directive*, DJØF Publishing, Copenhagen, 2014, 225-254.

<sup>45</sup> See in particular I. Herrera Anchustegui, "Collaborative Centralized Cross-Border Public Procurement: Where Are We And Where Are We Going To?" To be published in *Centralização Das Compras Públicas*. A. Sanchez-Graells, "Collaborative Cross-border Procurement in the EU: Future or Utopia?" presented at the workshop on 'Collaborative Efficiency in Government: The Trend, The Implications' *Upphandlingstraattlig Tidskrift* (Procurement Law Journal); 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", *European Procurement & Public Private Partnership Law Review*, Volume 12 (2017), Issue 2.

<sup>46</sup> HAPPI project and BBG – SKI. See op. cit. footnote 36.

Here it is worth mentioning one specific case. A British hospital opened a framework contract through its procurement services for the exclusive benefit of an Irish partner. The framework was therefore available for use by public sector bodies in Ireland only, while a separate framework agreement was open to organisations from the UK. The objective of the call was to enable the Irish hospitals to benefit from the significant experience gained by the lead buyer over the years in the provision of energy upgrade services. The project was based on an intergovernmental agreement and therefore an underlying political agreement to support the partner country by offering *de facto* procurement intermediary services.

In 2017, no contract was awarded that took place through a joint legal entity or any other entity established under EU law<sup>47</sup> by contracting authorities from different Member States, such as a European Grouping of Territorial Cooperation<sup>48</sup>. The latter allows public entities of different Member States to come together under a new entity with full legal personality. As there are currently 74 European Groupings of Territorial Cooperation involving members of more than 20 Member States (and more will become beneficiaries under EU Cohesion Policy), it can be expected that joint procurement could also be launched in the future by the relevant parties.

An important benchmark for comparing joint cross-border and total procurement is the proportion of procurement procedures that are negotiated with a company without a call for bids. With regard to the type of procedure, all procedures included the publication of a call for competition, and no case of direct award was recorded in 2017; for general

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<sup>47</sup> The study referred at footnote 9 covered the Brenner Base Tunnel case in the application of these provisions.

<sup>48</sup> As established under Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006. The European Grouping of Territorial Cooperation Regulation was established in 2006 and was the first European cooperation structure with a legal personality defined by European law.

procurement the use of a negotiated procedure without prior publication accounted for 5% of procedures in 2017. On the basis of this indicator, the bidder selection process was more transparent and open to competition in the case of joint cross-border procurement than procurement in general. Indeed, the cases and circumstances for direct awards (for instance, absence of competition, extreme urgency) provided for in the Directive<sup>49</sup> seem difficult to meet in the case of joint cross-border procedures.

Another significant indicator is the proportion of procedures awarded only on the basis of lowest price. It reflects how public buyers choose the companies they award contracts to, and in particular whether they decide based on price alone, or if they also take quality into account. Lowest price was used as the award criterion only in one third of the cases (11 of 33 cases for which data are available), with no significance difference between procedures involving utilities or contracting authorities under the Classical Directive. The choice of criteria obviously depends on what is being purchased, but the indicator for joint cross-border procurement reflects a better performance than general procurement, for which 44% of procedures chose their contractor only on the basis of price.

In general terms, the procurement procedures are all subject to the national law of the lead buyer only; no case has been found in which responsibilities are allocated to different buyers and in which different legislation accordingly applies (a possibility explicitly covered by the Directives). The same clarity is not available in respect of contract law (and often the procurement documents themselves are rather vague about this point). In some cases, the tender resulted in two separate contracts, which were based on the contract law of the place of performance of the contract. In others, buyers indicated that both with regard to procurement and contract law they applied the legislation of the lead buyer, regardless of the

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<sup>49</sup> Recital 50, and Article 32 of Directive 2014/24/EU.



place of performance. In explaining their motives for this decision, the buyers indicated that having the full process subject to the same legislation would have been clearer and simpler for the parties involved.

Several procedures have been run electronically (including the submission of tenders) as the transition to eProcurement set by the Directives was already well advanced in the relevant Member States in 2017 (e.g. this was the case where the lead buyer was Irish or Danish). Therefore, the transition to eProcurement did not appear to be a barrier to joint cross-border procurement. However, national portals for the publication of calls may not allow the publication of calls covering buyers from one or more countries and this, if confirmed, could be a barrier to attracting bidders. The publication in TED, on top of that in the national portal, may complement publication at national level and contribute to resolving this issue.

## **7. LEVEL OF COMPETITION AND SME PARTICIPATION**

CANs published in TED record the number of bids submitted. This is an important indicator of the level of competition in public procurement markets. Competition among bidders for public contracts is one of the main ways of achieving the final aim of public procurement policy, i.e. best value for money. Cases of single bids can be reported for procedures run under the Classical Directive only, as data on the number of bids received are rarely available for procurement conducted by utilities. There were very few cases recorded of a single bid in the case of joint cross-border procurement (five out of 25 awards under the Classical Directive, corresponding to 20% of cases). In comparison, for all procurement at EU28 level the percentage of contract awards for which there was a single bid (excluding frameworks and contracts in frameworks for reporting patterns) was 32%.

In general terms, single bids were less common in joint cross-border procedures, which seems to suggest that this type of procedure does not discourage competition and that the procedural and legal conditions are not too complicated for suppliers. On the contrary, the proportion of single bids was significantly lower than for overall procurement. This means greater competition, which allows more opportunities for buyers to obtain better value for money.

Regarding SME participation, it was possible to identify whether the contractor was an SME for most contracts awarded. Table 4 below illustrates the data, broken down by contracts awarded under the Classical and the Utilities Directives. Most lots were awarded to non-SME firms. This was particularly true for the procedures concerning utilities, where SMEs were able to win only two contracts out of 19 awarded, corresponding to 11% of the total. This was likely to be due to the nature of goods and services published by utilities and the size of the contracts, requiring internal resources which are rarely available to SMEs.

With regard to the procedures managed under the Classical Directive, SMEs were awarded one third of contracts, which was significantly lower than the share of SMEs for all public procurement procedures (54%). This was despite the fact that many of the contracts were of relatively small value. These data seem to suggest that aggregation of demand in two or more cross-border markets does not seem to favour SME participation. This may be for different reasons, including language barriers, different service cultures and contract law requirements, and the fact that a cross-border procedure may itself represent an additional barrier for SME participation. Another significant issue is selling and supplying two or more countries, which may be a severe constraint for SMEs.

Table 4: Number of contracts awarded to SMEs in joint cross-border procurement procedures (1 lot lot = 1 contract) 2017

Lots awarded to	Classical Directive	Classical Directive	Utilities Directive	Utilities Directive
an SME	8	32%	2	11%
non-SMEs	17	68%	17	89%
Total	25	100%	19	100%

*Source: calculation based on TED data*

Typically, the procedure includes only one lot (27 procedures overall out of 34), indicating that the various geographical markets involved were actually dealt with as a single lot. In those few cases where the procedure included more than one lot (sometimes several ones), this was not used to separate the market in accordance with the geographical markets of the buyers taking part in the procedure. In fact, in the cases assessed the subdivision of lots was necessary to procure specific services or goods corresponding to each lot (sometimes called ‘material lots’).

The proportion of tenders that were divided into lots is also an indicator of how the call design affected the attractiveness of the call for SMEs. For all procurement, in 2017 the percentage of calls for competition that were split into lots was 30.7%. In the case of joint cross-border procurement, a similar value was reached by the utilities (27%); whereas with regard to calls under the Classical Directive only 16% of calls for competition were split into lots. It must, however, be pointed out that joint cross-border procurement has to avoid dividing the joint markets into geographical lots as it would partially weaken its benefits. As

geographical lots seem less likely to be used in this context, the options available to buyers for splitting the call into lots is somehow reduced and this leads inevitably to a lower percentage of calls using lots. On the other hand, It is also true that buyers could still run a joint procedure to make efficiency gains, and then have the contracts awarded on geographical lots.

In addition, no link seems to emerge between aggregation of demand in two or more cross-border markets and the need to set up a consortium or group of suppliers to meet large demand. All contracts awarded to utilities were attributed to a single firm. With regard to calls awarded under the Classical Directive, 10% of contracts were awarded to a group of suppliers, also including SMEs, although it is not possible to assess the actual share of the overall contract allocated to SMEs.

Over 2 trillion euros is spent each year by public authorities and utilities in the EU28 for public procurement, and 545 billion euros is the estimated value of what was published in TED in 2017 (above the EU thresholds). A case-by-case assessment of the impact of procurement on the relevant market and the structure of the market itself<sup>50</sup> would be necessary to verify the impact of demand aggregation. In 2017 only 230 million euros was procured by buyers from different countries. This was a negligible fraction of the total of public procurement, and in the range of what is published in TED by countries such as Cyprus or Malta.

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<sup>50</sup> In concentrated markets pursuing demand aggregation may further reduce competition and (indirectly) innovation. The excessive aggregation of demand may lead to the creation of a unique buyer.

## 8. CROSS-BORDER PUBLIC PROCUREMENT – BUYING FROM SUPPLIERS FROM OTHER MEMBER STATES

Direct cross-border procurement occurs where the successful bidder is not located in the same country as the contracting authority/entity and is not domestically owned. In joint cross-border procurement, direct cross-border procurement takes place where the successful bidder is not located in the same country as the contracting authority which is acting as lead buyer. The following table 5 illustrates the situation at lots level.

Table 5: Direct cross-border procurement in joint cross-border procurement procedures – number of lots, 2017

	Classical Directive	Classical Directive	Utilities Directive	Utilities Directive
The winner is not located in the same country as the lead buyer (direct cross-border)	2	8%	11	58%
Winner and lead buyer are located in the same country	22	92%	8	42%
Total <sup>51</sup>	24	100%	19	100%

*Source: own calculation based on TED data*

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<sup>51</sup> The location of the contractor is not available in one procedure, and in the five procedures that have been cancelled (three utilities, and two regarding classical procurement).

Regarding classic procurement, in almost all lots the successful bidder and the contracting authority were located in the same country and so direct cross-border procurement was recorded in 8% of lots. In the two lots concerned, only in one case was the successful bidder located in a different country from any of the buyers involved in the procedure. This might suggest that knowledge of one of the markets concerned, of the procurement procedure and the contract conditions, might still represent a competitive advantage for the successful bidder. A further study focusing on the supplier side would be valuable to determine if these assumptions are accurate.

A completely different picture emerges in the case of utilities. There, 58% of lots were won by bidders located in a different country from that of the lead buyer, showing a high level of openness by utilities to foreign bidders. In the large majority of cases, illustrated in table 5 above, the contractor came from a ‘third Member State’, not included in the buyers’ group. Consequently, as a result of this openness, contracts were awarded to suppliers coming, for example, from Portugal, Italy, and Spain, i.e. countries not represented in any buyer group.

We can benchmark joint cross-border procurement with the data relating to overall procurement in terms of direct cross-border procurement. For all public procurement between 2009 and 2015, the average share of direct cross-border procurement in the number of contract awards issued in the EU was 1.7%. In the same period, the average share in the value of direct cross-border procurement was 3%<sup>52</sup>. The most recent data available refer to 2015, when the share of direct cross-border procurement was 2% in volume terms (number of awards) and 3% in value terms (share of the value of awards). These data are based on the

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<sup>52</sup> Study “Measurement of impact of cross-border penetration in public procurement”, Final report, February 2017, VVA, London Economics, and Joint institute for Innovation Policy for DG GROW Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.

same source (TED) and methodology (procurement is assessed at award level) as the one used for this assessment of joint cross-border procurement; however, with regard to joint cross-border procurement, the data refer only to 2017. It appears that the level of direct cross-border procurement is significantly higher than for all procurement. Although this does not come as a surprise, what is striking is the magnitude of the difference in volume terms – 25 times for utilities and 4 times for classical procurement.

Another interesting dimension concerns language, which is often considered as a common challenge to direct cross-border procedures. With regard to classical procurement, only in a minority of cases could the bidders place bids in English (apart from procedures where the lead buyer was located in the UK or Ireland). The situation observed in the utilities is the opposite, whereby in the large majority of cases bidders were asked to submit offers in English, possibly alongside the language of the lead buyer. This contributes to explaining the high level of direct cross-border procurement found for utilities. Although comprehensive information is not available regarding the language of the tender documents, in many cases the procurement documents were written in English when it was possible to submit a tender in English.

EU funding may be a stimulus to joint cross-border procedures. Although fewer than 60% of ‘classical’ projects received EU funding, the opposite applied to joint cross-border cases conducted by utilities. Although the number of cases is extremely small and no general conclusions can be drawn, EU funding may have contributed to spurring a buyer’s decision to conduct joint cross-border procurement in just less than half of the awards. Furthermore, none of the demand-pooling projects referred to in section 6 above benefited from EU funding. This shows the willingness of buyers to pursue that procedure to meet a need of the bodies or administrations involved.

Table 6: EU funding for joint cross-border procurement projects, 2017

EU funded projects	Classical Directive	Classical Directive	Utilities Directive	Utilities Directive
Yes	7	37%	9	60%
No	12	63%	6	40%
Total	19	100%	15	100%

*Source: own calculation based on TED data*

With regard to the cases under the Classical Directive, there were different sources of funding including Interreg (the programme helping regional and local governments across the EU to develop and deliver better policies in response to common challenges, and share solutions) and the Connecting Europe Facility (CEF). The projects relating to the construction of a bridge over the Danube between Hungary and the Slovak Republic, and the one relating to the management of Danube waterways, had both been funded by CEF.

Different types of EU funding vehicles were used by joint cross-border projects of the utilities, including the Energy Programme for Recovery and the energy ‘branch’ of CEF. There, the large presence of EU funding derives from the transnational nature of several of the projects concerned, such as the Baltic Pipe Project (enabling the supply of gas from Poland to the Danish market), the CobraCable (an energy interconnector between the Netherlands and Denmark), the Celtic interconnector (aimed at linking Ireland and France), and the Kriegers Flak-Combined Grid Solution project (connecting the Danish region of Zealand with the German state of Mecklenburg-Western Pomerania via two offshore windfarms, German Baltic 2 and Danish Kriegers Flak).



## **9. THE SURVEY: BUYERS' OBJECTIVES AND CHALLENGES, AND LOOKING AT CASES IN 2018 AND 2019**

A short survey complemented the data presented above. It addressed issues such as objectives and challenges, contract law applied, challenges in court, and the launch of procedures in the following years. This was possible through contacts and a short questionnaire sent to a group of buyers that awarded a contract in 2017 under the Classical Directive. The responses received covered a bit more than half of the contracts awarded in 2017 and mostly (but not exclusively) included 'demand-pooling projects'.

The buyers indicated the objectives that led them to embark on a more challenging adventure such as this one. These included some obvious objectives, such as reaching economies of scale and strengthening their bargaining power (as suppliers are also becoming bigger). This indicates that joint cross-border procurement can be considered from the perspective of changing market dynamics and challenging consolidated market positions. Another objective was related to the existence of strong political support for the initiative<sup>53</sup>; on such premisses, the participating buyers and their governments agreed to build the capacity of a public body or to achieve common political objectives (e.g. reducing CO2 emissions). One less conventional objective was referred to by some buyers. This concerns the technical dimension of the goods or services procured: maintaining a common hardware base, and the need to realise joint IT systems or infrastructure to be used by different administrations, which requires the harmonisation of the technical interfaces of each component.

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<sup>53</sup> This is clearly explained in the constraints which impose limitations on joint cross-border procurement in op. cit. footnote 33.

Overall, buyers contacted referred to a positive experience. The challenges reported most frequently were: i) the preparation of the tender documents, which required a joint effort due to different experiences and jurisdictions involved, and added time to the procurement; and ii) setting up the common agreement between the participating authorities. In one case, the project required an inter-governmental partnership, which obviously would not be needed in a national procedure. This was necessary to formalise the relationship between the parties involved and to maximise the fruits of cooperation. In several cases, the main challenges were linked to the coordination of planning (synchronisation of the emergence of the need to purchase), the agreement as to what was being procured, and different regulatory technical regimes existing at local level (e.g. the maximum size of vehicles of the municipality, which are set in relation to the maximum width of the streets in the historical center). In one case, the buyers reported a mixed experience as the market did not react positively and only a few bids were received, or it did not lower prices as expected. However, this view was not common. One buyer mentioned among the challenges the novelty of the procedure for the suppliers (and therefore providing explanations for, and conditions applied at, the different stages) and its publication in TED only (and not in the national portal) was confusing for a supplier.

There are no comprehensive data on whether joint cross-border procedures have been challenged in court. However, all buyers contacted (corresponding to half of contracts awards under the Classical Directive) confirmed that no court was involved. This is a bit surprising, as the legal risk to a joint cross-border procedure may be higher than for a national procedure. Unfortunately, the data collected by the competent authorities about the functioning of the remedies systems across the EU have little coherence. Consequently, it is not possible to calculate an indicator at EU level about the percentage of procurement

procedures that are challenged annually<sup>54</sup>. Nonetheless, the data available indicate that the percentage of the number of first instance reviews initiated is certainly higher than zero, as recorded for the very few cases assessed in this article.

One of the most surprising results is that most parties surveyed repeatedly conducted further joint cross-border procedures in 2018 and 2019. For instance, this was the case for the Danube waterway management project – which used this procedure three times until 2019 and plans to use it for at least three further procurements in the short term. However, other buyers operating in small markets, and whose activity is not transnational, have also voluntarily decided to conduct several procedures, both above and below the EU thresholds. Familiarity and confidence in returning to cross-border collaboration have helped to overcome the transaction costs associated with it.

These are not isolated cases. For instance, the three Baltic States (Estonia, Latvia, Lithuania) have been procuring medical vaccines jointly since 2015, and launched four different open calls between 2015 and 2018, adjusting the way of working along the way. The lead buyer and the parties involved changed over time, as in some cases public authorities from two out of the three States were taking part in the call. Significant savings have been reported, ranging between 10 and 25%<sup>55</sup>.

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<sup>54</sup> As information on national public procurement remedies systems is not collected in a structured manner, the Commission launched a study that gives insights into the situation in the Member States in terms of procedural data collected in the context of national public procurement remedies systems. Study to explore data availability at the national level in order to develop indicators for evaluating the performance of the Remedies Directive, EPRD, RPA, Milieu, August 2018. Available at <https://ec.europa.eu/docsroom/documents/33981>.

<sup>55</sup> See op.cit. footnote 38.

In one case, cross-border collaboration is well rooted and dates back to 2014, with 11 contracts awarded over the years, ranging from helicopter services, solar panels, insurance, and batteries to radio navigation equipment and services. This best practice involving Irish, Scottish, and English buyers will be facing some extra hurdles and uncertainties due to Brexit.

Moreover, the use of joint cross-border procurement is extending to more sophisticated and modern procurement procedures. In 2019 the cities of Copenhagen and Oslo launched a Dynamic Purchasing System (DPS) for the qualification of whole-load chargers. The DPS is open until 2025 and results from lengthy preparatory work. The high level of harmonisation in contract legislation between the relevant countries has largely contributed to its implementation (seven bids received, with only four qualified).

## CONCLUSIONS

The objective of this article is to carry out a comprehensive assessment of what happens in practice in the EU with regard to joint cross-border procurement. A handful of cases were known before this exercise and in some cases predated the application of the Directives in national legislation<sup>56</sup>.

Recourse to joint cross-border procurement remains rare, although in relative terms far more frequent than expected. There is a group of brave buyers who have repeatedly embarked on joint cross-border procurement and awarded contracts over the years. They have become ‘serial’ users of this new type of purchase. In those cases, the buyers have clearly in mind the benefits of coordinating purchasing activities and of sharing information to improve their procurement outcomes. Familiarity and a common working culture have allowed the

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<sup>56</sup> The most recent case covered by the “Feasibility Study” was implemented in 2016 (BBG SKI). However, the two others refer to 2014 (HAPPI project and BBT SE), while the procedure of EPCO was conducted in 2011.

necessary trust to build among the partners and have created the conditions for this specific form of voluntary public-public cooperation.

In the large majority of cases, the buyers involved are peers, situated at the same level of administration, possibly with similar resources and skills. However, a different model has also been found in which one large buyer supports a smaller body located in another country to build capacity and expertise.

Geographical proximity remains a key element of most projects assessed in 2017. By analogy with import penetration in procurement, geographical, historical and language proximity are all facilitating factors. The motivation for these projects includes economies of scale leading to lower prices and improved conditions, and stronger bargaining power and voice in the market.

However, other factors push buyers to embark on such an endeavour, such as challenging established market dynamics and fragmentation. Technical and legal harmonisation issues are sometimes important factors. Therefore, joint cross-border collaboration becomes a tool to ensure technical harmonisation and the interoperability of different national systems. Thus, for instance in the case of utilities, the buyers' group – who are partners in the construction of a network – requires a degree of technological standardisation for optimised operations and maintenance. Jointly awarding a framework agreement is the solution identified to achieve it successfully.

Regulatory and technical harmonisation of the goods or services to be procured are an important underlying element favouring the use of this procedure. Significant divergence is on the contrary a barrier to its implementation, as well as non-compatible contract law provisions (e.g. regarding the delivery terms) between the buyers involved.

Collaboration in procuring across borders is not associated with gigantic projects or large framework contracts. On the contrary, it is also used for small and below-EU-thresholds procurement. No case of standard or services or commodities (e.g. office furniture, electricity, etc.) was recorded in 2017. Rather, particular goods and services meeting the needs of the buyers are procured in this manner. This may be the result of (or the cause of) less frequent participation by CPBs in this procedure.

Brexit represents a challenge, as many joint cross-border cases reported in 2017 concerned collaboration between British and Irish buyers (while procedures for 2018 and 2019 involved buyers from other Member States). As indicated in the Commission notice on the withdrawal of the UK and EU rules in the field of public procurement<sup>57</sup>, all EU primary and secondary law ceased to apply to the UK from the withdrawal date. The UK then became a 'third country', no longer a member of the EU.

Obviously, one year of observation does not allow conclusions as to whether many of the aspects observed are structural, nor whether there is a pattern evolving over time. A longer data series would be needed for a more in-depth assessment. What emerges from the data is that joint cross-border procurement can be achieved without too many hurdles, and eventually without specific extra public funds. What is really needed is sharing information about practice. Many parties still do not know how to do it or, worse, consider it (almost) impossible. The question is how to make it easier for public buyers to gain access to information about joint-cross border procurement. This article tries to throw a first stone and open up data and information on this novel and challenging procedure.

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<sup>57</sup> In 2018 the Commission published a notice to stakeholders on the withdrawal of the UK and EU rules in the field of public procurement. Notice to stakeholders, Withdrawal of the United Kingdom and EU rules in the field of public procurement, [https://ec.europa.eu/info/sites/info/files/file\\_import/public\\_procurement\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/public_procurement_en.pdf).

Finally, the European Commission has been supporting joint cross-border procurement over the years, by gathering information and disseminating it<sup>58</sup>, and by encouraging and funding cooperative procurement<sup>59</sup>. In its recent Communication ‘An SME Strategy for a sustainable and digital Europe’<sup>60</sup> the Commission indicates that it will launch the ‘Big Buyers and Networks Initiative’ to facilitate the joint purchase of innovative and sustainable products. This goes exactly in the direction of fostering cooperation between buyers, lifting barriers through partnership across the borders.

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<sup>58</sup> The study referred at footnote 9 has been widely circulated and presented in various workshops.

<sup>59</sup> Communication from the Commission, Making Public Procurement work in and for Europe. COM(2017), 572 final, 3.10.2017. <https://ec.europa.eu/docsroom/documents/25612>

<sup>60</sup> COM(2020) 103 final, 10.3.2020. [https://ec.europa.eu/info/sites/info/files/communication-sme-strategy-march-2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-sme-strategy-march-2020_en.pdf)