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Exploring contractual and normative instruments for collaborative cross-border procurement in defence and security in the EU

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1. Introduction

In general terms, the will to engage in cooperative frameworks pertaining to public procurement projects is dependent upon market conditions and the objectives pursued by the interested parties. From an administrative perspective, such objectives might refer to industrial policy targets spanning either the national, regional or local level, with the added value and support of a wider cross-border coordinated strategy.¹ In this respect, EU legislation on public procurement not only encourages this type of cooperative framework, but it also pushes national authorities to opt for it. To this end, Directive 2014/24 explicitly bars Member States from prohibiting their contracting authorities to use central purchasing bodies from other Member States.²

The potential advantages of joint or collaborative public procurements refer to issues that are central for the development of the European Defence and Technological Industrial Base (EDTIB), namely: economies of scale, reduced administrative costs, sharing of knowledge and expertise, reduced costs in product development, cost-sharing and also operational benefits stemming from increased standardisation and interoperability.³ Nevertheless, although collaboration has been characterised as a “regular occurrence for the development of new defence equipment”, with initiatives in this respect predating the formal launch of the Common

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** The contents of this paper are based on the updated text of Section 6.2. “Setting the scene for joint procurement in cybersecurity and artificial intelligence” and Section 7.2. “The current regulatory conundrums, opportunities and challenges in defence and security procurement in the EU” of the PhD thesis defended by the author in September 2022 (unpublished), titled “Public Procurement for Defence and Security in the Context of Enhanced Integrated Cooperation within the European Union and NATO”.

¹ Roberto Cavallo Perin and Gabriella M Racca, ‘European Joint Cross-border Procurement and Innovation’ [2019] in Gabriella M Racca and Christopher R Yukins (eds), *Joint Procurement and Innovation. Lessons Across Borders* (Bruylant 2019) 103.

² Article 39.2. of Directive 2014/24.

³ Baudouin Heuninckx, *The Law of Collaborative Defence Procurement in the European Union* (Cambridge University Press 2017) 15-16. Doctrine has also identified a potential economic risk generated by this model of procurement, i.e. the creation of monopolies or monopsonies at EU-level, should the mechanism be ineffective in generating a wide participation of providers from the market. In terms of defence market integration, such an outcome would obviously go against the core objectives of opening the market and ensuring a wider participation in cross-border procurements, especially from SMEs (see Francesco Severio Mennini and others, ‘Joint Procurement and the EU Perspective’ [2018] in Gustavo Piga and Tünde Tátrai (eds), *Law and Economics of Public Procurement Reforms* (Routledge 2018) 119).

Security and Defence Policy (CSDP), it has not yielded the level of integration for which the EU has consistently strived.⁴

The success⁵ of collaborative procurement programs in the EU – especially those seeking to achieve large-scale results – is contingent upon numerous issues which can be broadly divided into three main categories: political, administrative and financial. Dedicated, coherent and coordinated political will is a *sine qua non* for joint cross-border initiatives at EU level. Complemented by willingness to share expertise and skills,⁶ it is the spark that ignites the flame and the fuel that sustains it. Essential as it stands, political will is nevertheless incapable of achieving any goals by itself, without the substantial contribution of an effective administrative framework, doubled by financial resources. While the latter are intimately linked to the political, the administrative aspect is, in its turn, dependent on clear and enforceable “rules of the game” (normative provisions), uniform procurement rules and standards and, as outlined in doctrine, “strong central leadership and management”.⁷

In terms of applicable rules, doctrine has identified four individual legal relationships which require clear and enforceable normative provisions.⁸ Firstly, the two-fold normative dimension of the decision made by a national contracting authority to take part in a collaborative procurement programme: the national legal framework providing the legal/procedural requirements to do so and the corresponding provisions of the relevant EU legal framework. Secondly, the relationships between the participating Member States amongst themselves and in relation to the programme management entity (as the case may be). Thirdly, the substantial rules applicable to the procurement procedure itself. Finally, the law applicable to dispute resolution, both in relation to the resulting procurement contracts and regarding potential disagreements (administrative or otherwise) within the collaborative program itself. The four relationships are discussed *infra*.⁹

Doctrine has outlined that cooperation seeking to achieve an accumulation of the public demand side has the potential to contribute to achieving many of the overall strategic objectives of the EU public procurement policies. It is in this context that the cooperative framework provided by Permanent Structured Cooperation (PESCO) and supported by the European Defence Fund (EDF) bears the most relevance as it can deliver an integrated, interoperable and ultimately consolidated demand from the participating Member States for defence equipment.¹⁰ An added benefit of this enhanced cooperation framework, supported by collaborative procurement programmes, is that it can foster the development of innovative legal

⁴ Martin Trybus, *Buying Defence and Security in Europe. The EU Defence and Security Procurement Directive in Context* (Cambridge University Press 2014) 53.

⁵ According to the EDA, defence expenditure among EU Member States dedicated to collaborative procurement remains significantly low, especially in relation to the established benchmark of 35% of the total defence equipment procurement, see European Defence Agency, ‘Defence Data 2019-2020. Key findings and analysis’ [2021] 10 <<https://eda.europa.eu/docs/default-source/brochures/eda---defence-data-report-2019-2020.pdf>> accessed 4 April 2023.

⁶ Emma McEvoy and Delia Ferri, ‘The Role of the Joint Procurement Agreement during the COVID 19 Pandemic: Assessing Its Usefulness and Discussing Its Potential to Support a European Health Union’ (2020) 11 *European Journal of Risk Regulation* 851, 857-858.

⁷ Natasha Azzopardi-Muscat, Peter Schroder-Back and Helmut 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 *Health Economics, Policy and Law* 43, 48-49.

⁸ Baudouin Heuninckx, *The Law of Collaborative Defence Procurement* (n 3) 39-40.

⁹ For an in-depth analysis of the contents and dynamics of the four legal relationships, see Baudouin Heuninckx, *The Law of Collaborative Defence Procurement* (n 3) 119-199.

¹⁰ Roberto Cavallo Perin and Gabriella M Racca (n 1) 103.

instruments capable of overcoming the innate administrative protectionism and normative nationalism that have been blocking progress towards reaching true market integration goals.¹¹

Considering that neither Directive 2009/81/EC (the Defence Directive) nor Directive 2014/24 do not provide an exhaustive set of rules for collaborative procurement, with overarching applicability in any situation – whether prescribed or not – it follows that the participating entities bear exclusive responsibility for creating “a legally feasible environment” for a joint procurement project. While a fluid normative solution such as this is arguably criticisable as a source of inconsistencies and confusion it is also submitted that it might provide a fertile ground for procedural and normative innovation to serve the specific needs of defence and security procurement (within the confines of the relevant principles of EU law).¹²

Against this backdrop and building on the contention that the conclusion of an agreement is foundational for any collaborative procurement initiative, this paper aims to provide insight into how such a framework would function and to outline some of its main normative components. The analysis in this respect is centred round the agreement on joint procurement for cross-border health threats, considering its relative success during the coronavirus pandemic. To this end, the examination touches on normative aspects that are considered essential to the functioning of a collaborative procurement, such as: the applicable law for procedural, substantive and dispute resolution issues; the decision-making arrangements; contract conclusion and provisions on the protection of information.

In addition, to broaden the perspective of the analysis and to provide practical context, the final section presents the case for including public procurement for cybersecurity and artificial intelligence under a joint procurement framework modelled on the main normative concepts and instruments discussed in the paper.

2. Literature review and the current state of play of the legal framework for collaborative procurement

As indicated above, the Defence Directive does not provide specific rules for joint procurement projects involving contracting authorities from two or more Member States. In such a scenario, the Commission Guidance Notice contains an explicit referral to the provisions of the classical procurement Directive (2014/24) as supplemental legal framework for issues in which the Defence Directive is silent.¹³ This is, once again, an indication that the Commission – or the EU for that matter – does not see unregulated issues in defence procurement as an all-encompassing and unlimited green card for contracting authorities to go entirely outside the EU framework, however appealing that might be. Thus, the Guidance Notice suggests that the requisite procurement standards would be met if the procedure would be based on the provisions of Article 39 of Directive 2014/24, which provides basic guidelines applicable to procurement involving contracting authorities from different Member States.

While the rules laid down by Article 39 are general in nature, they are nonetheless inherently bound by the normative logic and concepts of the classical procurement regime. Thus, it is submitted that it cannot be interpreted that said rules should be applied *ad litteram* by the

¹¹ Roberto Cavallo Perin and Gabriella M Racca (n 1) 104 and 121.

¹² Mari Ann Simovart, ‘Choice of law applicable to joint cross-border public procurement by central purchasing bodies or under occasional collaboration agreements’ (2021) 1 Procurement Law Journal (Upphandlingsrättslig Tidskrift) 3ff.

¹³ European Commission, ‘Commission notice on guidance on cooperative procurement in the fields of defence and security (Defence and Security Procurement Directive 2009/81/EC)’ [2019] OJ C157/1, 2, hereinafter referred to as “Commission Guidance Notice (2019)”.

interested contracting authorities and some degree of adaptation to the particularities of defence procurement should be considered acceptable without the risk of being construed as going wholly outside the prescribed regime.

In reference to the regime for cross-border collaborative procurement established by Article 39 of Directive 2014/24, commentaries have outlined the link between its flexible and arguably informal regulatory approach and the continuous transformation process affecting horizontal cooperation among administrations across the EU.¹⁴ This process is based on networked interaction, effectively replacing formalistic international diplomatic channels with direct contact and collaboration. Indeed, this type of approach is similar to the underlying rationale of the initiatives meant to enhance defence integration at EU level, through instruments such as PESCO, Coordinated Annual Review on Defence (CARD) and the EDF, which also seek to create strong networks for cooperation, knowledge and information sharing, at technical and operational level. Thus, it could be argued that referencing the provisions of Article 39 of Directive 2014/24 when dealing with collaborative procurements under the Defence Directive is a positive development and a potential source of inspiration for a future tailored-made normative solution *per se* for defence and security procurement.

It is relevant to note that article 39(5) of Directive 2014/24 mentions the establishment of European Groupings of Territorial Cooperation as an example of cross-border cooperation. Since they are intrinsically frameworks catering for the needs of public administrations seeking to implement regional cross-border initiatives, the analysis made here will not develop further on this subject. Nevertheless, it should be noted that doctrine has elaborated in detail in this respect and it provides valuable insights into the practical application of the provisions of Directive 2014/24.¹⁵ Another potentially effective tool for defence procurement goals in terms of research and innovation is the innovation partnership, provided by Article 31 of Directive 2014/24. Since it is only regulated in the framework of classical procurement and its scope is therefore arguably limited in terms of the caveats of the defence and security fields, it is submitted that the mechanism provided by collaborative procurement is better suited to serve the needs of said fields. Therefore, the analysis made here focuses only on the latter procurement instrument, although the innovation partnership is presently in the spotlight of scholarly research in the context of new impetus concerning green public procurement.¹⁶

The provisions of Article 39(4) of Directive 2014/14 offer considerable flexibility to the participating Member States in choosing the applicable procurement rules, with a single requirement pertaining to the existence of a connection between the Member State of origin of the chosen rules and the nationality of the participating contracting authorities.¹⁷ Furthermore, the choice is fundamentally limited by the overarching obligation imposed upon contracting authorities not to use their power of choice in order to avoid the application of mandatory public

¹⁴ Albert Sanchez-Graells, 'The Emergence of Trans-EU Collaborative Procurement: A "Living Lab" for European Public Law' (2020) 29 Public Procurement Law Review 30.

¹⁵ See *inter alia*: Alice Engl, 'Bridging borders through institution-building: the EGTC as a facilitator of institutional integration in cross-border regions' (2016) 26 Regional and Federal Studies 143; Beate Caesar, 'European Groupings of Territorial Cooperation: a means to harden spatially dispersed cooperation?' (2017) 4 Regional Studies-Regional Science 247; Peter Ulrich, 'Territorial cooperation, supraregionalist institution-building and national boundaries: the European Grouping of Territorial Cooperation (EGTC) at the eastern and western German borders' 28 European Planning Studies 57; Roberto Cavallo Perin and Gabriella M Racca (n 1) 108-115.

¹⁶ See *inter alia* Roberto Caranta and Pedro Cerqueira Gomes, 'Public Procurement and Innovation' (2021) 22 ERA Forum 371. Also, for an analysis of concrete cross-border joint procurement projects under Directive 2014/24, see Roberto Cavallo Perin and Gabriella M Racca (n 1) 160-168.

¹⁷ Albert Sanchez-Graells (n 14) 30.

law provisions stemming from EU law to which they are subject in their Member State of origin.

Even though affording a wide range of options is, in many respects, a positive solution for actors wishing to engage in diverse and complex collaborative projects, it is also a source of confusion and dilemmas giving rise to conflict-of-law conundrums with negative impact on the sustainability of the framework.¹⁸ The list of “unknowns” stemming from this supple regulation of applicable laws also has the potential to generate forum shopping among the participants. The issue of forum shopping could well be more than just a rhetorical exercise, as it is liable to effectively shape the developing ecosystems of cross-border collaborative procurement mechanisms based on the provisions of Article 39 of Directive 2014/24. Thus, models based on rules provided in jurisdictions with a more flexible approach or in those with comprehensive experience in procurements led by Central Purchasing Bodies (CPBs) could take precedence and lead to a polarization of collaborative procurement initiatives in a particular area, among a relatively limited number of participants or among homogeneous partners.¹⁹ In any case, the fine tuning of cross-border collaborative procurement mechanisms can be achieved through the gradual intervention of the Court of Justice of the European Union (CJEU) through judicial rule-making, considering its instrumental role in shaping EU public procurement law.²⁰

Doctrine has also highlighted several specific legal conundrums generated by the format of collaborative procurements, as regulated by Directive 2014/24. The main issues refer to the law applicable in the two distinct phases of a procurement procedure: the award phase and the contract execution phase. Where the award pertains to a framework agreement, an additional moment arises, namely the conclusion of subsequent contracts by the participating contracting authorities. Building on the explanations provided in Recital (73) of Directive 2014/24, one opinion suggests that the provisions of Article 39 of the Directive apply to the award phase and those of Regulation 593/2008 on conflict of laws apply to the performance phase.²¹ It is important to note, in this respect, that not only contract performance issues could be at stake, but also conflicts of a more administrative nature, stemming from the particularities of procurement contracts that have a dual administrative/civil nature – a distinction that is especially relevant in some EU jurisdictions.²²

It is also relevant to note that both the Defence Directive and Directive 2014/24 are conspicuously silent on the fundamental issue of reviews and remedies and, furthermore, the enforceability of decisions rendered by the competent bodies in the context of collaborative procurement projects. Referring to the provisions of Article 39 of Directive 2014/24, doctrine has underscored two presumptions stemming from this normative lacuna:²³ (1) the jurisdiction of choice inherently contains relevant provisions on remedies, which shall apply accordingly; (2) administrative and judicial review decisions rendered by the relevant authorities of said jurisdiction shall be given effectiveness by the authorities of all Member States participating in the collaborative project, by their own motion. While it is not altogether inconceivable that national authorities involved in a collaborative procurement project would find the necessary inclination to execute decisions handed down by review bodies from a different Member State,

¹⁸ Mari Ann Simovart (n 12) 2.

¹⁹ Albert Sanchez-Graells (n 14) 25 and 31.

²⁰ For a detailed analysis of the issue of the applicability of national legislation in joint procurement projects, see Mari Ann Simovart (n 12) 2-18.

²¹ Francesco Severio Mennini and others (n 3) 122.

²² For a discussion on various scenarios for contract awards see Baudouin Heuninckx, *The Law of Collaborative Defence Procurement* (n 3) 25-27.

²³ Albert Sanchez-Graells (n 14) 26.

it is nonetheless debatable whether said execution would be possible without some form of administrative/judicial intervention at national level, considering the profound formalistic nature of legal traditions throughout the EU (e.g. Romania). Thus, some form of normative intervention could be required, absent which the will to execute – however well intended – could remain mute and ineffective. For this reason, clear provisions on reviews and remedies are necessary.

In some situations, potential solutions seem evident, such as in the case of collaborative procurement programs built around a CPB, which is tasked to conclude a framework agreement with the selected economic operator, while the contracting authorities from the participating Member States have the option of concluding subsequent contracts. In this case, it could be argued that for the primary procurement procedure (i.e. that seeking to award the framework contract/agreement) the review and remedies mechanism is that prescribed by the law of the Member State where the CPB is registered. Thus, since the place of the contracting authority is taken exclusively by the CPB until the framework agreement is concluded, then any potential grievances from economic operators should naturally be taken with the CPB, under the rules of the Member State where it is registered. At this stage, the provisions of the legal frameworks of the other participating Member States and the possibility to enforce review decisions are irrelevant, since the only party called to respond is the CPB (of course, the Member States take part in the management of the review cases, through the relevant consultation and decisions mechanisms established in the collaborative program, including a potential burden-sharing arrangement).

In the next stage – i.e. concluding subsequent procurement contracts under the framework agreement – it is equally reasonable that the legal regime of each procuring Member State applies to said contracts, including in terms of review and remedies, should such issues arise. This fractioned applicability of different legal frameworks has been discussed in doctrine including with direct reference to the Defence Directive. In this respect, it has been argued that it can accommodate a solution where parts of a collaborative cross-border procurement are conducted according to the domestic law of the relevant contracting authority (e.g. contracts subsequent to a framework agreement).²⁴

As indicated above, Directive 2014/24 suggests that the execution phase is governed by the conflict of laws provisions of the Rome I Regulation.²⁵ The appropriateness of such a solution is debatable as it raises several issues for economic operators, such as difficult access to justice due to high cost of litigation generated by different languages and legal frameworks.²⁶

Using central purchasing bodies (CPB) has the added benefit of reduced administrative hurdles for the beneficiaries, since it is considered that contracting authorities using such services are inherently in compliance with EU law obligations, given that the CPB itself is bound by it.²⁷

²⁴ Mari Ann Simovart (n 12) 6 and *infra*.

²⁵ Recital (73) of Directive 2014/24 reads as follows: “Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties concerning conflicts of national laws. [...] Therefore new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting authorities and enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers. Those 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, complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and the Council (1) [...]”

²⁶ Albert Sanchez-Graells (n 14) 39.

²⁷ Albert Sanchez-Graells (n 14) 16.

This particularity of centralised procurement is especially relevant in the fields of defence and security, since administrative and procedural complexity (“red tape”) are important disincentives for contracting authorities to stay within the regime prescribed by EU law and not make use of the exceptions provided by the Defence Directive. Thus, it can be counted as an argument in favour of a full-scale implementation of collaborative defence procurement by using a CPB, which could either be the relevant authority of one of the participating Member States, or an EU body such as the EDA. Still, it should be noted that doctrine has at some point outlined that the EDA did not envision itself as a procurement agency but rather as a policy-maker.²⁸ In concrete terms, according to Article 5(3)(d) and 45(1)(d) TEU, the Agency will be in charge of joint research programmes. This refers to projects where a group of Member States decides to approach the research and development (R&D) of a certain piece of equipment on a common basis.²⁹

While Article 10 of the Defence Directive regulates the use of CPBs, employing them as procurement vehicles by contracting authorities from two or more Member States is not covered by the text of the Defence Directive, which means that such a solution can be implemented only within the general confines of EU procurement rules (in application of the non-circumvention principle). In this respect, the Guidelines provide that the foundation for a joint procurement is the existence of an agreement between the participating Member States.³⁰ The Guidelines are silent as to the legal regime of such an agreement, its contents (especially issues on which the Member States can or cannot regulate) and, especially, the normative framework in which it should be interpreted. Absent concrete rules in this respect, it is submitted that the general regime of the agreement would be that of an intergovernmental instrument, albeit within the EU legal framework and bound by its rules and principles.

On the issue of security of information, it remains debatable to what extent it can be an important concern for Member States.³¹ It depends on the level of mutual trust and positive experience in information sharing arrangements. Also, it depends on the scope of cooperation agreed upon by the participating Member States. In this respect, if there is no overall secure environment for information sharing, properly validated by the relevant authorities of the Member States, then the scope and complexity of any cooperation project is significantly limited from the start, thus relegating potential joint procurement projects to issues of relatively reduced importance and, implicitly, reduced impact in terms of defence integration and EDTIB consolidation. In such a scenario, discussions on the application of Article 346 becomes mute.

It has also been argued that participating Member States could benefit from a legislative loophole by opting to enter into a procurement agreement with third countries, thus falling under the exemption provided for government-to-government procurements and go outside EU law.³² While such a solution would not be entirely unfathomable, especially considering the various integration geometries promoted within NATO, it is nonetheless submitted that it would be

²⁸ Martin Trybus (n 4) 219. Nevertheless, a notable recent development designates the EDA as the coordinating entity of a project arrangement for the collaborative procurement of ammunition (155mm artillery rounds and multiple ammunition types) involving 23 Member States (see European Defence Agency, “EDA brings together 23 countries for Common Procurement of Ammunition”, available at: <https://eda.europa.eu/news-and-events/news/2023/03/20/eda-brings-together-18-countries-for-common-procurement-of-ammunition> [last accessed: 04.04.2023]).

²⁹ Martin Trybus (n 4) 219.

³⁰ Commission Guidance Notice (n 13) 2.

³¹ Pascal Friton, Christopher Wolters and Niklas Andree, ‘Cooperation in Defence and Security Procurement among Member States. Applicable Law and Legal Protection’ (2020) 15 European Procurement & Public Private Partnership Law Review 24, 31.

³² *ibid* 33.

under intense and legitimate scrutiny of the Commission, and even by the CJEU, in respect of the principles and rules established for joint defence procurement projects in the CSDP general framework. In this respect, according to the Defence Directive, an invocation of the exemption must be considered void if cooperating states intend to circumvent their obligations under EU procurement law.³³

In terms of responsibility for irregularities in the conduct of a joint procurement procedure, the Guidance notice indicates a common liability of all the participating contracting authorities, considering the obligations established by the Directive.³⁴ Naturally, this does not mean that economic operators are held to bring action against each individual authority, but only against that which coordinates the procedure. Aside from protecting economic operators from procedural disadvantages and guaranteeing their access to remedies, this solution also prevents potential forum shopping, as the applicable legislation is only that of the Member State in which the contracting authority is registered.³⁵ Still, it is submitted that a forum shopping of sorts can still take place on the part of the contracting authorities. This is particularly relevant in technically complex and inherently innovative joint procurements such as those in the fields of cybersecurity and artificial intelligence, where the participating Member States would be inclined to choose the “lead nation” based on its capability to mitigate as large a number of variables as possible. Among the criteria for such a decision, the national legal framework for procurement – especially regarding remedies – would be especially relevant (alongside administrative capacity, relevant experience etc.). In this respect, doctrine has outlined the fact that in the EU it can be difficult to find a Member State that could take the role of a lead nation in major collaborative programs.³⁶

It is interesting to note that, while the Commission confirms that there exists a need to adapt the classical procurement regime for the specific needs of joint procurements in defence and security – as shown *supra* – it nonetheless singles out the provisions of Article 39 of Directive 2014/24 as the ultimate benchmark in deciding whether or not there has been a circumvention of EU law.³⁷ It thus raises the question if the rules provided in said article were to be modified in order to accommodate “specific needs”, would that cast an irrefutable shadow of doubt on the legitimacy of the whole procedure? If not, then what alternative criteria could be used to gauge the extent to which the procedure is in line with EU procurement law? It is submitted that such fit-for-purpose criteria requires more in-depth consideration and should go beyond a “*mutatis mutandis*” reference to classical procurement rules, which only creates further uncertainty.

3. Seeking solutions for a functional framework for collaborative procurement in the model used by institutional cross-border agreements

The conclusion of an agreement represents the foundation of the future collaborative procurement initiative as it establishes the essential administrative framework discussed *supra*,

³³ Article 11 of Directive 2009/81 reads as follows: “None of the rules, procedures, programmes, agreements, arrangements or contracts referred to in this section may be used for the purpose of circumventing the provisions of this Directive.”

³⁴ Commission Guidance Notice (n 13) 2.

³⁵ Albert Sanchez-Graells (n 14) 22.

³⁶ Baudouin Heuninckx, *The Law of Collaborative Defence Procurement* (n 3) 18.

³⁷ Commission Guidance Notice (n 13) 4.

covering a wide range of issues, including aspects of contract and tort law.³⁸ A detailed study³⁹ on the challenges and opportunities facing cross-border classical procurement showed that the agreement between the contracting authorities is a very important factor for the entire cooperation process, considering the innate sensitivities of most contracting authorities when having to delegate authority. National law restricting the ways in which contracting authorities can participate in such projects is the main obstacle in this respect.

Thus, considering that the formal agreement between Member States is at the heart of any joint procurement programme, it is useful to seek further insight into how such a framework would function and to outline some of its main normative components. The oft-cited benefits of reduced administrative costs and economies of scale have been aptly illustrated by the joint procurement agreement in health issues. Since it has been recently tested with an arguable degree of success in the context of the coronavirus pandemic (the assessment of which goes beyond the scope of this research), the approved text of the agreement on joint procurement for cross-border health threats will serve as the focus of the analysis (hereinafter referred to as “JPA”).⁴⁰ To this end, the examination made here touches on normative aspects which are arguably essential to the functioning of collaborative procurement, such as: the applicable law for procedural, substantive and dispute resolution issues; the decision-making arrangements; contract conclusion and provisions on the protection of information.

Concrete work to devise and implement a centralised procurement mechanism for medical supplies was prompted by the challenges facing the Member States during the H1N1 pandemic in 2010. It was thus only in the face of pressing and tangible needs that the EU managed to foster the necessary political will to take the idea from theoretical debate to the implementation phase.⁴¹ By means of a basic analogy, one could argue that the complex and far-reaching security crisis generated by the Russian Federation's military attack and invasion of Ukraine in early 2022 might serve as a similar wake up call for the EU and especially its Member States regarding the protracted initiatives in defence integration at union level.

Since health issues were also not an integral part of the community acquis, a legislative vehicle was needed to serve as a legal basis for engaging in joint procurement procedures. Thus, the Council adopted Decision 1082/2013 on serious cross-border threats to health,⁴² based on Article 168(5) TFEU. In this context, it is worth noting that for defence and security procurement, as shown, the Commission Guidance notice indicates that the foundation for a joint procurement is the existence of an agreement between the participating Member States. Furthermore, Article 39(4) of Directive 2014/24 establishes an explicit requirement to conclude an agreement in the absence of a superseding international agreement. Thus, there is no explicit requirement for a legal basis such as Decision 1082/2013.

³⁸ Albert Sanchez-Graells (n 14) 23.

³⁹ Albert 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 *European Procurement & Public Private Partnerships Law Review* 97, 109.

⁴⁰ European Commission, ‘Commission Decision of 10.4.2014 on approval of the Joint Procurement Agreement to procure medical countermeasures pursuant to Decision 1082/2013/EU’ [2014] C(2014) 2258 final <https://ec.europa.eu/health/publications/commission-decision-c2014-2258-final_en> accessed 5 April 2023.

⁴¹ Emma McEvoy and Delia Ferri (n 6) 853.

⁴² Decision 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 2119/98/EC [2013] OJ L293/1. Decision 1082/2013/EU has been repealed by Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health [2022] OJ L314/26.

The JPA is considered a *sui generis* cooperation instrument that is a product of the EU ecosystem to the extent that it cannot be regarded as a classical international treaty (as provided by the Vienna Convention on the Law of Treaties) nor can it be considered a “pure” EU legal act.⁴³ Nevertheless, as it is concluded pursuant to the provisions of EU legal acts and refers to an issue pertaining to the common market, it thus falls entirely under Union law. It follows naturally that dispute resolution pertaining to the functioning of the JPA *per se* falls under the jurisdiction of the CJEU. In this respect, an explanatory document issued by the Commission⁴⁴ explicitly provides that CJEU jurisdiction was elected on the basis of Article 272 TFEU.⁴⁵

The JPA represents the administrative dimension by excellence in the equation of what it takes to have an operational and effective joint procurement scheme⁴⁶ and its text thus follows the traditional layout of cooperation agreements. It is divided into six titles and four annexes. The titles are in turn divided into numbered chapters and unnumbered sections detailing the relevant subject matter.

It is important to note, at the outset, that Article 1.5 of the JPA affords absolute freedom to the contracting parties to engage in parallel procurement procedures outside the Agreement, for the same products covered by its scope. This can be interpreted as a safety valve required by the national governments in view of their traditional push for keeping sovereign decision-making powers. Furthermore, having in mind the subject matter of the procurements covered by the JPA (individual medical equipment, vaccines etc.) and the potential for urgent needs to appear at any time, it was not difficult to accommodate this level of freedom to purchase individually. This approach is especially relevant in the realm of defence and security procurement.

Article 7 of the JPA provides rules on the decision-making mechanisms of the Steering Committees, which go into significant detail in order to avoid impasse. Thus, the primary consideration is to keep the procedure going forward, whatever the degree of misunderstanding between the participants. The designation of members in the evaluation committee must follow a complex competitive procedure in which the Commission has significant weight. Furthermore, the committee is chaired by a representative of the Commission who is also a member of the body. Among the prerogatives of these committees is that of approving specific contents of some of the most relevant procurement documents (such as technical specification, selection and award criteria etc.),⁴⁷ while the overall tasks of putting together the tender documentation is awarded to the Commission.⁴⁸

According to Article 12.1. of the JPA, aside from its role as an administrative coordinator, the Commission also acts as a “clearing house” between the contracting parties in relation to any disagreements which might arise from the JPA or the administration of the procurement procedure *per se*. Thus, the Commission has a central role in the mechanism, including in terms of strategic leverage - e.g. a procurement procedure cannot be launched without its approval. Thus, Article 13.1. establishes a collegiate decision mechanism for launching a procurement,

⁴³ Emma McEvoy and Delia Ferri (n 6) 854.

⁴⁴ European Commission – Health and Consumers Directorate-General, ‘Joint Procurement Agreement. Considerations on the legal basis and the legal nature of the Joint Procurement Agreement’ 3 <https://ec.europa.eu/health/system/files/2016-11/jpa_legal_nature_en_0.pdf> accessed 4 April 2023.

⁴⁵ Article 272 TFEU reads as follows: “The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.”

⁴⁶ Emma McEvoy and Delia Ferri (n 6) 855.

⁴⁷ Article 16.2. of the JPA.

⁴⁸ Article 16.1. of the JPA.

with a minimum number of contracting parties having to vote in favour of a proposal made by a steering committee member.⁴⁹ The Commission must be among the contracting parties supporting the proposal. Consequently, the Commission is also mandated to act as the sole representative of the Member States in any legal proceedings related to the actions carried out under the JPA, according to Article 12.4. read in conjunction with Articles 4.3.-4.5. of the JPA.

Whenever a framework contract is concluded under the JPA, subsequent or “specific” contracts are concluded by individual participating contracting authorities with the economic operators that are parties to the framework contract.⁵⁰ In this situation, the balance of rights and responsibilities changes back in the favour of the Member States, as the role of the Commission becomes marginal. Thus, individual contracting authorities are fully responsible for their implementation, including issues such as evaluating offers in case of reopening the competition, managing contractual relations and ex-post publication.⁵¹

While the framework contract (agreement) seems to be the most agreeable instrument for cross-border collaborative procurement – having in mind the fractional legislative approach discussed *supra* – it is not by itself a guarantee for success. Given its potential to ensure economies of scale and to support innovative solutions, the framework agreement must be doubled by comprehensive market analyses and strategic planning on behalf of the participating contracting authorities. Such an approach might also be mandatory for safeguarding the essential characteristics of the procurement in question, such as competition, transparency and – which is even more important for the EDTIB – ensuring SME's access to opportunity.⁵² These could even be mandatory requirements imposed by various financing tools which could be used to provide essential financial support for the project (such as financing through EDF or PESCO projects).

Title V of the JPA is dedicated to provisions on handling information or documents. While it provides some indications as to how information is to be shared, the duty to respect professional secrecy, access to documents and measures to protect information, it is insufficient in terms of security of information required in the fields of defence and security. Considering the scope of this particular JPA (focusing mainly on off-the shelf health products), such requirements were most likely considered unnecessary. For this reason, classified information is only mentioned in a safeguard clause allowing the participating parties an exception on grounds of EU or national legislation on the protection of classified information.⁵³

The essential issue of applicable law is regulated in arguably general terms. Thus, while in the first part of the JPA, Article 3 provides precise indications as to the rules applicable to the procurement procedure *per se*, aspects pertaining to dispute settlement – provided in the concluding segment, in Article 42 – are less precise.

Thus, in terms of the rules governing the joint procurement procedure, Article 3 establishes the primacy of the financial rules applicable to the general budget of the Union (provided by a

⁴⁹ Article 13.1. of the JPA reads as follows: “Any JPASC member may propose the launch of a procurement procedure. This proposal shall identify the medical countermeasures to be procured. A procurement procedure shall be started if at least five Contracting Parties, including the Commission, vote in favour of starting such procedure and have notified this intention to the Chair of the JPASC.”

⁵⁰ Article 27.1. of the JPA.

⁵¹ Article 27.4. of the JPA.

⁵² Roberto Cavallo Perin and Gabriella M Racca (n 1) 125.

⁵³ Article 36 of the JPA reads as follows: “Nothing in this Agreement shall preclude a Contracting Party from complying with provisions of Union or national law applicable to it regarding public access to documents, the protection of personal data or the protection of classified information.”

Regulation on the subject⁵⁴) and of the subsequent rules of application (provided by a Commission Delegated Regulation⁵⁵). The wording of Article 3 also sets an implicit rule of precedence insofar as the Financial Regulation represents the primary source and its rules of application a secondary one. Article 133 of Delegated Regulation 2012/1268 – in force at the time the text of the JPA was approved – established, as a general rule, that “in the case of a joint procurement procedure between one institution and the contracting authority from one or more Member States [...] the procedural provisions applicable to the institution shall apply.” At any rate, the procurement rules governing the JPA were (loosely) modelled after the regime provided by the classical procurement Directives, thus guaranteeing that the fundamental covenants of transparency, non-discrimination and sincere cooperation are respected.⁵⁶

The second paragraph of Article 133 provides an exception to this rule, based on considerations of economic burden. Thus, when the share pertaining to or directly managed by a contracting authority of a participating Member State represents half or more of the total value of the procurement contract covered by the JPA, then the EU institution involved in the procedure (e.g. the Commission) may decide that the rules applicable to said contracting authority (i.e. national) shall apply to the procedure at hand. It is not clear, however, how such a decision is made by the relevant EU institution and what rationale it should use in this respect. Aside from economic considerations, the possibility to decide on the application of national procurement rules is also possible in “other duly justified cases”, under the overall condition that the national rules in question “can be considered as equivalent to those of the institution.” The issue of equivalency should in theory be a straightforward affair, considering that the national procurement legislations of the Member States have transposed the relevant Directives and that the rules on principles applicable to contracts awarded by EU institutions are fundamentally based on the rules set out in said Directives.⁵⁷

Returning to the issue of the law applicable to dispute settlements, Article 42.1. of the JPA provides the general applicability of EU law for matters or disputes deriving from the subject matter of the JPA, supplemented where needed by the terms of the agreement itself and the general principles of law common to EU Member States. This solution seems adequate, considering the *sui generis* EU features of the cooperation envisaged by the JPA. The less precise character of the rules on applicable law – as indicated *supra* – is generated by Article 42.1., which shifts focus from EU regulations and principles applicable to its institutions to an open-ended optionality. Thus, the law governing the framework agreements and direct contracts pursuant to the JPA is left to be decided in the contracts themselves, including on issues related to dispute settlement. While this type of fluid approach is to some extent justified and even expected, it is nonetheless submitted that additional clarity is required and would need to feature in a potential procurement agreement on defence and security matters. In this respect,

⁵⁴ The Regulation in force at the time the text of the JPA was approved was Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [2012] OJ L298/1.

⁵⁵ Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union [2012] OJ L362/1.

⁵⁶ Emma McEvoy and Delia Ferri (n 6) 859 at note 59.

⁵⁷ See Recital (96) and Article 161 of 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, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L193/1.

minimal guidelines should include information as to how the substantial law would be selected and the criteria to determine the competent jurisdiction. This is needed in order to limit uncertainty and variables to the furthest extent possible because unpredictability is both a major disincentive as well as the primary justification for contracting authorities when choosing to take defence and security procurement contracts outside the EU legal framework or to award contracts to a limited number of national suppliers.

The CJEU is explicitly granted exclusive jurisdiction to hear any case pertaining to failure to comply with the Agreement or outstanding disagreement between the parties. It is in this capacity that the CJEU could very well exert its proven ability to shape the EU legal framework and to innovate in issues where either the Member States or the EU apparatus have failed to do so.

Considering that the conclusion of the JPA is based on an explicit legal basis provided in Decision 1082/2013,⁵⁸ it is worth pondering whether a similar administrative arrangement for defence equipment should also benefit from a concrete legal basis in an act of this level – although not considered mandatory, as already discussed above? It should be reiterated however that the JPA to procure medical counter-measures was concluded before Directive 2014/24 entered into force and thus could not benefit from the provisions of its Article 39(4), which establish an explicit requirement to conclude an agreement in the absence of a superseding international agreement.

It is important to note that the JPA framework is intended for the procurement of medical supplies only in the case of cross-border health crises and it is not a catch-all solution for any future joint procurement initiative in the field of health.⁵⁹ If this inherent limitation is considered essential to the legal nature of the JPA, then further reflection is required as to whether it could serve as a model or source of inspiration for joint procurement of defence/security equipment in situations which cannot be defined as “crises”.

Somewhat paradoxically, the motivation behind the appearance of collaborative projects – i.e. the need to leverage high costs and complexity – also acts as a disincentive for applying competitive procurement procedures for the award of contracts in relation to the same project.⁶⁰ In relation to this, doctrine has rightly defined a clear red line that should not be crossed just for the sake of developing trans-EU collaborative procurement, which refers to the fundamental values of public law that are common to the legal traditions of the Member States and indeed framed according to the *sui generis* approach of the EU: transparency, accountability and effective judicial review.⁶¹ What is still open for debate is how the enforcement of this red line should be carried out and the degree of rigidity in interpreting whether a normative solution is within or outside the line. This type of delicate balancing is typical for the field of defence and security procurement and should be characterised by a pragmatic and honest approach. The contribution of the CJEU in this respect is crucial, alongside the guidance offered by the Commission in its capacity as guardian of the Treaties.

⁵⁸ The legal basis is provided in art 5.3 of Council Decision No 1082/2013/EU of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] OJ L 293. Art 5.3 reads as follows: “The joint procurement procedure referred to in paragraph 1 shall be preceded by a Joint Procurement Agreement between the Parties determining the practical arrangements governing that procedure, and the decision-making process with regard to the choice of the procedure, the assessment of the tenders and the award of the contract.”

⁵⁹ Emma McEvoy and Delia Ferri (n 6) 861.

⁶⁰ Martin Trybus (n 4) 54.

⁶¹ Albert Sanchez-Graells (n 14) 41.

4. Procurement of technologies for cybersecurity and AI – the perfect setting to roll out the model framework for joint procurement ?

The case for including collaborative procurement for cybersecurity and AI under a framework built on rules such as those in the Defence Directive is fundamentally predicated on three main considerations. First, as shown, collaborative procurement has the potential to foster the integration of the defence market and defence and security cooperation in general at EU level (with the cyber domain and AI technology as integral parts). Second, regardless of the exceptions and exclusions traditionally applicable to defence procurements, collaborative projects in these fields should nonetheless be subjected to a tailored regime built on rules that ensure, to the largest extent possible, adherence to the principles enshrined in the Treaties, so that the rationale promoting the sustainable development of the EDTIB can be effectively applied. Finally, cybersecurity and AI have become essential parts of the defence and security continuum at Member State and EU levels, a reality which has been confirmed by and integrated into the strategic framework of the EU in terms of CSDP.⁶²

In practical terms, empirical research⁶³ has outlined the centrality of public procurement for cybersecurity needs, as contracts in this field are managed by national institutions rather than regional or local ones. The same research has highlighted that cross-border cybersecurity procurement is still a negligible occurrence. This provides the ideal setting for promoting work on PESCO and EDF-lead projects for collaborative procurement, using the lead-nation or the CPB scenarios. It is relevant to note that projects related to the cyber field form a cluster of their own within the PESCO ecosystem.⁶⁴ The slow-paced development of a technological ecosystem in which collaborative procurement would be the norm is also suggested by recent initiatives catered by the EDA and within PESCO⁶⁵ - e.g. the PESCO framework currently

⁶² The cyber component features prominently in the EU's new Strategic Compass, as a strategic enabler, a source of potential disruptions and threats and as an integral part of exercises aimed at strengthening mutual assistance, in line with Article 42.7 TEU (see Council of the European Union, 'A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security' (Brussels, 21 March 2022, 7371/22, 20). In relation to AI, the 2020 White Paper published by the European Commission outlines discussions between the Commission and the Member States on topics including joint procurement of AI and cybersecurity solutions (see European Commission, 'White Paper on Artificial Intelligence - A European approach to excellence and trust' [2020] COM(2020) 65 final, 6 and 8).

⁶³ Jukka Ruohonen, 'An Acid Test for Europeanization: Public Cyber Security Procurement in the European Union' (2020) 5 European Journal for Security Research 349, 370.

⁶⁴ Steven Blockmans and Dylan Macchiarini Crosson, 'Differentiated integration within PESCO – clusters and convergence in EU defence' [2019] Centre for European Policy Studies Research Report (no. 2019/04) 12 <https://www.ceps.eu/wp-content/uploads/2019/12/RR2019_04_Differentiated-integration-within-PESCO.pdf> accessed 4 April 2023.

⁶⁵ For initiatives and projects see *inter alia*: Daniel Fiott, 'European Armaments Standardisation' [2018] European Parliament – Directorate General for External Policies <<https://www.iss.europa.eu/sites/default/files/EUISSFiles/Defence%20study.pdf>> accessed 5 April 2023; Council of the European Union, 'Council Conclusions on the PESCO Strategic Review 2020' [2020] <<https://pesco.europa.eu/wp-content/uploads/2020/12/2020-11-20-Council-Conclusions-on-PESCO-Strategic-Review-2020.pdf>> accessed 5 April 2023; European Defence Agency, 'Annual Report 2021' <<https://eda.europa.eu/docs/default-source/brochures/eda-annual-report-2021.pdf>> accessed 5 April 2023; European Defence Agency, 'European Defence Matters no. 20/2020' [2020] <<https://eda.europa.eu/publications-and-data/magazines/european-defence-matters-magazine-issue-20>> accessed 5 April 2023; European Commission, 'Commission Implementing Decision of 30.06.2021 on the financing of the European Defence Fund established by Regulation (EU) No 2021/697 of the European Parliament and the Council and the adoption of the work programme for 2021' [2021]

supports the implementation of five (including CRRTs) collaborative projects in the cyber domain.⁶⁶

It is against this backdrop of the strategic drive of the EU to promote and support cross-border cooperation in the development and implementation of cutting-edge cybersecurity and AI technology that the particularities of the legal framework pertaining to collaborative procurement – presented *supra* – gain practical relevance. The push for technology uptake across the Member States through joint procurement or any other overarching strategic cooperation endeavour requires a coherent and effective framework. Its primary role is to provide a clear picture of the opportunities and vulnerabilities facing the Member States and their national contracting authorities who prove willing to embark on collaborative projects. R&D intensive projects such as those pertaining to cybersecurity and AI are especially prone to a wide and diffuse range of risks and unknowns liable to discourage by themselves the Member States from investing their sometimes-scarce human, financial and time resources into complex cross-border projects.⁶⁷ That is why a predictable administrative framework is essential to mitigate some of the risks and, more importantly, to ease the apprehension of the relevant actors (public bodies and private stakeholders alike).

An essential characteristic of the fields of cybersecurity and artificial intelligence is that the corresponding industries have not known the decisive influence of state authority as is the case with the defence industry in general. This feature is crucial for understanding the way the industries function, evolve and, ultimately, the way collaborative procurements should be approached, especially considering that they entail a significant R&D component.

Circling back to the normative analysis, it is necessary to determine whether the procurement of cybersecurity and AI technologies might fall under the provisions of the Defence Directive. Such a determination is intimately linked to the destination of the products or services acquired. Thus, independent of similarities with products/services used in the civilian sector, if those that form the object of the procurement procedure are used in a defence and/or security related context and they contribute to achieving specific objectives in these respects, then they would justifiably fall under the special regime of the Defence Directive.⁶⁸ It follows that a system used to protect data in a private company or in civilian administration (at large) could be purchased to carry out the same task in a military facility catering to activities in the sphere of national security. In the latter situation, the procurement would be made according to the Defence Directive (or even activating the Article 346 TFEU exemption, if justified) while the former would be carried out within the framework of the classical Directives.

In terms of collaborative R&D projects – especially salient in fields with such high-paced dynamics – they are expressly excluded from the application of the rules established by the Defence Directive.⁶⁹ Nevertheless the general principles of public procurement and those provided by the TFEU would still be applicable. This could be averted if the Member States

<https://ec.europa.eu/defence-industry-space/commission-implementing-decision-3062021-financing-european-defence-fund-and-adoption-work-programme_en> accessed 5 April 2023.

⁶⁶ “EU Cyber Academia and Innovation Hub (EU CAIH)”; “Cyber Threats and Incident Response Information Sharing Platform (CTISP)”; “Cyber Rapid Response Teams and Mutual Assistance in Cyber Security (CRRT)”; “Cyber and Information Domain Coordination Center (CIDCC)”; “Cyber Ranges Federations (CRF)”.

⁶⁷ Ivo Locatelli, ‘Do European Public Buyers Purchase Together? An Assessment of Joint Cross-Border Procurement Contracts Published in Ted in 2017 and Beyond’ [2019] *Ius Publicum Network Review* 21 <<https://ssrn.com/abstract=3648103>> accessed 5 April 2023.

⁶⁸ Jukka Ruohonen (n 63) 358.

⁶⁹ This specific exclusion is provided by art 13(c) of the Defence Directive.

would be in a situation to effectively invoke the exception provided by Article 346 TFEU.⁷⁰ In this respect, doctrine has noted an issue of interest, i.e. that reliance on Article 346 TFEU is reserved to Member States as they are the only recipients of the rights and duties established therein. Thus, in joint procurement projects entrusted to an EU agency such as the EDA, the generous exemptions provided by said article would not be applicable.⁷¹

For a more practical perspective, it is relevant to briefly examine an issue currently featuring high on the list of items with focused government attention across the Member States, i.e. cloud computing. Considering the EU's approach towards cybersecurity and digitization, as outlined in the strategic policy documents discussed *supra*, the inherent cybersecurity component in a complex procurement project for a government data centre (involving cloud solutions) would arguably justify the use of the special procurement rules provided by the Defence Directive. The main issue in this respect would be to provide solid legal reasoning and factual considerations to support the contention that the object of the procurement falls within the notion of sensitive works, products or services related to the protection of critical infrastructures. Said reasoning would have to be based on the provisions of the public policy documents and of the applicable legal framework in relation to government cloud solutions, both at national and EU levels.

Whether critical infrastructure is an essentially civilian issue or whether it lends itself to defence or national security considerations - and, thus, to a special procurement regime - is still an ongoing debate.⁷² The CJEU has not yet had the opportunity to shed light on this conundrum. Nevertheless, it is submitted that the conceptual framework surrounding the digital agenda of the EU, especially in terms of cybersecurity, allows for concluding that the object of this hypothetical procurement would fall under the wider notion of security-related assets. The idea of embedding defence and security considerations into notions which are traditionally civilian (e.g. cloud computing) is not entirely new. Thus, the concept of dual-use technologies lead to a circumvention of the general prohibition imposed by EU rules on using FP7 and Horizon 2020 research grants for funding military equipment.⁷³ In this case, the rules were bent by the fact that equipment development served both civilian and military objectives.

The potential advantages of applying the framework of the Defence Directive are mainly related to the general need to ensure a superior level of control of the procurement procedure. To this end, the main benefits refer, firstly, to the direct access to the restricted tender procedure or the negotiated procedure with prior publication. Furthermore, the Defence Directive provides the possibility of imposing specific requirements pertaining to security of supply, as well as additional control instruments for subcontracting, in comparison to the classical regime.

5. Conclusions

Having in mind the analysis made above, it is submitted that the administrative gap in joint procurement projects could be filled by recourse to existing normative instruments, which have been tested to some extent and could thus form the basis of an integrated framework. Arguably, the most clear-cut format would be one based on the coordinating role of a CPB from one of the participating Member States or an EU institution like the EDA (which would have to embrace its role as a procurement facilitator). The joint programme would be based on the

⁷⁰ Martin Trybus (n 4) 220.

⁷¹ Pascal Friton, Christopher Wolters and Niklas Andree (n 31) 31.

⁷² Jukka Ruohonen (n 63) 359.

⁷³ Raluca Csernaton, 'The EU's Defence Ambitions: Understanding the Emergence of a European Defense Technological and Industrial Complex' [2021] Carnegie Europe Working Paper 35 <https://carnegieendowment.org/files/Csernaton_EU_Defense_v2.pdf> accessed 5 April 2023.

provisions of an agreement concluded to this end by the participating Member States. It is critical that the agreement provides enough flexibility to accommodate the sovereignty woes of the Member States, i.e. particular defence or security related independent procurement initiatives carried out at national level, whether or not concerning the same goods or category of goods as those covered by the agreement.⁷⁴

Ideally, the CPB should be a Member State organisation, since this would allow the recourse to the rules provided in the Defence Directive as guidance in order to ensure that the procedure as a whole remains in line with EU law (notwithstanding the fact that R&D collaborative projects are explicitly exempt from the direct application of the Defence Directive). The main procurement instrument would be the framework agreement, concluded by the coordinating CPB under the rules and regulations applicable to it (either those of its Member State of origin or those applicable to EU institutions, respectively), while subsequent contracts concluded by each individual participating Member State would be subjected to their national legislations (especially in terms of dispute resolution).

In this context, it is submitted that the framework agreement is the most effective procurement vehicle to cater for the needs of collaborative defence and security procurement. It has been tested on numerous occasions, both in classical as well as defence procurement and has thus witnessed significant scrutiny by the courts of law (including the CJEU) and by doctrine. It follows that it has all the prerequisites to be and become (through normative and gradual transformation in practice) a stable yet sufficiently flexible instrument for collaborative procurement. Since an in-depth analysis of the vulnerabilities of the framework agreement goes beyond the scope of this paper, it is acknowledged that the conclusion on its appropriateness should remain a preliminary one, pending further research that can prove or disprove this contention.

The legal framework should also provide a clear characterization of the contracts stemming from collaborative procurement projects, i.e. the legal regimen to which they are subjected (private law contracts, administrative contracts or a hybrid solution), which should be recognised as such in the legislation of every Member State.

While it is not mandatory to have an explicit legal basis pertaining to the capacity of Member States to conclude an agreement for collaborative procurement, it is nonetheless true that a normative package in this respect would provide additional impetus and coherence to potential initiatives. Thus, at a political/strategic level, a Decision of the EU Council would serve as the normative root of the framework. It would be further complemented by a Regulation with EU-wide applicability, setting the ground rules, together with delegated power to the Commission to enact tertiary legislation to sort out the administrative details.

In terms of security of information, in consideration of the ambitious reach of the objectives set in terms of defence industrial integration, a future legal framework for collaborative procurement should have clear provisions on fundamental issues such as authorization and ownership on need to know.⁷⁵ Regardless of any preexisting level of trust or bilateral/multilateral arrangements in place, the need to have a specific system in place is predicated on the inherent sensitivities related to defence and security interests which have

⁷⁴ Similar to the freedom afforded to Member States under the JPA. See Natasha Azzopardi-Muscat, Peter Schroder-Back and Helmut Brand (n 7) 51.

⁷⁵ An in-depth analysis on the issue of security on information at EU level and potential solutions for further integration in this field are provided in Simion-Adrian Purza, 'Exploring Existing and Potential Normative Solutions for an EU-Wide Legal Framework for Security of Information in the Context of Defence and Security Procurement' (2021) 2 *Lex Et Scientia International Journal* 137-162.

traditionally pushed national authorities to deal with strategically important procurement outside the EU legal framework (based on Article 346 TFEU). Whether invoking said sensitivities (interests) is a reason or a justification is still debatable. Nevertheless, it is a fact that the need to protect classified information is central to any strategically relevant defence and security procurement project. Therefore, absent a clear and effective system capable of safeguarding the concerns of Member States in terms of security of information, significant and complex procurements will still risk being left outside the proposed framework, somehow similar to the limited impact of the Defence Directive on large procurement contracts.

In relation to review and remedies, as discussed above, the legal framework applicable to the conclusion of the framework agreement is that of the central purchasing body coordinating the joint procurement project. Subsequent contracts are to be subjected to the legislation of each individual Member State. While this solution seems the obvious (natural) choice, it is nonetheless criticisable for not providing a uniform approach. This type of inconsistency could discourage economic operators from engaging in collaborative procurements, since the variables implied by several different legal regimes for reviews and remedies pertaining to their contracts (however coordinated under EU law) are seen as resource-consuming risks. A potential solution to ease this type of apprehension would be a dispute resolution mechanism ingrained in the collaborative procurement framework. It would function largely as a mediation instrument, seeking to find solutions to any contractual issues that might lead to litigation between the suppliers and the contracting authorities. Rules on the enforceability of the solutions rendered by the mechanism and also eventual penalties could be also envisioned.

The current diversity of overarching policy and normative contexts surrounding collaborative initiatives has revealed that EU defence integration has reached a high degree of ambition and maturity. Thus, EU governments have shown political determination to move the process forward amidst a unique strategic momentum that may be harnessed with the help of programmes such as PESCO. Furthermore, in addition to the national contributions of the Member States, the EU provides substantial financial support from the EDF for collaborative research projects seeking capability development – arguably a game-changer in terms of the EU's long-standing reserve to use its budget for military capabilities. The Strategic Compass emphasises the importance of capability development once again, laying out the important goals in this regard, including reducing fragmentation and attaining perfect interoperability. In this context, it should be reiterated that the growth of the EDTIB is critical for full forces integration, with joint development and SME access to cross-border contracts as crucial components. It is against this backdrop that the EU and its Member States should harness the strategic momentum and push forward concrete legal and administrative solutions capable of providing an environment conducive to strategically relevant collaborative procurement, should the political will move decisively towards such initiatives.