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Theoretical Models and Implementation Practices: Critical Legal Analysis of Joint Cross-Border Procurement

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Il presente contributo analizza in chiave critica la disciplina europea dell'appalto congiunto transfrontaliero, un istituto giuridico volto a raggiungere l'interesse pubblico grazie al soddisfacimento (transfrontaliero) dei fabbisogni di amministrazioni pubbliche dislocate nei vari Paesi membri. Obiettivo, tuttavia, che pare (almeno parzialmente) contraddetto dall'alto livello di complessità della norma e della sua attuazione. Aspetto che, unitamente alla presenza di fattori critici sul piano concreto, conduce le amministrazioni aggiudicatrici a preferire il ricorso ad altre procedure di affidamento.

This paper analyses the EU legal framework of Joint Cross-Border Procurement. This is an instrument for achieving the (cross-border) satisfaction of the needs of different EU Member States' public authorities. This goal, however, seems to be (partially) at odds with the extremely complicated rules and their application which - together with other practical considerations, makes contracting authorities favour alternative procurement procedures.

1. Introduction. The necessity of Member States' cooperative approach. The Cross-Border Health Events case[1]

The globalisation, particularly in terms of free movement of people, capital, and goods around the world, has brought fast economic development. In the European Union, it contributed to establishing the EU Single Market[2]. Nevertheless, it should be mentioned that it also played a significant role in the diffusion of adverse cross-border health events[3]. The increased mobility of people on the planet has exponentially raised the risk of transmission of viruses and pathogens[4]. The Covid-19 pandemic shows this to be true, albeit before it there were the SARS outbreak (2003), the H1N1 pandemic (2009), the EBOLA (2014) and Zika (2016) outbreaks (2016). To tackle such a complex situation the national responses provided by individual States are largely useless, requiring instead the adoption of synergetic strategies[5]. For this reason, since the late 1990s, the European Union has developed some measures to jointly address and manage potential cross-border health events. There measures were: the Network for the Epidemiological Surveillance and Control of Communicable Diseases in the Community[6] in 1998, and the European Centre for Disease Prevention and Control (ECDP)[7] in 2004. However, the 2009 H1N1 pandemic revealed these prevention measures inadequate, showing serious vulnerabilities in their application.

The 2009 pandemic was faced by Member States in an uncoordinated manner, with competitive practices for purchasing vaccines that benefited some Member States (at the expense of others)[8]. This competitive approach was strongly condemned by the EU institutions[9], which emphasised the need to adopt cooperative practices between the Member States. And this on the basis of a solidarity logic for the mutual benefit of each EU country (and the Union itself), and with the explicit aim of avoiding the recurrence of events such as the H1N1 pandemic[10].

It was the Covid 19 pandemic that pointed out the connection between different national policies. Consequently, it highlighted the need for Member State coordination to protect people's health, that should no longer be restricted to

national borders[11].

Since the health status of one Member State depends on those of the others, fragmented efforts to address cross-border health risks make Member States together more vulnerable. For these reasons EU institutions adopted general acts to strengthen the EU's synergetic response in key areas (e.g. prevention, risk assessment)[12] and developed legal mechanisms to turn these efforts into action. These general acts include instruments for cooperation in the area of public procurement: Joint Procurement Agreement (exclusively applicable to the healthcare sector), and Joint Cross-Border Procurement (applicable to non-healthcare sector)[13].

2. Two Cooperative Legal Instruments: Joint Procurement Agreement (JPA) and Joint Cross-Border Procurement (JCBP)

Although their names sound similar, Joint Procurement Agreement (JPA) and Joint Cross-Border Procurement (JCBP) are different.

JPA[14] is a tendering procedure model for the mutual procurement of specific healthcare goods, the «*medical countermeasures*» (i.e. vaccines, antiviral drugs, and medical countermeasures for serious cross-border health threats[15]). It was originally regulated by Decision 1082/2013/EU of the European Parliament and of the Council of 22 October 2013[16], and recently repealed by Regulation (EU) 2022/2371 of 23 November 2022[17]. Consequently, JPA is excluded from the application of the 2014 Procurement Directives (i.e. Directives 2014/23-24-25/EU) and exclusively focused on the health sector[18].

Under the provisions of this Regulation[19], the European Commission and the Member States involved shall launch a JPA procedure for the urgent purchase of medical countermeasures for critical cross-border health threats.

The procedure is ruled by Article 165 of Regulation (EU, Euratom) 2018/1046 and must be anticipated by an agreement between the parties on Joint Procurement setting out the practical modalities and the aspects of the decision-making process.

All Member States, EFTA States and candidate countries for accession to the Union, the Principality of Andorra, the Principality of Monaco, the Republic of

San Marino and the Vatican City State are eligible.
Before starting the procedure, the Commission prepares an evaluation of the joint tender. That must indicate the proposed general conditions, delivery time and the suggested deadline for the decision on participation. In any case, the joint award must not affect the internal market, restrict trade, or distort competition. Furthermore, it must not have a direct financial impact on Countries not involved. The European Commission and the Member States participating in the JPA work together to coordinate the procedure, exchange information, build up stocks and deal with the distribution of medical countermeasures, by means specific mechanisms set up at EU level.
Before Regulation (EU) 2022/2371 was approved, and therefore under the regime of the previous Decision 1082/2013/EU, the European Commission and the countries involved signed the Joint Procurement Agreement on 10 April 2014[20].
This agreement has now been signed by thirty-seven Member States and non-EU countries[21]. It does not have the nature of an international treaty, but of an implementing measure of budgetary acts[22].
One of the advantages of JPA is the influencing role that the parties involved in the agreement can exercise on the market.
They can aggregate significant demand and obtain a wide availability of healthcare products at affordable prices – including those of an innovative nature. Furthermore, the role of the European Commission as a third actor can be read as a mode of promoting solidarity relations between the involved states. At the same time, it may also be a difficult element in achieving the goals of JPA. And this because of the increased transaction costs necessary for the involvement of a heavyweight contractor such as the European Commission. Further elements that may limit the success of this tool are the various individual centralisation strategies for building national preventive stocks[23], as well as the provision that any Member State may withdraw from the agreement at any time[24]. Moreover, the sectoral application of this institution to the health sector considerably limits its potential scope of application.
The JPA only apparently resembles the JCBP[25]. They are distinguished by some features that may induce to consider them, at the normative level, two different species of a common genus.

3. The Regulation of JCBP Established by Procurement Directive 2014/24/EU

The Directive 2014/24/EU introduced for the first time explicitly a framework to foster cooperation strategies, while increasing the benefits of the internal market[26], through the creation of cross-border commercial opportunities for suppliers and providers[27]. It created a legal instrument to expressly implement the principle of administrative cooperation between the public administrations of the Member States[28].

In this case the principle of administrative cooperation is declined on the side of public demand. Indeed, identical needs of different administrations can be satisfied in the same way regardless of the place where they are expressed.

Ideally Joint Cross-Border Procurement (JCBP) is appropriate for purchasing goods with standardised technical specifications at the lowest price on the EU market. This could potentially remove barriers between individual national markets that lead to different prices for the same good with identical technical properties (f.i. goods for which the same level of technical properties is demonstrated by appropriate certification). Indeed, these barriers result from the national benchmark market and are due to the presence of dealers from the same supplier, who have no interest in competing in different countries.

For this purpose, the EU legal framework first sets out two points that delimit the JCBP boundaries.

First, contracting authorities may act jointly to award public contracts across borders, but this must not be aimed at avoiding their own national rules and applying the more advantageous rules of another state[29].

Second, Member States shall not prohibit their contracting authorities from using central purchasing bodies located in another Member State (given, in any case, the possibility for Member States to set a limit *ex ante* by restricting the categories of centralised procurement activities that their national contracting authorities can adopt)[30].

Even though the Directive 2014/24/EU establishes these two conditions, it does not directly specify which body oversees supervising these prohibitions (the Court of Justice of the European Union?), nor does it make explicit which sanctions are to be applied.

The Directive 2014/24/EU outlines two different procedures that contracting authorities can adopt to implement JCBP[31]. The first one involves a central purchasing body, while the second one takes place between individual contracting authorities.

3.1. JCBP Using a Central Purchasing Body

The first of these two procedures, established by Article 39 para. 2 and 3 of Directive 2014/24/EU, enables a contracting authority to use the central purchasing body located in another Member State.
Directive 2014/24/EU aims to uniform the applicable legal regime by requiring the application of the law of the central purchasing body's country[32]. This is intended to avoid the application of different rules from one country to another in the sub-phases of the procedure.
For example, let's imagine the case of a national contracting authority wishing to use a foreign central purchasing body. In this case, the national contracting authority may use a foreign central purchasing body by applying foreign rules. But this is on the condition that the state of the contracting authority has not imposed any restrictions on the particular type of centralised procurement activity[33].

3.2. JCBP Between Contracting Authorities

According to Article 39(1), (4) and (5) of Directive 2014/24/EU, the second JCBP model allows two (or more[34]) contracting authorities from different Member States to act jointly to award a public contract[35].
The above-mentioned rule states that the tender can be awarded in two ways, offering a wide margin of discretion to the participating contracting authorities.
On the one hand, contracting authorities may set up a joint third entity that acts in the name and on behalf of the individual participating authorities[36] (f.i. the European Grouping of Territorial Cooperation, EGTC)[37].
In this case the contracting authorities sign the agreement establishing the third body, setting out the practical arrangements for the award of the contract and its duration on a discretionary basis between themselves. In this agreement, they must provide in detail which law is applicable: whether the law of the Member

State where the joint third party has its legal seat, or the law of the Member State where the joint third party pursues its activities[38].

If contracting authorities consider the creation of a joint third party to be excessively difficult and time-consuming, they may proceed with the award of the contract through coordinated action based on a mutual agreement. It is therefore essential for contracting authorities to regulate individual aspects of the procurement process.

To this purpose the Directive 2014/24/EU outlines two ways. The first one is to structure the procedure through the signing of an international treaty between all states of the respective contracting authorities involved[39]. The second one allows the individual contracting authorities involved in JCBP to agree contractually and with discretion on certain key elements: the allocation of responsibilities between the parties[40], the applicable internal rules and the organisation of the tendering procedure (also in terms of execution)[41].

4. The Theoretical Complexity of JCBP and Its Implementation Difficulties

Article 39 of Directive 2014/24/EU outlines an instrument that might, at first glance, appear to be useful for the achievement of the set goals. And this is true both for JCBP using a central purchasing body[42] and for JCBP between contracting authorities[43].

The level of complexity in the first case is lower than in the second. In the former, in fact, there is a contracting authority that uses the activities carried out by a single central purchasing body located in a different Member State, with the consequent application of the rules of the central purchasing body's State. This element of complexity can be overcome by verifying the compatibility of the rules to be applied by the central purchasing body with the legal system of the contracting authority, and by ensuring that there are no regulatory conflicts. This must be done before the launch of the procedure. And that means as soon as the contracting authority expresses its intention to use the activity of the foreign central purchasing body.

In the second case the level of complexity is higher. First of all, this is evident by considering the creation of a third party acting on behalf of and for the account

of the various contracting authorities participating in the JCBP[44]. This scenario appears complicated and less feasible mainly for reasons of time, as the constitution of a third party (where one does not already exist) requires adequate preparation.

In particular, the option of Article 39(1), (4) and (5) of Directive 2014/24/EU requires the participating contracting authorities to act on the basis of an internal agreement previously signed between the parties. This agreement therefore constitutes the pivot around which the system revolves[45].

A deeper analysis of the regulation turns up some critical points.

At first, there is the issue of the absence of regulatory conflicts. Indeed, the rules applicable to the tender award and those applicable to the execution of the joint contract must be legally compatible with each other.

Secondly, there is the difficulty of finding a satisfactory understanding between the parties involved in the procedure.

In addition to the complexity of the rule, however, there are also critical elements related to the execution phase, that can negatively affect the choice to use the JCBP. Among these factors, the language issue emerges in particular. Consider, for example, the choice of language for the tender documents and the contract itself. While on a logical level it might be advantageous to use a third language (f.i. English), on a pragmatic level this option must deal with national rules. Indeed, there are countries where the contract and tender documents must mandatory be drafted in the national language.

Language is therefore a barrier, leading to increased costs (and time) related to translation and asseveration of documentation, affecting the savings in costs that JCBP aims to achieve.

A further critical profile may arise from the choice of e-procurement platform for the management of JCBP, both in the award and execution phases. Since there is no rule mandating the use of a specific platform, it is therefore necessary for the parties to agree among themselves to choose it. It is difficult to find this common platform, given the natural trend of each contracting authority to use its own national systems – better known than others never been used before (the improper use of which could lead to the financial liability of the civil servant).

In addition, the correct identification of the value and/or the maximum quantity subject to the framework agreement of JCBP is a further problematic factor for

reaching the internal agreement. In addition to this critical aspect, there is the difficulty of identifying administrations that are even potentially beneficiaries of the framework agreement. On these two aspects, the recent case law of the Court of Justice of the European Union is clear[46].

5. Concluding Remarks: JCBP between Complexity, (In)Efficiency of the Rule and the Necessity to Achieve the Outcome

As explained in the previous paragraphs, the EU institutions have established JCBP as a procedure to achieve public interest through the (cross-border) satisfaction of needs of contracting authorities from different Member States.

The effective use of this procedure between different contracting authorities is essential to the legislator's intention. This is confirmed by the numerous documents in which the European institutions invite national contracting authorities to use JCBP[47], especially for the purchase of innovative solutions[48].

However, considering the legal framework it appears that the provisions of Article 39 of Directive 2014/24/EU seem to conflict with the purpose of the EU legislator. Indeed, JCBP is a legal instrument characterised by a high level of complexity. This factor, combined with the presence of other critical issues at the practical level, pushes contracting authorities to choose other procurement procedures. However, there are also (rare) positive experiences of JCBP[49].

JCBP is a difficult procedure to perform. It is unsuitable in the case of urgent purchases[50], and presents obstacles due to the discretionary power of the contracting authorities involved.

In fact, JCBP provides a wide range of discretion in favour of the participating contracting authorities.

At the theoretical level, this procedure is intended to allow the parties to achieve the objective of the award by following the path they consider most suitable for the specific case. The contracting authorities are thus free to trace this path as they see most appropriate.

However, if these discretionary aspects are implemented within a complex context, they can bring about behaviour that can be ascribed to the phenomenon of 'defensive administration'[51]. This phenomenon occurs in public

administration and consists of a distortion between the choices that the civil servant is required to take and those that he actually takes. The former are aimed at pursuing the public interest, while the latter are often directed at protecting oneself from potential liabilities that may arise from the exercise of discretionary powers[52]. Therefore, having the choice, the civil servant will adopt a known and sound procedure. In this way, he makes a discretionary choice based on existing procedures, rather than experimenting with new procedures to pursue the public interest. And this despite the latter being more efficient, but riskier in relation to the application of a complex, confusing or not yet applied rule[53].

This reflects the degree of (regulatory[54], but not only) complexity of JCBP, that requires strong process management skills to turn it from risk to opportunity.

However, only a few contracting authorities have qualified staff with specific administrative, procurement management (EU and national) and strategic vision skills. The most technically prepared administrations are undoubtedly the central purchasing bodies (CPBs)[55].

CPBs have been established to rationalise public spending. For this reason, they are composed of specialised and highly qualified civil servants, experienced in handling complex public procurement procedures, such as JCBP. It is the technical expertise of civil servants that could be useful in reducing situations of defensive administration. Although, honestly, it does not avoid them altogether.

These elements bring us to a reflection. If a rule fails to achieve its intended objectives due to systemic effects (as in the case of defensive discretionary administration), the legislator is the first responsible party. Indeed, the legislator in his legislative action must foresee the possible collateral effects that may arise from the incorrect application of the legal rule or from a different (and not necessarily wrong) legal interpretation.

Therefore, rules must be efficient[56]. As the Law and Economics approach states[57], in order to be efficient, regulations must maximise the collective welfare and reduce as much as possible transaction costs[58] and negative externalities[59]. Therefore, the rules must eliminate or reduce as far as possible legal and factual elements that impede the pursuit of the public interest.

Outlining a legal instrument with abstract potential (as the EU legislator done with the JCBP), by establishing a complex legal framework difficult to implement on a formal level, means nullifying *ab initio* the goal pursued. In

relation to the JCBP, let's consider the aforementioned systemic effects: the difficulty between the parties to reach a satisfactory agreement (resulting from the freedom that the European legislator grants to contracting authorities participating); or the presence of defensive administrative behaviour (resulting from the complexity of the rules).

What should be done about this?

At first, it might be useful to admit that the phenomenon to be regulated is indeed (perhaps too) complex, given the inherent limitations arising from the state of affairs.

Secondly, it may be helpful to amend Article 39 of the Directive 2014/24/EU, detailing the perimeter within which participating contracting authorities can act.

It would therefore be appropriate to narrow the area of discretion currently given to the parties, thereby reducing the possible cases of defensive administration. But beware: narrow, not eliminate the discretionary action. In fact, discretion is the very essence of public administration[60].

This aspect is also evident in the case of automated digital systems[61]: they do not eliminate discretion but strengthen it, emphasising the responsibility of those who designed them and those who take decisions based on them.

Finally, it might be useful to intervene downstream, by rethinking the system of incentives (economic, but not only) that push civil servants to make the right choices. Hence, correct even if risky choices, thus preventing individual defensive behaviour from negatively affecting the community.

However, it might also be helpful to intervene upstream. For instance, by promoting the use of already existing instruments through which EU management training is enhanced in view of the achievement of the managerial outcome (e.g. Erasmus traineeships for public administrations between Member States). Consequently, the principle of the result could strengthen the pursuit of the public interest in contexts of complexity and discretion. And this is precisely highlighted by the new Italian Public Contracts Code (legislative decree no. 36/2023), that contains the principle of the result in its first article. In this new Code, the result principle is in fact the implementation the constitutional principle of good performance of public administration, and the related principles of efficiency, effectiveness and economy. Focusing on the achievement

of objectives set by the EU and national laws, this principle is the main criterion to guide the exercise of discretionary power and to assess the responsibility of the civil servant[62].

1. This paper is a re-elaboration, under a different title and with significant changes to the text, of the paper intended for publication in C. Risvig Hamer, K.M. Halonen, M. Socha (Eds.), *Public Procurement: Centralisation and New Trends*, DJØF Publishing, Copenhagen (forthcoming). This paper is the result of a joint reflection of the two authors. Paragraph 1 must be attributed to R. Lombardi, and paragraphs 2., 3., 3.1, 3.2., 4., and 5 to S. Rossa.
2. Cf. Article 3(2) and Article 21 TEU; Article 45 Charter of Fundamental Rights of the European Union; and Articles 26 and 28 TFEU.
3. As highlighted by P. Farmer, *Infections and Inequalities: The Modern Plagues*, University of California Press, Berkeley, 2001; D. Quammen, *Spillover: Animal Infections and the Next Human Pandemic*, W. W. Norton & Company, New York City, 2012. In general on this topic see I. Kawachi, S. Wamala (eds.), *Globalization and Health*, Oxford University Press, Oxford, 2016.
4. This aspect is also confirmed on historical level: cf. F.M. Snowden, *Epidemics and Society: From the Black Death to the Present*, Yale University Press, New Haven, 2019.
5. As highlighted by A. Giddens (eds.), *The Global Third Way Debate*, Polity Press, Cambridge, 2001.
6. Cf. Decision 2119/98/EC of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community.
7. Cf. Regulation (EC) 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control, recently repealed by Regulation (EU) 2022/2370 of the European Parliament and of the Council of 23 November 2022 amending Regulation (EC) 851/2004 establishing a European centre for disease prevention and control.
8. On this topic, in Italian, G. Sdanganelli, *II modello europeo degli acquisti congiunti nella gestione degli eventi rischiosi per la salute pubblica*, in *DPCE online*, 2, 2020, p. 2328 ff.
9. Cf. Management of H1N1 influenza European Parliament resolution of 8 March 2011 on evaluation of the management of H1N1 influenza in 2009-2010 in the EU (2010/2153(INI)).
10. About the required solidaristic vision in emergency events, such as the Covid-19 pandemic, see in Italian F. Fracchia, *Coronavirus, senso del limite, deglobalizzazione e diritto amministrativo: nulla sarà più come prima?*, in *Dir. econ.*, 3, 2019, p. 575 ff.
11. On the application of public procurement during the period of the recent pandemic, see S. Arrowsmith, L. Butler, A. La Chimia, C. Yukins (eds.), *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, Hart Publishing, Oxford, 2021.

12. In relation to the Covid 19 pandemic, see for example the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Building a European Health Union: Reinforcing the EU's resilience for cross-border health threats (COM/2020/724 final), or the document of the European Commission, Pharmaceutical Strategy for Europe of 25 November 2020.
13. The current discussion will only focus on these two general instruments (JPA and JCBP), without analysing the specific instrument of the Advance Purchase Agreement (APA), because it was developed specifically in connection with the public purchase of Covid-19 vaccines, and not for general purposes o product category. In fact, it was developed in connection with the Covid-19 pandemic within the EU Strategy for COVID-19 vaccines (COM(2020) 245 final - Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank EU Strategy for COVID-19, 17 June 2020), and as underlined by G.M. Racca, S. Ponzio, *Contrats publics transnationaux: une perspective complexe*, in *IUS Publicum Network Reviw*, 2021, p. 31, it has nature of transnational public contracts. Without analysing this institution in detail, the following should in any case be pointed out briefly. In the full course of the Covid-19 pandemic, the European Commission ran a major procurement procedure for the benefit of the member states, by which it entered into agreements with individual EU and non-EU pharmaceutical companies to first co-develop, and later purchase, the covid vaccine (the APAs). In detail, the procedure was structured in the following steps, as described in the special report elaborated by the European Court of Auditors. The European Commission concluded an agreement with the individual Member States, based on which a Steering Board for vaccine procurement was created. This Steering Board appointed a Joint Negotiating Team that started exploratory talks and preliminary negotiations with the candidate vaccine manufacturers. After finding an agreement, the Joint Negotiating Team and the candidate manufacturer established a non-binding list of conditions and key elements. At that point, the European Commission sent the call for tenders to the candidate manufacturer, who responded to the call at short period. After this, the Joint Negotiating Team and the manufacturer proceeded with formal negotiations on the APA, following which the Steering Board approved the draft APA, that was finally approved by the College of Commissioners. Member States could then decide to join (or not) the APA within five days. At the end, the European Commission concluded the APA on behalf of the involved States. Cf. European Court of Auditors, *Special Report: EU COVID-19 vaccine procurement. Sufficient doses secured after initial challenges, but performance of the process not sufficiently assessed*, n. 19/2022, in https://op.europa.eu/webpub/eca/special-reports/covid19-vaccines-19-2022/en/#chapter9. In this way, the European Union, on the one hand, shared with the pharmaceutical company the business risk linked to the research and development of the vaccine, also through financial advances from the European budget; on the other hand, after the approval of the vaccine by the EMA, it exercised pre-emption on large quantities of doses

at a fixed price, distributing the vaccines on the basis of the population of the various member states. As highlighted by P. Mariani, *Il controllo delle esportazioni in situazioni di emergenza: il caso dei vaccini*, in *Riv. commerc. internaz.*, 1, 2022, p. 117, this mechanism turned out to be very important in ensuring the full availability of vaccines in a short time, since it normally takes about a decade to develop a vaccine. About the EU Vaccine Strategy see European Commission, *EU Vaccines Strategy*, in https://commission.europa.eu/strategy-and-policy/coronavirus-response/public-health/eu-vaccines-strategy_en?etransnolive=1. On this topic see S. Pugliese, *Verso un sistema di regolazione commerciale multilivello per contrastare il sovranismo: gli appalti congiunti nell'emergenza COVID-19 come laboratorio di sperimentazione*, in M. D'Arienzo, M.L. Tufano, S. Pugliese (eds.), *Sovranazionalità e sovranismo in tempo di COVID-19*, Cacucci, Bari, 2021, 371 ss.; in connection with the activity of the Health Emergency Preparedness and Response Authority (HERA), F.S. Della Corte, *The EU Vaccines Strategy: A Missed Opportunity for EU Public Health?*, in *European Journal of Risk Regulation*, 2023, p. 1. In general, about the situation of the first phase of the pandemic, see S. D'Ancona, *Appalti pubblici e Coronavirus: tra norme e buone prassi*, in CERIDAP, 1, 2020, p. 16 ss.; and, with critical geopolitical insights, A. Leconte, *Vaccino "bene comune universale"? Perché la geopolitica rema contro*, in *Policy Brief*, 21, 2021, p. 1 ss. In any case, the development of joint action mechanisms has further strengthened the usefulness of cross-border collaborative practices, as stated by Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (COM(2021) 380 final), 1. (and as it will be shown in the course of this paper).

14. On this topic see N. Azzopardi-Muscat, P. Schroder-Bäck, H. Brand, *The European Union Joint Procurement Agreement for Cross-Border Health Threats: What is the Potential for this New Mechanism of Health System Collaboration?*, in *Health Economics, Policy and Law*, 12(1), 2016, p. 43 ff.; R. Cavallo Perin, G.M. Racca, *European Joint Cross-border Procurement*, in G.M. Racca, C. Yukins (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, Bruylant Bruxelles, 2019, p. 93 ff.
15. Cf. Commission Decision on approval of the Joint Procurement Agreement to procure medical countermeasures pursuant to Decision 1082/2013/EU (C(2014) 2258 final).
16. 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.
17. Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision 1082/2013/EU.
18. Cf. G. Sdanganelli, *II modello europeo degli acquisti congiunti nella gestione degli eventi rischiosi per la salute pubblica*, cit., p. 2338, who, in relation to the model under Decision 1082/2013/EU, points out that, notwithstanding, the principles of equal treatment, non-discrimination, proportionality and transparency are equally applicable to it.
19. Cf. Article 12 Regulation (EU) 2022/2371.

20. Commission Decision on approval of the Joint Procurement Agreement to procure medical countermeasures pursuant to Decision 1082/2013/EU (C(2014) 2258 final).
21. Cf. European Commission, *Signing ceremonies for Joint Procurement Agreement*, in https://health.ec.europa.eu/health-security-and-infectious-diseases/crisis-management/signing-ceremonies-joint-procurement-agreement_en.
22. Cf. G. Sdanganelli, *Il modello europeo degli acquisti congiunti nella gestione degli eventi rischiosi per la salute pubblica*, cit., p. 2330, who specifies that possible disputes are subject to the exclusive jurisdiction of the Court of Justice of the European Union.
23. Cf. Communication from the Commission Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak (2020/C 116 I/01).
24. Cf. Article 48 Decision 1082/2013/EU.
25. On this topic G.M. Racca, *Principles of joint cross-border public contracts and transnational effects*, in S. de La Rosa, P. Valcárcel Fernández (eds.), *Les principes des contrats publics en Europe*, Bruylant, Bruxelles, 2022, p. 555 ff.; R. Cavallo Perin, G.M. Racca, *European Joint Cross-border Procurement*, in G.M. Racca, C. Yukins (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, cit.; F. Schotanus, *Joint procurement: an economics and management perspective*, in C. Risvig Hamer, M. Comba (eds.), *Centralising Public Procurement: The Approach of EU Member States*, Edward Elgar, Cheltenham, 2021, p. 54 ff.; A. Sánchez-Graells, *Is Joint Cross-Border Public Procurement Legally Feasible or Simply Commercially Tolerated?: A Critical Assessment of the BBG-SKI JCBPP Feasibility Study*, in *Eur. Proc. & Pub. Pri. Part. Law Rev.*, 12(2), 2017, p. 97 ff.; S. Ponzio, *Joint Procurement and Innovation in the New EU Directive and in Some EU-funded Projects*, in *IUS Publicum Network Review*, 2, 2014, p. 1 ff.; G.M. Racca, *Joint Procurement Challenges in the Future Implementation of the New Directives*, in F. Lichère, S. Treumer, M. Comba (eds.), *Modernising Public Procurement: The New Directive*, DJØF Publishing, Copenhagen, 2014, p. 225 ff.
26. Cf. Recital 73) 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.
27. See M. Comba, *Appalti pubblici per l'innovazione*, in *Dir. econ.*, 1, 2020, p. 184, and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Making Public Procurement work in and for Europe (COM/2017/0572 final), page 14. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in fact, did not prohibit the use of Joint Cross-Border Procurement, but did not explicitly mention it, as underlined by Recital 73) Directive 2014/24/EU.
28. Cf. R. Cavallo Perin, G.M. Racca, *European Joint Cross-border Procurement*, in G.M. Racca, C. Yukins (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, *cit.*, 94. See also M. Lottini, *From 'Administrative Cooperation' in the Application of European Union Law to 'Administrative Cooperation' in the Protection of European Rights*

and Liberties, in *European Public Law*, 18(1), 2012, p. 131 ff.; F. Lafarge, *Administrative Cooperation between Member States and Implementation of EU Law*, in *European Public Law*, 16(4), 2010, p. 600 ff. In Italian R. Cavallo Perin, G.M. Racca, *Cooperazione amministrativa europea*, in *Dig. Disc. Pubbli.*, 2017, p. 191 ff.; R. Cavallo Perin, G.M. Racca, *La cooperazione amministrativa europea nei contratti e servizi pubblici*, in *Riv. ita. Dir. pubbl. comunit.*, 6, 2016, p. 1457 ff.; D.U. Galetta, *Coamministrazione, reti di amministrazioni, Verwaltungsverbund: modelli organizzativi nuovi o alternative semantiche alla nozione di 'cooperazione amministrativa' dell'art. 10 TCE, per definire il fenomeno dell'amministrazione intrecciata?*, in A. Contieri, F. Francario, M. Immordino, A. Zito (eds.), *L'interesse pubblico tra politica e amministrazione*, Vol. I, Editoriale Scientifica, Napoli, 2010, p. 191 ff.

29. Cf. Article 39(1) last sentence Directive 2014/24/EU.
30. *Id est* activities conducted permanently, in the case of the acquisition of supplies and/or services intended for contracting authorities; or in the case of the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities. Cf. Article 39(2) Directive 2014/24/EU.
31. Cf. Article 39(1) first sentence Directive 2014/24/EU.
32. Cf. Article 39(3) first sentence Directive 2014/24/EU.
33. See footnote 30.
34. Cf. Article 39(4) first sentence Directive 2014/24/EU.
35. As well as to jointly conclude a framework agreement or manage a dynamic purchasing system.
36. Cf. Article 39(5) Directive 2014/24/EU.
37. In accordance with Regulation (EC) 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC). On this topic see G.M. Racca, S. Ponzio, *Contrats publics transnationaux: une perspective complexe*, cit., p. 1; S. Carrea, *The discipline of the European Grouping of Territorial Cooperation (EGTC) between European Union law, statutory autonomy and private international law: an attempt at synthesis*, in *Dir. comm. internaz.*, 2012, p. 611 ff.
38. Cf. Article 39(5) Directive 2014/24/EU.
39. Cf. Article 39(4) third sentence Directive 2014/24/EU.
40. Cf. in any case Recital 71) Directive 2014/24/EU.
41. Cf. Article 39(4) third sentence let. a) and b) Directive 2014/24/EU. As the procurement procedure can be managed in different ways, contracting authorities can structure it according to several models. The most intuitive model provides that there is a single contracting authority α that signs a framework agreement for the other participating authorities β, γ and δ. The selection phase of the supplier, and thus of the award of the framework agreement, is regulated by the law of the contracting authority that signed it, namely α. Subsequently, each contracting authority to the benefit of which the framework agreement has been awarded (β, γ and δ) will execute it in their States according to their own national rules. On the other hand, it is possible for contracting authorities to adopt a

different model, the block purchasing. In fact, it is also possible for contracting authority A to purchase the goods in bulk for the benefit of all the other contracting authorities B, C, and D participating in the agreement. In this scenario, the block purchase is regulated by the State national law of the contracting authority that signed it. At a later moment, each contracting authority (B, C and D) will be able to purchase the good from the authority that previously purchased it in bulk (A). The execution phase is regulated by the respective national disciplines. It should be noted, however, that bulk purchase for the benefit of other administrations, with subsequent resale, is not allowed in all Member States' juridical orders. This is the reason why the use of the framework agreement is a more practicable option.

42. According to Article 39(2),(3) Directive 2014/24/EU.
43. According to Article 39(1),(4),(5) Directive 2014/24/EU.
44. Cf. Article 39(5) Directive 2014/24/EU.
45. The internal agreement seems to be the most feasible option. This internal agreement is fundamental as a legal tool regulating the JCBP. In it, the contracting authorities allocate their respective responsibilities, decide on the specific national legal framework to be applied to JCBP, as well as on the applicable jurisdiction (considering the general prohibition of forum shopping in EU law) and establish all details concerning the internal organisation of the award procedure, including the choice of the award criterion – a criterion that could also be the criterion of the lowest price if the goods have standardised features that testify to the same level of quality.
46. Cf. respectively Court of Justice, Judgment 17 June 2021, C-23/20, *Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark*, ECLI:EU:C:2021:490, and Court of Justice, Judgment 19 December 2018, C-216/17, *Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice Soc. coop. arl v Azienda Socio-Sanitaria Territoriale della Vallecamonica - Sebino (ASST) and Others*, ECLI:EU:C:2018:1034. About it see C. Risvig Hamer, *CPBs and their users: shared liability, contract management and remedies*, in C. Risvig Hamer, M. Comba (eds.), *Centralising Public Procurement: The Approach of EU Member States*, cit., p. 87 ff.
47. Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Making Public Procurement work in and for Europe (COM/2017/0572 final), p. 14.
48. As underlined by G.M. Racca, C. Yukins (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, cit.
49. There are few previous experiences of cross-border procurement. However, one of them has been successfully implemented, that of Project HAPPI (Healthy Ageing Public Procurement of Innovations), the scientific coordinator of which was Prof. G.M. Racca, and which concerned the JCBP of medical goods characterised by a high level of technology. In particular, the HAPPI project was financed with funds from the European Commission and was conducted by a consortium of several participating European stakeholders, mainly consisting of central purchasing bodies and companies experienced in

innovative healthcare procurement. On this topic see European Commission, BBG, SKI, *Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, 2017, p. 33 ff.; R. Cavallo Perin, G.M. Racca, *European Joint Cross-border Procurement*, in G.M. Racca, C. Yukins (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, cit.; S. Ponzio, *Joint Procurement and Innovation in the New EU Directive and in Some EU-funded Projects*, in *IUS Publicum Network Review*, cit.

50. The EU institutions have appropriately provided specific procedures for emergency purchasing scenarios, especially in the health sector: cf. Council Regulation (EU) 2022/2372 of 24 October 2022 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level.
51. Among the academics who have explored this issue: A. Wildavsky, *The Politics of the Budgetary Process*, in *The Yale Law Journal*, 74(3), 1965; S. Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform*, Cambridge University Press, Cambridge, 1999; C.R. Sunstein, *Risk and Reason: Safety, Law, and the Environment*, Cambridge University Press, Cambridge, 2002.
52. As underlined in Italian by F. Fracchia, P. Pantalone, *La fatica di semplificare: procedimenti a geometria variabile, amministrazione difensiva, contratti pubblici ed esigenze di collaborazione del privato 'responsabilizzato'*, in *Federalismi.it*, 36, 2020, p. 33 ff., bureaucracy or defensive administration is also called 'fear of signing'. Defensive administration is not to be confused with corruption: the corrupt civil servant, in fact, pursues an individual gain by producing a collective damage, whereas the 'defensive' civil servant renounces a collective gain to avoid the risk of an individual damage. On this argument, in Italian, see M. Cafagno, *Contratti pubblici, responsabilità amministrativa e 'burocrazia difensiva'*, in *Dir. econ.*, 3, 2019, p. 625 ff.; M. Delsignore, M. Ramajoli, *La prevenzione della corruzione e l'illusione di un'amministrazione senza macchia*, in *Riv. trim. dir. pubbl.*, 1, 2019, p. 61 ff.; M. Cafagno, *Risorse decisionali e amministrazione difensiva: il caso delle procedure contrattuali*, in *Dir. amm.*, 1, 2020, p. 35 ff.
53. In this way V. Valentini, *Burocrazia difensiva e restyling dell'abuso d'ufficio*, in *Giust. pen.*, 2, 2020, which points out the presence of a trade-off between private costs and collective benefits that inevitably leads to a negative balance.
54. According to a study carried out a few years ago by Forum PA (a leading Italian service and consultancy company specialising in public relations, institutional communication, and training), it was pointed out that the excessive production of legislation and the continuous succession of regulatory interventions are two of the most important causes of defensive bureaucracy according to the civil servants interviewed by the study. Cf. C. Mochi Sismondi (coord.), V. Piersanti (eds.), *Burocrazia difensiva. Come ne usciamo? Una ricerca di ForumPA*, in *Forum PA*, 2017, p. 8.
55. On this topic see C. Risvig Hamer, M. Comba (eds.), *Centralising Public Procurement: The Approach of EU Member States*, cit.

56. See *ex multis*, in Italian, F. Denozza, *Norme efficienti: L'analisi economica delle regole giuridiche*, Giuffré Editore Milano, 2002.
57. Law and Economics combines the traditional view of law as a system of rules, obligations, and sanctions with an economic view in which law is seen as a set of incentives addressed to subjects and aimed at the adoption of a specific behaviour. On this argument see, among others, R. Coase, *The Problem of Social Cost*, in *The Journal of Law & Economics*, 3, 1960, p. 1 ff.; G. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, in *The Yale Law Journal*, 70(4), 1961, p. 499 ff.; R. Posner, *Economic Analysis of Law*, Little Brown, Boston, 1972; R. Posner, *The Economics of Justice*, Harvard University Press, Cambridge, Mass., 1981. Recently U. Mattei, *The Rise and Fall of Law and Economics: an essay for Judge Guido Calabresi*, in *Maryland Law Review*, 64(1), 2005, p. 220 ff., while, from a comparative perspective T. Eisenberg, G. Ramello (eds.), *Comparative Law and Economics*, Elgar Publishing, Cheltenham, 2016.
58. About it see R. Coase, *The Nature of the Firm*, in *Economica*, 4(16), 1937, 386 ff. In relation to this author's contribution, in general, R. Coase, *The Firm, the Market, and the Law*, in *California Law Review*, 77(1), 1989, p. 223 ff.
59. Theorised by A.C. Pigou, *The Economics of Welfare*, MacMillan, London, 1920.
60. On this topic, see the contributions of Italian literature, including M.S. Giannini, *Il potere discrezionale della pubblica amministrazione. Concetto e problema*, Giuffré, Milano, 1939; C. Mortati, *Potere discrezionale*, in *Nuovo Dig. it.*, 1939, 79 ff.; M. Nigro, *Le norme-principio della Costituzione e la discrezionalità amministrativa*, in *Foro it.*, 1951, I, III, p. 28 ff.
61. About this argument C. Coglianese, D. Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, in *Georgetown Law Journal*, 105, 2017, p. 1147 ff.; I. Giuffrida, *Liability for AI Decision-Making: Some Legal and Ethical Considerations*, in *Fordham Law Review*, 88(2), 2019, p. 439 ff.; C. Djeffal, *Normative Guidelines for Artificial Intelligence in Government and Public Administration*, in T. Wischmeyer, T. Rademacher (eds.), *Regulating Artificial Intelligence*, Springer, Cham, 2020, p. 277 ff.; H. Zech, *Liability for AI: public policy considerations*, in *ERA Forum*, 22, 2021, p. 147 ff.
62. See Article 1 legislative decree no 36/2023, Italian Public Procurement Code.