



Sanchez Graells, A. (2017). Is joint cross-border public procurement legally feasible or simply commercially tolerated? a critical assessment of the BBG-SKI JCBPP feasibility study. *European Procurement and Public Private Partnership Law Review*, 97-111. <https://ssrn.com/abstract=2944008>

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**Is Joint Cross-Border Public Procurement Legally Feasible
or Simply Commercially Tolerated?**

A Critical Assessment of the BBG-SKI JCBPP Feasibility Study

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*To be published in
European Procurement & Public Private Partnership Law Review.*

ABSTRACT

This paper provides a critical assessment of the “*Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*” prepared by BBG-SKI for the European Commission. The paper submits that the study provides some interesting data and details about relevant case studies, but that it does not shed significant light on the doubts created by the rules on joint cross-border public procurement (JCBPP) in the 2014 EU Public Procurement Package, and that the main weakness of the study is its lack of a general legal analytical framework.

In order to gain additional legal insights on the basis of the empirical data included in the BBG-SKI study, this paper proposes an analytical framework under which to assess the legal compliance of JCBPP structures. It then summarises each of the case studies included in the BBG-SKI study and offers a critical (re)assessment of the issues that would have required more information and/or which are insufficiently analysed in the BBG-SKI study. Based on this reorganised empirical evidence, the paper proceeds to a critical assessment of some of the outstanding legal barriers and challenges to JCBPP. It concludes by stressing some of the remaining uncertainties concerning legal development at Member State level, and calls on the European Commission to facilitate more detailed research leading to the adoption of future guidance on JCBPP under the 2014 EU Public Procurement Directives.

KEYWORDS

Joint procurement, collaborative procurement, public procurement, centralised purchasing bodies, joint entities, legal framework, choice of law, conflict of laws.

JEL CODES

H57, K12, K23, K33, K42

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1. Introduction

The European Commission remains committed to its policy of facilitating and promoting cross-border collaborative public procurement in the EU as part of the *Strategy for a deeper and fairer single market*,² broadly understood.³ On 20 March 2017, and as an effort to support innovative projects of collaborative procurement with a cross-border dimension, the European Commission published the *BBG-SKI study*.⁴ The study had the goal of assessing the feasibility of the possible implementation of *joint cross-border public procurement* (JCBPP), in particular focusing on the legal, administrative and organisational aspects of four selected projects.⁵ The BBG-SKI study was thus expected to shed light on the complex legal issues that JCBPP raises,⁶ and to provide insights on the ways in which Arts 37 to 39 of Directive 2014/24⁷—and their equivalent Arts 55 to 57 of Directive 2014/25⁸—can be transposed and developed by the Member States to facilitate the uptake of JCBPP.

The BBG-SKI study offers some interesting information on four JCBPP projects carried out before the implementation of the 2014 EU Public Procurement Directives was effective in the relevant Member States. Three of the case studies involve cross-border collaboration between, or involving central purchasing bodies (CPBs), and the other one focuses on cross-border procurement by an entity jointly created by two Member States to channel their cooperation in an infrastructure project of EU interest. The BBG-SKI study allows for empirical evidence of the legal difficulties created by JCBPP to start to emerge and sketches the legal solutions trialed in those projects by the contracting authorities concerned—which are generally creative and worthy of detailed analysis.

However, the BBG-SKI study does not subject those legal structures to a systematic or critical assessment and remains extremely shallow in its legal analysis, to the point of making empty general statements such as “*JCBPP is more a matter of legal complexity than of legal barriers*”,⁹ or that “*from a legal point of view JCBPP initiatives are not necessarily only a risky endeavour*,

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Upgrading the Single Market: more opportunities for people and business*, COM(2015) 550 final. Available at <http://ec.europa.eu/DocsRoom/documents/14007?locale=en>, last accessed 31.03.2017.

³ See the current European Commission’s *Public Procurement Strategy*, including its focus on facilitating the aggregation of demand, at https://ec.europa.eu/growth/single-market/public-procurement/strategy_en, last accessed 31.03.2017.

⁴ BBG – SKI, *Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, December 2016. Available at <http://ec.europa.eu/DocsRoom/documents/22102/>, last accessed 29.03.2017.

⁵ *BBG-SKI study*, 9.

⁶ For discussion and a mapping of the main issues, see A Sanchez-Graells, “Collaborative Cross-Border Procurement in the EU: Future or Utopia?” (2016) 3(1) *Upphandlingsrättslig Tidskrift* 11-37, available at <https://ssrn.com/abstract=2734123>, last accessed 29.03.2017. See also T Tátrai, “Joint public procurement” (2015) 16(1) *ERA Forum* 7-24; and S Ponzio, “Joint Procurement and Innovation in the New EU Directive and in Some EU-Funded Projects” (2014) 2 *Ius Publicum*, art 7, available at http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf, last accessed 29.03.2017.

⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

⁸ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

⁹ *BBG-SKI study*, 104.

*but also open up opportunities for achieving the goal of enhancing efficiency in public procurement” (sic).*¹⁰ This is a lost opportunity for the European Commission to have provided clarification of the new and complex rules on JCBPP in the 2014 EU Public Procurement Package.

In my opinion, the BBG-SKI study’s main shortcoming is its lack of a general legal analytical framework under which the different case studies can be assessed. This makes the information on the legal aspects of the projects it discusses appear scattered throughout the report and, ultimately, makes its analytical attempts fall rather short of identifying relevant unresolved legal issues or doubtful legal strategies—which, despite having been used in the specific case studies, are not checked for compliance with EU law or the domestic law of the relevant Member States, nor for their fit with the JCBPP models that the 2014 EU Directives have created,¹¹ which they are simply assumed to match.¹²

I find it rather telling, and disappointing, that one of the final conclusions in the study stresses that “[a]ll in all, legal uncertainties did not in any case render the JCBPP procedure as such impossible, but rather led to a number of adjustments and accompanying measures”.¹³ However, there is no hard assessment of whether those adjustments and accompanying measures were legally compliant or solely commercially tolerable (or tolerated). Indeed, upon reading the BGG-SKI study, the only conclusion that can be extracted with certainty from a legal perspective is that, given that none of these procedures were challenged in court, these legal structures cannot be seen to represent more than exercises of JCBPP that were commercially tolerated by the market—sometimes not without commercial reluctance or resistance, though. That is, from a pragmatic perspective, it can be stressed that all case studies showcase legal strategies that the respective contracting authorities managed to implement in practice. However, the deeper question of whether these strategies ensured JCBPP’s (full) legal compliance under the specific circumstances of each case remains uncharted territory. Thus, it is also hard to see how those legal strategies and structures could be generalised for contracting authorities of those or other Member States. The BGG-SKI study does not, in my view, significantly further our understanding of the determinants of legal compliance of JCBPP.

In order to go beyond this situation and to gain some additional insights on the basis of the empirical data included in the BBG-SKI study, this paper proposes an analytical framework under which to assess the legal compliance of JCBPP structures (2). It then summarises each of the case studies included in the BBG-SKI study and offers a critical (re)assessment of the issues that would have required more information and/or which are insufficiently analysed in the BBG-SKI study (3). Based on this reorganised empirical evidence, the paper proceeds to a critical assessment of some of the existing legal barriers and challenges to JCBPP (4). It concludes by stressing some of the remaining uncertainties concerning legal development at Member State level, and calls on the European Commission to facilitate more detailed research leading to the adoption of future guidance on JCBPP under the 2014 EU Public Procurement Directives (5).

¹⁰ *BBG-SKI study*, 111.

¹¹ For a limited attempt in that regard, see *BBG-SKI study*, 109-111.

¹² Indeed, the study simply indicates that “[w]ith a view to the typologies of JCBPP which the EU Procurement Directives lay out, the cases at hand illustrate some of the main forms of mechanisms for joint procurement: JCBPP with two or more CAs from different Member States jointly conducting a procurement procedure, including also CPBs jointly acting as CAs, and cross-border procurement through a joint entity”; *BBG-SKI study*, 107, footnotes omitted.

¹³ *BBG-SKI study*, 106.

2. An Analytical Framework to Assess JCBPP's Legal Compliance

Given the legal complexities of this type of procurement projects, I submit that it is useful (if not indispensable) to have a general analytical framework under which to assess JCBPP's legal compliance. In that regard, it is worth stressing that the case studies largely fit in the theoretical case scenarios I developed elsewhere.¹⁴ Those models structure the complex sets of legal relationships around (i) the relationship between the cooperating entities¹⁵ based in different Member States, be they CPBs or not (ii) the relationships between the contracting entity and the bidders created by the tender, (iii) the relationship between the contracting entity and the contractor(s), which can also imply a parallel or dependent relationship between the final users and the contractor(s) in the case of eg framework agreements tendered by CPBs, and (iv) the relationship between the CPB and the end users, where this exists. All of these relationships require a legal assessment, both from a substantive and a jurisdictional perspective.

Based on this abstract blueprint for analysis and setting other issues aside (such as tax law, budgetary law, etc)—from an (international) public law and public procurement perspective—the main issues that require detailed assessment in order to ensure JCBPP's legal compliance concern the following dimensions:

- (1) *Legal framework dimension*: international and domestic public law dimension of the collaborative relationship established between the contracting entities (be they CPBs or not), which can be complicated if the collaborating entities resort to private law mechanisms that may or not circumvent those (international) public law requirements (including constitutional issues), and the related issues of jurisdiction (or lack thereof);
- (2) *Public procurement dimension*: which concentrates on the potential conflict of public laws regulating the procurement process and procurement remedies, including issues of conflicting or overlapping jurisdiction; and
- (3) *Contractual dimension*: which concentrates on the potential conflict of (public or private) contract law applicable to the execution of the contract, including issues of jurisdiction (or alternative dispute resolution mechanisms).

There are some additional dimensions, such as (4) compliance with relevant rules in the relationships between end-user entities and CPBs where the JCBPP involves the participation of the latter, or (5) relationships between contractors and CPBs where there are rebates or other types of mechanisms that involve the transfer (back) of funds as a mechanism to finance the activities of the CPB. However, given the scant attention paid to these dimensions in the BGG-SKI study, this paper will not develop them any further. The next section will summarise, reorder and reassess the case studies in the BGG-SKI study around the three dimensions identified above. Section 4 will later engage in a more general assessment of some legal barriers and challenges for legally-compliant JCBPP under the 2014 EU Public Procurement Package.

¹⁴ Sanchez-Graells (n 6) section 2.

¹⁵ Cooperating or contracting entities is used loosely in this paper, to cover any entity covered by EU public procurement rules. It will thus encompass both contracting authorities and contracting entities, depending on the specific circumstances of the case.

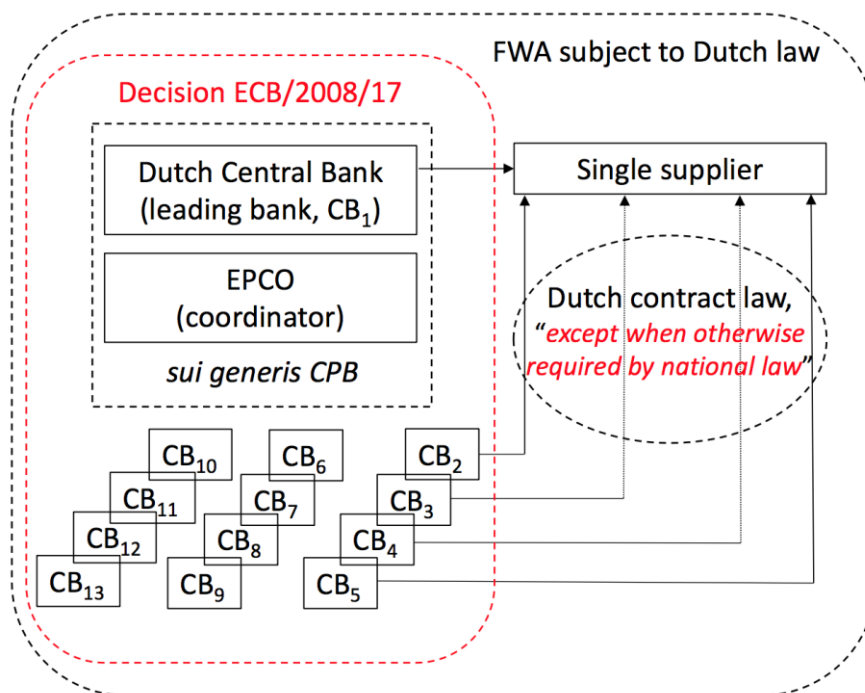
3. A (Re)Assessment of the Case Studies in the BBG-SKI Study

This section provides summaries and a critical (re)assessment of the case studies developed in the BBG-SKI study in line with the three dimensions identified above (2). It aims to provide a legally-centric account of each of the case studies and concentrates on legal implications of the different project structures. Remarks on their commercial or economic viability will only be made where relevant for the legal assessment.

3.1. The EPCO Case Study

The EPCO case study concentrates on the procurement of standard IT software packages through a reseller. The procurement was instrumented through a framework agreement tendered under Dutch law (both for the procurement and for the contract) and in English language, which subjected disputes to the jurisdiction of the competent court in Amsterdam both for procurement and contractual issues, although the parties were free to subject contractual disputes to arbitration or mediation by mutual agreement. The procurement was run by the Dutch central bank as leading procurer, playing “a similar role to that of a CPB under the coordination of EPCO”, and central banks from other Member States could use the structure if they so wished.

The structure of the procurement can be represented as follows:



In terms of the rules in Art 39(2) and (3) of Dir 2014/24 (which did not apply at the time), this is a close example of what can be considered cross-border use the services of a (sui generis) foreign CPB. However, there are a few specificities of the EPCO regime that could point out towards this being an example closer to the creation of a joint entity under Art 39(5) Dir 2014/24. Either way, the example needs to be considered in its own terms and bearing in mind important specificities in the legal structure and mandate of EPCO.

3.1.1. Legal framework dimension

This is an interesting case study because it concentrates on what is possibly the most advanced legal structure for the conduct of JCBPP in the EU. Since 2008, central banks participating in the Eurosystem have benefitted from the existence of the *Eurosystem Procurement Coordination Office* (EPCO),¹⁶ which aims to use the synergies of the different central banks in order to achieve best value for money in the procurement of goods and services to comply with the principles of cost efficiency and effectiveness. EPCO was created by Decision ECB/2008/17 of the Governing Council of the European Central Bank establishing the framework for joint Eurosystem procurement,¹⁷ and its legal framework was recently updated by Decision ECB/2015/51.¹⁸ As the BBG-SKI study echoes, “*EPCO defines itself as sui generis central purchasing body*”.

Indeed, in this case study, there are two very important circumstances that significantly mitigate issues around the existence of an international public law framework for the conduct of the procurement procedure: (1) the existence of an EU-wide legal framework derived from Decision ECB/2008/17; and (2) the on-going support of the lead central bank by EPCO as *sui generis* central purchasing body.

3.1.2. Public procurement and contractual dimensions

It is important to stress that the procedure was designed to avoid the existence of international choice of law issues by subjecting all legal aspects (*ie* both procurement and contract execution) to Dutch law, as a matter of principle. However, the extent to which this sorted out all existing legal issues cannot be assessed on the basis of the information provided by the BBG-SKI study and more detail would have been necessary for a definitive evaluation.

First, the potential existence of procurement law restrictions for the participation of central banks of other Member States on this specific type of JCBPP led by the Dutch bank and EPCO is, at least in part, mitigated by the existence of the EU-level framework of Decision ECB/2008/17, as well as by the specificities of the way in which BBG-SKI designed the data collection. The study only contains information on two Member States included in the assessment (Austria and Luxembourg), in addition to the lead bank (Netherlands). This is very relevant because the legal structure centred in the Dutch rules benefitted from the fact that (i) Austrian law explicitly provided for the possibility of a contracting authority to purchase from a CPB located in another Member State, and that (ii) under Luxembourgish law, contracting authorities may purchase works, supplies and/or services from or through a CPB and cooperate by launching a common procurement or by forming a new legal entity.

It is not possible to assess if similar possibilities existed under the procurement laws of the remaining participating Member States, or if any more general restrictions on international cooperation for cross-border procurement (including the need to use official languages of each Member State) may have been deactivated or substituted by the system created by Decision ECB/2008/17. It is also not assessed whether the special status that central banks usually enjoy in terms of operational and budgetary autonomy may have also played a significant role, or the extent to which this structure could be replicated more generally for non-central bank entities.

¹⁶ For background, see <http://www.epco.lu/>, last accessed 29.03.2017.

¹⁷ Decision ECB/2008/17 of the European Central Bank of 17 November 2008 laying down the framework for joint Eurosystem procurement [2008] OJ L 319/76.

¹⁸ Decision ECB/2015/51 of the European Central Bank of 23 December 2015 amending Decision ECB/2008/17 laying down the framework for joint Eurosystem procurement [2016] OJ L 6/5.

Second, the BBG-SKI study fudges the issue of the subjection of call-off contracts to Dutch commercial law. It generally presents the subjection of the framework agreement and all subsequent contracts to Dutch law as not creating any problems. However, a closer look may indicate more scope for issues and difficulties. Out of the three tenderers invited, “[t]wo suppliers did not meet the [tender] requirements, either because they submitted a conditional offer or did not agree with the terms of the framework agreement”.¹⁹ The report makes no attempt to clarify whether these conditions or lack of agreement derived from legal or commercial issues, which leaves the question unanswered.

It also transpires from the BBG-SKI study that these difficulties may have been relevant for at least some of the central banks. The report is not too clear on this point when it indicates that “[n]ot only the [public procurement] law of the leading bank applied but, for reasons of legal coherence, also the contractual law, meaning that the participating banks used Dutch law when calling off out of the framework agreement, **except when otherwise required by national law**. In general, the participating banks did not experience difficulties in applying the Dutch contractual law, **very few of them indicated some general legal restrictions in the use of a contract concluded by a contracting authority located in a different Member State, which implied that they could not use the joint cross-border agreement in all cases** (e.g. limitations on the orders to be placed via the joint framework agreement depending on their estimated value)”.²⁰

In my view, this indicates the existence of potential barriers to JCBPP for contracting authorities from some Member States, and this would have merited much more detailed analysis. In particular, a more in depth assessment would be needed to clarify whether the difficulties amounted to what those contracting authorities considered “*mandatory public law provisions in conformity with Union law to which they are subject in their Member State*”, which would continue to exclude them from possible participation even after the entry into force of Directive 2014/24 (see Art 39(1) *in fine*).

Overall, then, it is a shame that the BBG-SKI study did not make a better job of the analysis of the EPCO case study. Given EPCO’s extensive experience in JCBPP, it seems that this superficial analysis of only one of their procurement exercises is a missed opportunity to gain a better insight into the effective legal structures that have been used to date.

3.2. The HAPPI Case Study

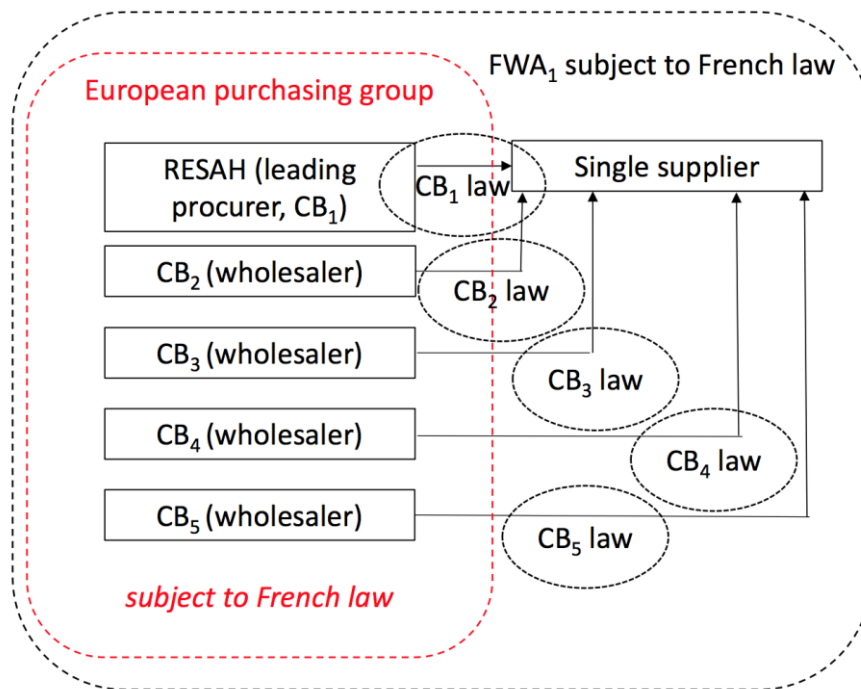
This case study analyses a JCBPP exercise between five CPBs based in different Member States and specialising in the healthcare sector, which tendered five single-supplier framework agreements for innovative products and services linked with ageing and well-being needs. The French CPB acted as lead procurer and the framework agreements were tendered under French law, and carried out in French, English and Italian. Any disputes arising from the tender process were subjected to the jurisdiction of the competent French courts (Paris). It was an explicit requirement of the tender documentation that each “*contracting authority was able to award subsequent contracts on the basis of the framework agreement concluded and executed them according to the respective national legislation*”; consequently, “[t]he competent instances for complaints arising from the award of subsequent contracts [were] the respective national review

¹⁹ BBG-SKI study, 28-29.

²⁰ BBG-SKI study, 27, emphasis added.

institutions".²¹ The participating CPBs decided to act as wholesalers, so there would be no direct contractual relationship between end user entities and suppliers.

The structure of the procurement can be represented as follows:



Note that there were four separate framework agreements, one for each of the lots.

3.2.1. Legal framework dimension

Given the absence of EU-level rules applicable to the collaboration between the CPBs (Art 39 Dir 2014/24 was not in force), and the absence of an international treaty governing their relationship, the participating CPBs opted to address the need to provide an umbrella (international) public law framework by creating a European purchasing group instrumented as a “groupement de commande” under French law.

Even if the BBG-SKI study raises no issues with this legal structure—but rather relies heavily on the trust that the legal assessments underpinning it were correct—I have serious doubts about the legal soundness of the structure and, more importantly, its replicability and scalability. It is not clear to me that CPBs in other EU Member States can, without more, enter into an agreement to create a ‘European purchasing group’ under French law. I have doubts around their international legal personality, their competence and power to enter into international agreements, and about the public law controls that (should) apply to such a decision.

The BBG-SKI study does not clarify the legal status of the participating CPBs under their respective legal orders (some are described as non-profit entities, whereas others seem to have corporate form). My impression is that all of the CPBs participating in the HAPPI project adopted private law institutional or corporate form and that they entered into this ‘European purchasing group’ agreement without many (or any, public law) checks on their competence to do so. The

²¹ *BBG-SKI study*, 38.

content of the agreement is not explained in any detail, and the extent to which disputes between the partner-CPBs would actually be subjected to French law and decided by the French courts (solely, or at all) is not clear to me.

3.2.2. Public procurement dimension

The tender seemed to be structured on the common understanding that the French CPB was solely in charge for the procurement, which was thus subjected and limited to French law and French remedies mechanisms.

However, the case study also shows that, given the need to manage multi-lingual tenders, the lead procurer did not assume sole responsibility for evaluation and award, but rather *“each of the partners analysed the offer received in its own language and wrote the conclusion of the analysis in English in a common analysis report template”*.²² To me, this means that the procedure was one where the lead procurer was not consistently and exclusively in charge of the procedure (*ie* there was no possible claim that all other CPBs were buying from the lead CPB, or that the lead CPB was exclusively responsible for all phases of the tender); but rather one where all CPBs were actually jointly responsible (and potentially liable) for (at least) the evaluation and award phases.

This is hard to reconcile with the rules in Art 39(4) Dir 2014/24—particularly in view of the limited detail the BBG-SKI study offers on the content of the agreements underpinning the “groupement de commande” under French law—and raises untested issues about potential remedies, which can be quite complicated because the administrative law applicable to each of these evaluations by the partner-CPBs can hardly be simply assumed to be French law.

The BBG-SKI study does not address other important issues, such as the potential challenge of the variability of law applicable to each call-off (particularly at pre-award stage if a potential tenderer challenged this contractual requirement, but also later, during execution and on the basis of commercial considerations); or the difficult interaction between the rules controlling the framework agreement and those controlling each call-off, particularly in view of the fact that there are no mini-competitions and, consequently, call-offs from the single supplier are regulated by *both* French law and the law of the relevant CPB. The extent to which review bodies and courts in each of the Member States (other than France) would be willing and able to apply French law in conjunction with their domestic rules is simply untested.

3.2.3. Contractual dimension

As mentioned above, the tender documentation was designed so that each *“contracting authority was able to award subsequent contracts on the basis of the framework agreement concluded and executed them according to the respective national legislation”*. In that regard, it is also important to stress that participating CPBs decided to act as wholesalers, which also creates significant peculiarities from a contractual perspective because they all hold direct contractual relationships with the suppliers within the frameworks and because every final user institution calling-off within the legal structure will actually be buying from its domestic CPB, which insulates them from cross-border disputes. Therefore, the legal structure is fundamentally geared towards trying to minimise the existence of cross-border issues and

²² BBG-SKI study, 40.

conflict of law difficulties through the establishment of specific clauses in the framework agreements (and each of the CPB call-off contracts).

Moreover, there seems to be an assumption that all these issues can be satisfactorily addressed by contract, and the BBG-SKI study stresses that “[a]s the procurement law applicable to the tender was the French law and the call-offs were made under the respective national legislations, **it was necessary to specify in the tender documents all the relevant details referring to the national requirements for subsequent contracts.** The tender documents included details on rules for the execution of the contract in each of the participating countries, e.g. provisions on the form of subsequent contracts, terms of delivery, invoicing, etc. Each call-off from the contract was conducted on an individual basis by the contracting authorities or the institutions they were representing”.²³

This begs the question whether the entirety of the rules applicable in a given legal order can actually be condensed in the tender documents or contract, as well as how issues of legal reform, evolution in case law or (more importantly) errors in the way the procurement rules are detailed in the tender documentation would be addressed. It is also highly impractical and it probably only happened in this case because the project was sponsored by the European Commission, which “support offered to the project was a co-financing of 95% of administrative costs ... and 20% financing of the product costs”.²⁴

Indeed, it is worth stressing that this case study concentrates on an initiative of innovative cross-border procurement that was heavily sponsored with EU funds and, as such, does not seem to reflect real incentives or needs for the goods and services tendered. Bearing in mind that there was a very significant EU-wide communication campaign and market investigation phase that ultimately resulted in a total of only 8 tenders (one of them non-compliant) for only 4 of the 5 lots/framework agreements in which the procurement was divided, and limited call-offs for around €250,000 overall, this raises significant issues as to its (commercial) viability.

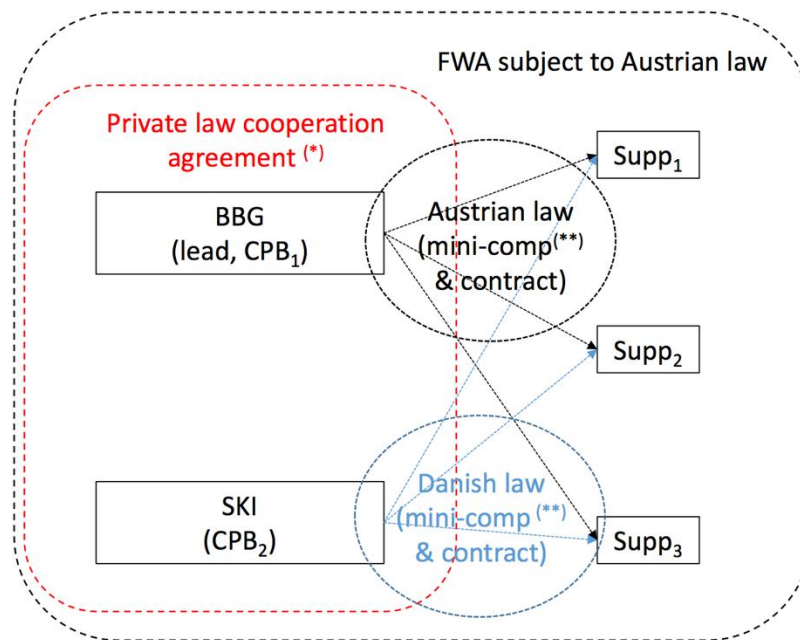
3.3. The Citrix Case Study

This is another case study on the procurement of standard software solutions, and shows some common technical aspects with the EPCO case study. However, the legal structure is significantly simpler, as it only involved a limited number of participating CPBs. It concentrates on the cooperation between the Austrian CPB (BBG) and the Danish CPB (SKI) [coincidentally, the authors of the study] for the acquisition of standard Citrix software. The procurement was instrumented through a framework agreement with three economic operators tendered under Austrian law in English. This subjected the tender for the framework agreement to the jurisdiction of the Austrian Administrative Court. However, Austrian procurement law did not apply to the entirety of the procurement and mini-tenders and direct call-offs were to be carried under respective national law of the relevant entity (ie either Austrian or Danish law). This presumably subjected these decisions to the respective remedies’ rules in each jurisdiction. The contractual law of the respective country of contract implementation would also be applicable and, for individual contracts, the appropriate court in Vienna or Copenhagen would be competent.

²³ BBG-SKI study, 39, emphasis added.

²⁴ BBG-SKI study, 43.

The structure of the procurement can be represented as follows:



(*) It is not clear from the BBG-SKI study to which law this ‘cooperation agreement’ was subjected, although it probably was Danish law because SKI mandated BBG.

(**) The framework allowed for direct call-offs of up to €50,000 to the cheapest bidder and required mini-competitions for higher value call-offs.

Please note that direct call-offs by contracting authorities are possible under the scheme. These are however not represented to avoid unnecessary graphical complication.

3.3.1. Legal framework dimension

At the outset of the analysis of the (international) public law constraints in this case, it is important to stress that the project started as a three-part collaboration between the Austrian, Danish and Finnish CPB. However, the Finnish CPB (Hansel) was forced to withdraw due to domestic legal restrictions.

It is interesting to highlight that, as spelled out in the BBG-SKI study: *“the Finnish CPB was not able to participate in the JCBPP. The restriction means both that it is impossible for Finnish contracting authorities to purchase using the public procurement law of another [Member State], and at the same time it is the legal limitation of the Finnish CPB which explicitly allows them to purchase only for or on behalf of domestic contracting authorities. Given this problem, the project team could not identify any measure to overcome this challenge”*.²⁵ Given the possibility that similar (constitutional) restrictions apply in other Member States, more details on this point would have been very important in connection with the future interpretation of Art 39(1) Dir 2014/24. At any rate, though, this is already a very clear indicator of the existence of an absolute barrier to JCBPP (which may or may not have been removed by the transposition of Dir 2014/24 in Finland) which requires further research.

The remainder of the case study concentrates on the cooperation between the Austrian and the Danish CPB (BBG and SKI respectively), which joint procurement was nested under a private law

²⁵ BBG-SKI study, 59.

cooperation agreement—whereby “SKI mandated BBG to conclude the framework agreement on its behalf”,²⁶ presumably under Danish private/commercial law. However, this aspect is not analysed in any detail and it is difficult to assess the extent to which resort to such private law mechanisms is in compliance with applicable Danish (and Austrian) law generally. There is also no indication of the dispute resolution mechanisms foreseen in that agreement, and the way it may (or not) have created issues of conflict of jurisdiction.

3.3.2. Public procurement dimension

The procurement was instrumented through a multi-supplier framework agreement tendered under Austrian law in English, as there “was no legal restriction in Austrian or Danish procurement law on using English as the main tender language”.²⁷

The subjection of the tender to Austrian law is an interesting choice because, as the BBG-SKI study explains, “[a]lthough the Austrian PP law provided for the possibility of a domestic contracting authority to purchase goods and services from a CPB located in another Member State and it would have been easier to apply this rule, BBG and SKI decided to conduct the procedure based on the possibilities offered in the new directive, namely in a joint cross border manner, with BBG acting as lead buyer and to apply Austrian PP law to the tender procedure”.²⁸ However, it is important to note that “Danish law did not provide for any restrictions on using Austrian procurement law for the award of the contract. At the same time, Austrian law did not explicitly prohibit BBG from awarding a contract on behalf of contracting authorities from another Member State”.²⁹ This limits the possibility of extracting general conclusions applicable to Member States where such characteristics are not present.

It is also important to highlight some particularities of the way in which the procurement was carried out. Despite being formally led by BBG, the implementation of the project raises issues about the exclusivity of the functions undertaken by the lead procurer. In particular, it is worth noting that—similar to the HAPPI case study (above 3.2)—in this case “[t]he tenders were evaluated by both CPBs” and “[t]he award was signed by BBG on behalf of SKI but the decision to award the contract to the three economic operators was taken by both organisations together”³⁰—which, once again, blurs the distinction of functions that cooperating CPBs tried to introduce in terms of lead/responsibility for the procurement.

It is not at all clear to me that, legally, it is true that the structure “automatically put BBG in the position of the lead partner”,³¹ as both CPBs jointly made the most important decisions in the procurement process. This is relevant, particularly in terms of potential remedies, and the assumption that only Austrian law operates and only Austrian courts are competent does not seem straightforward to me—as the activities of SKI could have easily been challenged in Denmark under Danish law in as far as it approved the tender documents, evaluated offers and signed the award proposal.³² Similar issues arise concerning the call-offs and the interaction between the tender documentation for the framework and the direct call-offs, as well as the

²⁶ BBG-SKI study, 56.

²⁷ BBG-SKI study, 55.

²⁸ BBG-SKI study, 53.

²⁹ BBG-SKI study, 59.

³⁰ BBG-SKI study, 56.

³¹ BBG-SKI study, 56.

³² BBG-SKI study, 57, table 4.

mini competitions (where applicable), which seem to me more complex than the way in which the BBG-SKI study represents them.

3.3.3. Contractual dimension

Moreover, it is important to stress that subjection to Austrian law was not extended to the entirety of the legal structure. *“The applicable contractual law was Austrian for call-offs made by Austrian contracting authorities and Danish law for those in Denmark. This approach seemed to be the most appropriate one, as **using Austrian law for the contractual relationship would have been impossible for the Danish contracting authorities** and strategically it was important for each CPB to offer its customers the legal environment to which they were used”*.³³ Similarly, rules applicable to jurisdictional issues were differentiated for the procurement and the execution phase: *“[i]n the tender documents it was stated that the competent review body for disputes resulting from the tender procedure is the Austrian Federal Administrative Court and for legal disputes arising from individual contracts out of the mini-tender, the respective Austrian or Danish Court. This formulation was used because **the CPBs wanted to avoid dealing with Danish court cases in Austria (sic) and vice versa**”*.³⁴

It is also interesting to note that, at the end of the procedure, *“it turned out that all bidders were Austrian companies (distributors and resellers) with Danish subcontractors, which was a strong indicator that the Danish market was reluctant about the JCBPP procedure, for reasons which are easy to understand”*.³⁵ These reasons have probably to do, in large part, with the distribution system of Citrix software and the limited competition in that market,³⁶ but it would have been interesting to know more about the subcontracting arrangements and the extent to which they create additional conflict of law issues where the call-off takes place in Denmark or, on the contrary, if this structure could also serve to avoid those issues from the perspective of the Austrian main contractors.

3.4. The Brenner Base Tunnel (BTT) Case Study

This case study concerns the tender for geological tests (a specialised type of construction-related services) to be carried out in both Austrian and Italian territory. The tender was organised as an open procedure to award a contract to a single economic operator (or consortium) and it was subjected to Italian public procurement law, using bilingual Italian-German documents. This subjected any litigation concerning the tender process to the jurisdiction of Italian courts. From a choice of law perspective, the contract was *functionally* split in two parts in that it *“was managed under Austrian law for the services provided by the supplier in Austria and under Italian law for those provided in Italy”*.³⁷ This was specified in the tender documents, which *“provided for a very clear distinction between the works which needed to be executed in each of the countries. This was something the contracting authority considered to be extremely important in order for the bidders to understand exactly which services needed to be implemented in each country”*. As a consequence, *“disputes arising from the execution of the*

³³ BBG-SKI study, 59, emphasis added.

³⁴ BBG-SKI study, 59, emphasis added.

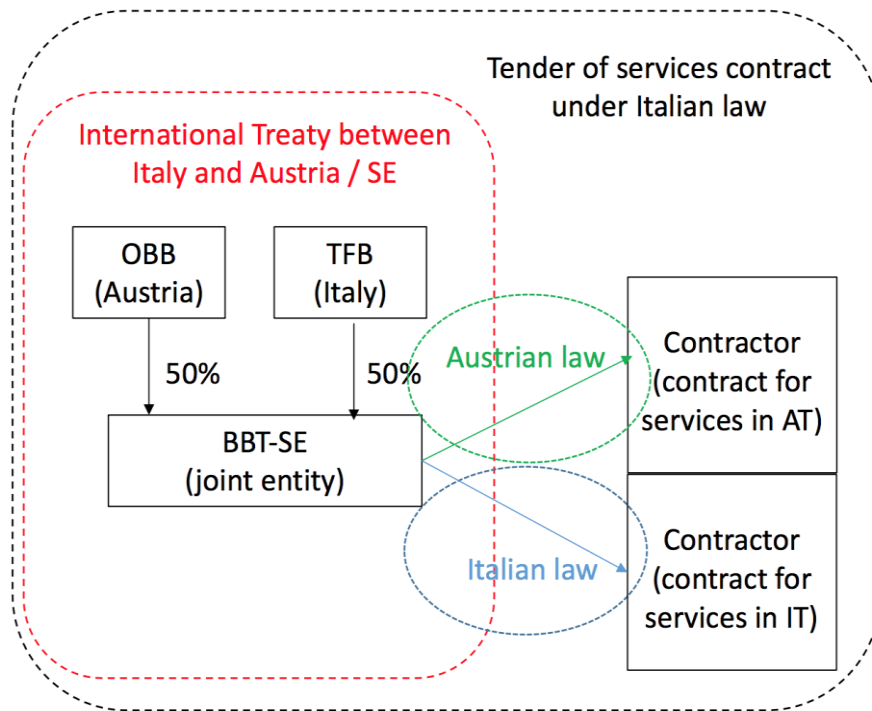
³⁵ BBG-SKI study, 56.

³⁶ BBG-SKI study, 49-53.

³⁷ BBG-SKI study, 67.

contract in Austria fall under the responsibility of the Court in Innsbruck, while those related to the execution in Italy of the Court in Bolzano”.³⁸

The structure of the procurement can be represented as follows:



3.4.1. Legal framework and public procurement dimensions

This case study concerns the procurement activities of the Brenner Base Tunnel SE (BBT), which is the entity in charge of the development of a railway tunnel connecting Austria and Italy created by an international treaty. It is a case of JCBPP through a joint entity that squarely fits within Art 57(5) of Dir 2014/25 [equivalent to Art 39(5) Dir 2014/24] and, as such, it triggers very different issues than those presented above because it does not require the same type of choice of law issues.

This derives from the fact that, as a general rule, the choice of law to which the procurement of the joint entity is subjected is already made – in this case, since 2015, the procurement carried out by BBT is subject to an asymmetric rule: “cross-border tenders as well as tenders for activities carried out in Italy ... fall under Italian procurement law whereas tenders for activities carried out in Austria [are subject] to the Austrian procurement legislation”.³⁹ As such, and provided projects of cross-border nature can be easily identified, this should not create complications due to the existence of this EU level system resulting from the joint regulation in an International Treaty between Austria and Italy and Dir 2014/25.

In that regard, it is worth noting that the complexities in the carrying out of cross-border procurement that the case study shows—notably, around the difficulties for non-Italian tenderers to meet qualitative selection requirements and unduly restrictive pricing and

³⁸ BBG-SKI study, 65.

³⁹ BBG-SKI study, 63.

budgetary rules—are, in my view, a result of inherent defects in Italian public procurement regulation, rather than a result of the cross-border nature of that specific procurement.

The analysis seems rather shallow and possibly defective in that the case study ignores the very relevant competition distortions that derived from the use of price-only as the award criterion coupled with the strictures of Italian law mandating the tender to be based on an ex catalogue estimated price/budget. Similarly to the HAPPI case (above 3.2), it is difficult to see how this can be touted as a successful case, particularly in view of the obvious *de facto* exclusion of non-Italian bidders. In my view, some of these defects could have been successfully challenged as contrary to the EU public procurement rules and their underpinning principle of competition (but that exceeds the scope of this discussion).

3.4.2. Contractual dimension

In my view, this case study offers limited insights, in particular because the BBG-SKI study provides very limited details surrounding the contractual structure underpinning the *functional* split according to the place of provision of services—which could raise questions as to whether this is a single contract subject to two different legal regimes, or if the award is of two interconnected but independent contracts. In any case, this seems something that can be subjected to negotiation and contractual agreement under Italian and Austrian law as a pragmatic solution to ensure compliance with site-specific regulations (in particular on health and safety), which is a very idiosyncratic issue.

4. Some Legal Barriers and Challenges for Legally-Compliant JCBPP

The reorganisation of the information provided by the BBG-SKI study along the lines of the three analytical dimensions outlined above (2) allows for a structured analysis of some of the legal barriers and challenges for legally-compliant JCBPP that, in my view, the study fails to critically assess.

4.1 Legal framework dimension

The BBG-SKI study stresses that “[s]etting up an agreement between the contracting authorities involved seems to be a very important factor in the cooperation process as the delegation of the procurement processes of one institution to another **is a sensitive issue for most contracting authorities**. A clear mandate and clarification from the beginning on the roles of each party and the responsibility of the contracting authority are therefore essential”.⁴⁰ However, despite this importance, the study simply indicates that “one basic issue is that national laws restricted in different ways the activities of national CAs in their relationship with foreign [contracting entities] and/or CPBs”,⁴¹ without much more. This issue would have required an in-depth analysis.

In my view, the four case studies pertain to two very different categories. First, there are cases where the (international) public law issues are resolved through the existence of an international treaty (BBT) or an EU-level specific legal framework (EPCO). These do not create

⁴⁰ BBG-SKI study, 96, emphasis added.

⁴¹ BBG-SKI study, 107.

difficulties once the legal framework is in place,⁴² but it must be acknowledged that these instruments will hardly become the standard framework for JCBPP.

Second, there are cases where the relevant entities (all of them CPBs, in the case studies that fall under this category) opt to ‘escape’ the public law framework that would otherwise (likely) apply to their activities, and thus eg opt for the use of mechanisms based on either the domestic public law of a different Member State (HAPPI) or private law (Citrix, concerning SKI’s mandate to BBG) in a way that is not legally assessed in the study.

Taking the HAPPI case study, there is simply a statement to the effect that *“the partners in the consortium could benefit from the fact that the respective Member States did not oblige their CPBs only to apply their respective domestic procurement law”*.⁴³ However, there is no evidence that the use of the French domestic institution of the “groupement de commande” to create the European purchasing group was (technically) either possible under French law, or under the relevant public laws of the other Member States in which the participating CPBs are based. This lack of assessment does not suggest that the use of these structures was necessarily illegal, but it does seem to involve legal risks that are unexplored in the BBG-SKI study.

Similarly, regarding the Citrix case study, there is no analysis of the possibility for the Danish and Austrian CPBs to simply enter a private internal cooperation contract. Given the difficulties faced by the Finnish CPB in that project, it is plausible to think that both the Danish and Austrian CPBs checked these issues before going forward. However, it is also possible that the project may have been undertaken *despite* the existence of significant legal risks for commercial reasons.

4.2. Public procurement dimension

The BBG-SKI study indicates that *“[t]he difficulties arising mostly trace back to conflicts of national public procurement regulations including questions of applicability as regards legal remedies. They may furthermore also be owed to uncertainties relating to the relevance of other legal requirements stemming from national law, such as constitutional and/or administrative law restraints, and due to needs for clarification as to the substantial contract law”*.⁴⁴ In my view, it is not clear that all case studies managed to exclude (or even minimise) these risks and effectively subject the respective tenders to one and only one domestic regime, either substantively or in terms of procurement remedies.

Where contracting entities collaborate in crucial phases of the tender (notably, the evaluation of tenders and the award of the contract, such as in the HAPPI and Citrix cases), it would be difficult to insulate the non-lead entity from domestic claims under domestic law. Similarly, in those cases where the procurement is instrumented by a framework agreement under the law of a Member State but the call-offs are carried out in accordance with the law of another

⁴² Indeed, *“it can be said that agreements between Member States dealing with JCBPP situations, such as the treaty between Austria and Italy regarding the Brenner Base tunnel, and/or other specific legal provisions such as – now – Decision 2016/21/EU (ECB/2015/51) regarding the EPCO system, show a significant potential to facilitate JCBPP projects because they create stability and – at least to some extent – contribute to the necessary legal certainty for the participating parties”*, BBG-SKI study, 110.

⁴³ BBG-SKI study, 107.

⁴⁴ BBG-SKI study, 106.

Member State (again, as in the HAPPI and Citrix cases), a watertight distinction of legal regimes (both substantive and remedial) is also hard to accept.

Given that channelling the tender exclusively through a standard procurement procedure carried out (exclusively) by a single (lead) CPB is difficult—and, thus, a system that hybridises paras 2 & 3 with para 4 or with 5 of Art 39 Dir 2014/24 seems to be the practical approach followed (to some or other extent) in all case studies involving more than one contracting entity (*ie* to the exception of the BTT case)—this creates uncertainty as to the distinction between the models of JCBPP sketched in Art 39 Dir 2014/24 and raises important issues surrounding the need for more detailed procedural rules (or, at the very least, guidance) in the absence of an EU-level legal framework (such as in the case of EPCO).

4.3. Contractual dimension

All case studies—with the only possible exception of EPCO's, although this is not too clear from the BBG-SKI study—show a very strong need, or at least preference, for contracting authorities to have their domestic law apply to contract execution. This can be problematic because legal structures are complicated where bidders have to accept asymmetrical choice of law conditions as part of the tender documentation, and it also raises tender costs by imposing additional transparency requirements concerned with the law applicable to the contract during execution.

Moreover, this disconnect between public procurement and contract laws can create particular difficulties in countries that have differentiated public contract law regimes—as opposed to subjecting them to general (private) contract law. It can also trigger other legal risks, for example where there is an unavoidable interaction of pre-award and post-award documentation and requirements, such as call-offs without mini-competition within framework agreements, which are by definition regulated by the basic conditions set at award of the framework (under the procurement law of a Member State) and the specific conditions fine tuned in the call-off and subsequent contract (under the law of a different Member State).

4.4. Some additional issues and challenges

Finally, from a different perspective, it may also be worth stressing that, in the case studies covered in the BBG-SKI study, tenders tended to take place in markets that have very peculiar competitive structures,⁴⁵ such as the market for standard software packages—where there are issues of limited competition in the supply side—or the market for innovative well-being solutions—where there was significant uncertainty as to the existence of sufficient (or any) supply, and as evidenced eg by the very limited participation in the HAPPI, Citrix and EPCO projects. In part, some of these projects (in particular the Citrix case) were driven by commercial considerations that may have trumped concerns around legal risks.⁴⁶ A detailed competition law

⁴⁵ *BBG-SKI study*, 98.

⁴⁶ As the BBG-SKI study puts it, “*it was ... important for the CPBs to challenge the software developer, to negotiate an agreement covering two different countries thus pushing him (sic) to act Europe wide and transparently*”, 98.

assessment may also have been warranted in the Citrix case, as the compliance of BBG-SKI's behaviour with competition law may be called into question.⁴⁷

On its part, the BBT case is itself a clear example of a procurement-created distortion of market competition due to mandatory Italian indicative price requirements and restrictive qualitative selection criteria, which in my view demonstrates a case of procurement failure rather than a success. Overall, the peculiarities of these markets and/or specific tenders make it difficult to assess the extent to which the case studies are representative of the feasibility of JCBPP in more competitive (commodities) markets, which can also carry higher risks of legal challenge.

5. Conclusion and Normative Recommendation

This paper has shown how, under a more structured and critical analysis than that carried out in the BBG-SKI study (which is shallow and, on many an occasion, rather naïve), the significant legal difficulties and challenges implied in JCBPP projects such as the four case studies discussed therein remain fundamentally unaddressed. There are few common elements in terms of the legal solutions adopted, beyond a hint towards a tendency to design the tenders in a way that avoids the emergence of trans-EU public law by fragmenting and re-localising different phases of JCBPP—though not always in a way that necessarily or unquestionably ensures the success of this strategy.

In my view, a number of open and complex questions remain unanswered in the three analytical dimensions of the (international) public law framework for these collaborations, conflicts of public procurement laws (both substantive and remedial) regarding the JCBPP tender, and conflicts of private (and public) law applicable to the ultimate contractual relationships.

Despite the factually-interesting discussion of the (mostly) commercially successful case studies covered in the BBG-SKI study, it does not shed any substantial light on key issues of legal compliance and on the way in which Member States can transpose and develop the rules of Arts 37 to 39 Dir 2014/24 (and their equivalents in Dir 2014/25). It also does not provide a sufficiently representative mapping of challenges and potential solutions as to make it possible to devise models of legal structure that can work under the general constraints of the legal systems of Member States with different levels of public law checks and balances over the activities of their contracting entities and, in particular, their CPBs.

It seems clear to me that much more detailed and careful legal research is needed in this area, and that the European Commission should facilitate such more detailed research with a view to the adoption of future guidance on the rules applicable to JCBPP under the 2014 EU Public Procurement Directives. I would suggest that a comparative law project based on the analytical blueprint developed here and in previous contributions is a promising possibility.

⁴⁷ Regarding their subjection to competition law, see A Sanchez-Graells & I Herrera-Anchustegui, "Revisiting the concept of undertaking from a public procurement law perspective – A discussion on *EasyPay and Finance Engineering*" (2016) 37(3) *European Competition Law Review* 93-98. Available at <https://ssrn.com/abstract=2695742>, last accessed 31.03.2017.