CROSS-BORDER PUBLIC PROCUREMENT IN THE EUROPEAN UNION

CEZHRANIČNÉ VEREJNÉ OBSTARÁVANIE V EURÓPSKEJ ÚNII

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I. Introduction

Public procurement is a complex agenda that includes legal, economic and political aspects. Public procurement is, because of the volume of funds that public authorities spend to meet their needs, a tool through which public policy makers try to achieve also secondary benefits, such as environmental or social benefits. Every year public authorities in the EU spend around 14% of GDP on public procurement.⁽¹⁾ Public procurement also has the potential to contribute to innovation. Increasingly, public procurement is used as a lever to drive economic growth, and achieve objectives such as unlocking innovation, SMEs participation and delivering sustainable outcomes.⁽²⁾ In order to support the functioning of the EU Single Market and to eliminate possible barriers arising from specific public procurement rules in the Member States, the EU has adopted EU public procurement law and rules that gradually unify public procurement rules in the Member States.

For preventing cross-border economic and legal obstacles, public procurers from different Member States are allowed to implement joint public procurement. Cross-border public procurement makes it possible to jointly meet the needs of several contracting authorities from different EU Member States and thus contribute to a more efficient functioning of the sin-

gle internal market.

The aim of this paper is to contribute to analytical results in the field of cross-border public procurement contracts carried out jointly by contracting authorities from several EU Member States.

II. Theoretical background

Public procurement is a crucial pillar of services, goods and works delivery for public authorities. The most important goal of joint cross-border public procurement is to make the most of the potential of the Single Market⁽³⁾. "Efficient and transparent public procurement can help address the major challenges Europe faces, especially when it comes to creating sustainable economic growth and new jobs. Through improved procurement practices, public authorities can get better value for money and contribute to a more innovative, sustainable, inclusive, and competitive economy, while also tackling societal policy objectives"⁽⁴⁾. European legislation on public procurement is in place to increase transparency and facilitate competition within the EU Single Market. The assumed benefits include lower prices and better quality for public purchasers when procuring supplies, services and works. One of the key objectives of having common public procurement procedures across EU are

⁽¹⁾ European Commission, (2017)

⁽²⁾ OECD, (2019)

⁽³⁾ Azud, J., Plaváková, L., Bartoš, P. (2019)

⁽⁴⁾ European Commission, (2021a)

Abstract (EN)

Joint cross-border public procurement is a public procurement procedure in which a contract is awarded jointly by contracting authorities from two or more Member States. Such an approach contributes to the fulfilling potential offered by the EU Single Market. The aim of the paper is to contribute to the analytical results focused on the evaluation of joint cross-border procurement. The results are processed on the basis of data selected from TED. The results show that this approach in public procurement is not commonly used by contracting authorities. The use of this approach is dominated by the supply of services and the use of open procedure as a tendering procedure.

Abstrakt (SK)

Spoločné cezhraničné verejné obstarávanie je taký postup vo verejnom obstarávaní, v ktorom zadávajú zákazku spoločne verejní obstarávatelia z dvoch alebo viacerých členských štátov. Takýto postup podporuje využitie plného potenciálu, ktorý ponúka vnútorný trh EÚ. Cieľom článku je prispieť k štúdiám zameraným na hodnotenie spoločného cezhraničného obstarávania. Výsledky sú spracované na základe údajov selektovaných z oznámení uverejnených v TED. Z prieskumu vyplýva, že táto forma verejného obstarávania nie je v praxi bežne využívaná verejnými obstarávateľmi. Pri využití tohto postupu dominuje dodávka služieb a verejná súťaž ako uplatnený postup verejného obstarávania.

Keywords (EN)

public procurement, joint procurement, cross-border procurement

Kľúčové slová (SK)

verejné obstarávanie, spoločné obstarávanie, cezhraničné obstarávanie

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laid down by European law is the facilitation of cross-border procurement⁽⁵⁾.

Cross-border procurement is a specific form of procurement that is characterized by a cross-border element. Cross-border procurement coordinates between contracting authorities or contracting authorities from several EU Member States. In accordance with Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, cross-border public procurement can be implemented in several models.

Joint cross-border public procurement can take the form of central procurement. In the context of this model of cross-border procurement, in order to eliminate conflicts between the national laws of the EU Member States, the conflict rule provides that the provision of centralized procurement activities by a central purchasing body located in another Member State is carried out in accordance with the national rules and provisions of the Member State in which the central purchasing body is located.

In addition, cross-border procurement may take the form of occasional joint procurement by several contracting authorities or contracting entities from different EU Member States. In such a case, however, the implementation of cross-border procurement must be preceded by the conclusion of a written agreement between the contracting authorities or entities participating in the joint cross-border procurement.

Other model of joint cross-border procurement is its implementation through a joint body set up by contracting authorities or contracting entities from different Member States. In the case of this cross-border procurement model, the relevant legislation governing the public procurement process needs to be defined, either by a decision of the competent authority acting on behalf of such a body or in the founding act of the joint entity, with two options to choose from conflict of law of the applicable law, either the law of the EU Member State in which the joint body has its registered office or where carries its activities.

Several studies have been undertaken in recent years to investigate the extent of cross-border public procurement. The number of factors that were potentially associated with cross-border procurement is very large⁽⁶⁾. Several benefits arise from committing to joint cross-border public procurement such as lower price, innovation or simplification of administration.

Cross-border public procurement is also intended to help entities implement various cross-border development projects. In this way, it is possible to apply uniform rules to the entire performance, which is the subject of the project⁽⁷⁾. On the other hand, from the Opinion of the European Committee of the Regions – Implementation report on public procurement⁽⁸⁾ shows that cross-border procurement has not brought any added value to local and regional authorities. Despite uniform procurement procedures across the EU, which are costly and time-consuming, no or very few cross-border tenders are submitted. According to the opinion, this is probably due to

the fact that the electronic platforms of the individual Member States differ from each other and constitute an obstacle to the participation of businesses and entities from neighbouring countries⁽⁹⁾.

Possible reasons for the low share of cross-border public procurement include different Member States' rules, e.g. in the areas of health and safety at work, construction, waste management and others. Potential foreign bidders often lack the necessary capacities, material and legal resources to meet the requirements of other Member States. Barriers also include requirements for cross-border certificates and electronic signatures⁽¹⁰⁾.

III. Legal background

Joint procurement by contracting authorities from different Member States currently encounters specific legal problems related to conflicts between national laws and rules.

The conditions created by EU public procurement law and rules were expected to result in increased cross-border tendering. Despite the fact that joint cross-border procurement is not new in EU law, contracting authorities still face significant legal and practical difficulties in procuring from central procurement organizations in other Member States or in joint procurement. These difficulties should be eliminated so that contracting authorities can reap the full benefits of the internal market's potential.

Joint cross-border procurement rules should be shaped in order to facilitate cooperation between contracting authorities and increase the benefits of the EU internal market by creating cross-border business opportunities for suppliers of goods and service providers. These rules should lay down the conditions for the cross-border use of central purchasing bodies and determine the applicable public procurement legislation, including redress legislation, in cases of common cross-border procedures, supplementing the conflict-of-law rules⁽¹¹⁾.

Contracting authorities from different Member States are allowed to set up joint bodies. Special rules are laid down for such forms of joint procurement. Such a joint body may be the European Grouping of Territorial Cooperation (EGTC)⁽¹²⁾. The main objective is to facilitate and promote territorial cooperation and cohesion throughout the EU and regions.

Contracting authorities from different Member States may act jointly in the award of public contracts. A Member State may not prevent its contracting authorities from using centralized procurement activities offered by central purchasing bodies located in another Member State. Several contracting authorities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system. However, contracting authorities should not use joint cross-border procurement to circumvent the mandatory rules of public law applicable in the Mem-

⁽⁵⁾ European Commission, (2011).

⁽⁶⁾ Tkáč, J., Griga, M., (2016).

⁽⁷⁾ Tkáč, J., Griga, M., (2016).

⁽⁸⁾ Opinion of the European Committee of the Regions – Implementation report on public procurement (2020/C 39/09).

⁽⁹⁾ Piga, G., Tátrai, T., (2016).

⁽¹⁰⁾ Opinion of the European Committee of the Regions – Implementation report on public procurement (2020/C 39/09).

⁽¹¹⁾ Directive 2014/24/EU of the European Parliament and of the Council.

⁽¹²⁾ Regulation 1082/2006 of the European Parliament and of the Council.

ber State in which they are located. Such rules may include provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies, etc.

The EU law emphasizes the importance of strategic planning in public procurement and the emphasis on its environmental, social and innovative aspects⁽¹³⁾.

IV. Methodology

It should be noted that data on cross-border public procurement are scarce and not widely available. To create a dataset for analysis, we used a special selection in Tenders Electronic Daily (TED). TED is the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement. It is the special source for the study of public procurement data at the micro level. Tenders for public contracts that fall under EU rules must be published in the TED.

Our dataset contains data on contract award notices (CANs) published in TED in 2014–2021⁽¹⁴⁾ by the contracting authorities based in the EU27 Member States (MS), the UK, and the EFTA countries. We have selected CANs which are joint procurement in the EU MS (contract involves joint procurement)⁽¹⁵⁾ and then we individually examined every CAN whether it contains a cross-border element. Cross-border elements means that contracting authorities are from at least two or more MS, or central contracting authority purchase behalf on contracting entities from at least two MS. Participating countries and the number of contracts that involve joint procurement can be seen in the tab. 1.

Table 1: Joint Public Procurement (2014–2021)

Country	Contract Award Notice (CAN)
Denmark	14
France	2
Germany	6
Spain	5
Portugal	1
Belgium	9
Sweden	8
Italy	3
United Kingdom	166
Finland	7
Netherlands	1
Switzerland	1
Austria	1
Norway	66

Source: own processing based on TED data, 2021

In the analysis, we focused on identifying the contracting authority (type of buyer), tendering procedures, type of contract and number of cooperating countries per CAN. It is interesting to find out whether any of the above-mentioned characteristics dominate.

V. Results

Segmenting the "joint procurement" CANs by cross-border elements showed that the cross-border share is lower. The results by year and country can be seen in the tab. 2. Germany dominates the participating countries.

Our analysis reveals that contracting authorities prefer joint cross-border public procurement, in particular for the supply of services (fig. 1.). Only a small number of cross-border CANs from dataset were for the supply of goods and no record for work contracts.

If we look at the number of cooperating countries, we find that the most frequently cooperating are contracting authorities from 2 to 5 countries (fig. 2.). Co-operation between contracting authorities from all or almost all Member States is rare.

Based on the results, we can summarize that joint cross-border public procurement was most often used by bodies governed by public law and by utilities entities (fig. 3.). In the future, there is potential for increasing the share of cross-border procurement by the European institutions, which could serve as a model for the use of this tool. Member States should take measures to encourage the participation of regional and local public authorities and agencies in joint cross-border procurement. It is for this type of entities (public procurers) that joint cross-border public procurement can have the greatest benefit. This method can be used in the implementation of a number of EU projects, which are implemented, for example, in border areas by partners from several Member States. Open procedure was mostly used in joint cross-border procurement CANs, almost 50% (fig. 4.). In an open procedure anyone may submit a full tender. This procedure is used most frequently in general. It is open to the unlimited number of economic operators.

The second most common tendering procedure was negotiated procedure without prior publication. It is a special procedure for awarding above-limit contracts, which may be used by the contracting authority if the conditions laid down by law for its use are met. The joint cross-border public procurement can be more effectively used within lighter public procurement regime⁽¹⁶⁾.

Within the joint procurement (regardless of the cross-border element), the most economic tender was used as a criterion for award contract. This was followed by the criterion of the lowest price. The major question arising from implementation of joint (cross-border) procurement are still related to the price and the number of procurers joining the common purchasing⁽¹⁷⁾.

Joint cross-border public procurement can contribute to the creation and implementation of innovation, where innovation means the introduction of a new or significantly improved product, service or process for public procurement purposes. In case where no solution yet exist on the market, procurement enables buyers to get new solution according to their needs⁽¹⁸⁾.

⁽¹³⁾ Tkáč, J., Slobodníková, M., (2020).

⁽¹⁴⁾ last update August/24/2021.

⁽¹⁵⁾ advanced search by "joint procurement".

⁽¹⁶⁾ Calleja, A. (2016).

⁽¹⁷⁾ Piga, G., Tatrai, T., (2018).

⁽¹⁸⁾ Bovis, Ch., (2016).

Table 2: Joint Public Procurement with Cross-border elements

Contract Award Notice (CAN)									
Country	2014	2015	2016	2017	2018	2019	2020	2021	total
Denmark							1	1	2
France				1					1
Germany		1	3		1				5
Spain				1			1		2
Portugal					1				1
Belgium		1	1				1		3
Sweden			1	1				1	3
Italy					1	2			3
Finland			1	1	1				3
Netherlands					1				1
Austria					1				1
total	0	2	6	4	6	2	3	2	25

Source: own processing based on TED data, 2021

Figure 1: Number of CANs by the type of contract

Source: own processing based on TED data, 2021

Figure 2: Number of cooperating countries per CANs

Source: own processing based on TED data, 2021

Figure 3: Number of CANs with cross-border element by type of public procurers

Source: own processing based on TED data, 2021

Figure 4: Number of CANs with cross-border element by type of tendering procedure

Source: own processing based on TED data, 2021

VI. Conclusion

Joint cross-border public procurement represents an opportunity for contracting authorities to reap the full benefits of the EU Single Market. Currently, it is necessary for the European institutions in particular to take measures to ensure the popularization of joint cross-border public procurement and the relevant legal framework. The results based on the data from TED show that this procedure is used rather exceptionally. It is used at all levels of governance, but in our opinion, it has the potential to bring benefits especially for regional and local public authorities. These contribute greatly to the implementation of European territorial cooperation projects, which take place not only in border regions. Within them, public authorities from several countries cooperate and can thus apply uniform rules to achieve the objective of public procurement related to cross-border projects.

The main findings of this paper highlight that the public procures most often used this approach in cooperation between two to five countries.

The EU legal framework allows for the use of multiple models for the implementation of cross-border public procurement. The results show that contracting authorities have used this approach mainly to procure services. At the same time, they used the public tender to the greatest extent.

Various EU and national policy initiatives should to facilitate joint cross-border collaboration in public procurement and promote benefits which may be attained by contracting authorities. The Member States have to find means to incentive public procurers to look beyond borders.

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