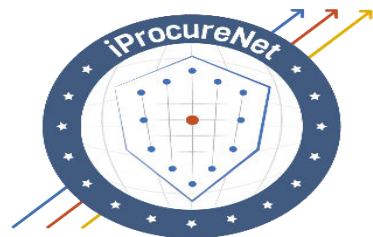


IPROCURENET: LEGAL CHALLENGES IN JCBPP

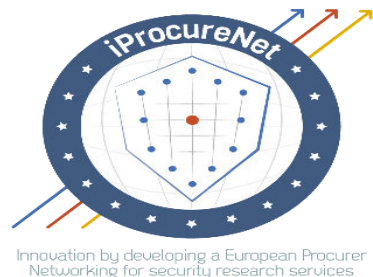
Mari Simovart
University of Tartu



Innovation by developing a European Procurer
Networking for security research services



This project has received funding from the European Union's Horizon 2020 Research and Innovation Programme under grant agreement no. 832875. The opinions expressed in this document reflect only the author's view. The European Commission is not responsible for any use that may be made of the information it contains.



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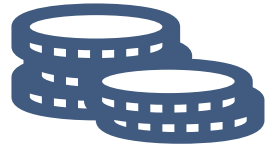
CHALLENGES TO JCBPP



LEGAL CHALLENGES

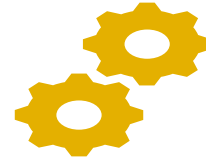
Different national **regulatory standards.**

Fragmented rules on EU level.



ECONOMIC CHALLENGES

Unease of **suppliers** towards joint procurement due to **lack of experience** and **lower prices**



TECHNICAL CHALLENGES

Different **technical standards**



PRACTICAL CHALLENGES

Different **national priorities.**

Lack of knowledge on other countries' practices and investment needs



AWARENESS & INFORMATION

Difficult access to innovation alongside daily duties

Lack of **awareness** of existing solutions and of joint procurement

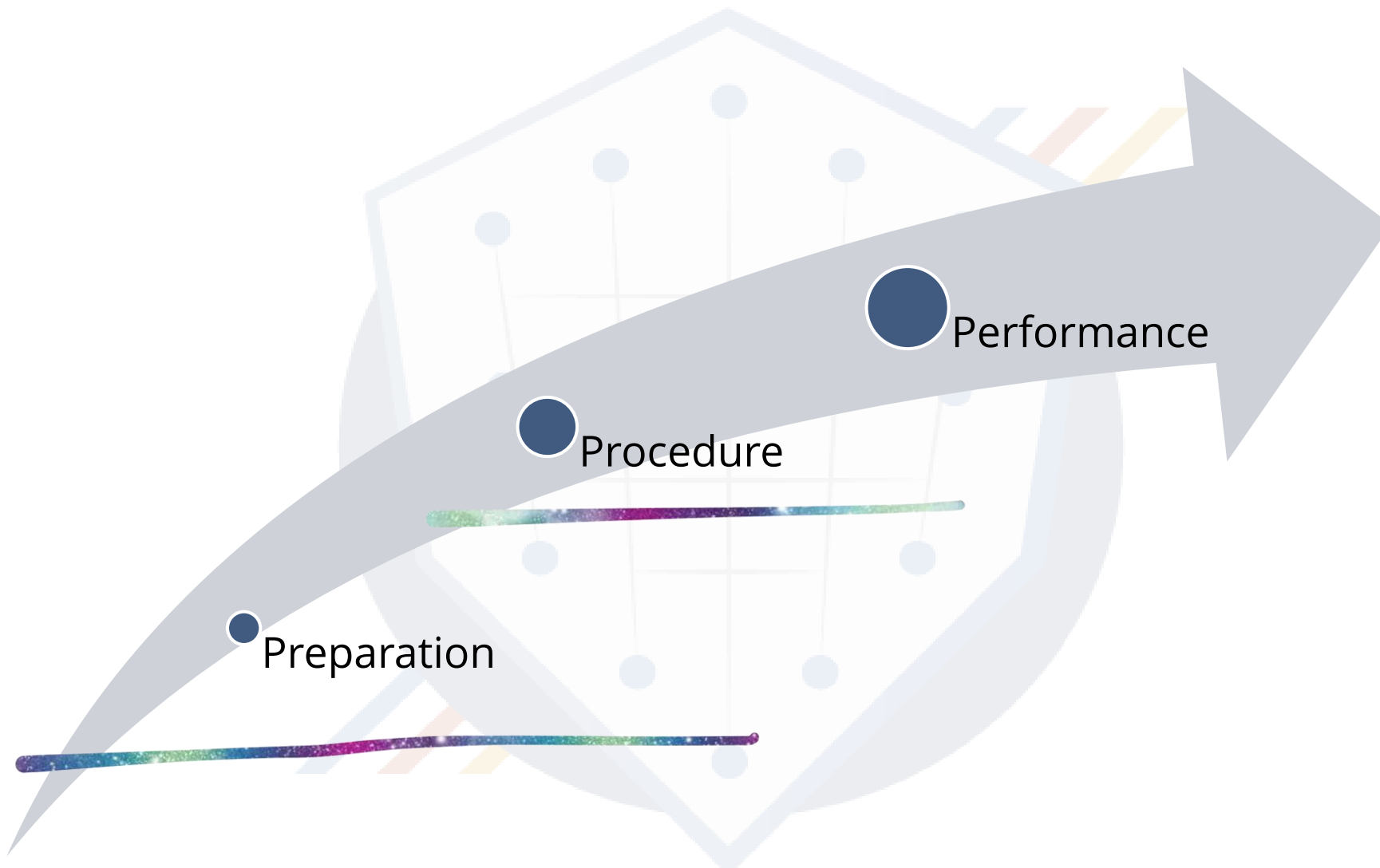


- Mari Simovart
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 - conflict of laws in JCBPP
 - methodological and soft law choices
- Aleksei Kelli
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 - Intellectual property and innovation
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 - PhD student & attorney-at-law
 - Duty of diligence in JCBPP



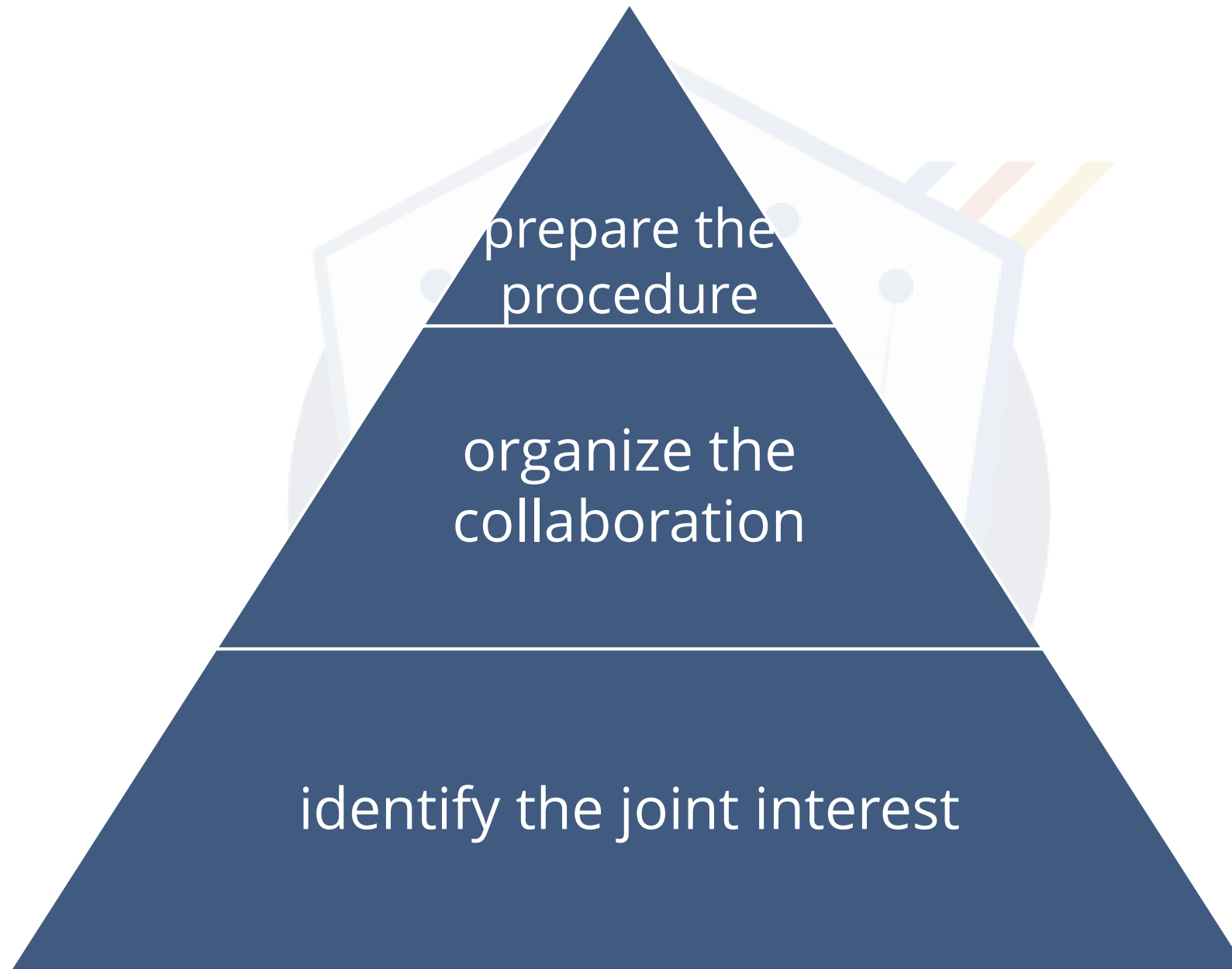


LEGAL RESEARCH
FOR IPROCURENET



MAPPING LEGAL CHALLENGES OF JCBPP PROJECTS

on a timeline of a procurement



PURPOSES OF THE
PREPARATION
PHASE

CROSS-BORDER COLLABORATION

16.3.2023

3rd iProcureNet Conference Bratislava

Legal issues in
preparation phase

The Preparation for JCBPP

Identification of joint procurement needs

(Preliminary) Market research

Identify financing opportunities & apply for funding, if necessary

Decision or memorandum to cooperate

Collaboration agreement

Preparing the technical description

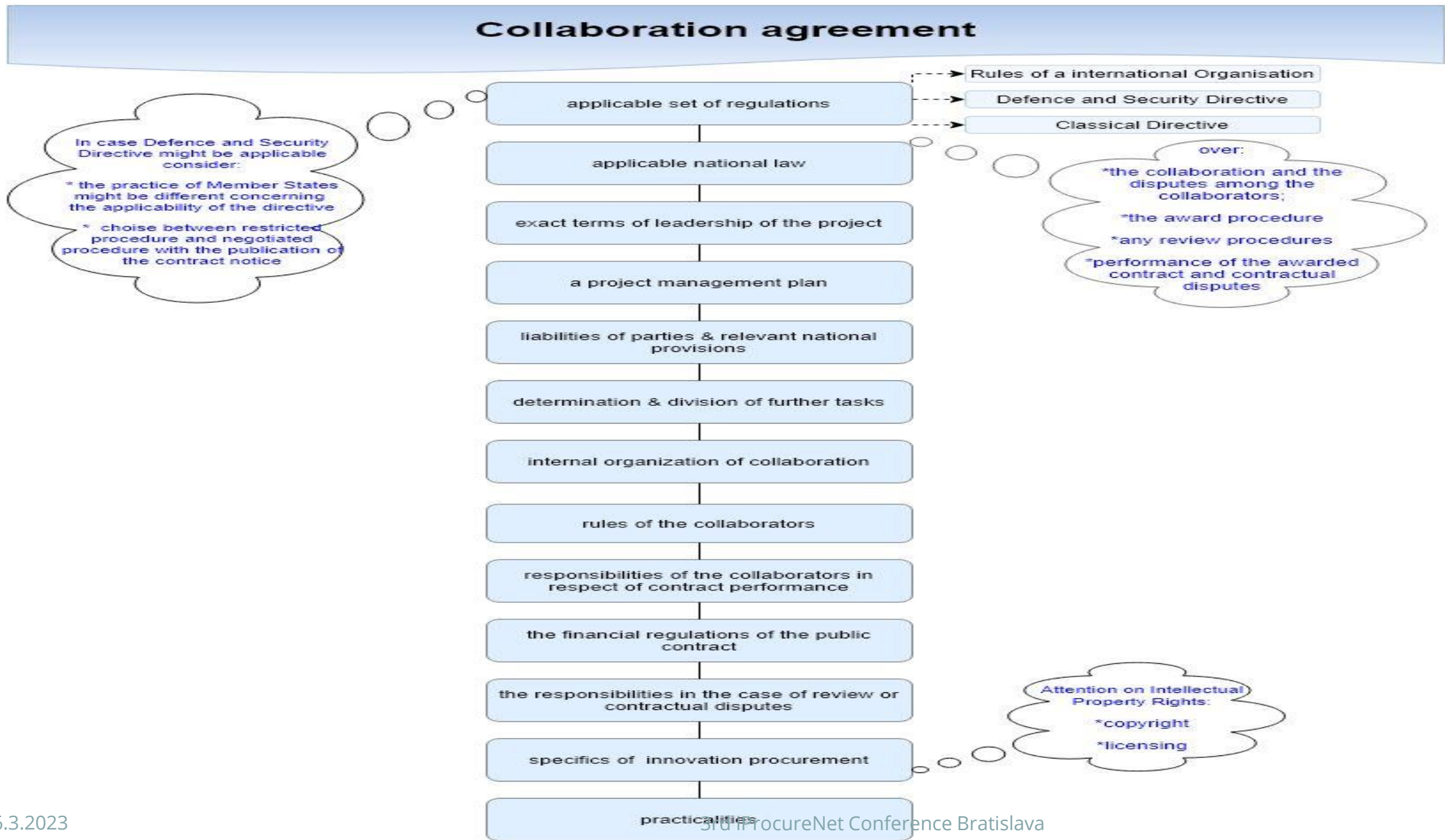
Choosing and drafting the terms of the procurement procedure

In case of innovation consider:

- * should the purchase include a pre-commercial procurement activity;
- * should the stages of purchasing be arranged into one procedure or conduct two stages as separate procedures;
- * should it be any negotiated procedure – competitive procedure with negotiations, competitive dialogue or the novel innovation partnership, a negotiated procedure without publication of a contract notice;
- * terms of intellectual property rights

In case Defence and Security Directive might be applicable consider:

- * the practice of Member States might be different concerning the applicability of the directive
- * choice between restricted procedure and negotiated procedure with the publication of the contract notice



Types of collaboration in JCBPP:

- **a joint entity**, incl. European Groupings of territorial cooperation (Art 39 (5), Directive 2014/24);
- using **centralised purchasing activities** (para 2-3); or
- operating based on an international agreement or a **mutual agreement** - an ***ad hoc JCBPP*** (para 4).

COLLABORATION

Types of collaboration
according to the
Classical Directive

- Suitability of collaboration type?
 - *Ad hoc*: for pilot projects
 - Over-the-counter products: CPBs
 - Competency of CPBs
 - Definition of CPBs:
 - E.g., as a *European public body*, the European Border and Coast Guard Agency **Frontex** can function as a CPB in the meaning of the Defence and Security Directive (Art 1 (18)).

TYPES OF COLLABORATION

**Suggestions for
choosing the type of
collaboration**

- To establish a JCBPP project in either ***ad hoc*** collaboration or with a **CPB**, it is probably necessary to initially agree on general terms, e.g. in a memorandum of collaboration.
- An initial collaboration decision to include:
 - Roles, aims & objects
 - Financing
 - **Jurisdiction & review**
- **A collaboration agreement** to include:
 - more specific duties
 - **comprehensive framework** for the
 - Procurement procedure
 - Contract performance
 - Potential review procedures

MEMORANDUM OF COLLABORATION

Suggestions for drafting collaboration decisions and agreements

COLLABORATORS' GENERAL CHOICES IN JCBPP PROCEDURE

Legal issues related
to procedural phase

REGULATORY FRAMEWORK: WHICH DIRECTIVE?

- The Defence & Security Directive:
 - military equipment, incl. arms, munitions etc.;
 - sensitive equipment - *involving, requiring and/or containing classified information*;
 - contracts related to sensitive works and services.
- Mixed contracts – lighter regime applies.
- Other contracts are subject to the Classical Directive.

... WHICH DIRECTIVE?

- National practices can differ in **borderline cases**.
Examples:
 - UAVs, anti-drone devices and surveillance devices.
 - garments of anti-ballistic protection
 - under D & S Directive by *Jandarmeria Romana*; the Finnish Border guard or by the Ministry of the Interior of the Czech Republic

REGULATORY FRAMEWORK: WHICH PROCEDURE?

- Popular choice: **open or restricted procedure**. Examples:
 - Drones for Maritime and Coastguard Agency, UK; Internal Ministry of Greece; Scottish Government
 - Bulletproof vests by the Finnish Border guard, *Jandaermeria Romania*
 - **Nb!** AI: e.g. Maltese police purchased police equipment, incl. AI analytical software; restricted procedure under the Defence and Security directive was used to purchase artificial intelligence by the Centre for Security Studies, of the Hellenic Ministry of Citizen Protection

... WHICH PROCEDURE?

- Procedures with **negotiations**:
 - ballistic garment for the Belgian Police
 - drone systems/unmanned aerial systems in JCBPP for Norwegian Police Shared Services (PFT) together with the Police Authority and the Coast Guard in Sweden
 - bulletproof vests for Ministry of the Interior of the Czech Republic.
- **innovation partnership** in the internal security sector include: tender by *Statsbygg*, the Norwegian government's building commissioner, property manager and developer, for purchase and construction of reliable, moveable vehicle barriers to create perimeter security around Government Quarter,
- tender for the benefit of Devon and Cornwall Police and Dorset Police, UK, 'to explore solutions that will enable officers to reduce time spent to secure and preserve forensic evidence resulting in evidential capture time being reduced by 50 % during a collision investigation,'
- a tender for study, development and production of breathing apparatus for underwater rescue missions in France.

... WHICH PROCEDURE?

In conclusion:

- **Negotiated procedures** - competitive procedure with negotiation, negotiated procedure with prior publication, competitive dialogue or innovation partnership - can be relevant for purchasing **innovative products** or services on the 'most preferred list'.
- We advise collaborators in a JCBPP to acknowledge **possible national variations** in interpreting the scopes of the two directives.



Collaboration



Procurement procedure



Review of procurement



Public contract



Contractual dispute

CHOICE OF
LAW?

Classical Directive:

- JCBPP by a **joint entity** follows the law of the registered office or the place of carrying out the activities of that entity (Art 39(5)).
- JCBPP by a central purchasing body (**CPB**) is subject to the national law of the CPB (Art 39(3))
- *Ad hoc* collaboration: as **agreed by the collaborators**

Defence and Security Directive: no guidance.

NATIONAL LAW APPLYING TO JCBPP BY A CPB: CLASSICAL DIRECTIVE

The national law of the CPB applies to the JCBPP procedure and ***any steps of purchasing activity*** conducted by the CPB, *incl.*

- award of a contract under a DPS;
- competition under a framework agreement;
- choice of tenderers under a framework agreement.

However, the law of the CPB also applies to steps of the JCBPP that another contracting authority conducts itself under Art 37(2) 3rd subparagraph.

- ***Practical difficulties!***
- Questionable ***legality*** under administrative law?
- ***Limited flexibility***, forced surrendering to CPB?
- **Complicated review over procurement.**

NATIONAL LAW APPLYING TO JCBPP BY A CPB: DEFENCE & SECURITY DIRECTIVE

- The Defence and Security Directive contains no similar restrictions, accepting *i.a.* the scheme where parts of JCBPP are conducted by a contracting authority under its own domestic law.
 - *E.g.*, awards of contracts based on a framework agreement, or awards of contracts under a DPS.
 - More flexibility, less problematic review.

JCBPP procedure is subject to the national law(s) as **agreed by the collaborators**

- contracting **authorities must agree on** the applicable national law (Art 39(4)(a))
- ... and **must refer** to the choice of law in the procurement documents.
- An exception, if subject to an international agreement between the Member States concerned.

LAW APPLICABLE TO AN *AD HOC* JCBPP PROCEDURE: AN UNSUCCESSFUL LEGISLATIVE PROPOSAL:

- (i) where **a single contracting authority** acts on behalf of the others, the national rules of this authority prevail;
- (ii) when the procurement procedure is conducted **jointly**, the applicable procurement rules are determined on the basis of **the main place of the contract performance**, e.g. the location of works or the place of provision of supplies and services;
- (iii) should the application of the first two rules prove to be impossible, the national rules of the contracting authority with **the largest share of the costs** would apply.

- *Council of the European Union. Proposal for a Directive of the European Parliament and the Council on public procurement – Cluster 6: Aggregation of demand, 6907/12, 28.02.2012*

USE THE PROPOSAL AS GUIDANCE?

- Similar soft law guidelines or mandatory norms would ***benefit the legal certainty***.
- Possible variations, where reasonable.
 - For instance, mini-competitions based on a framework agreement subject to a national law of the contracting authority conducting the mini-competitions even if different from the law applying to the procedure of awarding the framework agreement.



NATIONAL LAW APPLICABLE TO PUBLIC CONTRACTS?

Obvious importance of contract terms for both the public procurement procedure and the public contract.

- No legal certainty without known interpretation and rules of enforcement concerning, for instance:
 - terms of delivery
 - payment conditions
 - penalties, warranties, damages and other contractual remedies etc.
 - JCBPP **collaborators must agree on** and must publish the national law applicable to the awarded public contract.

WHAT ARE THE DEFAULT RULES ON NATIONAL LAW APPLICABLE TO PUBLIC CONTRACTS?

- Should the collaborating parties fail to agree on applicable law, Recital 73 of the Classical Directive refers that the applicable law is to be determined according to the rules of the Regulation (EC) No 593/2008 of the European Parliament and the Council - the Rome I Regulation.
- However, there are problems with the R I R operating towards public contracts:
 - applicability?
 - resulting conclusions, when applicable?

APPLICABILITY OF THE ROME I REGULATION

- Rome I Regulation is designed for solving conflict of law disputes concerning civil law contracts and does not apply to administrative matters (Art 1 (1)).
 - Applicability is determined autonomously of national legal systems and consistently with the Brussels I Regulation!
 - Administrative contracts are excluded from the scope of Rome I Regulation, wherefore application of R I R to French public procurement contracts or other contracts classified as an instrument subject to public law has been questioned.

APPLICABLE LAW UNDER THE ROME I REGULATION



As a first rule, the applicable law is determined for particular types of contract, e.g. sales or service contracts (Art 4 (1) of R I R).



When the contract is of no such type, the contract must be governed by the jurisdiction of the party delivering the **characteristic performance** (Art 4 (2)).



Exceptionally, another jurisdiction can apply if it is clear from all the circumstances of the case that the contract is “**manifestly more closely connected**” with that a country (Art 4(3)).

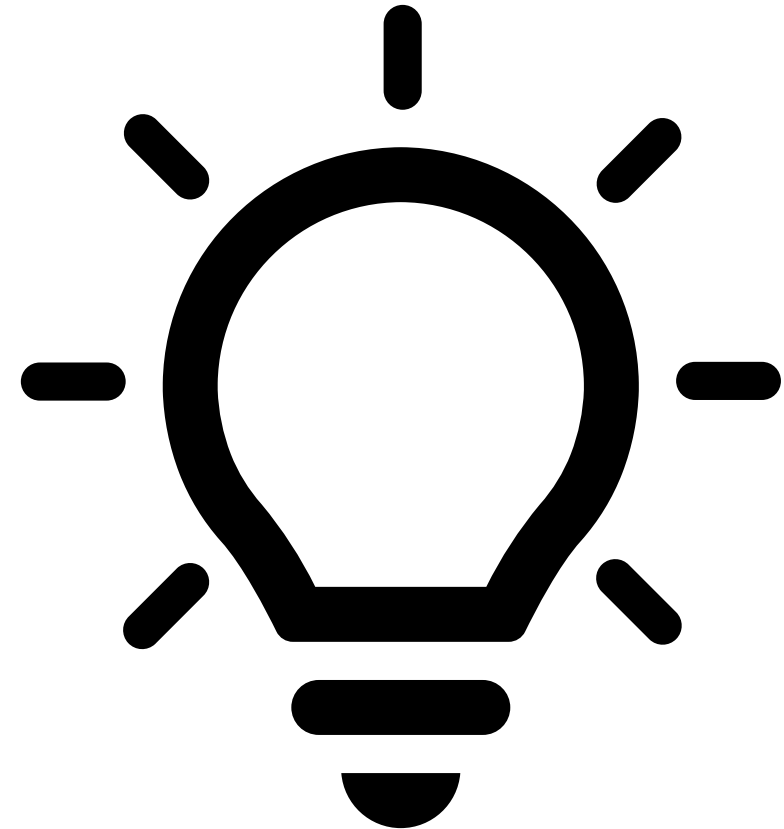
PUBLIC CONTRACTS AS EXCEPTIONS UNDER ROME I REGULATION?



- Can application of exceptional Art 4(3) of the Rome I Regulation be justified?
 - The importance of approaching a **single transaction as an entirety** rather than having parts of a transaction subject to different laws can be a factor justifying the exception.
 - However, in itself, public sector participation in a contract would not necessarily indicate to a close connection with the respective jurisdiction – the influence is determined on a case-by-case basis.

A COMPARABLE SOLUTION: ROME I REGULATION ON AUCTIONS

- A contract for the sale of goods by auction is subject to the ***law of the country where the auction takes place*** (Art 4(1)(g)).
 - Rationale of the rule:
 - *in order to avoid application of an unforeseeable law.* Having a closer connection to the place of the auction, application of the law of the latter to the contract by auction is ***more predictable***.
 - ***“for the convenience and the economy of the auctioneers”***.



IN CONCLUSION:
NATIONAL LAW
APPLICABLE TO
PUBLIC CONTRACTS

Collaborators must agree on national law applicable to public contracts awarded in JCBPP, regarding the following:

- As a rule, a public contract should be subject to **the same law as the award procedure.**
- Occasionally, a public contract can be subject to the national law of a contracting authority other than the CPB or the lead buyer, if that contracting authority actively participates in performing the public contract.
- A combination of the above.
 - *E.g.*, a framework agreement and mini-competitions.
- Consider application of some soft law instrument instead of national law.

SUBJECTING PUBLIC CONTRACT TO SOFT LAW INSTRUMENT

Unless excluded by the national law, collaborators can consider subjecting public contracts to some internationally recognized soft law instrument. For instance:

- International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts (PICC)
 - Nb! comments to PICC Art 3.1.1 are illustrated with examples of cases focusing on public contracts.
- PECL - [the Principles on European Contract Law](#)
- Draft Common Frame of Reference (DCFR)

In a JCBPP setting, resorting to an instrument drafted on basis of and incorporates the internationally recognized principles of *lex mercatoria* (PECL, PICC etc), might be a justified “neutral” solution.

Review of JCBPP is subject to Directive 89/665/EEC or Directive 2009/81/EC, Title IV.

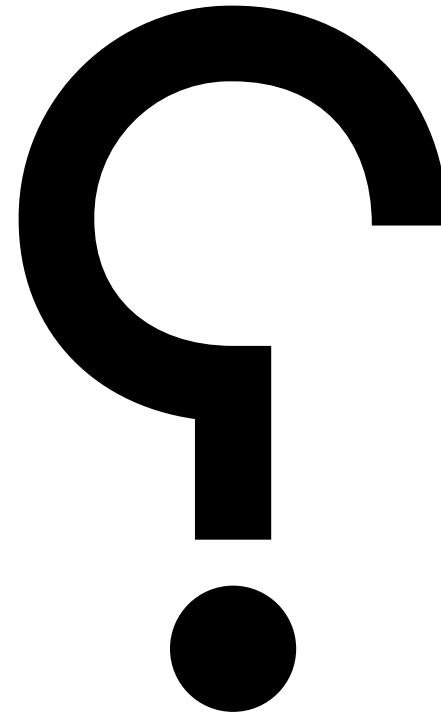
- Any interested economic operator can **initiate review proceedings** due to an alleged violation of public procurement law by a contracting authority, **in the Member State where the contracting authority is situated** and the Member State is liable to provide such option (Art 1 (1) 4th paragraph of Remedies Directive).
- Member States must ensure that any decisions of review bodies are effectively enforceable upon contracting authorities (Art 2 (8)).
- In a JCBPP situation, this can sometimes lead to ***the review body having to apply foreign law.***

NATIONAL LAW
APPLICABLE TO AND
THE PLACE OF
REVIEW OVER JCBPP

CAN REVIEW BODIES APPLY FOREIGN PROCUREMENT LAW?

If a contracting authority conducts a part of a JCBPP procedure under a foreign law (e.g. with a CPB as the lead buyer), the review body must apply that law.

- Is the review body legally vested with the right to apply foreign law?
 - Even if a review body is entitled, is it essentially competent to do that?
 - If not, the national review system may fail to offer sufficiently speedy and efficient review options as the Directives require.



NEED FOR DIRECTION REGARDING REVIEW OVER JCBPP

- The **gaps in the regulation** can leave upcoming review over JCBPP subject to *legal uncertainty* and *reduce the speed or efficiency* of review in such cases.
- In order to overcome that controversy, the directives would need to guide the Member States to implement necessary changes in their review systems. For instance:
 - to establish the **competency of review bodies** in cases of JCBPP;
 - specify which of collaborating contracting authorities must be the party to review proceedings in JCBPP cases;
 - establish if and how can a review body **summon a foreign contracting authority** into the review proceedings etc.

CONCLUSIONS ON
CHOICE OF LAW IN
JCBPP

- There are **gaps in the legislation** on the EU level, concerning default conflict of law rules in different stages of JCBPP.
- The **competence of review bodies** to review JCBPP procedures need attention as well.
- Addressing these issues on the level of **directive** or *via* **guidance** from the Commission would greatly serve legal certainty and support the further development of JCBPP.

NB! THE CHOICE OF LAW ISSUES

- ... concern the collaboration agreements as well.
 - Depending on the type of the collaboration, the law governing the collaboration agreement can be subject to public international law, administrative law or private contract law.
 - In addition: can the collaboration be subject to a law of a third country?

CROSS-BORDER COLLABORATION: INTELLECTUAL PROPERTY

16.3.2023

3rd iProcureNet Conference Bratislava

Legal issues related
to IPR in JCBPP

41

MANAGING IPR IN PUBLIC PROCUREMENT: STRIKING THE BALANCE

Types of IP:

- **Copyright** (written works, software, audiovisual works, sculptures, databases, three-dimensional designs, architectural works such as buildings, constructions, parks, etc.);
- **Related rights** (*sui generis* database, performances, phonograms, etc.);
- **Industrial property** (patents, trade marks, industrial designs, trade secrets).

GUIDANCE ON INNOVATION PROCUREMENT

- *Member States and public buyers are encouraged to **take a strategic approach to IPR** when dealing with public procurement;*
- ***Defining clear IPR clauses** in the tender documents is thus important for all public procurements;*
- *Public buyers must ensure that the **allocation of intellectual property rights** in their procurement takes into account the **applicable IPR legal framework** in Europe and at national level*

Commission notice - Guidance on Innovation Procurement. Brussels, 18.6.2021. C(2021) 4320 final

GUIDANCE ON INNOVATION PROCUREMENT

*There are **two basic options** available to public buyers for the allocation of intellectual property rights resulting from a project, with many variations in between:*

- the public buyer **requires the transfer** of the new intellectual property rights; or*
- the public buyer **does not require such transfer** and the intellectual property rights remain with the contractor.*

Commission notice - Guidance on Innovation Procurement. Brussels, 18.6.2021. C(2021) 4320 final

GUIDANCE ON INNOVATION PROCUREMENT

*As these rights are a **valuable asset** and may have an impact on the **attractiveness of public procurement for innovators**, it is important that public buyers clearly **define upfront, in the tender documents**, the **allocation of intellectual property rights** linked to the public contract, taking into account the various interests at stake, namely the public interest and policy objectives*

Commission notice - Guidance on Innovation Procurement. Brussels, 18.6.2021. C(2021) 4320 final

GUIDANCE ON INNOVATION PROCUREMENT

*As the procuring entity pays 100 % of the costs, it often considers that it is **entitled to all results**. However, **transferring** the intellectual property rights that are attached to those results to the public buyers may **stifle innovation**. The contractors may be **prevented** from **re-using or even adapting/improving the innovation** in a different context or for a different customer, which might also result in lower quality and higher costs for the public buyer. In many cases, **suppliers are better placed than public buyers to commercialise the innovations** resulting from a public procurement, to **secure** the appropriate protection of the intellectual property, and defend the intellectual property rights **in courts**.*

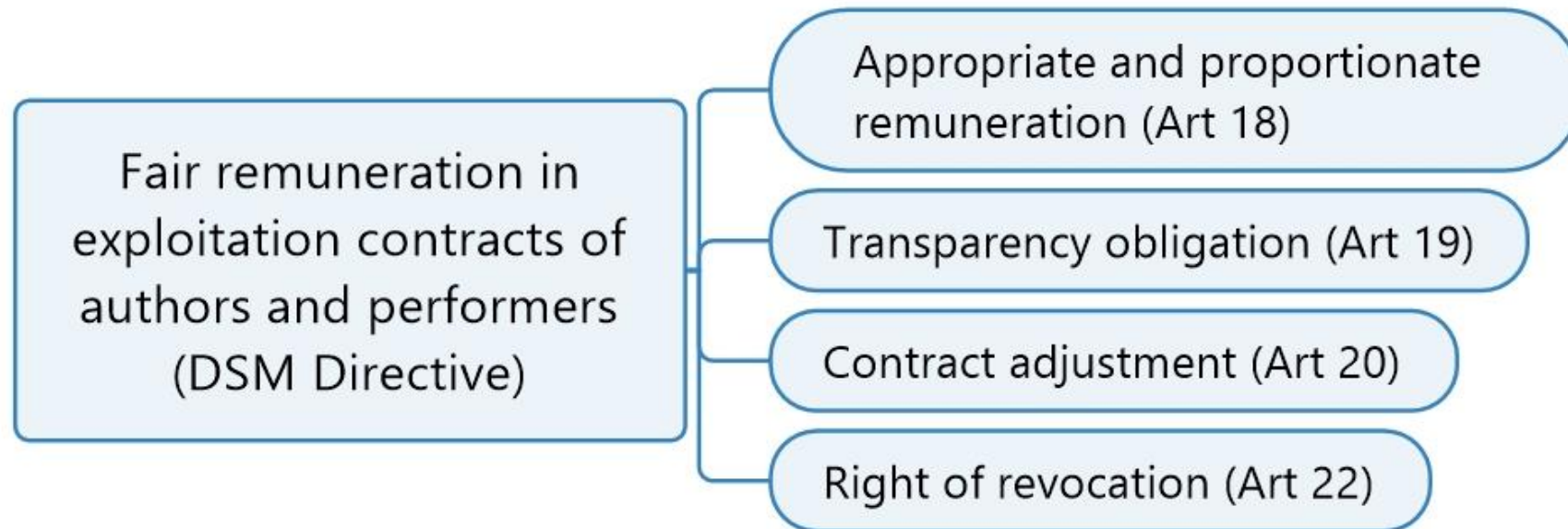
Commission notice - Guidance on Innovation Procurement. Brussels, 18.6.2021. C(2021) 4320 final

IPR OWNERSHIP IN PROCUREMENT

*There is also a need to improve the conditions for companies to protect and use IP in public procurement with a view to stimulating innovation and boosting the economy. **Member States should consider leaving IP ownership to the contractors where appropriate, unless there are overriding public interests at stake or incompatible open licensing strategies in place.***

Communication “Making the most of the EU’s innovative potential - An intellectual property action plan to support the EU’s recovery and resilience”. COM/2020/760 final

DSM DIRECTIVE (2019/790)



CONCLUSION: ONE SIZE DOES NOT FIT ALL

- The **aims of the procurement** determine the extent of the control needed over IPR.
- Pay attention to the tenderer's rights and option to transfer - *Nemo plus iuris ad alium transferre potest quam ipse habet!*
- Be aware of inalienability of moral rights!
- Be aware of lock-in situations!
- Be aware of co-ownership challenges!

DUTY OF DILIGENCE IN JCBPP

Collaborators' duty
of diligence in a
JCBPP procedure

DUTY OF DILIGENCE OF CONTRACTING AUTHORITY

- **Underlying principles:** equal treatment of economic operators + diligence (contract law) + good administration (admin law).
- The **aim of the duty:**
 - to create a set of obligations expected of each CA in specific, high risk stages of procurements;
 - to reduce the risk of breach of equal treatment and transparency.
- Legal grounds: T-540/10, T-235/11 on negotiated procedure without prior notice; Directive 2014/24/EU, art 72 on contract modification.

... DUTY OF DILIGENCE

- Reasonable thoroughness in any activity by CA, based on risks leading to potential breaches of the equal treatment principle.
- Depending on the potential breaches, it can include a duty to:
 - ... use outside experts, or
 - ... apply the best practices of the concerned field,
 - ... assess the balance between extra efforts in preparation and the resources needed for that.

DIRECTIVE 2014/24/EU, ART 72

Contracts ... may be modified ... where all of the following conditions are fulfilled:

- i. the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;*
- ii. the modification does not alter the overall nature of the contract;*
- iii. any increase in price is not higher than 50 % of the value of the original contract or framework agreement.*

CONCLUSIONS

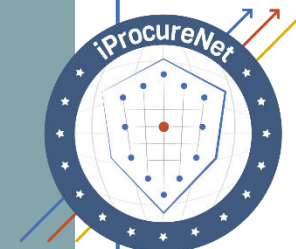
Gaps in the EU legislation and inconsistencies such as conflict of law rules and differentiation of JCBPP means, challenge JCBPP practice.

Duty of diligence of collaborators, diverging national practices and policy rationales must be acknowledged.

Addressing these issues on the level of **directive** or *via* **guidance** from the Commission would greatly serve legal certainty and support the further development of JCBPP.

THANK YOU FOR YOUR ATTENTION!

MARI ANN SIMOVART



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16.3.2023