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b-solutions

FINAL REPORT BY THE EXPERT

Advice Case: Cross-border e-procurement

Advised entity : EGTC GO (IT - SI)

Expert: Ozbič Mitja

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Introduction

DESCRIPTION OF THE APPLICANT IN THE EXAMINATED CASE

The EGTC GO is located on the Slovenian - Italian border. It participates to the INTERREG VA ITALY SLOVENIA Programme and EGTC GO is the sole beneficiary of an ITI operation focused on two pilot cross-border actions. The first one, “ISONZO SOČA” has the aim to create a cross-border park through the Isonzo Soča river building a cross-border network of walking and cycling routes. The second one, “Construction of a network of cross-border health services” aims at improving the use and the performance of social-health services within the cross-border territory of the EGTC GO, through a work of integration between the services and health facilities provided by Hospitals and Health Public Bodies of the area.

Both actions provide for significant public tender procedures for work, supply and service contracts.

The national e-procurement platforms generate obstacles in cross-border tendering procedures since economic operators, above all SMEs, are able to apply only in the platforms where their business is located not just due to language barrier, but also for different IT standards and - last but not least - due to the complicated input procedures requested for the participation also to very small procurement procedures as the ones for a value upper than 5.000 € (in Italy) and 20.000 € (in Slovenia). In these cases the SME are interested for a simply demand&offer procedures as in commercial use, through an e-mail system of communication with the contracting authorities . The SMEs have no time to spend one and more hours in the data entry steps requested by the e-procurement systems. So the digitalization of the public procurements procedures has the opposite effect, factually removing small enterprises from the market. They have no interest for complex e-procurement procedures, especially where the object of the procedure is a small procurement from 5.000, 00 to 20.000,00, which is the ordinary sum of local public procurement



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if we exam the area of supplies and services in small local government bodies. The same dimensions, except the area of public works, is valid for the examined subject EGTC.

In relation to the above mentioned facts, the Regulation (EC) No 1082/2006 of the European parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) in Article 2 contains provisions concerning the Applicable law in the operative life of an EGTC:

1. An EGTC shall be governed by the following:

(a) this Regulation;

(b) where expressly authorised by this Regulation, the provisions of the convention and the statutes referred to in Articles 8 and 9 (i.e. Statute and Convention of the EGTC);

(c) in the case of matters not, or only partly, regulated by this Regulation, the laws of the Member State where the EGTC has its registered office.

Where it is necessary under Community or international private law to establish the choice of law which governs an EGTC's acts, an EGTC shall be treated as an entity of the Member State where it has its registered office.

2. Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned.

It's clear that an EGTC has limited powers for defining rules of the applicable law, because the main rule is the "site of the registered office" rule.

As the ITI actions impact both in Italy and in Slovenia, therefore EGTC GO has necessary decided to promote an approach becoming a cross-border contracting authority thanks to Directive 2014/24/EU art. 39 point 5. In order to fulfil with the Directive, a complex procedure has been set up, because Italian and Slovenian transposition of the Directive is quite different. Anyhow, the three Councils of Gorizia, Nova Gorica and Šempeter-Vrtojba Municipalities adopted an Agreement, signed on May/June 2019, on the applicable national procurement rules authorizing EGTC GO to act on both Slovenian and Italian territory under the respective legislation distinguishing when acting under Italian law and when acting under Slovenian law on the basis of certain types of



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contracts. It represents a more flexible procedure as the static one regulated in Chapter II of the proposed ECBM Regulation, because the one decided by the Assembly of the EGCT is a case to case procedure referring to the singular location of the intervention and the specific sector of the procurement. Because the EU Directives discipline just the public procurement procedures and not all the other connecting procedures (i.e. Tax and duties, control of financial flows, anti-mafia instruments, anti-loudering etc.), they are consequently regulated by the Convention and the Statute of the EGTC in conformity with the Article 2 of the EGCT EU Regulation i.e. the Italian regulation is prevalent respect to the Slovenian one. Therefore for all those procedures the applicable law is Italian with all the problems that derive from this rule when all the procurement procedure is regulated by the Slovenian rules while all connected (controlling) procedures are regulated by the Italian dispositions.

The steps are as follows.

The Assembly of the EGCT decides in each case the applicable law respecting the two main principles:

- a) Italian law due to the registered office in Italy and where the activities of the EGTC are managed
- b) Slovenian law due to the activities executed in Slovenia

For every single tender procedure the Assembly shall decide which law is applicable. If no decision is adopted for the tendering procedure, the Italian law shall govern the procedure.

In the case of public tendering procedures for infrastructures situated just in the Slovenian territory, the Slovenian law shall be applied. For the procedures with mixed interventions both in Italy and in Slovenia, the Assembly shall decide which law has to be applied. So, it's an case to case system, with a flexible "rule of the rules".

1. Description of the Obstacle

Description of the legal or administrative obstacle in the specific context.

'However, in many cases cross-border barriers (especially in relation to health services, labour regulation, local public transport and business



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development) stem from differences in administrative practices and national legal frameworks.¹

In the examination of the submitted case we fixed the focus on the Fundamental rights of the Treaty of European Union, especially on the freedom to choose an occupation and the right to engage in work (Article 15), the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State; freedom to conduct a business (Article 16). In relation to the TFEU it's of main importance the functioning of the internal market, a core objective of the European Union (Article 3 TEU and Article 3(1)(b) TFEU).

E-procurement has been introduced in the EU, Italy and Slovenia to reduce administrative obstacles and simplify access to tendering opportunities in each Member State (MS). But, in developing this main open oriented aim, on the all other site the software systems were created and designed by the software houses for the single MS, not considering the possibility of accessing to the internet procedures by all the participants from the other MS' due to the technical and software instruments requested for the registration on the tender-web sites of the single MS or of the single contracting authority. This provoked a formally correct introduction of the e-procurement systems in each single MS, but generally not useful for each enterprise located in other MS, especially if there are SME.

The case proposed to the Expert in this advised case is the factually demonstration of a formally correct, but factually wrong transposition of EU directives in the MS, due - principally - to the:

- 1) not (integrally) translated websites: at least in English, but also in the language of the neighbour**
- 2) not harmonized use of the electronic authentication procedures and electronic communication tools in the single MS for e-procurement registration in the case of a cross-border interest to participate to the tender**

¹Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a mechanism to resolve legal and administrative obstacles in a cross-border context {SEC(2018) 268 final} - {SWD(2018) 282 final} - {SWD(2018) 283 final} i.e. ECBM, p. 4of the Explanatory Memorandum



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3) no correct implementation of the software managing the e-procurement procedure in the single MS due to the request of the national tax/enterprises registration code and not allowing foreign tax/enterprises registration codes.

E-OBSTACLES IN ITALY – MEPA www.acquistinretepa.it

The Italian MEPA system i.e. Mercato elettronico della pubblica amministrazione – Electronic market of the public administration² is the main website in Italy for the public procurements, especially for the Ministries' level. It also has the option for operating in the English version, but there are only a few pages with the introductory description of the Italian system and just the link for the foreign enterprises is written in Italian language. For example, if the interested enterprise selects the published tenders, all the data are in Italian. All the links in the page are then only in Italian, so a foreign operator cannot use the system and the single tools of it.

In the description of the procedure the explanation describes the possibility to register the user also with a foreign fiscal code number (step 1) and at step 3 is describing the necessary insert of the VAT number (“partita IVA”) not clarifying if it is possible also to insert a foreign VAT number³.

²https://www.acquistinretepa.it/opencms/opencms/english/foreign_firms_new.html

³Connect to the website www.acquistinretepa.it and click onto “Non sei ancora registrato?” (still not registered?).

In this section you will need to follow 5 steps.

Step 1: insert your personal data and contact details. In case you don't own an Italian fiscal code number you can easily indicate the fiscal code number of the country of your residency. We remind you that it is necessary to fill in the contact details by indicating a mobile phone number in the field “Telefono”.

Step 2: in the field “Ambito di appartenenza” (i.e. Who are you) you can choose either “Pubblica Amministrazione” (Public Authority) or “Impresa” (Enterprise).

Since you are a foreign firm, choose the option “Impresa” (Enterprise).

Step 3: enter the VAT number (“Partita IVA”) of your enterprise. In case the system does not automatically find your enterprise among the registered ones, it will give you the possibility to manually register it on the form.

Step 4: check the information entered in the form and confirm them clicking on “Conferma”.

Step 5: the system will assign you a User ID (“Nome Utente”). You will need to choose a password and confirm it. The password has to include 8 alphanumeric characters (at least a number and an upper-case letter). In this step you will



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If somebody wants to enter in the reserved area of the site, for the identification are allowed just Italian *electronic signatures (i.e. SPID system)*. The alternative tool is the authentication with user name and password (phase 1) ⁴, but also this procedure is just in Italian language. When the user shall identify himself with the fiscal code number, it's not allowed to insert a foreign one, because the Italian fiscal code has a minimum of 16 characters while the Slovenian one just 8, the first one is composed by numbers and letters, the second one just by numbers. So the system stops the next step and a foreign user cannot register himself. If the person, who try to register himself as user after acquiring an Italian tax code, goes to the next steps of the registration, the new obstacle is represented by the requested VAT number. If the foreign enterprise tries to pass to the second phase of registration, i.e. "*abilitazione*", the problem is that all the text is in Italian language and also when is selected the link to the English flag, the system redirects the user to the first explanation page in English, describing the general functioning of the Italian e-procurement system. So it's impossible the access in English to an operative part of the e-procurement platform, operating in English just in its descriptive part.

E-OBSTACLES IN SLOVENIA

- www.ENAROČANJE.si

also need to read and accept the terms and conditions of the eProcurement platform and then save the data entered by clicking on "Salva i dati inseriti".

Procedure to qualify MePA

In order to operate on the MePA it is necessary that the goods, services or maintenance works you would like to offer are included among the ones listed in the official documents of the MePA. Therefore, to verify whether you can offer a specific good, service or maintenance work you should: log onto the platform and click on "Bandi" (calls for qualification) – "Mercato Elettronico" (electronic marketplace). You will find the list of the different product categories and the calls for qualification;

Choose the call for qualification you intend to apply for and download the official documents for consultation. In the Technical Specifications ("Capitolato Tecnico") you will find the list of products that can be procured according to the call for qualification.

In case the product you intend to offer is included in one of the calls for qualification of the MePA you can start the qualification process by filling in a request for qualification to the specific call for qualification. Consip receives and examines the requests for qualification in chronological order.

⁴<https://www.acquistinretepa.it/opencms/opencms/registrazione.html>



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If we examine also the Slovenian e-procurement system, entering in the main webpage of the system of publishing tenders, managed by the official Bulletin of the Slovenian Republic and by the Ministry for public administration ⁵, there is no link to read the content in English.

The site is accessible for registration just of the Slovenian public administration bodies, so it's not possible to register a public procurement authority with address in another MS due to the automatic searching of the Slovenian public bodies by the system and there is no possibility to insert other subjects manually.⁶

- www.ejn.gov.si/en/

The main website for the e-procurement in Slovenia <https://ejn.gov.si/> is also in English. The result is that there are more application forms for registration written in English (application form enarocanje for foreign public administration and for foreign enterprises), also the system is bilingual and the users have the possibility to navigate through the website in English. The only non-translated part are the single descriptions of the published procurement procedures⁷, but all the menus are in English. The link to the tender documentation leads the user to the previously described official webpage for e-procurement publication which is just in Slovenian.

OTHER OBSTACLES

There are also other obstacles explained by the EGTC in the examined case or raised up by the expert.

PRE-CONTRACTUAL CONTROLLING PROCEDURES

Because the EGCT is an organism with its registered office in Italy, in application of its constitutive act (and the Article 2 of the EGTC Regulation) it shall apply the Italian controlling rules for public procurement procedures.

⁵<https://www.enarocanje.si/>

⁶<https://www.enarocanje.si/Geslo/?method=nov>

⁷https://ejn.gov.si/ponudba/pages/aktualno/aktualna_javna_narocila.xhtml



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Referring to the Article 2 of the Reg. (EC) No. 1082/2006 the Convention for the constitution of the EGTC⁸ states that

Article 6 (applicable law and financial control) This Convention and the related acts will be governed by the Italian legislation. The administrative, financial and accounting control of the EGTC will be subject to the current rules of the Italian Republic.

And also the Article 4.2 of the Statute of the GECT states that

Article 4 (legal form and applicable law)

4.2. In accordance with Article 2 of the EC Regulation and Article 4 of these Statute, the Group shall be submitted to Italian legislation applicable to organisations governed by public law.

The main compulsory controls before signing a public agreement with the subject offering the selected offer are the anti-mafia control, the DURC control about regular payment of taxis and social assurance due sums, the verification about crime precedents of the legal representatives and technical directors of the enterprise, the absence of enforcement executing procedures by the State's tax concessionary, because in this case all the due sums shall be paid to it by the PA.

BDNA – national Italian anti-mafia register and criminal records – the main problem is the impossibility to insert in the electronic controlling system letters with Slovenian diacritical signs “č š ž” so, if the operator inserts a name with a “c” instead of a “č” he's not sure, that the controlled subject is registered in the system with the same name, because the letter „č“ in the transposition from Slovenian to Italian language could be written also as „ch“ (or “tsch” using the German form of trans-littering or “ig” using the “Friulian” one). The viceversa theoretically doesn't exist due to the different tools of controlling, not generated by an automatic system, if the contracting authority requests informations to the slovenian authorities in written form. But, if the EGCT uses the Slovenian electronic system E-dosje for the controlling of the subjects involved in the tender's procedures, the problem is the same. Also the Slovenian system doesn't allow the letters of the Italian language not existing in the Slovenian language letters as “ò à ù è”, present in the Italian alphabet. The result is an incomplete controlling of the most important controlled data as the crime and anti-mafia precedents.

⁸<https://euro-go.eu/en/chi-siamo/obiettivi-e-documentazione/>



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ANAC – is the registering system of the Italian public procurement Authority applied also by the EGCT also in the cases of Slovenian law governed procedures due to the registered office in Italy.

DURC – the certification of regular tax and social contribution operating just for Italian subjects.

EXPROPRIATION PROCEDURES

Due to the fact that the EGTC is managing procurement procedures for works in Italian and Slovenian territory, it's necessary also to expropriate private lands both in Italy and in Slovenia especially, for example in the submitted case, where the public organism needs to develop and to realize biking tracks that go from one to the other side of the border in a common urban area as is Gorizia/Nova Gorica/Šempeter. The EGTC decided to use two types of solutions: where there was possible, the competent national authority (i.e. the Common) directly and previously proceeds with its own national procedure to acquire the necessary private land for the realization of the public work. Then the EGTC starts with the public procurement procedure for the further realization of the public work. In the other cases, when there is no previous procedure managed by the local public subject, the EGTC should act with the expropriation procedure but, due to the lack of specifically formed personnel for the managing of that type of procedures, the EGTC signed agreements programming and coordinating that procedures through an administrative delegation of the powers to the local government body, i.e. the common. With this solution there is no necessity to search for mixed solution or for the application of the rules of one MS in the other MS, as proposed in the forming ECBM.

VERIFICATION OF REGULAR DONE WORK / FINAL TEST

If the public work is realized in Slovenia, then the EGCT applies the Slovenian technical rules and safety prescriptions in the verification of the regular realization of the infrastructure as projected at the beginning and vice-versa. This means that in case of a public procurement procedure ruled by the Italian Public procurement Code, for the final test and technical prescriptions for a work located in Slovenia, the EGTC applies the Slovenian rules. However all the financial flows are ruled by the Italian law. (for example the financial transaction are monitored by the use of the CIG i.e. the Italian identification number of the single public financial flow concerning the public procurement).



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COSTS FOR YARD'S/SERVICE'S SAFETY AND WHOLE COST OF THE PROCUREMENT

Another important problem is represented by the different rules in the definition of the cost of the public procurement, meanwhile the Italian Public procurements Code requests the specification of the safety costs separated from the cost of the procurement, where the first one are fix and the second one is subject to auction discount, the same rule is not present in the Slovenian public procurements legislation. The EGTC has solved also this problem and obliges the bidders also in the case of Slovenian tender to specify separately the costs for the safety from the amounts subject to rebates.

2. Indication of the Legal/Administrative Dispositions causing the Obstacle

The first disposition causing the obstacle was for the EGCT the art. 40 p. 2 of the Italian Procurement Code (D.lgs. 50/2016) in the meantime entered into force, making mandatory electronic communication and information exchange in the procurement procedures, as transposition of the art. 22 of the Directive 2014/24/UE.

Although art. 22.7.3 of the Directive 2014/24/UE states that

“To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 87 to establish the mandatory use of such specific technical standards, in particular with regard to the use of electronic submission, electronic catalogues and means for electronic authentication, only where technical standards have been thoroughly tested and proved their usefulness in practice. Before making the use of any technical standard mandatory, the Commission shall also carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software.”,

both Italian and Slovenian competent Authorities have made mandatory national or regional e-procurement platforms with different IT standards, with restrictions derived from the use of the Italian Fiscal Code or VAT registration number of the economic operator and many other obligations linked to the nationality of the economic operators. National Authorities paid no attention to the



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interoperability of the systems or to its openness to other MS economic operators (national/regional e-procurement platforms are, especially in Italy, in the MS national language and this is the first and main obstacle to interoperability).

The Italian and Slovenian legislative framework obligates EGTC GO to apply e-procurement procedures equal to or over 20.000 € in the case of Slovenian law and equal to or over 5.000 € in case of Italian law.

For the Italian law the art. 1, par. 130 of the Law number 145/2018, modifying the art. 1 par. 450 of the Law number 296/2006, obligates the public entities, excluding the school system, to use e-procurement procedures for the tendering procedures equal to or over 5.000 €, but just for goods and services. The national website is <https://www.acquistinretepa.it/opencms/opencms/>.

In Slovenia the thresholds from which procurement notices are to be published on the procurement portal are laid down by the law governing public procurement. In accordance with the first paragraph of Article 22 of the Public Procurement Act (ZJN-3, Official Gazette of the RS, No. 91/15) and the second paragraph of Article 7 of the Public Procurement Act in the field of defense and security (ZJNPOV, Official Gazette of the RS, No 91/15, 90/12 and 90/14 - ZDU-1I) notices of invitation to tender shall be published on the portal in connection with the following procurements:

- goods and services in the general field: EUR 20,000,
- constructions in the general area: EUR 40,000,
- infrastructure goods and services: EUR 50,000,
- constructions in the infrastructure area: EUR 100,000,
- defense and security goods and services: EUR 40,000,
- defense and security works: EUR 80,000.

The national website for publications is <https://www.enarocanje.si/Portal/>

The ID number



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It is important to take note that Italian e-procurement platforms give access only to those economic operators registered in the respective MS, since national VAT position and national Fiscal Code is mandatory to be registered in the e-procurement platforms.

The language

Furthermore, e-procurement platforms are designed only in the language of the MS (or Italian – just 1 page in english on www.acquistiretepa.it or Slovenian language – the website www.enarocanje.si), making the instructions to fulfil the procedure truly incomprehensible for economic operators located in one part or the other part of the border.

The Certified Electronic Mail

Finally, even though the procedures follow the general guidelines given by the Directive 2014/24/UE, many procedural details are related to the transposition of the Directive in the given Member State as, for example, the ownership of an Italian Certified Electronic Mail (Posta Elettronica Certificata - PEC), mandatory for each official communication towards Italian Public Administration. This despite the art. 22.1 of the Directive states that

“The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators’ access to the procurement procedure.”

And the par. 5 of the same art. 22 continues

“ Contracting authorities may, where necessary, require the use of tools and devices which are not generally available, provided that the contracting authorities offer alternative means of access.”

Par. 6 of art. 22, lett. (i) also establishes that

“the contracting authorities shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU⁹ and shall put in place necessary

⁹See also COMMISSION IMPLEMENTING DECISION of 17 March 2014 amending Decision 2011/130/EU establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under



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measures to be able to process these formats technically; in case a different format of electronic signature is used, the electronic signature or the electronic document carrier shall include information on existing validation possibilities, which shall be under the responsibility of the Member State. The validation possibilities shall allow the contracting authority to validate online, free of charge and in a way that is understandable for non-native speakers, the received electronic signature as an advanced electronic signature supported by a qualified certificate.”

3. Description of a Possible Solution

A. THE EGTC “SELF-SOLUTION”

The examined Authority resolved itself the problem using another private e-procurement software, not using neither the Italian MEPA system nor the Slovenian ENAROCANJE system. Specifically this system was used starting from the second batch of works concerning a walking bridge over the Isonzo/Soča river and connecting cycling ways to the existing way in Slovenia. The first lot, concerning a parking place and supporting infrastructure in Slovenia (Vrtojba-Camp Vrtojba), was managed on the Slovenian e-procurement platform ejn.gov.si.

EGTC GO have a cross-border impact and the technical and professional ability has to be owned by a consortium composed by both Italian and Slovenian economic operators. Crossborder services or works may be implemented in several cases only when the economic operators are experienced both in the Slovenian and Italian subject matter of the contract and they are operating in both MS.

As long as there was no obligation to use e-procurement platforms, EGTC GO was able to publish on its website the expression of interest both in Italian and Slovenian languages, providing documentation in both languages and exemplifying the procurement process by giving the possibility of expressing interest also through traditional methods (by post on paper documentation or by ordinary e-mail). Now that economic operators shall produce documents through the e-procurement platforms, EGTC is sure that if they publish on the Italian platform only Italian economic operators will express interest while

Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2014) 1640) (Text with EEA relevance) (2014/148/EU)



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if they publish in Slovenia only Slovenian economic operators will express interest. Many EGTC GO procurement procedures could be negatively affected because of the lack of experience of the economic operators in the neighbouring country. Also the quality maybe lower and/or the price higher if the e-procurement is limited - due to the e-procurement national system used - to the national enterprises and not opened also to the economic operators of the neighbouring state.

Also, the cross-border impact is one of the specific aims of EGCT GO, consequently performed activities on the ground have been immediately affected by the recent obligation of using only e-procurement procedures (especially for the Italian ruled procedures with the low threshold of 5.000 €). EGTC GO, not having a legal competence nor in the e-government legislative framework nor in the public procurement legislative framework, tried to advise the competent authorities (especially the Region Friuli Venezia Giulia, having legislative competence in the field of organization of local government and connecting public procurement procedures) how much the new procedures have heavy effects on the cross-border impact of the market.

Despite this, EGTC GO has adopted a very operative solution to the obstacle, purchasing an *ad hoc* e-procurement software and, in cooperation with the software house, (partially) translating the platform content in Italian and Slovenian language and offering by electronic means unrestricted and full direct access free of charge to the procurement documents (as stated in art. 53 of the Directive 2014/24/UE).

B. EXISTING EU TOOLS

Regardless of the solution found by the EGTC, also the EU Institutions give some tools to overcome the obstacles.

For example is actually published the **2019-2 CEF Telecom Call: Digital Skills and Jobs Platform**¹⁰ with several calls precisely on these aspects:

CEF-TC-2019-1 eIdentification (eID) & eSignature (indicative budget: €5 million)	14 February 2019	Closed on 14 May 2019
CEF-TC-2019-2 eProcurement (indicative budget: €1 million)	4 July 2019	14 November 2019

¹⁰ https://ec.europa.eu/inea/sites/inea/files/5._european_platform_for_digital_skills_and_jobs.pdf



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For example the second call has the aim to

2.1.3 Implementation or update of the European Single Procurement Document (ESPD) service

a) An ESPD compatible service can be either implemented to the latest ESPD Exchange Data Model (EDM)¹², or by reusing the ESPD/VCD (Virtual Company Dossier) open source framework, provided as a deliverable by the ESPD. The ESPD service should be linked to national databases, if the latter are available.

b) Update the existing ESPD service to the latest ESPD Exchange Data Model (EDM), by interconnecting it with existing national databases, or by providing cross-border direct and free access to public authorities in other countries. All ESPD services must be able to import and export an eESPD as defined in the ESPD– EDM and must be linked to eCertis.

2.1.4 Implementation of the eTendering interface

Implementation of the eTendering interface is to support private companies and contracting authorities, in particular central purchasing bodies, in making their eProcurement systems interoperable. Applicants should foresee joining the eTendering interface user group which will be facilitated by the OpenPEPPOL Pre-award Coordinating Community

The deployment and/or use of the eDelivery Building Block or a compliant eDelivery service provider is mandatory for the implementation of the eTendering .

The results expected from the above mentioned financial assistance are defined in section 3.9.2.3 of the 2019 – 2020 Work Programme:

☐ Implementation of contract registers: Update existing contract registers to provide more structured information about procurement procedures to achieve more transparency.

☐ Implementation of solutions interconnecting national notice publication portals and TED: Update publication solutions to make it easier for companies, in particular SMEs, to find potential business opportunities abroad.



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☐ Implementation or update of the European Single Procurement Document (ESPD) service: Provide or update an existing ESPD service that should connect to national databases to facilitate the SMEs' participation in public procurement procedures.

☐ Implementation of the eTendering interface: Open up eTendering services to allow SMEs to use compatible clients for accessing and submitting proposals, to facilitate their participation in public procurement procedures.

Another tool is the collaborative platform Joinup (<https://joinup.ec.europa.eu/>) **Share and reuse Interoperability solutions for public administrations businesses and citizens.**

Joinup is a collaborative platform created by the European Commission and funded by the European Union via the Interoperability solutions for public administrations, businesses and citizens (ISA2) Programme. It offers several services that aim to help e-Government professionals share their experience with each other. It hopes to support them to find, choose, re-use, develop and implement interoperability solutions.

C. (MS) ENTITIES AND TIMING

The main solution for the MS is to use e-procurement procedures without electronic obstacles as:

CI. national ID codes for the access to the website

CII. national certified electronic mails for the e-communication if they aren't interoperable between MS'

CIII. use only of the national language, without translation in english and in the neighbouring language of all the contents of the e-procurement web site

The main obstacles in the examined case derive from administrative and/or technical rules that may be eliminated on short term by the software houses working for the MS' Ministries. For example the main problem of registration of the ID number on the e-procurement public site in Italy is solved just with the modification of the software allowing the input also of extra MS tax



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and/or VAT numbers , searching them for controlling not only the Italian company register but also in the European one. The same solution is applicable for the two other informatics problems: the use of national digital signing tools and of the national certified digital e-mail. In both cases is possible to change the software system allowing also foreign tools. The main problem is probably represented by the interconnection of the certified e-mail that has the same legal status as registered letter . All these problems could be solved in a period of maximum 6 months by the national authorities.

The last EU e-procurement call 2019¹¹ states that

The use of Building Blocks such as eID, eSignature, and eTranslation, is strongly encouraged in this call. Public and private service providers making use of eID and eSignature must ensure that their solutions are compliant with the eIDAS Regulation. eID through EU-Login is implemented in eCertis and Automated Translation is expected to be integrated into eCertis in Q2 2019.

The different generic services support several action lines of the Tallinn Declaration on eGovernment of 6 October 2017¹².

The next step or rather a more effective way of problem solving is a compulsory system which needs a modification of the Directive 2014/24/EU with its emendation through the adoption of upgraded rules for specific aspects of the dispositions stated in the Directive as, primary, the intercommunicating tools for the tenders in every Member State. The main instrument of rule's definition should be a Regulation, due to the compulsory system necessary to assure the effective adoption of interconnecting tools of identification, registration, authentication, and communication between the public authorities and the participants. The actually legal instruments in force in the national legal systems of the Member States, deriving from the applications of the Directive 2014/24/EU, and the technical characteristics defined by the Commission (see Annex IV of the Directive also referring to Article 87) are – as verified in the examined b-solution case and in other recognized cases by the Expert – not sufficient to assure the application of the EU rules. The first and immediate result of such a situation is the discourage of SME

¹¹CALL FOR PROPOSALS CONCERNING PROJECTS OF COMMON INTEREST UNDER THE CONNECTING EUROPE FACILITY IN THE FIELD OF TRANS-EUROPEAN TELECOMMUNICATION NETWORKS / CEF TELECOM CALLS 2019 / CEF-TC-2019-2: eProcurement

¹²<https://ec.europa.eu/digital-single-market/en/news/ministerial-declaration-egovernment-tallinn-declaration>



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to participate to the e-tender procedures in other Member States, especially in the border territories of the Member States, where the interest is higher for low value public contracts as in the central areas of the Member States and that kind of contracts are more numerous in the peripheral (rural) areas than in the central (urban) areas. A SME has no time to acquire a different e-mail system and another ID number in the other MS just to participate to a (small) e-tender. It's better and simpler for it to use the same time in the searching of several small private procurements with a simple system of approaching, often orally or by worldwide used e-mail systems, and a sure b2b agreement, than a complicated public tender procedure without any sure final award. A really effective interconnecting system of the public procurements in the EU must base its operative functionality on worldwide used tools of identification and communication. The first one is surely, for the enterprises, the companies register ID number, as obtained and used in the home Member State without the necessity to acquire another one in the MS of the public procurement procedure. The second one is the use of ordinary e-mail address for communications. Surely the certified e-mail is preferable, but actually in the EU it is not still assured the intercommunicating use of that type of tool.

The art. 22 of the Directive requests that the

The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure.

Our opinion is that such a disposition, as verified "on the field" is not enough for an effective participation to the e-procurements systems, due to the fact, that the contracting authorities are often "thinking" from a national point of view, without attention to the European dimension of every public procedure, though small for value, interest or executing area. Internet causes that every public procurement procedure is an interesting procedure for all the economic operators over Europe.

Based on the above mentioned facts and practical obstacles in conflict with the EU rules, we proposed a strictly compulsory integration of the art. 22 of the Directive. We know that the proposed text is more appropriate for a Regulation, but in this "state of the arts" the simplest way is to:

A) integrate the public procurement Directive with some compulsory provisions which definitively preclude any different formulation of the public calls or programming of the e-procurement software



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(art. 22 and art. 39.5 of the Directive) concerning the registration ID codes for authentication, the electronic communications with the contracting authority and the use of official and foreign languages in the tendering documentation;

B) integrate the EGTC Regulation with other specific options of applicable law, also for single phases or aspects;

C) to propose modifications of the proposed draft ECBM Regulation.

A) Public procurement Directive emendation.¹³

A.1) The article 22 of the Directive - Rules applicable to communication - should be modified by the Commission as follows in application of paragraphs 7.2. and 7.3. of art. 22 applying the delegated procedure defined in art. 87 of the Directive:

1.1. Member States shall ensure that all communication and information exchange under this Directive, in particular electronic submission, are performed using electronic means of communication in accordance with the requirements of this Article. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure. For the registration and authentication in the e-procurement procedure it's forbidden to request to the participants identification codes and/or tools available just in one Member State or communication tools, as e-mail's software, available just in one Member State and not interoperating with the e-procurement systems of other Member States where the contracting authority has its registered office. The use of such foreclosure systems invalidates all the e-procurement procedure. Identification codes, as the company register number acquired in one Member State, shall be automatically recognized in the e-procurement procedure of the other Member State without any request of further registration of the

¹³All the proposed emendations are written in **bold** text.



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participant in the other Member State before the award of the public procurement. All the instructions and invitations shall be written in a way that is understandable for non-native speakers.

1.2. Notwithstanding the first subparagraph, contracting authorities shall not be obliged to require electronic means of communication in the submission process in the following situations:

(a) due to the specialised technical nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;

(b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licensing scheme and cannot be made available for downloading or remote use by the contracting authority;

(c) the use of electronic means of communication would require specialised office equipment that is not generally available to contracting authorities;

1.3. Our opinion is, that the rules (b) and (c) are not necessary and are rather useful for not applying the rules of the Directive by the Member States, so it would be better for the fully application of the Directive principles and with the aim to preclude cross-border obstacles, to delete the two specified options, because the rules (a) and (d) (and the proposed (e)) are sufficient as exclusion options. The procedure shall be the one stated in par. 7.2. of this article referring to procedure described in the art. 87 of the Directive.

(d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means;



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(e) due to the low value of the public contract or to its standard and common used features it's simpler, more efficient and faster, especially for the SME, to use other forms of communications and participation to the public procurement procedure than the electronic one.

1.4. In respect of communications for which electronic means of communication are not used pursuant to the second subparagraph, communication shall be carried out by post or other suitable carrier or by a combination of post or other suitable carrier and electronic means.

1.5. Notwithstanding the first subparagraph of this paragraph, contracting authorities are not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary either because of a breach of security of the electronic means of communications or for the protection of the particularly sensitive nature of information requiring such a high level of protection that it cannot be properly ensured by using electronic tools and devices that are either generally available to economic operators or can be made available to them by alternative means of access within the meaning of paragraph 5.

1.6. It shall be the responsibility of the contracting authorities requiring, in accordance with the second subparagraph of this paragraph, means of communication other than electronic means in the submission process to indicate in the individual report referred to in Article 84 the reasons for this requirement. Where applicable, contracting authorities shall indicate in the individual report the reasons why use of means of communication other than electronic means has been considered necessary in application of the fourth subparagraph of this paragraph.

2. Notwithstanding paragraph 1, oral communication may be used in respect of communications other than those concerning the essential elements of a procurement procedure, provided that the content of the oral communication is documented to a sufficient degree. For this purpose, the essential elements of a procurement procedure include the procurement documents, requests for participation,



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confirmations of interest and tenders. In particular, oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders shall be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.

3. In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

4. For public works contracts and design contests, Member States may require the use of specific electronic tools, such as of building information electronic modelling tools or similar. In such cases the contracting authorities shall offer alternative means of access, as provided for in paragraph 5, until such time as those tools become generally available within the meaning of the second sentence of the first subparagraph of paragraph 1.

5.1. Contracting authorities may, where necessary and just in the case of specific types of public procurement not generally requested by the public authorities, require the use of tools and devices which are not generally available, provided that the contracting authorities offer alternative means of access.

5.2. Contracting authorities shall be deemed to offer suitable alternative means of access in any of the following situations, where they:

(a) offer unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of the notice in accordance with Annex VIII or from the date when the invitation to confirm interest is sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which those tools and devices are accessible;



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(b) ensure that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available free of charge online; or

(c) support an alternative channel for electronic submission of tenders.

6. In addition to the requirements set out in Annex IV, the following rules shall apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate:

(a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;

(b) Member States, or contracting authorities acting within an overall framework established by the Member State concerned, shall specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure; that level shall be proportionate to the risks attached, the value of the contract and the importance of the public procurement;

(c) where Member States, or contracting authorities acting within an overall framework established by the Member State concerned, conclude that the level of risks, the value of the contract and the importance of the public procurement, assessed under point (b) of this paragraph, is such that advanced electronic signatures as defined by Directive 1999/93/EC¹⁴ of the European Parliament and

¹⁴No longer in force, Date of end of validity: 30/06/2016. Now Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.



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of the Council are required, contracting authorities shall accept advanced electronic signatures supported by a qualified certificate, taking into account whether those certificates are provided by a certificate services provider, which is on a trusted list provided for in Commission Decision 2009/767/EC , created with or without a secure signature creation device, subject to compliance with the following conditions:

(I) the contracting authorities shall establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU¹⁵ and shall put in place necessary measures to be able to process these formats technically; in case a different format of electronic signature is used, the electronic signature or the electronic document carrier shall include information on existing validation possibilities, which shall be under the responsibility of the Member State. The validation possibilities shall allow the contracting authority to validate online, free of charge and in a way that is understandable for non-native speakers, the received electronic signature as an advanced electronic signature supported by a qualified certificate.

Member States shall notify information on the provider of validation services to the Commission, which shall make the information received from the Member States available to the public on the Internet;

(ii) where a tender is signed with the support of a qualified certificate that is included on a trusted list, the contracting authorities shall not apply additional requirements that may hinder the use of those signatures by tenderers.

In respect of documents used in the context of a procurement procedure that are signed by a competent authority of a Member State or by another issuing entity, the competent issuing authority

¹⁵2011/130/EU: Commission Decision of 25 February 2011 establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2011) 1081).



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or entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of Decision 2011/130/EU. They shall put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned. Such documents shall contain in the electronic signature or in the electronic document carrier information on existing validation possibilities that allow the validation of the received electronic signature online, free of charge and in a way that is understandable for non-native speakers.

7.1. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to amend the technical details and characteristics set out in Annex IV to take account of technical developments.

7.2. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to amend the list set out in points (a) to (e)¹⁶ of the second subparagraph of paragraph 1 of this Article where technological developments render continued exceptions from the use of electronic means of communication inappropriate or, exceptionally, where new exceptions must be provided for because of technological developments.

7.3. To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 87 to establish the mandatory use of such specific technical standards, in particular with regard to the use of electronic submission, electronic catalogues and means for electronic authentication, only where technical standards have been thoroughly tested and proved their usefulness in practice. Before making the use of any technical standard mandatory, the Commission shall also carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes or software.

¹⁶In the final text take in consideration the proposed repealing and the insertion of a new letter as possible option.



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8. Due to the primary target of the Internal market of effective and fast communications between the market and the contracting authorities, as application of the fundamental principles of the Treaty (Articles 26, 28, 49-55 and 56-62 TFEU), especially in the internal borders areas and cross-border projects, the dispositions of this Article represent fundamental principles of the public procurement procedures also for public procurements with values below the threshold amounts stated in Article 4 .

A.2) Another article of the Directive to be amended is Article 39 of the Directive, especially paragraphs 4 and 5, concerning the case of procurement involving contracting authorities from different Member States as in the examined case of the EGTC GO. The proposed emendations are as followings:

4. Several contracting authorities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system. They may also, to the extent set out in the second subparagraph of Article 33(2), award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement that determines:

(a) the responsibilities of the parties and the relevant applicable national provisions for each phase of the procedures, including the collateral procedures and after-award acts as construction site safety rules, supplies labels and characteristics, testing standards of the works or supplies, contractual provisions, control of management of public funds, accounting controls, tax provisions, social and labour provisions, with the possibility to determinate different applicable national provisions for different phases and/or sectors, ensuring in any case the coordination dispositions between different applicable national provisions;

(b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.



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A participating contracting authority fulfils its obligations pursuant to this Directive when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure. When determining responsibilities and the applicable national law as referred to in point (a), the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective Member States. The allocation of responsibilities and the applicable national law shall be referred to in the procurement documents for jointly awarded public contracts.

5. Where several contracting authorities from different Member States have set up a joint entity, including European Groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council or other entities established under Union law, the participating contracting authorities shall, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules:

(i) of one of the following Member States:

(a) the national provisions of the Member State where the joint entity has its registered office, including or excluding the collateral procedures and after-award acts as construction site safety rules, supplies labels and characteristics, testing standards of the works or supplies, contractual provisions, control of management of public funds, accounting controls, tax provisions, social and labour provisions ;

(b) the national provisions of the Member State where the joint entity is carrying out its activities, including or excluding the collateral procedures and after-award acts as construction site safety rules, supplies labels and characteristics, testing standards of the works or supplies, contractual provisions, control of management of public funds, accounting controls, tax provisions, social and labour provisions;

or

(ii) the relevant applicable national provisions for each phase of the procedures, including the collateral procedures and after-award acts as construction site safety rules, testing standards of the works or supplies, supplies labels and characteristics, contractual provisions, control of management of public funds, accounting controls, tax provisions, social and labour provisions, with the possibility to determinate different applicable national provisions for different phases and/or sectors, ensuring in any case coordination dispositions between different applicable national provisions.



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The agreement referred to in the first subparagraph may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards.

6. Referring to the primary target of the Union to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions (Article 174 TFEU), with particular attention to cross-border regions and the CBC Programmes supporting cooperation between NUTS III regions from at least two different Member States lying directly on the borders or adjacent to them, the dispositions of this Article represent fundamental principles of the public procurement procedures for the contracting authorities in that areas also for public procurements with values below the threshold amounts stated in Article 4 .

B) EGTC Regulation proposed emendations.

Another necessary solution is the emendation of the EGTC Regulation, especially of Article 2, with the possibility of applying also rules different from the place of the registered office of the EGTC, when it's necessary for the full functioning of the EGCT. The Statute (Article 8 of the Regulation) should define this possibility, similarly to the ECBM (Articles 8 and 9).

Finally, through a broader implementation of the EGTC Regulation 1302/2013/EU, Article 2, indeed, envisages the possibility to apply also rules different from those in effect in the place where the EGTC is registered when it is considered necessary for the full functioning of the structure itself.

It's also necessary to amend the Article 8 of the Regulation, as referred in Article 2 and amended by the Regulation number 1302/2013/EU, with the express option to use different national laws in the same administrative procedure, for some phases of the procedures, collateral procedures, sub-procedures, status, control mechanisms and so on. This aim consents to choose the best applicable law of the Member States, participating to the EGTC, in the governing of the acts and the activities of the EGTC. Doing so, we have the optimal legal tool for every specific situation managed by the EGCT (for example: 1. it's possible that one lot of a public work, managed by the EGTC, is located in one Member State and another lot in the other Member State, with the necessity of a different regulation of each part of the public work / 2. the public procurement procedure is governed by the law of one Member



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State and the technical classifications, labels and safety provisions of the work/supply are governed by the law of another Member State, with ad hoc solutions).

Therefore, the proposed emendation of the EGTC Regulation are as follows:

Article 2

Applicable law

1. The acts of the organs of an EGTC shall be governed by the following:

(a) this Regulation;

(b) the convention referred to in Article 8, where it is expressly authorised under this Regulation to do so; and

(c) in the case of matters not, or only partly, regulated under this Regulation, the national law of the Member State where the EGTC has its registered office.

Where it is necessary to determine the applicable law under Union law or private international law, an EGTC shall be considered to be an entity of the Member State where it has its registered office.

1a. The acts and activities of an EGTC relating to carrying out tasks, referred to in Article 7(2) and (3), inside the Union shall be governed by applicable Union law and national law as specified in the convention referred to in Article 8, including the possibility that some phases, status, controls, sub-procedures and/or collateral procedures of the same principal procedure are governed by the national law of one Member State and other by the national law of another Member State, with compulsory coordinating dispositions referring to the applicable national laws.

The activities of an EGTC that are co-financed from the Union budget shall comply with the requirements set out in applicable Union law and the national law relating to the application of that Union law.

2. Where a Member State comprises several territorial entities which have their own rules of applicable law, the reference to the law applicable under paragraph 1(c) shall include the law of those entities, taking into account the constitutional structure of the Member State concerned.



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Article 8

Convention

1. An EGTC shall be governed by a convention concluded unanimously by its members in accordance with Article 4.
2. The convention shall specify:
 - (a) the name of the EGTC and its registered office;
 - (b) the extent of the territory in which the EGTC may execute its tasks;
 - (c) the objective and the tasks of the EGTC;
 - (d) the duration of the EGTC and the conditions for its dissolution;
 - (e) the list of the EGTC's members;
 - (f) the list of the EGTC's organs and their respective competences;
 - (g) the applicable Union law and national law of the Member State where the EGTC has its registered office for the purposes of the interpretation and enforcement of the convention;
 - (h) the applicable Union law and national law of the Member State where the EGTC's organs act, including the possibility that some phases, statuses, controls, sub-procedures and/or collateral procedures of the same principal procedure are governed by the national law of one Member State and other by the national law of another Member State, with compulsory coordinating dispositions referring to the applicable national laws;
 - (i) the arrangements for the involvement of members from third countries or from OCTs if appropriate including the identification of applicable law where the EGTC carries out tasks in third countries or in OCTs;
 - (j) the applicable Union and national law directly relevant to the EGTC's activities carried out under the tasks specified in the convention including the possibility that some phases, statuses, controls, sub-procedures and/or collateral procedures of the same principal procedure are governed by the national law of one Member State and other by the national law of another Member State, with compulsory coordinating dispositions referring to the applicable national laws;



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(k) the rules applicable to the EGTC's staff, as well as the principles governing the arrangements concerning personnel management and recruitment procedures;

(l) the arrangements for liability of the EGTC and its members in accordance with Article 12;

(m) the appropriate arrangements for mutual recognition, including for financial control of the management of public funds; and

(n) the procedures for adoption of the statutes and amendment of the convention, which shall comply with the obligations set out in Articles 4 and 5.

3. Where the tasks of an EGTC concern only the management of a cooperation programme, or part thereof, under Regulation (EU) No 1299/2013, or where an EGTC concerns interregional cooperation or networks, information under point (b) of paragraph 2 shall not be required.

4. Pre-assessment of whether the case could be solved with the European Cross-Border Mechanism

Most of afore mentioned cases have a solution using the instrument described in the ECBM , especially in Article 12.4 :

Where the legal obstacle consists only in an administrative provision, rule or administrative practice of the committing Member State or in an administrative provision, rule or administrative practice clearly distinct from a provision adopted under a legislative procedure and can therefore be changed or adapted without a legislative procedure, the competent committing authority shall inform the initiator in writing its refusal or willingness to change or adapt the relevant administrative provision, rule or administrative practice within eight months.

The obstacles examined in this report are mostly an example of a nonconforming execution of European and/or national dispositions and the main reason of the impossibility of no connecting different subjects in e-procurement procedures derives from a lack of attention of the software programmers, who are thinking with a national and not with an European mind. It means that, when they are writing the software for a public organism, they put no attention to the possibility of a participation also of foreign subjects. So, the ID procedures and the intercommunication



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procedures are addressed just to internal subjects, without attention to the interconnecting with other European ID codes , signing certificates and communication protocols. This despite the aforementioned protocols and directives of the Union define the protocols of interconnecting MS' systems.

It's important to emphasise that, applying the Article 2 of the EGTC Regulation, in its Constitutive act and Convention the grouping may decide the internal dispositions regulating its processing , but the main rule is the law of the State where the grouping has its registered office. This could be a problem, resolvable through the ECBM. The possibility to decide the applicable law is limited to the public tenders, thanks to the Public procurements Directives, but the EGTC is not able and also allowed to decide the law to apply also in the other cases connected or autonomous from the sector of public tenders.

On the other side the ECBM may also cause exceptional distortions of the competition in the EU market. For example, if in the examined area of Gorica/Nova Gorica the Italian legislation for safety on construction sites is applied (which derives from the European directives on safety and health at work¹⁷ as well as the Slovenian one), as a result of the EU directives itself, strictly applied in Italy to the yards, we'll have surely more security also in the Slovenian yards, but at the same time there will be an invasion of Italian security officers in Slovenia as being qualified under Italian legislation (similar to the Polish plumber syndrome in the Bolkestein Directive) because there will be no Slovenian people with the same professional classification.

We propose also to integrate the Article 9 - "Content of the initiative document" of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a mechanism to resolve legal and administrative obstacles in a cross-border context {SEC(2018) 268 final} - {SWD(2018) 282 final} - {SWD(2018) 283 final}.

The purpose is the same as in the proposed emendations of the Public procurement Directive and of the EGTC Regulation.

Article 9 - Content of the initiative document.

¹⁷<https://osha.europa.eu/en/safety-and-health-legislation/european-directives>



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1. The initiative document shall include at least the following elements:

(a) a description of the joint project and of its context, of the corresponding legal obstacle in the committing Member State as well as of the rationale for resolving the legal obstacle;

(b) a list of the specific legal provisions of the transferring Member State resolving the legal obstacle or, where no appropriate legal provision exists, a proposal for an ad hoc legal resolution;

(b.a) a proposal of applicable national provisions for each phase of the areas, departments, procedures, acts, tasks and activities, including the collateral procedures and after-award acts in public procurement or other procedures as construction site safety rules, testing standards of the works or supplies, contractual provisions, control of management of public funds, accounting controls, tax provisions, social and labour provisions, with the possibility to determinate different applicable national provisions for different phases and/or sectors, ensuring in any case coordination dispositions between different applicable national provisions, with the proposal, where no appropriate legal provision exists, for an ad hoc legal resolution;

(c) a justification for the area of application;

(d) the foreseeable duration or, where duly justified, its unlimited duration;

(e) a list of the competent committing authority or authorities;

(f) a list of the competent transferring authority or authorities.

2. The area of application shall be limited to the minimum necessary for the effective implementation of the joint project.

5. Other Relevant Aspects to this Case

A more elastic rule's contest allows to find the optimal regulation in every singular case, while a too stringent law contest inhibits the development of case to case optimal solutions.

Independently from the particular law applied for the singular public procurement procedure, due to the reason, that the EGTC has his registered address in Italy, also all the tax aspects of every act put in place or of every signed agreement are ruled by the Italian law. It's another case where,



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despite the Slovenian law applied to the public procurement procedure, the selected enterprise shall pay Italian's registration tax and stamp duty though the first one isn't due in case of VAT payment (i.e. reverse charge). The same rules are valid for what concerning the contribution due to the Italian public procurements authority ANAC for the participation in public tenders. Also if the procedure concerns public works to be built in Slovenia and the procedure's law is the Slovenian one, the participating enterprises shall pay the contribution to the aforementioned Italian Authority.

As mentioned before, also the financial flows monitoring system is the Italian one, independently from the rules of the tender procedure. About data managing, the GDPR is applied both in Italian or in Slovenian regulation in the same mode, so there were no problems in this subject. The law applying to the final public procurement agreement is not so relevant, because the dispositions in public procurement are the same in both regulation and, in every case, the law of obligations is quite similar in Italy and in Slovenia, deriving from the same common Roman law system.

As aforementioned the EGTC applies the rules of *lex loci* for the technical aspects of the public work, and the same rule is valid for the preliminary phase of the project of the work and the final phase of the final inspection and test. For the project services, the only request by the EGTC was the experience in designing the same or similar type of work in the State where is planned the new construction. It means that are allowed to participate also the designers from the other MS who are enabled to work in the other MS. Where the work is planned in both MS, the designer shall be able to work in both the States. For example, for the cycling cross-border path the fundamental requirement was the professional title in both the MS.

FINALLY

Concluding the examination of the case, we think and observe that the EGTC GO, knowingly or no conscientiously, created a mixed system of national rules, if we analyse the entire procedure of the public procedures (ITA or SLO it depends from several factors as stated before), from the project (SLO if situated in SLO or vice-versa), through the selection of the best tender and the final test (SLO if situated in SLO or vice-versa), the pre-contractual controls (ITA due to the Convention and the Statute), the signing of the agreement (ITA), the payment of the contractual



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act taxes (ITA Italian's registration tax and stamp duty), data monitoring communication (ITA ANAC and SLO EJN-Enaročanje-Edosje) .

The main rules are despite:

A) *lex procedure* for the public procurement acts

B) *lex loci* for the planning of the work, contract dispositions, technical rules, financial and data flows (i.e. CIG identification code), final tests of the infrastructure and yard's&service's safety.

C) mixed system for collateral procedures as publication of the notice on both on Italian and Slovenian official bulletin, registration of the procurement procedure in both systems (EJN in Slovenia and ANAC in Italy, for the last one also with the payment of the due sums to this public institution stated for every procurement, independently if it's managed in Italy or outside) , anti-mafia controls using the Italian platform BDNA also when the Slovenian law is applied and the yard is in Slovenian territory. But also when the Italian law is applied , the EGTC publishes the public procurement in both official journals – Slovenian and Italian one - and , above the Community thresholds, also on the EUOJ. In the same time, due to the pre-contractual controlling systems, both the procedures are used, the Italian ANAC and BDNA and the Slovenian E-Dosje if the participants are from both the MS. But, because it's impossible to know it before, the EGTC registers the public procurement procedure in every case in both the MS, necessary then to use the datas from both the controlling systems (ANAC and Edosje).

In any case the main problems are:

A) the language of the e-procurement platforms and publications

B) the adversity of the SME to work using that platforms because for them is a lack of time: doing so the aim to help the SME to participate to the procedures has the opposite effect of not convincing them for participation in e-procurements calls, due to the too complicated imputing of data and more over complicated way of communicating with the PA.

So we think that the optimal solution is an EU general regulation without MS' executive regulations, especially referring to the technical aspects of validation, communication and registration in the Public tenders platforms. The alternative in the examined case is the possibility for the EGTC to decide which law to apply not solely in the public procurement procedures but also in the connected phases of its activities.



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6. References and Appendix/Appendices if any

References:

EU docs – as mentioned above

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