



**EUROPEAN COMMISSION**  
HEALTH AND CONSUMERS DIRECTORATE-GENERAL

Public health  
**Health threats**

## **JOINT PROCUREMENT AGREEMENT**

### **Considerations on the legal basis and the legal nature of the Joint Procurement Agreement**

Disclaimer: This is a technical document prepared for the purpose of supporting a discussion on the Joint Procurement Agreement. Any views expressed in this document are purely those of the writers and may not in any circumstances be regarded as stating an official position of the European Commission.

## **I. Legal basis**

1. At Union level, the legal basis for addressing serious cross-border health threats has been reinforced with the Lisbon Treaty. **Article 168** of the Treaty on the Functioning of the European Union states, inter alia, that the Union's action in the field of public health should cover monitoring, early warning of and combating serious cross-border threats to health, and that a high level of human health protection is to be ensured in the definition and implementation of all Union policies and activities. According to the same provision, Member States must, in liaison with the Commission, coordinate their policies and programmes in the areas covered by the Union action in the field of public health.

2. Paragraph 5 of Article 168 of the TFEU provides the power to the European Parliament and the Council, after consultation of the European Economic and Social Committee and the Committee of the Regions, to adopt measures on combating serious cross-border health threats. As the arrangements necessary for the development and implementation of a joint procurement mechanism required the adoption of a legal act under this paragraph, joint procurement of medical countermeasures was incorporated in Article 5 of the Decision **1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross border threats to health and repealing Decision No 2119/98/EC**<sup>1</sup>.

3. Without the inclusion of joint procurement into a legal act the creation and management of a joint procurement mechanism would have been left to the Member States, in accordance with paragraph 2 of Article 168 of the TFEU.

4. Article 5 of the Decision 1082/2013/EU provides that the institutions of the Union and any Member States which so desire may engage in a joint procurement procedure with a view to the advance purchase of medical countermeasures for serious cross border threats to health. It lays down common rules for practical organisation of such procedure. It foresees that Member States can (but do not have to) participate in a joint procurement procedure. Article 5 further provides that the joint procurement procedure will be conducted pursuant to the third subparagraph of **Article 104(1) of Financial Regulation**<sup>2</sup> and pursuant to **Article 133 of the Rules of Application**<sup>3</sup>.

## **II. Joint procurement agreement as a budgetary implementing measure**

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<sup>1</sup> OJ L 293, 5.11.2013, p. 1

<sup>2</sup> Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union

<sup>3</sup> Commission Delegated Regulation (EU, Euratom) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union

5. In accordance with these provisions, the institution and the contracting authority from Member States, EFTA States or Union candidate countries, concerned by the joint procurement procedure shall **agree** in particular upon the practical modalities for the evaluation of the requests for participation and/or of the tenders, the award of the contract, the law applicable to the contract and the competent court for hearing disputes.

6. The authorities who will proceed to a common procurement procedure, rather than organising individual procurements, have therefore to conclude a Joint Procurement Agreement. From the point of view of the Union law, the joint procurement agreement is intended to implement a provision of a legislative act, namely, Article 5 of Decision 1082/2013/EU. As it is concluded between the Commission and the participating states, it is considered by the Commission as a budgetary implementing measure of Decision 1082/2013/EU. Its unusual character is explained by the fact that it is a measure adopted in common by the Commission and the participating states. In line with the provision of Article 168 paragraph 5, the Commission will implement the decisions taken by the Member States and coordinate the joint procurement procedure.

7. The Joint Procurement Agreement is concluded pursuant to the Financial Regulation and Decision 1082/2013/EU, and falls entirely within the subject matter of the Treaties. These acts provide explicitly that they are governed by Union law (including principles common to the Member States), and any disputes are subject to exclusive jurisdiction of the Court of Justice<sup>4</sup>. It is not an international treaty, in the meaning of the Vienna Convention on the Law of Treaties<sup>5</sup>.

### **III. International law versus Union legal order**

8. The Union legal order is separate and distinct from national legal orders, and is also separate and distinct from the legal order of international law (Opinion 1/91, para. 21<sup>6</sup>).

9. International legal personality entails the privilege of being able to enter into agreements under international law. But this is indeed a privilege, and not a constraint on the freedom of international legal persons. In other words, international legal persons may still enter into agreements under other legal orders if they so decide, provided they have legal personality under the respective legal order chosen. For example, two or more States may decide to enter into an agreement that is not governed by international law,

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<sup>4</sup> The Treaties explicitly foresee the possibility to elect jurisdiction of the Court of Justice in respect of agreements to which the Union is a party and also in respect of disputes between Member States which relate to the subject matter of the Treaties (Articles 272 and 273). The Joint Procurement Agreement indeed elects jurisdiction of the Court of Justice on the basis of Article 272.

<sup>5</sup> The Vienna Convention on the Law of Treaties is a treaty concerning the international law on treaties between sovereign states. The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations

<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991CV0001:EN:PDF>

i.e. by the Vienna Convention on the Law of Treaties, but that is instead governed by the national law of one of those States. International law does not oblige legal persons to enter into agreements only under international law.

10. Article 2 paragraph 1 point (a) of the Vienna Convention defines “treaty” as “an international agreement concluded between States in written form and governed by international law...”. These conditions need to be fulfilled cumulatively, and since the Vienna Convention applies only to “treaties” (pursuant to its Article 1), if one condition is not fulfilled, the Vienna Convention does not apply. Consequently, the Vienna Convention itself explicitly foresees the possibility of agreements concluded between States that are not international agreements, or that are not governed by international law, to which the Vienna Convention does not apply. This is made further explicit in Article 3 of the Vienna Convention.

11. The principles of free consent and the *pacta sunt servanda* rule are universally recognized, including at international law (see inter alia the third recital to the Vienna Convention). Since customary international law constitutes a source of Union law, these principles also apply within the Union legal order. These principles include the freedom for parties to an agreement to choose a governing law.

12. It follows from the foregoing that Member States retain the ability to choose, by common accord, the governing substantive law of any agreement they jointly enter into, provided they have legal personality under the respective legal order chosen. They may also decide to pre-define a governing jurisdiction (a court or arbitration tribunal).

13. The Joint Procurement Agreement includes an explicit choice of substantive law clause in Article 1 paragraph 4, which prescribes that the governing substantive law of the agreement is Union law (and not international law or a national law).

14. As regards the question of international legal personality, by way of distinction with international law, Union law also recognises legal personality where this is conferred by the national law of one of the Member States. Consequently, for example, where the “State of Denmark” (a signatory to the Joint Procurement Agreement) does not have international legal personality (only the “Kingdom of Denmark” does), the “State of Denmark” does have legal personality under Union law so long as it has legal personality under Danish law. A number of future signatories to the Joint Procurement Agreement will fall under this category, i.e. they have legal personality under Union law but not international law.

15. In the light of the foregoing, and even if the Joint Procurement Agreement was signed only by international legal persons, the signatories are free to elect to be governed by a substantive law other than international law. Therefore, the potential signatories could validly elect Union law as the governing law of the agreement.

16. In addition, the Joint Procurement Agreement will be signed by various persons that have legal personality under Union law but that do not have necessarily international legal personality. Consequently, the Joint Procurement Agreement cannot be international agreement, and the Vienna Convention on the Law of Treaties cannot apply.