

6. Cross Border eProcurement

Background

eProcurement can increase the efficiency of government through the simplification of administration systems affecting the tendering process (e.g. saving time, increasing transparency and improving coordination).¹⁷² Indeed, the i2010 eGovernment Action Plan estimated that electronic procurement and invoicing could result in annual savings of tens of billions of euros (OECD 2003)¹⁷³. An emerging challenge is cross border eProcurement. Indeed, the eGovernment Action Plan sets out plans covering 2006–2010 for cooperation between the Commission and Member States to investigate and develop cross border eProcurement solutions (European Commission 2006). eProcurement was again identified as a priority policy action at the Lisbon Ministerial declaration in September 2007 noting the launch of a number of large scale ICT PSP Pilots on cross-border eProcurement. However, cross border initiatives can present a number of challenges due to the diversity of the institutional and legal settings of different Member States. Digitization can either work as an emancipator from existing hurdles, or add more difficulties to the process of public purchasing.

The embedded case studies

In the discussion below two case studies are explored that illustrate how the difficulties of and solutions adopted by different Member States presented themselves vis-a-vis the general scheme of barriers and legal dimensions identified by the Breaking Barriers to eGovernment Project. In the first of these cases, some of the Northern European Countries are devising a set of open standards to be used by companies and governments in building interoperable eProcurement processes. In the second, Belgian and French authorities decided to join forces to share the costs of developing an open source eCatalogue software¹⁷⁴ for public eProcurement, and faced a number of barriers related to the mutualization of their administrative processes.

It is important to note that, in spite of the importance that a pan-European cooperation in developing cross-border eProcurement processes would assume, the initiatives in this area are rare. If not even the participation of economic operators in foreign tendering processes within the European Union has really taken over, the situation is even worse with regard to the cooperation between different Member States in developing common platforms and processes for public eProcurement. In this sense, we believe that a systematic focus on the projects in question may offer some guidelines on practices to be replicated or avoided in future initiatives, pointing to some issues that could otherwise remain hidden or unexpectedly present themselves at some point during the life of those initiatives – and that this may to some extent encourage and facilitate the development of other like projects on cross-border electronic public procurement within the European Union.

¹⁷² OECD (2003)

¹⁷³ http://europa.eu.int/information_society/activities/egovernment_research/doc/highlights/egov_action_plan_en.pdf

¹⁷⁴ See European Commission, IDABC, “Cross-border sharing of eProcurement software development – can it work?” (2006) 06 Synergy: The IDABC Quarterly 13 at 14

Case study: The Northern European Subset: An Open Platform for Cross-Border eProcurement

Marcelo Thompson Mello Guimarães

Oxford Internet Institute, University of Oxford

Introduction

The case study examined in the lines below is the Northern European Subset (NES) Project. In NES, a group of Northern European countries is devising a set of open standards to help companies and governments to build open and interoperable eProcurement processes. The aim of this article is to understand the barriers encountered by the parties in implementing the NES project, the actions undertaken to address these barriers, and which lessons can be learned from them. The article approaches the subject from a multiplicity of perspectives which have a clear interplay with law and policy aspects surrounding eProcurement in the European context.¹⁷⁵ Nonetheless, it also enlarges on points beyond the legal intricacies of public procurement to bring a comprehensive portrait of one of the incredibly few cross-border initiatives on eProcurement in the EU. In doing so, the aims of this article are two-fold. On the one hand, it offers lawyers a large view of factual issues potentially faced in the implementation of projects alike. On the other hand, it offers administrators some hints on how these issues may interact with law and policy aspects surrounding eProcurement.

The article departs with a brief background on the current stage of EU law and policy on public procurement, providing some notes on the importance of a harmonized pan-European framework. Section 3 defines NES technical scope and its goals in light of the European Commission Action Plan on Public Procurement. Section 4 draws a more comprehensive overview of NES, portraying its historical background and the barriers found by the partners in many different settings, which I group in five overarching categories: financial, organizational, legal, technological, and social. Section 5 provides a systematic picture of the internal (to NES) and external (to eProcurement in general) dimensions of the barriers found the partners, in light of the general categories of barriers defined by the Breaking Barriers to eGovernment Project. It also portrays the actions undertaken by the partners to overcome these barriers.

Background

Public procurement, as governmental processes in general, is like a statue of Janus – at the same time facing the past and the future, tradition and change. It can be a gateway to the effective management of public purchases and to the achievement of important public policies, or it can be a backdoor to excessive bureaucracy, cumbersome organizational cultures, painstakingly detailed and diversified regulations, and resistance to technological adoption. This non forward-looking face was perhaps the most visible face of public procurement until some years ago – a process of which small and medium enterprises tended to stay apart, incapable of coping with all the red-tape and

¹⁷⁵ For more topical notes on the rules concerning eProcurement in the EU as well as on the understanding of the European Commission with regard to them, see Roger Bickerstaff, “The New Directives’ Rules on E-communication Mechanisms in Public and Utilities Procurement” (2004) 13 P.P.L.R. 277. See also Roger Bickerstaff, “Review: Commission Staff Working Document on the Requirements for Conducting Public Procurement Using Electronic Means” (2005) 14 Public Procurement Law Review NA17. Many of these rules do not have a direct relation with the activities currently undertaken by NES, as they either deal with procedural aspects of electronic procurement, or with applications not presently encompassed by the scope of the project – such as those which would enable electronic auctions, the use of electronic signatures, time-stamping, amongst others. That is to say, they do not constitute barriers to NES or relate to barriers which NES is trying to solve. To the extent that these rules do relate to NES, however, they will be mentioned in the lines that follow.

demanding efforts involved.¹⁷⁶ Now however, we live a moment of opportunity and change. New Directives on public procurement were adopted,¹⁷⁷ and came into force in 2006, an Action Plan for their implementation defines some milestones to be achieved with regard to electronic procurement,¹⁷⁸ and most European countries are seeking to embrace good practices on electronic procurement, to a lesser or larger extent.

However it is not all hearts and flowers. Several of the objectives described in the Commission's Action Plan seem to have been widely ambitious at this point.¹⁷⁹ To start with, the very cornerstone of the envisioned objectives – the implementation of the legal framework correctly and on time did not take place. From the countries involved in the NES Project,¹⁸⁰ only Denmark and the UK had implemented the Directives by the scheduled date (January 1st 2006).¹⁸¹ As noted by Trybus (2006), “most member states, including those who made the deadline appear to have left implementation to

¹⁷⁶ In a public consultation carried out by the European Commission by the end of 2004, and which led to the Action Plan on Electronic Public Procurement, more than 60% of the respondents (in majority small and medium enterprises) pointed out that what they would expect from public electronic tendering would be more transparency, better usability, and less efforts than tendering in traditional paper means. See European Commission, “Commission eProcurement Business Survey” (17.01.2005), on-line: http://ec.europa.eu/internal_market/publicprocurement/docs/e procurement/consult-stats_en.pdf.

¹⁷⁷ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (30.04.2004) [Utilities Directive]; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004) [Public Procurement Directive]. Reference in this document to “the Directive” or “the public procurement Directive” are to be understood with regard to the latter, as well as any references to isolated articles hereinafter.

¹⁷⁸ European Commission, “Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Action plan for the implementation of the legal framework for electronic public procurement” (13.12.2004), on-line: http://ec.europa.eu/internal_market/publicprocurement/docs/e procurement/actionplan/actionplan_en.pdf [Action Plan].

¹⁷⁹ Early noting that, more than ambitious, the actions suggested could hinder the development of the very market place they seek to foster (understanding that I do not share, though), see Roger Bickerstaff, “The Commission's Action Plan for the Implementation of the Legal Framework for Electronic Procurement” (2005) 3 Public Procurement Law Review NA62: “The extent to which this ambitious programme of activities can be carried through by the Commission is open to question. In any event, given the early stage of development of the public sector eProcurement market, there must be a risk that the market place will be deterred rather than incentivised by the Commission's activities” at NA68.

¹⁸⁰ See section 4.2 infra.

¹⁸¹ “According to Danish law the public procurement directives are directly applicable since they are incorporated *telles quelles*. The directives have been implemented by the following governmental orders: (...) Governmental order number 937 of 16 September 2004 concerning the procedures for the award of public works contracts, public supply contracts and public service contracts (...) Governmental order number 936 of 16 September 2004 concerning procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. The above mentioned governmental order number 937 implements the procurement directive 2004/18/EC on public works, supplies and services. Governmental order number 936 implements the utilities directive 2004/17/EC. Each directive is printed as an annex to the respective governmental order. Thus the actual text of the directives constitutes the current legislation in the field of public procurement in Denmark”. See Danish Competition Authority, “Procurement Rules in Denmark - Legislative Framework” (October 2005), on-line: <http://www.ks.dk/english/procurement/legislation/pro/>. A legal package was approved in Norway only shortly before easter in 2006, as a proposal to the Storting (the Norwegian parliament), having the 1st January 2007 as its original target date for implementation. The proposal revises the current Norwegian Public Procurement Act, and is expected to mark “the day when electronic means in public procurement was fully adopted” in Norway. See Ehandel: The Norwegian Electronic Public Procurement Portal Breakthrough for eProcurement, “Breakthrough for eProcurement”, on-line: http://www.ehandel.no/index_en.php/Artikkel/item/705.html. See also European Commission, IDABC, “eGovernment Factsheet - Norway - Legal framework” (February 2007), on-line: <http://ec.europa.eu/idabc/en/document/6755/407>. In the same sense, Iceland has only recently (October 2006) sent a proposal to its parliament so as to modify its existing Public Procurement Law. European Commission, IDABC, “eGovernment Factsheet - Iceland - Legal framework” (January 2007), on-line: <http://ec.europa.eu/idabc/en/document/6597/399>.

the last minute”.¹⁸² The Directives can be considered to be immediately effective and enforceable¹⁸³ since that deadline has passed. However, the big-bang effect of their sudden materialization in different legal systems, without harmonized laws that discipline the way this will happen, may prompt the establishment or protraction of different barriers to public procurement, and to governmental functions that it is instrumental to.

In reality, albeit public procurement corresponds to 16% of the EU's GDP,¹⁸⁴ it has not received as much attention in European law and policy as it would be¹⁸⁵ compatible with its direct importance as a public service and with the benefits that may stem to contracting authorities from the effective implementation of public procurement processes.¹⁸⁶ This lack of more in-depth consideration is not compatible either with the indirect though strategic effects of public procurement in the achievement of broader societal goals in areas such as trade, innovation, environment and social policies – areas which the new directives came expressly to reinforce, drawing upon previous European Court of Justice case-law.¹⁸⁷

From a cross-border perspective, the establishment of a harmonized legal framework can prevent the conversion of public purchases into a significant non-tariff barrier to trade – as countries tend to devise protectionist regimes for their national industries by means of public procurement law.¹⁸⁸ At the European level, this is something the new directives seek to avoid, as otherwise undermining the very freedoms the Treaty on European Union provides for. At the global level, harmonization initiatives are carried out within the scope of the WTO's Agreement on Government Procurement, which is mostly subscribed to by developed countries, and by the UNCITRAL Model Law on Procurement of Goods, Constructions and Services, which will arguably fill an important gap by providing for “sound international or supranational procurement rules”.¹⁸⁹ But, more than trade, from the perspectives encompassed by the “Breaking Barriers to eGovernment” project, the absence of harmonized public procurement laws internalizing the directives may create problems to contracting authorities, and other stakeholders, ranging from leadership and organizational issues, to technical design and trust aspects. It may also prompt difficulties of coordination among authorities of

¹⁸² Martin Trybus, “The Morning After the Deadline: The State of Implementation of the New EC Public Procurement Directives in the Member States on February 1, 2006” (2006) 3 Public Procurement Law Review 82

¹⁸³ As indicated by the European Court of Justice, since its early decisions in *Van Gend en Loos* and *Costa*. See Case 26/62 *Van Gend Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; and Case 6/64 *Costa v. ENEL* [1964] ECR 585. As Chalmers et al point out in their “European Union Law”, in these cases “the Court held that the Community was a sovereign legal order, which gave rise to rights that could be invoked before national courts and that in cases of conflict, the Community law took precedence over national law”. Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti, and Adam Tomkins, *European Union Law: Texts and Materials* (Cambridge: Cambridge University Press, 2006) at 14.

¹⁸⁴ Action Plan, *supra* note 6.

¹⁸⁵ Christopher Bovis, *Public Procurement in the European Union* (Oxford: Oxford University Press, 2005) at 1.

¹⁸⁶ “If online procurement is generalised, it can save governments up to 5% on expenditure and up to 50-80% on transaction costs for both buyers and suppliers. While it is difficult to quantify competition and efficiency benefits for the EU as a whole, greater competition and efficiency in public procurement markets can impact - directly and indirectly - on the whole economy and play an important role in achieving the Lisbon objectives”. Action Plan, *supra* note 6 at 3.

¹⁸⁷ See Public Procurement Directive, *supra* note 5, particularly recitals 1, 5, 23, 28, 29, 33, 34, 46.

¹⁸⁸ Governments may intervene in economic activities by raising tariff – i.e. taxes on imports of commodities – and non-tariff barriers to trade. With regard to the latter, besides public procurement law, different kinds of laws and policies can be used, such as state subsidies, environment and sanitary restrictions, labour law, exchange rate management policies, intellectual property law, amongst others.

¹⁸⁹ International Chamber of Commerce, Secretary General, “ICC support for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services” Letter January 25 2007 GS/EO/ev, on-line: http://www.iccwbo.org/uploadedFiles/ICC/policy/commercial_law/pages/Final_Comments UNCITRAL_Model_Law_on_Procurement.pdf. For more a detailed discussion on the context of those instruments, see, for instance, Attila Kovacs, “The Global Procurement Harmonisation Initiative” (2005) 1 Public Procurement Law Review 15. For a specific discussion on the UNCITRAL Model Law, covering electronic procurement related aspects, see Don Wallace Jr, Christopher R. Yukins, and Jason P. Matechak, “UNCITRAL Model Law: Reforming Electronic Procurement, Reverse Actions, and Framework Contracts” (2005) 40-WTR Procurement Lawyer 12.

different countries.¹⁹⁰ As the e-invoice aspects we are going to address below¹⁹¹ prove, certainties with regard to the legal framework are essential to prevent the emergence of these barriers.

Of course regulation is not only made up of laws. Architectural constraints embedded in code and standards are also important to determine how the use of a technology will influence behaviour at the individual and collective dimensions. Choices and normative perceptions take a concrete expression in the design of a technology, affecting policy decisions as much as law does.¹⁹² So, it is important to understand, with the European Commission's Action Plan, that, besides legal, "technical and organisational barriers ... may result from procurement online"¹⁹³ - and also that organisational barriers themselves can result from or be addressed by technological choices.¹⁹⁴

The Northern European Subset project provides an auspicious way of coping with existing barriers to electronic procurement and with barriers that other kinds of electronic procurement processes may create, and have created in the past. We will see how in the lines that follow.

Definition of the Case Study

In his recent overview on European eProcurement,¹⁹⁵ Emilio Castrillejo, representative of the IDABC on eProcurement, and member of the European Commission's Enterprise and Industry Directorate-General, summed-up that the main challenges faced by eProcurement in the EU relate to: catalogues, signatures, and standards. Undefeated, those challenges would hamper interoperability in European eProcurement. Mr Castrillejo's perception reflects to some extent the Commission's view set forth in the Action Plan, that: i) the completion of the legal framework with appropriate basic tools, ii) the removal / prevention of barriers in carrying public procurement procedures electronically, and iii) detecting and addressing interoperability over time are key objectives to a well functioning Internal Market in electronic procurement.¹⁹⁶ In effect, all these key

¹⁹⁰ "Early adoption of the new eProcurement provisions is essential to avoid barriers to and distortion of competition. It is also very important for the rapid development and the effective use of eProcurement by economic operators. Member States should deploy all efforts to comply with the Directives' deadline. Erroneous or divergent interpretation of the new rules can create barriers to cross-border trade and ultimately fragment the market". Action Plan, *supra* note 6 at 3.

¹⁹¹ See sections 4.1 and followings.

¹⁹² For all, see Lawrence Lessig, *Code and Other Laws of Cyberspace* (NY: Basic Books, 1999), arguing, for instance, that "Code constitutes cyberspaces; spaces enable and disable individuals and groups. The selections about code are therefore in part a selection about who, what, and, most important, what ways of life will be enabled and disabled". See also David Post, "The Unsettled Paradox : The Internet, The State, and The Consent of the Governed" (1998) 5 *Indiana J. Global Legal Studies* 521, online: Author's Website <http://www.temple.edu/lawschool/dpost/Sov.html> See also Dan Burk, "Cyberlaw and the Norms of Science" (1999) *B.C. Int. Prop. & Tech. F.*, online: http://www.bc.edu/bc_org/vp/law/st_org/iptf/commentary/content/burk.html.

¹⁹³ Action Plan, *supra* note 6 at 3.

¹⁹⁴ In this respect, it is clear that the Public Procurement Directive is concerned not only with regulating procedures, but also with addressing the underlying technological infrastructure of electronic procurement. As Bikerstaff notes with regard to Annex 10 of the Directive, which establishes requirements for devices for the electronic receipt of tenders, requests to participate and plans and projects in contests: "the preamble in Annex 10 states that the "devices" "must at least guarantee, through technical means *and* appropriate procedures" the matters set out in the Annex. This language and, in particular the use of the "and" in relation to "technical means and appropriate procedures" appears to have the effect that establishing administrative procedures governing the use of e-communications technology will not be sufficient to comply with the requirements of the Annex. The wording appears to suggest that there must be technological solutions to satisfy the requirements of the Annex". See Roger Bickerstaff, "The New Directives' rules eCommunication mechanisms in public and utilities procurement", *supra* note 3 at 281.

¹⁹⁵ Emilio Castrillejo, "European eProcurement: An Overview" (June 2006), on-line: European Commission, IDABC <http://ec.europa.eu/idabc/servlets/Doc?id=25046>.

¹⁹⁶ Action Plan, *supra* note 6 at 3.

measures encompass to some extent the establishment of standards, and relate to the different dimensions of interoperability addressed in the Commission's Communication on Interoperability.¹⁹⁷

To address interoperability concerns and promote the development of a common-standard to be used in electronic procurement is what the Northern European Subset (NES) project is mainly about. As such, it hits the nail on the head by focusing on those which were identified as the utmost challenges and objectives by the European Commission, and seems to follow step by step the recommended actions for addressing interoperability requirements as set forth in the communication on interoperability.¹⁹⁸ Targeting priorities, and allowing for the development of a phased approach,¹⁹⁹ the NES project focuses on basic eProcurement functions (at this point ranging from electronic catalogues, ordering, and invoicing), and envisions the facilitation of electronic collaboration, based on international standards, towards a common platform, a common infrastructure to support the development of eProcurement in the EU. In sum, its core purposes are: i) to facilitate interoperability and practical use of eProcurement both in domestic and cross border trade; ii) facilitate harmonization of different eProcurement documents; and iii) contribute to the development and use of an international standard for eProcurement.

Technically what NES does is to develop a common library and generic eProcurement documents as a subset by refining the Universal Business Language (UBL) common library and documents. From this subset, NES devises context specific documents, grouped in different profiles, which may have a narrower or a larger scope. Both the subset and the profiles are devised by NES so as to meet different businesses processes (e.g. e-cataloguing, e-ordering, e-invoicing) that may take place either in a business-to-government or in a business-to-business relationship. The profiles, range, for instance, from a "basic invoice profile", which is the basis of a business process of invoicing involving a standalone invoice document, to "basic eProcurement", which, besides invoicing, also involves other phases such as an order, an order response, among others. The profiles, thus, are instrumental to basic eProcurement functions.²⁰⁰

Box: Universal Business Language (UBL)

"UBL, the Universal Business Language, is the product of an international effort to define a royalty-free library of standard electronic XML business documents such as purchase orders and invoices.

Developed in an open and accountable OASIS Technical Committee with participation from a variety of industry data standards organizations, UBL is designed to plug directly into existing business, legal, auditing, and records management practices, eliminating the re-keying of data in existing fax- and paper-based supply chains and providing an entry point into electronic commerce for small and medium-sized businesses".

The UBL standard was devised mainly "to avert a crisis in electronic business caused by competing XML business-to-business document standards by choosing as a starting point an existing XML business document library as the basis for creating a new "Universal Business Language" that [would] be a synthesis of existing XML business document libraries".

¹⁹⁷ European Commission, "Communication from the Commission to the Council and the European Parliament: Interoperability for Pan-European eGovernment Services COM(2006) 45 final" (13.2.2006), on-line: IDABC <http://ec.europa.eu/idabc/servlets/Doc?id=24117> at 6.

¹⁹⁸ Those actions involve, amongst others: setting priorities; policy documents and guidelines; encouraging communication between administrations; management of generic elements; standardisation; an architecture for the effective delivery of eGovernment services; common infrastructure to support eGovernment interoperability etc. Ibid at 7-11.

¹⁹⁹ In the Action Plan, the Commission exposes the view that "a phased development of eProcurement is most likely to maximise benefits for both the public and the private sector", and that "[g]overnments should ... be able to modulate and adjust implementation of the new electronic tools over time". *Action Plan*, supra note 6 at 7. By the same token, the UK Office of Government Commerce's guide to public eProcurement, suggests that a "big bang" approach should be avoided, acknowledging: "[e]xperience shows that taking a gradual approach and not trying to implement too much too quickly is the best method of achieving success". Office of Government Commerce, "eProcurement in Action: A guide to eProcurement for the public sector" (2005), on-line: <http://www.ogc.gov.uk/documents/cp0025.pdf> at 4.

²⁰⁰ Jostein Frømyr, and Martin Forsberg, "Common platform for eProcurement – Presentation at the UBL symposium" (November 16, 2006), on-line: NES http://www.nesubl.eu/download/18.6f606810f80ad8ee38000276/NESPresentation_20061116.pdf at 3.

Its development took into consideration the “standards/specifications issued by UN/CEFACT, ISO, IEC, ITU, W3C, IETF, OASIS, and such other standards bodies and organizations as the UBL TC [deemed] relevant”. As its ultimate goal, the UBL Technical Committee intended, “to promote UBL to the status of an international standard for the conduct of XML-based electronic business.”

Source: *Organization for the Advancement of Structured Information Standards*201

Implementation and Settings of the NES Case Study

Background

The NES project finds its roots in the previous experience of eInvoicing in Denmark. In December 2003 the Danish “Act Pertaining to Public Payments”, and a subsequent Regulation by the Minister of Finance, mandated that all invoices should be sent by companies to the Danish government in electronic means. The purpose of this was “to encourage companies to do more electronic invoicing”,²⁰² and the result, since the regulations came into force, in February 2005, was an “instant critical mass of approximately 15 million digital invoices a year”.²⁰³ It also led to the conversion of public-sector entities systems from physical to digital handling of invoices, which is expected to save the Treasury more than EUR 120 million, in addition to savings in internal administrative processes.²⁰⁴

A specific standard was devised for the Danish eInvoicing procedures – the OIOXML,²⁰⁵ as a subset of an early and still non-official version of the UBL standard (UBL 0.7). The premature adoption of a non-official standard happened due to financial constraints. There was a budget cut which was about to be made by the Minister of Finance, and due to this reason OIOXML was developed by implementing many alterations to UBL, which led to the incompatibility between both standards. The same thing happened in Sweden, with another version of UBL. This technical design problem ended up creating more difficulties to Danish and Swedish companies than helping them. Since those companies implemented the format and started to use it internally, their coordination with foreign companies or governments may have been hindered, as they would speak different languages with regard to the format of the document schemes they are using, which is not compliant with an international standard. This is a problem the NES project is now trying to address with its adoption of a subset based on UBL v. 2.0.

The Beginning

NES today involves Denmark, Sweden, Norway, Finland, England, and Iceland. Some other countries, such as Estonia, Romania, Austria, and the Netherlands, have shown interest in taking part in the project. Denmark and Sweden, as mentioned, have been focusing on UBL for some time, but that was not the case of the other partners in NES. The project was kicked-off by Denmark, who two years ago assumed the leadership and asked the other Northern countries if they would be interested in joining them in devising the requirements for the new UBL version which was released in December 2006. Although there was agreement on the importance of joining efforts for an

²⁰¹ See OASIS, “Universal Business Language (UBL) TC” (December 2006), on-line: OASIS http://www.oasis-open.org/committees/tc_home.php?wg_abbrev=ubl

²⁰² Mikkel Brun, and Ralf Cimander – National IT and Telecom Agency, Denmark, “Good Practice Database: eGovernment case details - Electronic invoicing to the public sector in Denmark” (January 2007), on-line: eGovernment Good Practices Framework http://www.egov-goodpractice.org/gpd_details.php?gpdid=1967.

²⁰³ Ibid.

²⁰⁴ Ralf Cimander, and Mikkel Brun – National IT and Telecom Agency, Denmark, “Good Practice Case: eInvoicing in Denmark – Prepared for the European Commission, DG Information Society and Media, eGovernment Unit.” (January 2007), <http://www.egov-goodpractice.org/download.php?&fileid=1145> at 2.

²⁰⁵ OIOXML stands for Offentlig Information Online (public information online) Extended Markup Language – which, as the name says, is an XML Schema devised specially by the OIO, based upon the UBL XML Schema. See National IT and Telecom Agency, OIO “The Danish XML Project”, on-line <http://www.oio.dk/dataudveksling/danishXMLproject>.

eProcurement initiative, the definition of a common standard to be adopted was more problematic, with some of the countries advocating the adoption of a UN/CEFACT²⁰⁶ standard, such as EDIFACT.²⁰⁷ However, on the one hand, UBL is expected to grow and at some point become a UN/CEFACT standard. On the other hand, UBL was the only suitable XML-based standard which was available at the time, because most of the rest was using EDI. So, after some thoughts, the group was formed.

The advantage that NES UBL would have over EDIFACT would be the possibility of offering a profiles-based harmonized subset, tailored for specific business needs, and prepared for cross-border trade. This would not be the case with EDI, where the possibilities of choice are arguably too vast, demanding bilateral agreements, pre-synchronization of data, and changes of internal processes – the result being that only a few parties with large volumes can come on board, leaving SMEs out of the process.²⁰⁸ It seems, thus, that NES comes to solve the barriers of coordination posed by unrestrained choices, organizational inflexibility raised by difficulties of individually adjusting business processes on a bilateral basis, instead of relying upon a predefined set of documents and profiles which can be readily used, and digital divides which would result from the exclusion of small and medium-sized enterprises from cross border eProcurement processes.

Timeline

Tracing back the origins of NES, we could perhaps say that it found its most remote legal foundations in the 2001 European Directive on invoicing, which established that invoices could be “sent either on paper or, subject to an acceptance by the customer, by electronic means”, and that Invoices sent by electronic means shall be accepted by Member States provided that the authenticity of the origin and integrity of the contents are guaranteed(...).²⁰⁹ This was the very basis for the e-Invoicing legal framework in Denmark, as we just mentioned above, which was approved in 2003, had its technical infrastructure (the OIOXML standard) in place by 2004, became enforceable in February of 2005, and reached the milestone of 90% of invoices sent to public institutions in electronic means by the Autumn of 2005. Two other projects that also contributed for the development of NES were the eProcurement initiatives of Denmark, in particular with respect to eCatalogues,²¹⁰ and eInvoicing in Sweden.²¹¹

²⁰⁶ See United Nations Centre for Trade Facilitation and Electronic Business, on-line: <http://www.unece.org/cefact/index.htm>

²⁰⁷ Ibid.

²⁰⁸ See also Jostein Frømyr, and Martin Forsberg, *supra* note 28 at 8. See NES, “NES Workshop: Brussels February 15th 2007”, on-line: <http://www.nesubl.eu/download/18.6f60681109102909b80002763/NES-workshop+minutes+15+feb+2007.pdf>.

²⁰⁹ Council Directive 2001/115/EC of 20 December 2001 amending Directive 77/388/EEC with a view to simplifying, modernising and harmonising the conditions laid down for invoicing in respect of value added tax. Art 2(2).

²¹⁰ Denmark is considerably developed with regard to the electronic ordering of goods and services. In a 2005 of report mentioned by the eNorway equivalent to the European Commission Action Plan on eProcurement, the international consultancy firm Rambøll Management concluded that Norway is among the best in Europe in the area of electronic ordering services, which are carried out by Ehandel.no – The Norwegian Electronic Public Procurement Portal. On the other hand, the report also recommended that Norway should prioritize invoicing and electronic publication of tenders (See Norway, Ministry of Modernization, “Strategy and actions for the use of electronic business processes and electronic procurement in the public sector: A follow-up to eNorway 2009 – the digital leap” (October 2005), on-line: http://www.ehandel.no/data/file/file_283.pdf at 3. As Andre Hoddevik, Head of eProcurement Secretariat, Ministry of Government Administration and Reform, Norway notes “most public sector users of ehandel.no require the supplier to present their products in eCatalogues and many also require that the suppliers are able to respond to their orders via ehandel.no”. The result is that “[a]n increasing number of suppliers acknowledge the importance of ehandel.no as a sales improving tool and are increasingly aware of the need for correct, sufficient and updated information in their eCatalogue”. See eGov Monitor, “Q&A Andre Hoddevik, Head of eProcurement Secretariat, Ministry of Government Administration and Reform, Norway” (August 2006), on-line: <http://www.egovmonitor.com/node/7221>. The goal now is that all public sector authorities must be able to receive and process invoices in electronic means by 2009 (see Norway, Ministry of Modernization, *ibid.* at 8), or, slightly more optimistically, by the end of 2008 (see Ehandel: The Norwegian Electronic Public Procurement

By 2005, as well, Denmark invited the other countries to participate in developing the project which would turn into NES, and later that year the group was formed. In April 2007 the first official version of NES was released, supporting basic eProcurement functions. In its second phase, NES will maintain its current profiles, and incorporate new profiles, and countries willing to participate.²¹² It is also expected to devise utilities related to the communication of text messages. A convergence between UBL and UN/CEFACT is expected, the latter having already acknowledged the former as a “first-generation XML document standard [which] provides a usable stepping stone to the future”, in its 2006 plenary.²¹³ A CEN/ISSS workshop will also happen in May 2007,²¹⁴ possibly leading to NES UBL being acknowledged as a European Standard, if its business plan proposal is approved.

Financial settings

Although the involved countries may have individual calculations of the benefits that may stem from the adoption of eProcurement standards, there is no collective estimation of the savings that the NES project may generate. This does not seem to have been a financial barrier to generating resources, at this time, as the countries involved are sponsoring the project with their own internal resources. Denmark is investing around DDK 500,000 per year, Sweden around the same value, and Norway and Iceland a bit more than that. A small amount has been allocated to sponsoring a minimal centralized organization, which consists of a coordinator to organize the meetings, check minutes, etc.

Organizational settings

To date, NES has been adopting a quite discursive and decentralized structure. As described by the NES Steering Committee's Chair, all the partners have agreed upon is that they wanted to do cross-border trade using a common subset of UBL. Apart from that, they have merely been relying and trusting in each other, and sharing things using the Internet without a more centralized structure. The first effort towards some degree of formalization has been the application for a CEN/ISSS Workshop (See Box). The partners are undertaking this step as a prior milestone before the application to define NES UBL as a unified eProcurement standard within UN/CEFACT standard. In the future, it is also expected that some bureaucracy will need to be established as for how to maintain the NES UBL standard.²¹⁵

Box: CEN/ISSS [European Commission for Standardisation / Information Society Standardisation System]

“CEN/ISSS provides market players with a comprehensive and integrated range of standardization services and products, in order to contribute to the success of the Information Society in Europe”.

“In addition to formal CEN Technical Committees, CEN/ISSS provides a less formal environment through CEN/ISSS

Portal, "E-invoice in public sector by 2008", on-line:

http://www.ehandel.no/index_en.php/Artikkel/item/684.html).

²¹¹ See *infra* 4.6.2.

²¹² See Jostein Frømyr, and Martin Forsberg, *supra* note 28 at 28.

²¹³ See CEN/ISSS, “Draft Business plan for a CEN/ISSS Workshop on 'Interoperability in the Implementation of electronic public procurement in Europe' (CEN/ISSS WS/ePPE)” (February 2007), on-line: <http://www.cen.eu/cenorm/businessdomains/businessdomains/iss/iss/activity/ebbebusinessplan.pdf>.

²¹⁴ Research and interview carried out for this paper took place before May 2007. For follow-ups on the development of NES after the CEN/ISSS Workshop's kick-off meeting in May 11 2007, the reader is encouraged to refer to: CEN European Committee for Standardisation, “Workshop on 'Business Interoperability Interfaces on public procurement in Europe' - WS/BII”, on-line:

http://www.cen.eu/cenorm/businessdomains/sectors/iss/iss/activity/ws_bii.asp. See also Dansk Standard, “Workshop on 'Business Interoperability Interfaces on public procurement in Europe' - WS/BII”, on-line: <http://www.en.ds.dk/3782.1>.

²¹⁵ It is important to understand, though, how can the information that NES forms a cooperation, as provided by Jostein Frømyr and Martin Forsberg (*supra* note 28 at 3), be reconciled with this idea of decentralization discussed herein.

Workshops. These offer the opportunity for direct participation in the standardization process. They are ongoing working groups that are open to all interested parties, including vendors, service providers, regulators, users and consumer groups.

CEN/ISSS Workshops aim to arrive at a European consensus on an issue that can be published as a CEN Workshop Agreement (CWA). These deliverables may take the form of best practice agreements, codes of conduct or pre-standards, with the formal backing of CEN, one of the three European Standardization Organisations”.

On the 11th of May, the "Interoperability in the implementation of electronic public procurement in Europe" will have its kick-off meeting. "The objectives of the Workshop are to provide a basic framework for technical interoperability in pan-European electronic transactions, expressed as a set of technical specifications that cross-refer to relevant activities, and in particular are compatible with UN/CEFACT in order to ensure global interoperability. The Workshop will be focused on implementation facilitations and coordinating pilots implementing the technical specifications output. The requirements and final specifications will be input into UN/CEFACT.

The starting point for the Workshop is the NES and CODICE customizations of OASIS Universal Business Language 2.0, which is recognized by UN/CEFACT as a stepping stone towards a unified business standard”.

Source: *European Committee for Standardization*²¹⁶

As noted above, with regard to its outputs, NES seeks to make cross-border eProcurement easier for their companies, at the first level, and for their governments, at the second one. The goal is to ensure that companies in the respective countries will use the same format whether they are dealing with other companies in the same country, with the public sector in their own country, or with companies in other countries. Though, it is understood that changing the way people work, especially in the public sector, is very difficult. The existing culture was always one used to deal with paper form, a hands-on approach to tendering, and a more or less localized supply. In Denmark, for instance, it has been 10 years since their first initiative of using a procurement portal begun, and there is still a long way to go in changing procedures. Governmental offices are seen as not being particularly eager to change their ways of doing things. The biggest purchasers, though, which spent generous amounts of money, are far advanced in using eProcurement (hospitals being the best examples) so as to be more efficient.²¹⁷

Technological settings

(1) Interoperability

The coordination among the partners in NES has been marked by a uniform approach to the standards they are defining based on UBL 2.0. By focusing on the most relevant part of the extensive information present in UBL, the partners devise guidelines saying how it should be implemented in the countries involved. This solves the problem of information overload and interoperability for users, as it pacifies, with a uniform interpretation, diverging and incompatible interpretations that could be formed in the adaptation of NES to different business processes. An example of a definition which the partners needed to approach was that of an “address”. What is an address, and how should it be represented? A problem here is that some addresses in the mountain area of Norway do not have street names or house numbers, but coordinates.

²¹⁶ European Committee for Standardization / Information Society Standardization System, “About ISSS” (February 2005), on-line: http://www.cen.eu/cenorm/businessdomains/businessdomains/iss/iss/about_iss/iss/index.asp. European Committee for Standardization / Information Society Standardization System, “About CEN/ISSS Workshops” June 2006), on-line: http://www.cen.eu/cenorm/businessdomains/businessdomains/iss/iss/about_iss/iss/about_workshops.asp.

²¹⁷ NES' Chair was also asked in the interview whether she sees network effects as a potential barrier to be overcome in the adoption of open standards in eProcurement, in changing an infra-structure which was likely dominated by proprietary software vendors. Though, the question didn't seem to find a wider resonance with regard to NES, this author believes this may be a strong barrier to consider in the context of organizational and workplace inflexibility.

Organizational and Semantic Interoperability: NES thus seeks to create interoperability at the business process level (organisational interoperability)²¹⁸ for the companies that intend to adopt the standards. Its focus on business-to-government, on eProcurement as a service of e-Government, happens at a mediate level, as the NES outputs are also expected to be used by governments in their public procurement processes. By agreeing on 8 basic business processes and devising 8 standard profiles, of more or less complicated structure, NES at the same time: i) avoids trying to be as generic as to pursue a one-size-fits-all approach, thus escaping unachievable and self-deceiving goals of neutral policies that only foster fragmentation and uncertainty with regard to technology; and ii) provides for the incorporation of companies and governments with different levels of development with regard to their implementation of standards, suiting the needs of different specialists, which may span from the most basic to the more complex profiles and processes. In a second instance, NES also focus on semantic interoperability, by narrowing down a unified interpretation of the different elements in UBL. This is being done, for instance, with regard to the address problem portrayed above, and with taxes, whose kinds and hypotheses of incidence vary from country to country.

Open Standards and Technical Interoperability: By devoting its attention to an XML based schema, the project is also concerned with technical aspects of software programming. Here, as well, interoperability is envisioned. At this stage, however, NES is mostly concerned with its subset of UBL documents and implementation guidelines on how to use them. However, as explained above, the partners also foresee the further development of eProcurement utilities related to text communication – and this is also expected to be open source.

(2) Usability

NES seeks to adopt a balanced approach to the usability of its standards and guidelines. The idea is to make things simple, but not too simple. On the one hand, NES must ensure the compatibility between its standards and the OASIS UBL, operating within that set, and excessively complex standards may hamper such desideratum. On the other hand, NES must avoid overly simple standards such as that devised for the Swede Svefakturan, which is based upon UBL 1.0 and arguably so simple that cannot be really used by any company. According to Senior Advisor Knut Øyvind Granli, of the eProcurement Secretariat under the Norwegian Ministry for Government Administration and Reforms, as the Swede “Svefaktura is based upon UBL 1.0 (...) [t]he authorities in Sweden have moved the starting date for using e-invoice up one year, to the summer of 2008”.

²¹⁹

Legal Settings

The discussions on open standards and open source are deeply connected to the legal settings of the NES project. With regard to this, two points might be brought to our attention in here. The first relates to how the project interacts with the legal framework on public procurement in Europe. The second refers to how the project, in general, is legally structured and specifically to how it deals with the intellectual property over the intellectual creations it devises.

(1) The Law and NES: a Place for 'Ought'?

With regard to the first point, it is worth considering how the implementation of the EU procurement directives could further contribute to the establishment and development of the NES project. It is clear that without its new legal landmark on invoicing, the prior initiatives on e-invoicing in Denmark wouldn't have unfolded the way they have. As noted by the Danish Agency for Governmental Management in its “e-Invoicing in Denmark”²²⁰, “[r]egulation by law and backing by parliament is

²¹⁸ In its communication on interoperability, the European Commission divides the concept of interoperability in three different dimensions: organisational, technical, and semantic interoperability. See European Commission, *supra* note 25 at 5-6.

²¹⁹ See Ehandel: The Norwegian Electronic Public Procurement Portal, “The race for e-invoice is on”, on-line: http://www.ehandel.no/index_en.php/Artikkel/item/825.html.

²²⁰ See Danish Agency for Governmental Management (Økonomistyrelsen), “eInvoicing in Denmark” (November 2005), on-line:

crucial. In the case of electronic invoicing, legislation has been crucial in enabling swift conversion of all administrative processes for the parties involved. Also, legislation has provided security in volume of orders for the private suppliers". As NES furthers the e-invoicing initiative, this gives food for thought on the current status of (non)implementation of the public procurement directives – and on whether specific regulations preserving and taking the current options of NES for open standards and open source further in eProcurement could not be as beneficial as the legal framework on e-invoicing was. On the one hand, vague defences of “technological neutrality”²²¹ ideals do not seem to work as an obstacle to the legal promotion of standards that can be embraced by any vendor. Differently from the understanding that some authors seek to inculcate,²²² the adoption and promotion of open source software, standards and architecture does not reflect a restrictive and anti-competitive choice for one kind of product or technology – rather, it embraces a legal and political option that at the same time widens the autonomy of governmental and private customers, and fosters the democratic values²²³ enshrined in open regimes that empower society at large. The adoption of a common framework for electronic procurement, learnt on the e-invoice initiative, could be essential to contour coordination, and organizational flexibility barriers, providing legal security for the development of the NES project – and other projects that may draw upon it.

(2) The Law in NES: Hidden and Perceived Legal Issues

With regard to NES' legal structure (second point above), it is important to notice that some coordination barriers and legal problems that may normally take place when a mutual organization is set up have not yet made an express appearance in NES – for instance, intellectual property (e.g. shared ownership), and budgetary law related aspects, amongst other legal issues that usually arise from discussions on how to allocate resources in a centralized unity vis-a-vis further distribution of related outcomes. The fact that those barriers have not been expressly identified with regard to these discussions does not mean they may not affect the project even if this is configured in a distributed fashion – that is, if this lacks a central organization to which resources and outcomes can be allocated. The perception, though, seems to be that barriers will arise as some lesser or larger expression of formality and centralization develops. Before that, it is believed that no barriers existed, and that now, as the partners are introduced to more complex bureaucracy, the barriers are beginning to arise.

Tax and Authentication Technologies: The partners have identified some legal issues that could hinder the adoption of its deliverables – namely the existence of different tax regimes in the countries involved, which the NES documents must comply with. The countries have first discussed this issue separately with their respective tax departments, and then altogether, in a second discussion, how they must equalize their different tax requirements. Apart from this real and perceived issue with regard to tax law, the project avoided for the time being the issue of authentication technologies that would have the potential to hinder its future development. In effect,

http://www.oes.dk/graphics/Filbibliotek_OES/OFFENTLIG/Betaling/Elektronisk_fakturering/Einvoicing_in_Denmark.pdf at 6.

²²¹ In an important interpretive document about the new procurement directives, the European Commission remarked that: “[t]he legal framework is technology-neutral and does not distinguish between open source and commercial products as long as they are interoperable with information and communication technology products in general use”. European Commission, “SEC(2005) 959 Commission Staff Working Document: Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC” (July 2005), on-line: http://ec.europa.eu/internal_market/public_procurement/docs/eprocurement/sec2005-959_en.pdf. On the one hand its important to ponder on whether the document is right in supposing that open source is necessarily non-commercial. On the other hand, it is worth noting that one who opts for open source alternatives is not opting for a particular technology, but for a particular licensing scheme. It's a legal choice, not a technological one. If traditional proprietary systems are suddenly subject to an open source license, and have their source code disclosed as a consequence, won't they become open source too?

²²² See, for instance, McLean Sieverding, “Choice in Government Software Procurement: A Winning Strategy” (2006) 6 Public Procurement Law Review 338.

²²³ See, for instance, Mark Perry, and Brian Fitzgerald, “FLOSS as Democratic Principle” (2006) 2:3 International Journal of Technology, Knowledge and Society 155. See also Marcelo Thompson Mello Guimarães, “The Democracy of FLOSS: Software Procurement under the Democratic Principle” (2007) University of Ottawa Law and Technology Journal [forthcoming].

even though the directives on public procurement encourage the adoption of authentication technologies,²²⁴ which EC authorities (see 2. above) consider one of the biggest challenges to electronic procurement in the EU, the partners deliberately decided to merely leave room for their further adoption with NES eProcurement documents. Doing so, the project allows for a layered realization of its goals, purposefully not converting into a reality something which it rightly perceived as external to its immediate objectives as e-signatures are not a part of UBL.

Intellectual Property Rights: If on the one hand NES seems to have been pursuing a clear legal strategy for ensuring that the deliverables are juridically suitable to their users, on the other hand an internal aspect of the NES own legal setting has yet to come clear: its strategy for dealing with intellectual property rights. By devising a subset of standards, the NES partners have both co-authorship rights (copyrights / droits d'auteur) on the original parts of such subset and the duty to clear rights for their usage of its non-original parts. As a result, with regard to their own rights, the NES partners need to have a defined strategy for licensing the subset's components; and, with regard to their duty to clear rights, the NES partners need to clarify to their potential users how do their works comply with the licensing policies of the original works they were derived from. Uncertainty about licensing policies may diminish degrees of trust and create problems with regard to coordination.

It seems clear from the NES website that the partners have agreed on licensing their works under a Creative Commons license. Creative Commons exists for facilitating the adoption of less restrictive licensing models by intellectual creators; it makes a wide range of possibilities available between the extremes of reserving all rights (as copyright typically entails) or no rights at all (which is the regime of works under the public domain) over intellectual creations. Its ultimate goal is "to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules".²²⁵ The project was born in Stanford Law School in 2001, inspired by ideals stemming from the free software²²⁶ and open source movements²²⁷, and since then has gained the world, being embraced by uncountable non-governmental and governmental organizations internationally. Governments, particularly, have seen in openness models fostered by licensing regimes like these a wider possibility of fulfilment of the democratic principle, besides other numerous reasons related to a "breaking barriers" perspective, as noted above.

So, it is certainly laudable that NES is following this trend. However, NES needs to ensure that this has been done in a proper way, from both the perspectives described above: of dealing with its own rights, and of dealing with rights of others. On the one hand, if one follows the pertinent link on the NES website's home page one will be taken to the personal website of Mr Philippe Kerignard, who subjects his works to a Creative Commons license. The relation between Mr Kerignard and NES, if any, is completely unexplained, and no distinction between his works and those of NES is established. On top of that, in spite of the several different alternatives of licenses within the Creative Commons Project, NES merely says that it subjects its works to "the creative commons license". On the other hand, NES needs to clarify to its end users if it is possible to subject UBL derivative works to a creative commons license, or if OASIS has a specific IPR policy that prevents this from happening. In fact, OASIS does have an IPR policy, whose notices section reads:

²²⁴ See, for instance, Public Procurement Directive, *supra* note 5, recital 17: "Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. To this end, use of electronic signatures, in particular advanced electronic signatures, should, as far as possible, be encouraged. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices". This is also reflected in the modal verb *may* used in art. 42(5)(b): "Member States may, in compliance with Article 5 of Directive 1999/93/EC, require that electronic tenders be accompanied by an advanced electronic signature in conformity with paragraph 1 thereof". And though art. 71(2) requires that "[c]ommunications, exchanges and the storage of information shall be such as to ensure that the integrity and the confidentiality of all information communicated by the participants in a contest are preserved", this is not necessarily linked to the use of electronic signatures or to the scope of NES at this point.

²²⁵ See Creative Commons, "'Some Rights Reserved': Building a Layer of Reasonable Copyright", on-line: <http://www.creativecommons.org/history>.

²²⁶ See Free Software Foundation, on-line: <http://www.fsf.org>.

²²⁷ See Open Source Initiative, on-line: <http://www.opensource.org>.

"This document and translations of it may be copied and furnished to others, and derivative works that comment on or otherwise explain it or assist in its implementation may be prepared, copied, published, and distributed, in whole or in part, without restriction of any kind, provided that the above copyright notice and this section are included on all such copies and derivative works. However, this document itself may not be modified in any way, including by removing the copyright notice or references to OASIS, except as needed for the purpose of developing any document or deliverable produced by an OASIS Technical Committee (in which case the rules applicable to copyrights, as set forth in the OASIS IPR Policy, must be followed) or as required to translate it into languages other than English".²²⁸

Whether the NES subset of UBL documents merely comments on or otherwise explains UBL may be open to discussion. But even if it is so, it seems that, at the very least, a notice as required by OASIS should be included together with the deliverables. In addition to this, it must also be considered that, if the Office of Government Commerce (UK) were to become one of the partners in the project, a more nuanced approach would be necessary with regard to the rules that govern Crown Copyright vis-a-vis the OGC's contributions. In the UK, Crown Copyright is subject to article 163 of the Copyright, Design, and Patents Act of 1988, which reads: "Crown copyright. 163.— (1) Where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties— (a) the work qualifies for copyright protection notwithstanding section 153(1) (ordinary requirement as to qualification for copyright protection), and (b) Her Majesty is the first owner of any copyright in the work".²²⁹ The OGC's website is also very clear in asserting that "[they] want to encourage the reuse of OGC best practice, but whatever the form of reuse, you will need a licence"²³⁰. In an interesting study commissioned by the Commons Information Environment, whose members range from the British Library to the British Archive and the BBC, the AHRC Centre for IP and Technology Law at the University of Edinburgh pointed out that Creative Commons Licenses are not applicable to works protected by Crown Copyright, where a specific kind of license introduced by the Office of Public Sector Information ("Click-Use license") must be used.²³¹ Add to all of this, still, the fact that the Directive on the Re-Use of Public Sector Information²³² "does not oblige Member States to allow re-use of documents",²³³ what does not seem to shed any light into eventual obligations of the UK with regard to licensing its public documents in an open regime – for more politically correct²³⁴ that this may sound, and have sounded to the partners in NES.²³⁵

In sum, the complexity of dealing with intellectual property matters in works of shared authorship is likely to have led to seemingly unsuspected coordination barriers not only between the partners, but in their relation to other actors as well – e.g. OASIS and the UK Office of Public Sector Information. The lack of more in-depth attention to intellectual property matters, however, is reflected in the way the very licensing of the NES' deliverables to the end-users is being undertaken (with a link to a

²²⁸ OASIS, "OASIS Intellectual Property Rights (IPR) Policy" (April 2005), on-line: http://www.oasis-open.org/who/intellectualproperty.php#licensing_req.

²²⁹ Copyright, Designs and Patents Act 1988 (UK), c.48, www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm s. 163.

²³⁰ UK, Office of Government Commerce, "Intellectual Property - statement on OGC's guidance" (August 2006), on-line: http://www.ogc.gov.uk/intellectual_property_intellectual_property_from_other_sources.asp.

²³¹ Andres Guadamuz, Jordan Hatcher, Charlotte Waelde - AHRC Research Centre for Studies in Intellectual Property and Technology Law, The University of Edinburgh, "The Common Information Environment and Creative Commons: Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licences" (October 2005), on-line: Intrallect http://www.intrallect.com/cie-study/CIE_CC_Final_Report.pdf.

²³² Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, on-line: http://europa.eu.int/eur-lex/en/oj/dat/2003/l_345/l_34520031231en00900096.pdf.

²³³ Elizabeth F. Judge, "Crown Copyright and Copyright Reform in Canada" in Michael Geist, ed. "In the Public Interest: The Future of Canadian Copyright Law" (Toronto: Irwin Law, 2006) 550 at 587-588.

²³⁴ The understanding is that the partners wouldn't join NES if this was not the model adopted.

²³⁵ Still, it is interesting to ponder on why the license adopted was not the European Union Public License v1.0, approved by the Commission last January, for the distribution of software developed within the IDABC framework. See European Commission, IDABC, "European Union Public License (EUPL v.1.0)" (January, 2007), on-line: <http://ec.europa.eu/idabc/en/document/6523>

personal website). And even if the perception in the lines above is equivocal, at the very least all these points deserve further clarification in the NES' website so that other barriers are not raised – for instance, with regard to trust, which is the spot frequently squeezed by proprietary vendors in relation to open source / open standards technologies.²³⁶

Equality and Non-Discrimination Apart from these observations with regard to the real but seemingly not perceived issues related to intellectual property, it is important to mention that the open characteristic of the NES standard is that it is inherently suitable to promote the accomplishment of some of the very objectives and principles set forth in the public procurement directives. For instance, the requirements that “[t]he tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use” (Art 42(4)) seems much more likely to be achieved within a scheme of openness than with a proprietary one.²³⁷ In this sense, analysing this issue vis-a-vis the EC Treaty, Sue Arrowsmith understands that “a requirement to communicate through a proprietary system involving costly investment might not be justified. Under the EC Treaty, a requirement for a particular means of communication may be caught by the free movement provisions and need to be justified on the basis of public interest grounds under Art 43 and 48 or mandatory requirements under Art. 28 EC”.²³⁸

Transparency: Besides equality and non-discrimination, one of the most important principles set forth in the Directive is that of transparency.²³⁹ Commenting on it, Christopher Bovis argues that the principle of transparency serves two main objectives. On the one hand, by introducing a system of openness, it establishes a greater degree of accountability, and eliminates potential discrimination on grounds of nationality – which is essential for streamlining cross-border procurement. On the other hand, it fosters a wider system of good practices, granting to contracting authorities and economic operators alike the possibility of having a say in the needs of the demand side.²⁴⁰ When Bovis speaks of transparency, here, he is focusing on the principles of mandatory advertisement and publication of public contracts. We can of course imagine an even broader perspective, where transparency is reflected throughout the whole infra-structure for electronic procurement. As such, it would work both in the first sense described by Bovis, where citizens would have the possibility to scrutinize the way their governmental systems work, and in the second sense, by allowing an active societal participation in the development of standards and software that the government uses – in a commons based peer production mode of development that is the very picture of NES itself. Both these dimensions are extremely intertwined with a wider perception of the democratic principle, as discussed above in this section. Both of them are widely promoted by the NES project.

²³⁶ See Wikipedia, “Fear, Uncertainty and Doubt”, on-line:

http://en.wikipedia.org/wiki/Fear%2C_uncertainty_and_doubt.

²³⁷ Bickerstaff notes that “There is an issue with the requirement in Article 42(4) that the “technical characteristics” of the “tools” used for e-communication must be “generally available”. Of course, most email packages are proprietary products and their technical specifications are kept confidential by the software developer. (Open source software, such as Linux[3], is different in that the source code for this software is available to all licensees). However, in this context it is unlikely that the term “technical characteristics” of the e-communication tools would require the full availability of the technical specification or the source code of the software package. Instead, for the purposes of the Directive, it would appear to be sufficient for the IT standards which are utilised in the software packages, such as SMTP and POP3[4], to be “generally available””. See Roger Bickerstaff, “The New Directives’ Rules e-Communication Mechanisms in Public and Utilities Procurement”, *supra* note 3 at 279. I must concur with Bickerstaff with regard to his note that open / available standards foster interoperability. Though, for reasons already explained above, I believe the adoption of free / open source software, which ensures broader possibilities of civic participation in the construction of technological systems that will ultimately shape how the interaction between citizens, organizations and governments is carried out, fits better within a democratic regime than closed, proprietary software does. In this sense, I understand that the expression technical characteristic may perhaps deserve that some lights are shed on it by broader principles that guide public administrations beyond mere procurement rules do.

²³⁸ Sue Arrowsmith, “The Law of Public Utilities and Procurement” (London: Sweet & Maxwell, 2006) at 1164.

²³⁹ Public Procurement Directive, *supra* note 5 Article 2: “Principles of awarding contracts. Contracting authorities shall treat economic operators equally and non-discriminatory and shall act in a transparent way”.

²⁴⁰ Christopher Bovis, *supra* note 13 at 50.

Social Reach

(1) Bridging Digital Divides

As we noted above, the new procurement Directives embrace some broader societal goals that previous European Court of Justice case-law had already understood as legitimate to be pursued in public procurement processes. Electronic procurement, if optimally carried out, may be more inclusive of SMEs and contour traditional difficulties associated with paper bureaucracy. However, the use of electronic means itself can create more problems than it solves, if a suitable design is not adopted so as to increase usability of the chosen technologies and standards. NES, in this sense, can contribute to a better usability of eProcurement services, so that we can focus on the principle of “no citizen left behind”²⁴¹ with broader lenses, in the sense of including economic operators that so far have been excluded from procurement services²⁴² – especially considering a cross-border perspective – and spilling over its beneficial effects to society at large.

This being said, it is not expected that SMEs will start implementing NES by themselves. The NES documents and profiles are not so simple that they can be autonomously used by SMEs. Although, they are deployed so as to be easily integrated with ERP systems, Office Banking programs, e-mail clients etc, so that vendors can easily implement them and make things easier for the SMEs. In Denmark, the Danish UBL subset, of which NES is a subset, was released in November, and several ERP vendors have since then been implementing the standards in their ERP systems.

(2) Leveraging Trust

It is expected that NES will leverage trust in eProcurement with its common set of standards. By reflecting the convergence of 6 different countries on a specific subset, the NES project will contribute to lessening complexities and uncertainties in eProcurement. It will make it easier for software vendors just to pick the NES UBL subset as a common standard and eliminate confusion surrounding this.

Transparency and openness are also key in here for increasing the levels of trust, particularly in governmental implementations of current and future NES profiles. By shifting from proprietary to open standards, governments will be assigning to citizens broader possibilities of scrutinizing governmental purchases, and to economic operators the possibility of making sure about the competitive nature of tendering processes.

Systematizing the Barriers

Table 3 systematizes the barriers identified in the lines above within the overarching scheme of the Breaking Barriers to eGovernment project. The Breaking Barriers Project identified seven categories of barriers: leadership failures, financial inhibitors, digital divides and choices, poor coordination, workplace and organizational inflexibility, lack of trust and poor technical design²⁴³. The left column portrays some barriers related to public procurement in general, and eProcurement in particular, which may have been experienced in or addressed by the NES project. The middle

²⁴¹ See European Commission, “i2010 eGovernment Action Plan: Accelerating eGovernment in Europe for the Benefit of All” (2006), on-line:

http://europa.eu.int/information_society/activities/egovernment_research/doc/highlights/egov_action_plan_en.pdf.

²⁴² According to the Commission eProcurement Business Survey, around 50% of European SMEs don't bid in public tenders outside their countries more than occasionally. With regard to cross-border electronic procurement, the companies point out that the most significant barriers to its development are: incompatible IT standards; inappropriate design of tendering systems; inadequate legal framework; and linguistic barriers. Also among the reasons these companies believe as preventing the generalized use of eProcurement in the EU, the most salient are: different rules in Member States; and complex rules in tendering procedures (see European Commission, *supra* note 4). The NES project, in line with EU policy on eProcurement, was very sagacious in purporting to solve the technical and organizational dimension of these barriers. If the perception of EU SMEs with regard to the legal dimensions of these barriers will also shift at some point, remains to be seen.

²⁴³ <http://www.egovbarriers.org>

column portrays some other barriers that NES itself have faced, explicitly or not. The right column portrays the particular insights and actions of the partners to prevent or address the several barriers foreseen or experienced in NES.

Table 3: Barrier Dimensions

	External Dimension (Barriers to eProcurement)	Internal Dimension (Barriers to NES)	Insights and Actions
Leadership	Last minute approach to the new Directives' implementation by many EU countries, unveiling a relative neglect of public procurement's importance in EU law and policy. May prompt or sustain other barriers of coordination, digital divides, organizational inflexibility, trust, and technical design.	Initial difficulty in motivating the partners to join the project.	<p>Common understanding among the partners with regard to standards might contour lack of more in-depth legal certainty.</p> <p>Importance of Denmark's initial experience with e-Invoicing and UBL (the OIOXML Elektronisk Regning).</p> <p>Adoption of a phased approach, targeting basic priorities (e-cataloguing, e-ordering, and e-invoicing), discarding other issues (e-signature), and leaving some for a second moment (e-tendering).</p> <p>NES has been adopting a decentralized structure, and working in a commons-based peer production model in developing its subset. The informality of its bazaar-like architecture has so far worked as an instrument to contour the bureaucratic difficulties that a more centralized structure could pose in the beginning, and was instrumental for the project's uptake – though it is now expected that a more centralized structure will increasingly exist.</p> <p>NES adoption of open standards and open source democratizes possibilities of participation in the innovation process to society at large – that is to say, it shares leadership with citizens.</p>
Financial	As in other eGovernment services in general, eProcurement may experience financial inhibitors which stem, mostly, from the fact that costs are more visible than benefits.	Urgency in granting resources for the project ²⁴⁴ carried out the premature adoption of a non-official version of UBL (this, on the other hand, generated initial interoperability / technical design problems).	<p>Though there is not a centralized calculation of the project's benefits, each country has its own calculations of internal benefits. This does not seem to have posed any barrier to the development of NES, and to its raising resources internally within each country involved.</p>

²⁴⁴Though this refers to Denmark's e-invoicing project and not directly to NES, we here assume that early barriers that could have hampered the former would have equally thwarted the latter.

		Difficulty in convincing the partners to coordinate financial resources to apply for a CEN/ISSS workshop.	
Digital Divide	Traditional Public Procurement processes tend to exclude SMEs, as much as electronic public procurement does if carried out through inconvenient and unaffordable forms.		By devising a basic set of open standards, and raising it to the level of a cross-border paradigm, NES will be instrumental to the Directive's desideratum that "[t]he tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use". This will be essential to include SMEs in eProcurement processes, and reduce the levels of inequality between these companies and bigger ones.
Coordination	Difficulties in agreeing on common standards.	Initial difficulty in agreeing on a common standard. Possible hidden issues with regard to intellectual property vis-a-vis the partners' existing copyright laws, and OASIS IPR policy.	In spite of the initial difficulty in agreeing on a common standard, there was the perception that openness was indispensable.
Workplace and Organization	Difficulty of changing an existing culture that always used to deal with paper form, a hands-on approach to tendering, and a more or less localized supply – even more serious with respect to public procurement.		By ensuring that companies from each of the countries involved will use the same format whether they are dealing with other companies or governments, from their own countries or from others, NES is believed to make cross-border eProcurement easier for their companies, at the first level, and for their governments, at the second – though, it should also be remarked that the implementation of the standards will be carried out by different software applications vendors, and benefits for users might thus come indirectly, from the harmonization of these applications, and, I would add, from the network effects that may positively stem from their collective adoption.
Trust	Obscure and cumbersome traditional paper-based public procurement processes may prompt lower levels of trust than open and accessible electronic	The lack of clarity with regard to NES' intellectual property policies vis-a-vis those of OASIS and the governments involved	By reflecting the convergence of 6 different countries on a common standards' subset, the NES project might contribute to lessen complexities and uncertainties in eProcurement, and thus to

	procurement platforms.	may undermine the adoption of the subset.	leverage trust – which is likely to be potentialized by the openness and transparency of NES standards and guidelines.
Technical Design	<p>Difficulties in promoting interoperability.</p> <p>Existing procurement systems for business-to-business are mostly based on EDI (UN/EDIFACT), which demands prior bilateral agreements, pre-synchronization of data, modification of internal processes, and is characterized by an overload of options to choose. Result: exclusion of SMEs (though being primarily an issue of technical design, problems of coordination, organization, and digital divides are also raised in here).</p>		<p>Addresses the need of promoting interoperability from a holistic perspective (focusing on semantic, organizational and technical dimensions of interoperability).</p> <p>NES focus on business-to-business procurement as a first stage towards adopting its same set of standards for business-to-government processes. By doing so, it offers a basic profiles-based harmonized subset of open standards, tailored for specific business needs, and prepared for cross-border trade, but also expected to be used to break these same barriers with regard to public eProcurement.</p> <p>The idea is to create something simple, but not so simple that can't be adopted by companies. NES seeks to avoid prior experiences such as the UBL 1.0 based 'Swefakturan', from Sweden, which is too simple, and cannot be really used by any company – though it was developed so as to make small companies happy. Balance between being simple but not to simple.</p> <p>In its further development, it is perceived as essential that NES is kept compatible with the UBL, operating within the frames of that set.</p>

Conclusion

The NES project offers an auspicious informational platform to further cross-border electronic procurement among the countries involved and internationally. It comes to fill in an important lacuna, and addresses many existing barriers to eProcurement with a series of good practices that will hopefully find resonance within the United Nations standardisation body (UN/CEFACT) at some point. This, indeed, lies at the very core of NES ambitions for the way ahead, as much as attracting new countries to join the group.

As NES grows, the challenges the partners already face in trying to coordinate 6 countries will certainly grow together, and a more centralized structure will likely be necessary. At this point, problems of administrative law that thus far have not been perceived as a hurdle may surge, besides other hidden issues that dedicated legal bodies may then identify – as, for instance, the intellectual property aspect discussed above. A first sample of these problems will probably develop as the process towards the CEN/ISSS Workshop Agreement unfolds.

It is still very early to judge the progresses of NES, and the extent to which it will contribute to achieving the ambitious objectives set forth in the European Commission Action Plan. The NES

Steering Committee's Chair believes that until 2010 it will be possible that cross border public procurement will develop between some countries. Among the Northern Countries, themselves, she believes that maybe 50% of them will be able to fully conduct cross-border public procurement through electronic means.

More than objective numbers, though, NES already provides an elegant portfolio of good practices that should be praised for its own conceptual value: an open and transparent approach to standards, a phased strategy which was able to identify priorities, eliminate unachievable goals, postpone others, mobilize a different number of partners around its objectives, be fast enough so as to secure funds, and learned enough so as to reflect upon the unintended consequences of the hasty decision for a non-official standard, and, overall, focus on the normally less worked out dimension of public procurement practices – the market, devising usable instruments to streamline its adoption of eProcurement standards, which will inevitably carry out a better capability of SMEs to deal with electronic procurement processes, and, in the end, to do electronic business with governments. A virtuous cycle, which will hopefully be perceived by many other countries that will join NES, carrying out international recognition for this insightful project.

Case Study: Cross Border Tenders: A Joint Belgian–French initiative

Cristina Dos Santos

Centre de Recherches Informatique et Droit (CRID), University of Namur, Belgium

Definition of the Case Study

The Cross Border Tenders public procurement activity focused on in this study is a practical example of an experiment in computerized ‘mutualization’: the shared operation of, or investment in, ICT resources.

This initiative to develop software to manage an electronic catalogue of current supplies is a partnership between contracting authorities in two EU Member States: the Federal Public Service of Human Resources and Organization in Belgium and the French Ministry of Finances, Directorate-General of the Modernization of the State. They had defined common functional requirements for which the jointly developed eCatalogue software is expected to provide an answer. Similar needs are faced by many other contracting authorities, even when they have different characteristics and activities. In the second phase of the project, it was therefore planned to open the use of the software to other authorities who felt it would be of assistance in meeting their procurement needs.

The potential importance of their investment in this software led the project’s Belgian and French contracting authorities to decide to become partners in sharing the costs of developing this solution. This is an example of the practice of ‘upstream mutualization’ (shared investments). Opening the rights to the use of the project’s eCataloguing software later to other administrations with similar needs could also be of value to relevant authorities in other EU Member States. This prospect was a ‘downstream mutualization’ (resource sharing), which saves ‘new’ users very heavy investment costs while encouraging them to contribute, at least partially, to the expenses incurred by the two initial developers and users.

Setting of the Cross Border Tenders case study

This case deserves to be studied because some of the difficulties it encountered are related more broadly to the ‘new’ practice of computerized mutualization, whose importance is increasingly acknowledged as a factor in the promotion and success of eGovernment. For example, the need for administrations²⁴⁵ to work in networks and to simplify their processes constrains them to ensure the interoperability of their information processing systems and to coordinate their initiatives, which leads them to move closer within the framework of collaborations and resource sharing. The positive effects of such unions, or from proximity to larger administrations, also enable small administrative bodies to benefit in the development of eGovernment projects they otherwise might not have had the means to carry out alone in the long term.

This view was supported by the declaration in November 2005 at the EU Ministerial Conference in Manchester. They highlighted the importance of, and Ministers’ encouragement for, the development of practices of mutualization and the creation of networks of common data-processing/computerized resources within the framework of the EU’s i2010 eGovernment Action Plan (European Commission 2006) and this was further highlighted in the Ministerial Declaration in Lisbon in 2007. As described by Schneider (2006: 25–6): ‘Ministers agree to work together and with the European Commission to share existing tools, common specifications, standards and solutions more effectively and to encourage collaborative development of solutions where necessary (...). Member states will during the period 2006–2010, share technologies, where appropriate develop common solutions and work towards interface harmonization of existing solutions in the field of eProcurement and develop means of dissemination across all levels of the public sector’.

²⁴⁵ Particularly the federal structure of the Belgian State.

Two dimensions of the institutional and geographical contexts of this case reveal the complexity of the interests involved:

1. The public procurement considered here was designed at the initiative of two ministry departments in Belgium and France, whose territorial competences correspond to the territories of the concerned States. Both have particular competences relating to the promotion and development of eProcurement. subject to the institutional specificities peculiar to each State²⁴⁶, the projects of those two entities seem to be relatively similar.
2. The plan to open the use of the software developed within the framework of this public procurement to other administrations with an interest in it would extend its scope much wider than these territorial borders, potentially covering all Member States and institutions in the EU.

The study has had to be limited mainly to the first phase of the project, involving only the initial two contracting State authorities in Belgium and France, as it has not yet made substantial progress beyond. However, the second phase also offers valuable insights because the prospect of opening the right of the use of the software to other administrations has represented one of the main obstacles to the project's further development for the Belgian and French partners. These seem to have had a considerable influence among its founding partners since the project's initial conception.

Challenges and potential barriers faced

Planning for the kind of computerized mutualization project studied in this case is naturally likely to consider three areas where obstacles are likely to occur naturally:

1. The lack of political good-will from people responsible within the concerned States, such as the will to lead this kind of project and to assign the means necessary for its effective implementation. (Related to the leadership failures and poor coordination barriers.)
2. The psychological dimension of such a project. This can result in some resistance to change, for instance in introducing new practices for open public procurement, or in a reluctance to accept constraints imposed by the legal status of another State. (Related to the workplace and organizational inflexibility barrier.)
3. The difficulty in gathering potential partners around sufficiently close functional needs that could be able to justify common initiatives and investments. (Related to the leadership failures, poor coordination and financial inhibitors barriers.)

As the international character of this Cross Border Tenders project seemed to pose a significant obstacle to its success, the study team felt it was essential to collect information through two parallel routes and distinct sets of contacts within each partner. This was needed to establish if their respective analyses of the common experiment diverge, partially converge or match each others' views. In addition to establishing these parallel contacts, a key aim of the study's methodology²⁴⁷ was to allow participants sufficient spontaneity to enable them to fully express their view of the encountered difficulties.

Adoption and implementation of Cross Border Tenders initiative

Perceived and real barriers

Participants in the study reported that they were conscious that certain difficulties concerning the three categories highlighted in the previous section could have compromised the launching of the project. In practice, however, they found they were not confronted by them or, at least, did not find they raised a sufficiently serious constraint to be of significant concern.

²⁴⁶ Particularly the specific requirements of the federal structure of the Belgian State.

²⁴⁷ For more details of the study's working method, see Appendix 2 at the end of this study report.

The study's working method revealed a particularly interesting insight into the project's adoption and implementation. Although its contacts indicated on behalf of each of the partner administrations a similar overall perception of the obstacles met, the study's researchers observed that their analyses diverged on certain significant points. For example, some obstacles identified by study participants from both administrations were located by different interlocutors in answers to different questions.

Even such divergences are not fundamental. But they do show the need—and the difficulty of doing so—to define and to speak a common language with all the partners in any project of computerized mutualization. It also indicates why the project prioritized the initial establishment of its functional needs and objectives (e.g. in the organization of its working method and the rules of behaviour between partners). This challenge becomes much more important, and delicate, when the project takes on an international dimension as this one did, when the partners can be influenced by their working within different operating modes or by their different sensitivities.

The main actual barriers encountered

From an early stage in the project, the legal aspects were found to be less easy to resolve than the technical ones, particularly questions about who is in charge and the precise nature of the contractual solution, such as: 'Who is the lead contractor?'; 'How do we combine budgets across national borders?'; and 'Where does responsibility lie?'²⁴⁸ The resolution of such key issues in this case offers important insights for others undertaking similar ventures.

The most significant barriers actually encountered during the project's adoption and implementation were:

1. definition of the legal status/framework of the operation;
2. the operation's administrative framework;
3. organization of the collaboration between partners; and
4. the conditions for opening the rights of software use to users other than the initial two partnering authorities.

Definition of the legal status of the operation

The involvement of two administrations from different Member States seeking to agree a common approach to public procurement caused a primary difficulty in defining the legal status of such an international partnership, resulting from the combined effects of several laws to which the contracting authorities must conform. For instance, the methods of transfer and execution of public procurement are subject to legislation especially devoted to the public procurement, inspired by EU directives²⁴⁹ (as transposed to laws within each Member State) and by general administrative laws specific to each Member State, which can vary significantly between States. The European 'inspiration' is only very partial, since the directives relating to the coordination of the procedures of public procurement primarily govern aspects related to the signing of procurements, while the execution of these is left within the control of the national authorities.

In addition, the relevant 'contracting authority' in the large majority of the cases is a 'public authority' that is subject to legislation framing administrative action in each State involved. This legislation can be concerned with a variety of factors, such as: the budgetary dimensions of any administrative operation; the formalities that administrative acts must meet (e.g. formal motivation of such acts); the mechanisms of delegation of powers within an administration; and the mechanisms of internal as external control which surround the adoption of these acts. These legal frameworks obviously vary within each State, according to the characteristics of each category of contracting authority (e.g. State; public companies; local authorities; public interest organization; or mixed structure).

²⁴⁸ These questions are based on comments by Jean-Pierre Gennotte (2006) of Belgium's Federal eProcurement Service.

²⁴⁹ See, for example, European Commission (2004).

These considerations suggest that, in spite of the existence of a common framework of reference constituted by EU directives, the legal status of each public procurement is likely to vary appreciably, according to the profile of the concerned contracting authority. The consequence is obvious: any public procurement carried out on the common initiative of several contracting authorities with different profiles will have the effect of increasing the complexity of the legal status, since it will be necessary to take account of all the diverse rules applicable to the operation. The difficulty becomes even greater when the public procurement involves several contracting authorities in different Member States. The common base formed by the directives does not offer to the contracting authorities more than very limited guidelines on the direction the operation needs to take.

Within the European framework, partnerships frequently link public actors from different Member States, as in this case. Nevertheless, the legal status of these operations remains uncertain, particularly because of the interplay of concurrent legislative framework. Appendix 1 at the end of this study highlights three such examples to offer further insights and reflections to those provided by this study, particularly in relation to the complex crucial demands posed by the need to coordinate cross border procurement within a consistent international framework while at the same time addressing national and institutional interests in sustaining local modes of operation.

The administrative operational framework

A number of legal and financial factors in the Cross Border Tenders case have raised concerns for the management of the administrative authorities involved, especially regarding their internal procedures and budgetary controls. For instance, the operating modes of the public authorities were characterized by a high degree of formality and a general rigidity that does not favour the modernization of practices, such as through eProcurement processes. An example of a specific institutional constraint was that the concerned Belgian contracting authority had available only a limited amount from its Ministry to spend within a particular financial year, as part of its annual budgets. This slowed the pace at which the development could progress, such as by limiting the undertaking of important studies and preliminary steps to help the project's initial definition.

This case, like any project of mutualization, naturally encounters difficulties of this kind because the participation of a number of public partners implies a rupture with the bilateral character (one contracting authority/one economic operator) of the traditional procedures for open public procurement. The complexity this entails is due primarily to the adoption of procedures affecting the responsibility of operations which are not generally adaptable to the creativity required to be effective.

Organization of the collaboration between partners

Participants in the case study clearly indicated that, from the launching of the project, they were conscious of the need for defining precisely the terms of collaboration between the public partners. Various instruments were considered in order to frame the political agreements and the choice of people from the administrations to manage this collaboration.

Obstacles seem to have resulted particularly from difficulties related to the provision of financial and human resources contributed by each partner to the management of the project. Our analysis supports the frequent observation on the management of experiments of mutualization that the enthusiasm of the principal promoters is not always enough to convince their own authorities of the need to place at their disposal the appropriate means for realizing such a project—or, in the absence of such means, the urgency to seek through a study of the project's legal aspects new ways in which those could be involved. The main problems hampering progress in this case seem to have arisen from the new character of such a partnership and the difficulty of locating it within familiar landmarks for the political and administrative authorities.

Opening the rights of use of the software to other users

The prospect for opening of the rights of use of the project's software outside the initial two contracting authorities has represented a substantial difficulty since the launching of the project.

The path recommended was to achieve this within the framework of open. Our analysis of this suggests the following observations:

- Extending the rights to use the software to new users could cause difficulties of a methodological nature, such as the definition of the aims of opening of the rights of use (e.g. diminishing the financial investment burden or developing a community of users for the future improvement of the software) and determination of the organization of the financial relations between all stakeholders. However, those do not represent an obstacle to the signing of a public procurement, which holds at a distance these 'new' users. The methodological requirements also do not exercise an influence on the management of the public procurement; at most, they affect some of the aspects of the partnership between the two original contracting authorities who, for example, will have to agree on the mode of the software intellectual property when there is a transfer of usage rights in their favour.
- At the stage of the signing of the public procurement, the founding Belgian and French contracting authorities must obviously take into account the prospect of opening the software to other users, particularly if the contract which binds them to the service provider does not operate, in their favour, a transfer of the software property, but constitutes only one licence of use. In this case, the contract's terms and conditions would offer much flexibility for the contracting authorities to support widening use of the software to other administrations. The study's participants from the relevant Belgian and French administrations suggested that although this kind of contractual issue is important, their actual experience was that this dimension may be more of a perceived than a real barrier. However, their concerns indicate that this aspect must still be taken into account in the management of such projects.
- The appeal of 'open source'²⁵⁰ licences as a support for the opening of the community of users of the project's eProcurement software is not surprising. This type of licence is generally known to guarantee flexible conditions of use and diffusion of software. In addition, the open source model is often presented as favourable to the development of eGovernment, because it helps to support capabilities such as interoperability, the durability of its data or the independence of the authorities with regard to ICT service providers. Nevertheless, the recourse to open source software can, in certain cases, compromise the success of an operation of mutualization when it covers a downstream phase of resource sharing, as in this case here with the opening to new users.
- Allowing the greater freedom in use enabled by an open-source software (e.g. in important user adaptability of the software) could lead to a certain anarchy among the users that diminishes the benefits that can be obtained through diverse experiments among different user communities. In addition, a high degree of diversification of the software can place each user in a situation of dependence with regard to the people who contributed to this diversification by the customization of the original software.

Again, it is worth noting that any obstacles in this respect are not imposed by the international dimension as such.

Factors affecting this case of significance to wider eGovernment initiatives

The Seven Barrier Categories

The Breaking Barriers Project, funded by the EC, identified and explored the key barriers to eGovernment in Europe. The project team proposed seven key barrier categories of obstacles to eGovernment progression. The categories are intentionally broad and tied to a multitude of more specific barriers relevant at different governance, institutional and jurisdictional levels. This categorization is particularly valuable when discussing the barriers relevant to this case which may

²⁵⁰ For example, the Modinis Free/Libre/Open Source Software initiative (<http://www.flossworld.org>).

have relevance for other eGovernment initiatives. In summary the barriers are: leadership failures, financial inhibitors, digital divides and choices, poor coordination, workplace and organizational inflexibility, lack of trust and poor technical design²⁵¹.

The following are the main issues that arose during the implementation of the in the Cross Border Tenders initiative of relevance to the seven key barrier categories identified by the Breaking the Barriers to eGovernment project (no new barriers were detected in this case study outside these categories).

Leadership failures: The failure to resolve certain key areas of direction between the main partners, such as over re-use of the eProcurement software, was a significant obstacle. Questions about who is in charge of what required much attention and have at times been difficult to resolve.

Financial inhibitors: Some financial constraints with the timing of the Belgian budget affected the pace of progress. Combining budgets across national borders was a general inhibiting factor.

Digital divides and choices: This was not a significant factor in this case.

Poor coordination: Different legal frameworks and modes of operation in the different States and contracting authority involved made the coordination of efforts among the stakeholders complex and difficult in some areas. In such circumstances, the legal status of each public procurement is likely to vary appreciably as the result of different local interpretations of the legal requirements of the local contexts, even when there is a common framework of reference (e.g. relevant EU directives). In addition, difficulties in identifying where responsibility lies made it harder to have effective coordination. Lack of agreement on extending use of the software was a coordination as well as leadership obstacle.

Workplace and organizational inflexibility: Constraints on financial and human resources made the management and running of this project more difficult. More generally, legal and financial constraints created difficulties in opening the authorities to new ways of management and modernization to improve the effectiveness of open public procurement.

Lack of trust: Full trust between partners in a computerized mutualization project like this is essential, but can be made more difficult by the international dimension in cross border procurement.

Poor technical design: Technical software design and implementation problems punctuated the project's progress but did not affect the overall fate of the operation, so could not be seen as significant obstacles.

Relative levels of influence of key factors that could affect eGovernment projects

On a 100% scale, the following are approximate relative levels of influence on Cross Border Tender's case of some key factors that could affect eGovernment projects:

- **Political, administrative and organizational (40%):** the need for administrations to work in networks and to simplify their processes constrains governments to take into account not only the national dimension of barriers to eProcurement procedures, but also those related to pan-European projects. Furthermore, when problems of interoperability of the information processing systems and the coordination of such systems could become key factors to their success.
- **Legal (30%):** This is related mainly to public procurement and eProcurement regulations, intellectual property rights (open source software, etc), and trade law (contract law, contractual relationships, etc) in its international/European dimension. The resolution of such key issues in this case offers important insights for others undertaking similar ventures.

²⁵¹ For more details about the Breaking Barriers to eGovernment project please see <http://www.egovbarriers.org>

- Financial (20%): the annual budget accountability system within public administrations may block any further attempt to create such partnerships, if there would not be a clear political will at the European level to get over this financial dimension.
- Social and economic (5%): some of the difficulties this case encountered are related to the 'new' practice of computerized mutualization, whose importance is increasingly acknowledged as a factor in the promotion and success of eGovernment. Difficulties related to the provision of financial and human resources contributed by each partner are key factors to a good management of such projects.
- Technological issues (5%): to develop such initiatives the technical architecture of the software may take into account the interoperability of the systems. Such barrier should be overcome by previous partnership between the contracting authorities, as it was the case here.

Conclusions

The case examined in this report is characterized by an international dimension that is still rather new in the field of public procurement, at least in terms of the involvement of several contracting authorities from different Member States. The diverse perceptions and interests of the different stakeholders indicate the importance of developing a common language with all the partners in any project of computerized mutualization. Some issues perceived as potential barriers at the outset of this study did not prove to be the cause of actual failures, such as technical software difficulties.

Many of the main difficulties were of an administrative nature that needed to be addressed by legal and methodological methods designed to overcome recurring constraints, such as budgetary timing and licensing the rights for software use. A fuller examination of such issues in this case required further investigations, but the administrations concerned were not been able to organize this. This inability to undertake the necessary research to throw more detailed light on why the management of the new eProcurement operations had difficulty in overcoming some obstacles could be a reason why the study as reported here does not reveal particular obstacles of a political or psychological nature. Nevertheless, these factors seemed to play a significant role in the project's failure to make more progress, as indicated by the problems with the Belgian authority's budgetary timing and licensing the re-use of the software.

At first sight, the failure to make more progress in the second phase could be attributed to the international dimension, as a number of harmonization and related issues need to be addressed (e.g. by the relevant European authorities). However, it is essential to observe that the encountered difficulties largely went beyond the international dimension of the operation (e.g. extending to the operating modes of the public authorities and general characteristics of mutualization projects that constrain the ability of public authorities to depart from their traditional practices).

The study did not reveal many obstacles directly related to eGovernment developments as such. For example, it did not identify particular difficulties arising from the use of 'dematerialized' electronic digital means in the relationship between administrations and their interlocutors (citizens, companies, associations, etc.). Instead, the main obstacles identified in this report could also be found in fields other than eGovernment (e.g. in mutualization for procuring machines to support work common to several local governments).

However, an important issue as highlighted above is the consideration of whether or not to take up the potentially valuable use of an open source model. This needs to be done through a careful objective evaluation of its appropriateness for achieving the specific aims of each mutualization project—rather than perceiving it as an ideological matter. For other operations similar to those of this case study, it should be possible for the contracting authorities who wish to acquire rights in the software to develop a hybrid form of 'made-to-measure' licence. This could incorporate some clauses from the open-source license model, while taking account of other requirements imposed by objectives suited to mutualization operations but which might not conform to open-source standards.

A deeper general and systematic study of the methodological and legal aspects identified in this report—with the aim of benefiting the greatest number—is needed to ensure the nascent practice of open public procurement as illustrated by this case is given the chances to succeed that it deserves, particularly in eGovernment.

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Appendix 1: Other examples of international public procurement partnerships

The Sustainable Cities Project SUS-CIT²⁵²

Several territorial communities of Belgium, France and Germany joined together within the framework of a partnership seeking to realize a working programme granted by the European structural funds. The coordination of the initiative is led by the Walloon Region in Belgium. Although the relationship between the EU and this consortium of communities from different States is not directly related to the kind of public procurement focused on in this study, it is of relevant interest for the following main reasons.

The organization of the Walloon Region leadership facilitates the management of the operation and the running of the exchanges with their common interlocutor (the European Union). This kind of arrangement is a guarantee of the success necessary in any complex operation, such as the management a project of mutualization²⁵³. This leadership arrangement also suggests which legislation should be applicable to relations between the members of the partnership. In this case, it is the Belgian legislation which was indicated as the applicable law. Such a unique legal reference frame facilitates the ability to take account of the legal aspects of the partnership. This arises from the contractual clauses governing, on the one hand, the principles of accountancy and, on the other hand, the cooperation with third parties. Each public procurement that a partner (one of the local authorities) makes must be subjected to the applicable law of its Member State. Thus, here there is no difficulty related to the choice of a legal status.

With regard to public procurement, this experiment is not directly exploitable in the definition of the legal status of a cross border tender as each public procurement likely to be passed within the SUS-CIT framework does not have an international characteristic. However, this example does

²⁵² An initiative within the in the framework of the European Commission's INTERREG IIIB ENO programme (see: <http://www.nweurope.org/page/projet.php?p=&id=592>).

²⁵³ With or without an international dimension.

suggest—indirectly, but certainly—that the facilitation of operations with international characteristics between public partners require solutions that support to the maximum the application of a single/unique legal status.

Contract of Concession for an international high speed railway line

An international agreement was reached between France and Spain in 1995 that created a procedure attributing a concession relating to the realization and exploitation of a section of high speed railway line between Perpignan in France and Figueras in Spain. The international dimension of this unique operation is obvious as it involves partners from two different States, which suggests the need for determining the law applicable to the concession. This was addressed, for example, in Article 30.5 of the concession contract:

The law applicable to the Concession is:

the provisions of this convention, and

the common principles of the rules applicable in France and Spain to sub-contracting works and public services including the rules released by the supreme administrative jurisdictions on the matter; if no common principle can be worked out to solve a determined question, the referees observe the rule which, taking into account the public interests in question, appear to them best adapted to the interest of the Concession, chosen among the applicable rules in France or Spain, or inspired by those.

This concern for finding an appropriate legal status corresponding to a “common denominator” to the systems of both States appears ideal at first sight. However, it isn’t clear that it is a realistic aim. For instance, the definition of common rules in the relevant legislation and case law of both States supposes that their national systems are sufficiently close and are founded on common concepts, without which the definition of a common base would not be possible.

In addition, following the terms of this clause and of Article 30 read as a whole, the applicable law is primarily regarded as an instrument for helping the resolution of any litigations by, if necessary, helping to choose the referees for the litigations. These referees will determine *a posteriori* the law applicable to the management of this concession. A similar approach is not really compatible with the elementary requirements of legal security. This legal security concern is not met in a system which refers to common rules from two different national systems. The clarity of the legal status is completely lacking. A similar manner of proceeding therefore does not appear favourable to supporting the leadership of projects of mutualization with international dimensions, where the lack of reliable reference points can be a real obstacle to their effective management.

Franco–Belgian joint public procurement relating to cremation facilities

A convention of cooperation has been established to govern the collaborative methods of signing joint public acquisition and maintenance of installations of cremation between partners from France and Belgium. This involves two structures of inter-municipal cooperation: the inter-municipal IDETA in Belgium and French ‘Urban Community of Lille’. The international dimension is again essential here, particularly for the definition of the legal status of the public procurement, as it covers two contracting authorities from two different States (and two legal systems).

The Belgian law has been declared applicable here (e.g. with the procedures of signing a joint public procurement in execution of the partnership). IDETA is charged with ensuring the coordination of the operations and carrying out public procurement in the name of both contracting authorities. This leadership by IDETA does not exclude intervention by the Urban Community of Lille in the selection procedure, in particular by giving its approval prior to the notification of the choice of the supplier at the end of the signing procedure.

This Franco-Belgian co-operation relates, however, only to the operations regarding the signing of the public procurement. After this, the execution of the public procurement will be carried out in accordance with each national law. Any litigation during this execution process will thus be regulated according to the law and the procedures in force in the State concerned with the services.

The following general observations are relevant to these mechanisms:

The choice of one (unique) national legislation applicable to the signing of the joint public procurement facilitates the definition of the legal framework and avoids the insecurity caused by reference to rules common to both States. Although this alignment of the respective choices of the leadership and applicable law is ideal from many perspectives, it can also raise certain practical obstacles to the management of the operations which should not be minimized. For instance, it is necessary for one of the partners to agree to intervene in an operation in ways that is not governed by 'its' national law; in certain cases, this can create obstacles of a political or psychological nature. In addition, an elementary climate of trust must reign between the partners as one must giving up part of its control of the operation to the benefit of the other partner.

The need for public procurements to follow each national law regarding their execution can help to avoid difficulties resulting from a joint international public procurement (e.g. with regard to different modes of payment). Each contracting authority can regain control of its operations after having benefited from the advantages of a common signing. This approach lends itself well to the execution of a joint public procurement where there is a supply contract in which the services need to be rather easily individualized.

Franco-Belgian public procurement of data processing departments

Two solutions were considered initially for an agreement between France and Belgium on public procurement for data processing/computerized departments. These reflect characteristics outlined in the Cross Border Tenders case that is the focus of this report: ie a reference to the common framework traced by EU directives relating to public procurement, from which Belgian and French legislation proceeds (and appear to be extremely close to each other).

The choice of one of the two national legislations to govern the signing of the public procurement, and the search for a solution that takes account in its execution of the differences in treatment in each administrative system (e.g. the procedures for paying for the services).

The first solution may seem tempting, but this does not in itself make it possible to define with sufficient precision the mode of the public procurement, as discussed earlier in this report. The directives do not govern all aspects of the signing of a public procurement. For certain activities, they give to the Member States only an indication of minimal obligations to observe, leaving to each one the 'translation' of those obligations into more precise rules. The directives also do not tackle the administrative dimension of the contracting authority's actions. As previously explained, this aspect is left to the discretion of the Member States and refers to each national system. Finally, it needs to be stressed that the EU directives do not relate to the execution of public procurements. It is therefore necessary to refer to the concerned national legislation, or to a base of common principles. The unsatisfactory character of this arrangement has been previously discussed.

The second solution seems to have been favoured by the promoters of this case, who were confronted with the difficulties presented by the management of differentiated procedures for the execution of public procurements. This situation is similar to the above example in this Appendix of the Franco–Belgian joint public procurement relating to cremation facilities, which ensured a common attribution of public procurement requirements by allowing the execution to be differentiated.

However, it is not clear that the same solution could be transposed to the joint public procurement of data processing departments, since the services provided by the operator (data-processing/computerized service provider) cannot be so easily differentiated. The dematerialized character of the electronic services does not lend itself to a 'cutting up' of the financial contributions corresponding to the shares of the services from which each contracting authority profits. Such cutting would be possible only if the public procurement granted two licences for the use of the software developed. The total amount of the public procurement would be thus divided in two amounts, each representing the cost of a licence from which each contracting authority would be titular.

The aim of opening the use of the eCatalogue software to other administrations in the Cross Border Tenders initiative of this case study required sufficiently flexible conditions to encourage a preferred

solution that grants a licence of use involving a complete transfer of the rights of the software, so that both contracting authorities could control its later diffusion. However, this question is less related to the international dimensions of the project than the management of the intellectual property rights within the framework of the public procurement.

Appendix 2: The study's information gathering strategy

As explained in the main study above, its prime research aims were to prioritize parallel contacts in the two administrations and to encourage the spontaneous expression by participants of their experiences and perceptions of the project. This was carried out in the following planned phases:

- End of September 2006: Description of the project (context, subject, needs, etc.) by the principal correspondent of the Belgian administration. This was not concerned with obstacles to the realization of the project, as it was unnecessary at this first stage to duplicate subsequent steps of information gathering.
- Beginning of October to mid-November 2006: The phase of 'spontaneous' expression (in writing), when representatives of both administrations were invited to identify the obstacles they perceived as hindering the success of the project. During this period, the researchers wrote a questionnaire intended to be sent later to participants to enable them to react to what the researchers had imagined the obstacles would be. This questionnaire was designed without knowing the content of opinions and analyses expressed spontaneously by participants during this period.
- Mid-November 2006–beginning of January 2007: Processing of the questionnaire by the representatives of the concerned administrations. During this period, the researchers identified similar cases likely to flourish, by comparative data, the study the eProcurement experiment of mutualization being studied (see Appendix 1). This involved the examination of questions related to the international dimension of the project, as well as the intrinsic characteristics of mutualization experiments.
- Mid-January–February 2007: Drafting of the report on the research.

Conclusion

Both the projects examined here have an international dimension which could be expected to introduce new co-ordination problems into the initiatives, particularly for NES with a greater number of countries involved from the outset. In the future, the challenges faced by partners already in the co-ordination of six countries can be expected to grow and a centralized structure may be necessary. For CBT the international dimension was a clear barrier to development to the second phase, particularly through harmonization and related issues. Different legal frameworks and modes of operation in the different States and contracting authority involved made the coordination of efforts among the stakeholders complex and difficult in some areas. However, as noted above the encountered difficulties went beyond the international dimension of the operation, for example extending to the operating modes of the public authorities and general characteristics of mutualization projects that constrain the ability of public authorities to depart from their traditional practices.

Some of the barriers experienced in these projects were distinctive to cross border procurement, rather than the most commonly experienced barriers identified by the Breaking Barriers project. The study did not reveal many obstacles directly related to eGovernment developments as such. For CBT, the main obstacles identified in this report could also be found in fields other than eGovernment (e.g. in mutualization for procuring machines to support work common to several local governments) and barriers identified in other cases, such as poor technical design, were not observable.

Both projects are at an early stage and it can be expected that further, possibly also distinctive barriers will emerge in the future. It is still very early to judge the progresses of NES, and the extent to which it will contribute to achieving the ambitious objectives set forth in the European Commission Action Plan. If centralization is required, problems of administrative law that thus far have not been perceived as a hurdle may surge, besides other hidden issues that dedicated legal bodies may then identify – as, for instance, the intellectual property aspect discussed above.

Overall though, these business facing projects constitute an auspicious start to the development of further cross-border electronic procurement among the countries involved and internationally. As noted above, NES already provides an elegant portfolio of good practices that should be praised for its own conceptual value: an open and transparent approach to standards, a phased strategy which enabled effective prioritization and a focus on the normally less worked out dimension of public procurement practices – the market.