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legislation: The game changer

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Abstract

Originally introduced by the Court of Justice of the European Union, the presence of 'certain cross-border interest' is used to justify the application of EU principles to public procurement contracts that fall out the scope of EU law. Nonetheless, cross-border interest needs to be proven based on the criteria settled by the CJEU. This article presents firstly, a definition of cross-border interest and its relevance; secondly, the latest trends on digital public procurement and e-administration. Finally, the paper will discuss whether based on the criteria of the CJUE the expansion of digitalisation will render the presence of cross-border interest automatic, thus increasing transparency and consequently changing forever how we apply EU law.

Keywords: Cross-border interest, threshold, public procurement, EU principles.

Themes: EU Public Procurement Law. Administrative Law. EU Law.

Sub-theme: Digitalisation in the European Administrative space and its challenges.

Section 1: Introduction

The goal of this paper is to determine how the expansion of digitalisation and e-administration has caused –in conjunction with the definition of cross-border interest-¹ a paradigm change in terms of how we apply European Union (EU) law in the context of public procurement.

Public procurement law covers the activity of public administrations and public bodies acquiring works, services and goods from private companies. The total share of those contracts in the total EU economy represents a 13.5% of the EU GDP.

At EU level, the economic relevance of public contracts and the need to open them within the framework of the internal market was already the leading goal in 1970s, when the first Directive on Public Procurement was drafted.² Provisions throughout the 1970 Directive on public work contracts were primarily focussed on regulating the procurement process and participatory conditions in order to abolish hindrances to intra-Community movement.

With regards to the applicability of EU public procurement law, the starting point is the same as any other EU law field: purely national issues are excluded, as in principle the rules governing free movement should not apply to purely national situations.³ Thus, emphasis was made on the harmonization of procedures for contracts with economic significance -over certain pecuniary threshold - as part of the process of developing the internal market. The presence of a hard pecuniary threshold entails that a contract with value X (X being the threshold) will be of cross-border interest and therefore it will be advertised EU-wide, whereas a contract with value X- 1€ will not. As a consequence, the existence of a pecuniary threshold to establish the dichotomy between national/EU issues creates a contradiction in terms of transparency: Despite its value, a contract may very well be of interest to an economic operator in another member state if they have

¹ The Court of Justice of the European Union (CJUE) has used both the term interest and element. For the purposes of this paper, cross-border interest and cross-border element are understood as equal and interchangeable. In order to ensure cohesion throughout this paper the term used is cross-border interest only, hereinafter abbreviated as ‘CBI’.

² Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts. *Official Journal* L 185, 16.8.1971, pp. 5-14 Due to the analysis of different case law interpreting the consequently legislative instruments on public procurement, the term ‘Directive’ will be used indistinctly and it should be understood as making reference to the correspondent applicable Directive *ratione temporis*.

³ See articles 4 and 5 of the Consolidated version of the Treaty on European Union [2008] OJ C115/3

the capacity to perform it. But a contract will never be of EU interest if it is not advertised sufficiently. Thus, where do we draw the line?

In the context of European public procurement law, those contracts that due to its pecuniary value⁴ fall below the scope of the Directives,⁵ may still be subject to European Law whenever there is a cross-border interest. Therefore, in order to apply the provisions pertaining free movement present in the treaties, the existence of a cross-border interest needs to be proven. However, the definition of what constitutes cross-border interest is not clear, as the Court of the EU (CJUE)⁶ has mostly focus on addressing elements that may serve as ex-post indicia.

The requirement of a cross-border interest entails two main problems. Firstly, there is no – apparent-consensus in the available case law on its definition, which creates an obvious legal uncertainty. Secondly, as the presence of cross-border interest brings up certain obligations for the contracting authority in terms of transparency, it is something that has to be addressed prior to the publication of the contract.

In essence, the lack of an actual definition of what constitutes cross-border interest opens a door to circumvent transparency requirements: if a contract lacks cross-border interest and it is not advertised sufficiently, it is less likely that potential foreign economic operators will tender, hence limiting the cross-border interest of the contract further. Moreover, the need for contracting authorities to determine what constitutes cross-border interest in spite of it being a clearly

⁴ Article 1(1) ‘This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contest, whose value is estimated to be not less than the thresholds laid down in Article 4’. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65 p. 65-242

⁵ The term Directive is used here broadly as all Directives on public procurement have include pecuniary thresholds as criteria to determine their material scope of application. Hereinafter and unless stated otherwise, the term Directive should be understood as referring –broadly- to any of the latest Directives included in the Public Procurement Package of 2014: Directive 2014/23/EU on concessions, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on the special sectors also known as Utilities Directive.

⁶ The term shall be consider as comprising both the European Court of Justice (ECJ) and the General Court (GC).

European concept goes against any harmonisation criteria and is likely to constitute a hindrance to the internal market.⁷

This paper proposes one simple solution to the problems outlined above based on the tools that have already been given by the European institutions: the digitalisation of the internal market and the case-law of the Court. To that effect, this paper aims to show that de facto the CJEU has already given a clear definition of what constitutes cross-border interest and its combination with the current digitalisation process expands the presence of cross-border interest rendering it almost automatic.

Therefore, this paper will firstly (section 2), provide a definition of what constitutes cross-border interest ex-ante. This need for a clear definition is not trivial. As mentioned earlier, the existence or lack thereof of a CBI has an impact on the obligations of the contracting authority pertaining transparency. It is the snake that bites its tail: without CBI there is no obligation for contracting authorities to be subject to the principle of transparency⁸ and no obligation to publish Europe-wide. Nonetheless, without transparency and Europe-wide publication it is unlikely that an economic operator will be aware of a public procurement contract in another member state. In this regard, it will be argued that the CJUE has provided for a clear definition of what constitutes CBI, despite having focused mostly on elements that may indicate the presence of CBI.

Secondly, on section 3 it will be shown how the implementation of digital tools and e-administration de facto enlarges the scope of EU public procurement law based on the definition of CBI. To do so, several instruments of digitalisation in public procurement law will be addressed.

⁷ See provisions on the freedom of services and art. 37 TFUE. Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C326. Article 37.1 'Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The provisions in this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others'.

⁸ Other than the requirements included under national law that may or not transpose literally the provisions included in the Directives.

The paper will then move onto discussing whether based on the criteria of the CJEU the expansion of digitalisation will render the presence of cross-border interest automatic, and in turn the applicability of EU principles to all public procurement contracts (under section 4). Lastly, section 5 will offer concluding remarks.

Section 2: The Relevance and definition of Cross-Border Interest.

In order to apply European Public Procurement Law the first necessary element is to have a contract over the pecuniary threshold established in the Directives.⁹ However, some provisions aimed at ensuring the transparency of the contract may still be applicable as a consequence of the application of the general principles of public procurement whenever the contract is of cross-border interest.

Regarding the determination of the existence of cross-border interest, it is considered that an economic operator capable of providing services, works or supplies of considerable value is also more capable of overcoming the additional burdens relating to the obligation to adapt to the legal and administrative framework of the Member State where the contract is to be carried out, as well as language requirements.¹⁰ When the projected benefits of said contract outweigh the projected

⁹ See Article 1(1) ‘This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contest, whose value is estimated to be not less than the thresholds laid down in Article 4’ and Article 4 Directive 2014/24/EU: ‘This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds: (a) EUR 5 186 000 for public works contracts; (b) EUR 134 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III; (c) EUR 207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; that threshold shall also apply to public supply contracts awarded by central government authorities that operate in the field of defence, where those contracts involve products not covered by Annex III; (d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV’.

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65 p. 65-242

¹⁰ See e.g. Case C 318/25 *Tecnoedi* [2016] ECLI:EU:C:2016:747 para 25

burdens for an economic operator tendering in a foreign country, such economic operator will likely submit a tender thus presenting an objective cross-border interest.

The CJUE has taken two approaches to the concept of CBI. On one hand, identifying the existence of CBI on the basis of the presence -ex-post- of certain criteria (up to the national court to decide)¹¹ as seen in the table below.¹²

Criteria used to define CBI	None	Value of the contract	Place of performance	Technical characteristics	Complaints of foreign tenderers.
Number of cases	15	17	15	9	5

Table I: Cross-border interest as assessed by the Court of Justice of the European Union (CJUE) (Own source)

On the other hand, the CJUE has indeed provided for a definition of cross-border interest that can be used ex-ante based on the nature and intrinsic relevance for the sake of transparency of the concept of cross-border interest.

¹¹ How the existence of CBI is up to the Court to decide is specifically mentioned in the following cases: Case C-376/08 *Serrantoni* [2009] ECLI:EU:C:2009:808; Case C-226/09 *Commission v. Ireland* [2010] ECLI:EU:C:2010:697; Case C-358/12 *Libor* [2014] ECLI:EU:C:2014:2063; Case C-42/13 *Cartiera* [2014] ECLI:EU:C:2014:2345; Case C-425/14 *Edilux* [2015] ECLI:EU:C:2015:721 and Case C-221/12 *Belgacom* [2013] ECLI:EU:C:2013:736. Nevertheless, this does not mean that the CJUE cannot contravene the decision of the national courts. Despite stating repeatedly that the presence of a cross-border interest is up to the Court to determine, the Court has also denied the assessment made by both national courts and the European Commission in several occasions, see *Tecnoedi* and Case C-187/16 *Commission v. Austria* [2018] ECLI:EU:C:2018:194

¹² Cases were selected using a double sample analysis approach. Firstly, a Boolean search at the European Law data base was conducted using a combination of the terms ‘Cross-border interest’, ‘cross-border element’, ‘public procurement’ and ‘public contract’. Secondly, a word-search was conducted in each of the cases under the ‘affected by’ section in each of the existing Directives pertaining public contracts/procurement. Both searches provided with the same amount of cases thus providing the sample with a high reliability. The final sample included thirty-three cases. Those thirty-three cases were the result of combining the two searches and excluding duplicities. Each of those cases were coded based on whether they explicitly mentioned or lacked thereof any of the criteria mentioned in Table I.

Regarding the first consideration, the presence of certain criteria, the CJUE has focused on the value of the contract, the place where the contract is going to be performed, the technical characteristics of the contract and the existence of complains from foreign tenderers.

Beginning with the value of the contract, the CJUE has referred to it in seventeen¹³ out of the total thirty-three cases where cross-border interest was mentioned. Whereas the CJUE has not provided for any explicit reference to the amount accounting as sufficient value to be considered of cross-border interest, in *Tecnoedi* explicitly stated that the value of the contract ‘does not reach even a quarter’.¹⁴ And in *Secap Santorso*¹⁵ the CJUE determined that due to the different economic perspectives in different Member States, foreign operators ‘may benefit from significant economies of scale [...] (and) be in a position to make a bid that was competitive and at the same time genuine and viable but which the contracting authority would not be able to consider’.¹⁶

Moving into considerations pertaining the place where the contract is to be performed, location has been used as a criteria in fifteen¹⁷ of the cases analyzed. The most relevant case in this regard

¹³ Namely Joined Cases C-147/06 and C-148/08 *Secap Santorso* [2008] ECLI:EU:C:2008:277; Case C-160/08 *Commission v. Germany* [2010] ECLI:EU:C:2010:230; Case C-531/10 *Commission v. Slovak Republic* [2011] ECLI:EU:C:2011:232; Case C-159/11 *Azienda Sanitaria* [2012] ECLI:EU:C:2012:303; *Libor*; *Cartiera*; Case C-470/13 *Generali Providencia* [2014] ECLI:EU:C:2014:2469; Case C-113/13 *Azienda sanitaria locale n. 5 ‘Spezzino’ and Others* [2014] ECLI:EU:C:2014:2440; Case C-278/14 *SC Enterprise Focused Solutions SRL* [2015] ECLI:EU:C:2015:228; *Tecnoedi*; Case C-298/15 *Borta* [2017] ECLI:EU:C:2017:266; Case C-486/17 *Olympus Italia* [2017] ECLI:EU:C:2017:899; *Commission v. Austria* [2018]; Case C-65/17 *Oftalma* [2018] ECLI:EU:C:2018:263; Case C-699/17 *Allianz* [2019] ECLI:EU:C:2019:290; *Belgacom* and Case T-384/10 *Commission v. Spain* [2013] ECLI:EU:T:2013:277

¹⁴ *Tecnoedi* para 24

¹⁵ *Secap Santorso*

¹⁶ *Secap Santorso* para 26

¹⁷ Namely *Secap Santorso* [2008] ECLI:EU:C:2008:277; Case C-159/11 *Azienda Sanitaria* [2012] ECLI:EU:C:2012:303; Case C-699/17 *Allianz* [2019] ECLI:EU:C:2019:290; Case C-221/12 *Belgacom* [2013] ECLI:EU:C:2013:736; Case T-384/10 *Commission v. Spain* [2013] ECLI:EU:T:2013:277; Case C-358/12 *Libor* [2014] ECLI:EU:C:2014:2063; Case C-42/13 *Cartiera* [2014] ECLI:EU:C:2014:2345; Case C-470/13 *Generali Providencia* [2014] ECLI:EU:C:2014:2469; Case C-113/13 *Azienda sanitaria locale n. 5 ‘Spezzino’ and Others* [2014] ECLI:EU:C:2014:2440; Case C-278/14 *SC Enterprise Focused Solutions SRL* [2015] ECLI:EU:C:2015:228; Case C-318/15 *Tecnoedi Construzioni Srl contra Comune di Fossano* [2016] ECLI:EU:C:2016:747; Case C-298/15

is Tecnoedi, where the CJUE considered that the fact that the work was going to be performed two hundred kilometres¹⁸ away from the border was of no relevance for the existence of a cross-border interest. The reason not to determine the cross-border interest of the contract –despite its presence being the main argument from the referring court- was the potential downsides that an economic operator is forced to bear within a cross-border procurement: ‘[...] in any event, [the place where the works are performed] cannot be the only evidence which must be taken into account, in so far as potential tenderers from other Member States may face additional constraints and burdens relating, inter alia, to the obligation to adapt to the legal and administrative framework of the Member State where the work is to be carried out, as well as to language requirements’.¹⁹

Regarding the third criteria, the technical characteristics of the contract have been mentioned in nine²⁰ cases out of the total thirty-three, being the most relevant one *Enterprise Focused Solutions*²¹(par. 21): ‘[...] despite the low value of the contract [...], it must be held that the contract at issue in the main proceedings could have certain cross-border interest in the light of [...] *the reference processor being that of an international brand*’ (emphasis added). The case concerned involved the supply of computing systems and equipment in which the reference was made to an [at least] Intel Core i5 3.2 GHz or equivalent processor which was understood as sufficiently clear and universal reference which could be of interest to every supplier regardless of their country of origin.

And lastly, the existence of complaints from foreign tenders was mentioned solely in five cases.²²

Borta [2017] ECLI:EU:C:2017:266; Case C-486/17 *Olympus Italia* [2017] ECLI:EU:C:2017:899; Case C-187/16 *Commission v. Austria* [2018] ECLI:EU:C:2018:194; and Case C-65/17 *Oftalma* [2018] ECLI:EU:C:2018:263.

¹⁸ The reference to two hundred kilometres is not casual. In *Commission v. Spain* and *Secap Santorso* the CJUE ruled (paras 114 and 31 respectively) that due to the closeness of the contract to the border (less than 200km) even low-value contracts may be of certain cross-border interest.

¹⁹ *Tecnoedi* para 21 and 25

²⁰ See *Borta* para 44, *Commission v. Slovak Republic*, *Enterprise Focused Solutions* paras 20-21, *SECAP Santorso* para 24, *Spezzino* para 49 and *Belgacom* para 29 *Oftalma* para 40, *Olympus* para 18 and *Tecnoedi* para 15

²¹ Case C-278/14 *SC Enterprise Focused Solutions SRL* [2015] ECLI:EU:C:2015:228

²² Case C-65/17 *Oftalma* [2018] ECLI:EU:C:2018:263; Case C-531/10 *Commission v. Slovak Republic* [2011] ECLI:EU:C:2011:23; Case C-113/13 *Azienda sanitaria locale n. 5 ‘Spezzino’ and Others* [2014]

The approach of the CJUE to the exam of complaints from foreign operators to determine the existence of cross-border interest has two different doctrinal lines of reasoning. On one hand, we have the cases where the CJUE determined that the complaints from economic operators had to be real and not hypothetical, and even then, they could not be sufficient to determine the existence of cross-border interest. This is the case of *Spezzino*, where the CJUE determined that ‘(t)he referring Court may, in its overall assessment of the existence of certain cross-border interest also take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious. More particularly, as regards ambulance services, the CJUE has held, in an action for failure to fulfil obligations, that certain cross-border interest cannot be established solely on the basis of the fact that several operators in other Member States had lodged a complaint with the European Commission and that the contracts concerned were of significant economic value’.²³ The same argumentation is given in *Oftalma* and *Tecnoedi*.²⁴

On the other hand, we have the opposite – and a more rational- approach. In *Commission v. Slovak Republic*, the CJUE understood that in the context of a contract with cross-border interest there cannot be complaints from foreign economic operators. The absence was due to the lack of compliance with the obligations brought up by the existence regarding transparency requirements: ‘[b]y its breach of the principle of transparency, the ministry simultaneously breached the prohibition on discrimination, since it dealt differently with the group of undertakings which it notified of the public contract and the group — including undertakings established outside the Slovak Republic — which were not notified but could have had an interest therein.’²⁵ And in clearer words from *Belgacom*: ‘there is certain cross-border interest, without its being necessary that an economic operator actually has manifested its interest. It (national court) found that, given the import of the agreement at issue in the main proceedings, it is probable that undertakings

ECLI:EU:C:2014:2440; Case C-221/12 *Belgacom* [2013] ECLI:EU:C:2013:736; Case C-425/14 *Edilux* [2015] ECLI:EU:C:2015:721

²³ *Spezzino* para 49

²⁴ *Oftalma* para 40 and *Tecnoedi* para 20: ‘it is also possible to take account of the fact that complaints have been made by operators situated in Member States other than that of the contracting authority, provided that it is established that those complaints are real and not fictitious’

²⁵ *Commission v Slovak Republic* C 30/22 29.1.2011

established in other Member States would have manifested their interest had the contact been put out to tender'.²⁶

Based on the above, it cannot be argued that the existence of cross-border interest depends solely on the presence of complaints by foreign operators. The presence of complaints indicates a clear cross-border element ex-post but, although it serves as an indicium for national courts, it cannot be used by contracting authorities. Nevertheless, the main (or rather most common) line of argumentation followed by Court puts an extra emphasis on the impact of transparency in public procurement in particular and the work of the administration in general.

The analysis of the elements mentioned by the case law is relevant as it provides for a list of indicia to analyse ex-post. Notwithstanding, for the purposes of this paper it is necessary to address and provide for a definition ex-ante.

With regards to the cases that provided for a definition or justification for the existence of cross-border interest. The first case to be addressed where this was clearly outlined is *Strong Segurança*.²⁷ In paragraph 35 of its judgment the CJUE justified the existence of a cross-border interest based on the specific nature of the contract. It continued by defining cross-border interest as an element intended to enable undertakings from another Member State to examine the contract notice and submit a tender, which intrinsically links its existence to the publication of the contract notice in the Official Journal or other Europe-wide publication mechanisms.

The obligation to publish, or the linkage between the existence of cross-border interest and a published ex-ante notice in the European Journal, was also explored under T-258/06²⁸ and *Oftalma*.²⁹ In the former case (T-258/06), the Court understood that the principle of transparency entails that the contract notice must be advertised prior to the award of the contract, hence there is little potential for cross-border transactions without an ex-ante obligation.³⁰ The latter (*Oftalma*)³¹ elaborated on the definition provided by *Strong Segurança* by adding that the purpose of the

²⁶ *Belgacom* para 31

²⁷ Case C-95/10 *Strong Segurança* [2011] ECLI:EU:C:2011:161 paras 35 and 38

²⁸ Case T-258/06 *Commission v. Germany* [2010] ECLI:EU:T:2010:214 para 40

²⁹ Case C-65/17 *Oftalma* [2018] ECLI:EU:C:2018:263

³⁰ T-258/06 para 40

³¹ *Oftalma* para 35 and 35

existence of a cross-border interest in a tendering procedure is to enable undertakings from other Member States to examine the contract notice and submit a tender. The Court understood as well that the existence of cross-border interest brings up an obligation to the contracting authority to have a sufficient degree of advertising that ensures competition and the impartial review of the procurement procedure.

Overcoming burdens such as language requirements may be something achievable by using standards or technical references with global use. An example of technical references was addressed and explained in *Enterprise Focused Solutions*.³² The case concerned involved the supply of computing systems and equipment in which the reference was made to an (at least) Intel Core i5 3.2 GHz or equivalent processor which was understood as Sufficiently clear and universal reference which could be of interest to every supplier regardless of their country of origin.

Based on the above, if considering that the access to a procurement contract must be of sufficient worth for an economic operator to go through the inherent language and administrative burdens of a foreign Member States, having a unique referencing system or mechanism that overcomes such burdens will, make contracts have a cross-border interest. Moreover, the expansion of digitalisation provides a unique tool for that.

Nevertheless, and summarising the above, based on the case law provided by the CJUE, cross-border interest can be defined as follows: An element capable of attracting foreign operators despite the intrinsic burdens of cross-border procurement and intended to enable undertakings from another Member State to examine the contract notice and submit a tender.

Section 3: Digitalising Public Procurement

Digitalisation -understood as the migration to an ICT environment- has been a constant element in the European agenda since the late 90s. In more recent times, as part of its ten priorities for the period 2019-2024 the von der Leyen Commission decided to put its focus on digitalisation through the Digital Single Market Strategy.³³ According to the European Commission a

³² Case C-278/14 *SC Enterprise Focused Solutions SRL* [2015] ECLI:EU:C:2015:228

³³ https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en [Last accessed on December 15th 2020]

‘digital single market is one in which the free movement of goods, persons, services and capital is ensured and where citizens, individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or native residence’.³⁴

Such definition implies that whenever an activity is conducted online, Member States must guarantee that individuals from all Member States can access to it in a ‘seamless’ manner or without barriers: a digital environment knows no borders, and it is up to member states not to purposely limit it.³⁵ If already in the early 70’s public procurement was identified as a market where there could be potentially a high number of barriers to the internal market, it is only a matter of logical interpretation to consider that this continues to be the case. Consequently, not only public procurement itself but the whole scope of activities of the administrations in the European Union has been subject to a process of modernisation and digitalisation.³⁶

As part of the aforementioned general trend of modernisation and promotion of e-administration and digitalisation,³⁷ the role of the public administrations and public procurement cannot be understated as part of the development of the digital internal market. The last directives on public

³⁴ Commission, ‘Commission staff working document. A Digital Single Market Strategy for Europe – Analysis and Evidence. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe’ COM (2015) 192 final.

³⁵ Paul Lucian, ‘A few considerations regarding the strategy for the digital single market’, *Revista Economică* 70:2 (2018) p. 69

³⁶ See Alessandra Silveira and Joana Covelo de Abreu, ‘Interoperability solutions under Digital Single Market: European e-Justice rethought under e-Government paradigm’ *European Journal of Law and Technology* [2018] 9-1

³⁷ Digitalisation understood here as the migration into an online/digital setting of pre-existing tools. For an analysis of advanced digital techniques (use of AI in procurement, blockchain and smart contracts) see Albert Sánchez Graells, ‘Digital Technologies, Public Procurement and Sustainability: Some Exploratory Thoughts’ (*How to Crack a Nut*, November 8th 2019) <https://www.howtocrackanut.com/blog/2019/11/6/digital-technologies-public-procurement-and-sustainability?rq=digital%20technologies> and ‘Governance, blockchain and transaction costs’ (*How to Crack a Nut*, March 22nd 2019) <https://www.howtocrackanut.com/blog/2019/3/22/governance-blockchain-and-transaction-costs> last accessed on March 17th, 2021.

procurement³⁸ constituted a large step towards the modernization of public procurement and the continuation of an ongoing trend of promotion of transparency in procurement.³⁹ The modernisation of public procurement can be seen in two different –although intertwined elements: the introduction of new digital mechanisms in public procurement and the increase of transparency both as a demand towards contracting authorities as well as a consequence from the introduction of such digital mechanisms.⁴⁰ In plain words the current EU public procurement legislation demands more transparency from contracting authorities and limits the options for the contracting authorities to refuse being transparent and increase bureaucracy by giving them (digital) tools thus increasing transparency by themselves.⁴¹

Two of the main elements towards digitalisation in public procurement were the implementation of the European Single Procurement Document (hereinafter ESPD), and the eCertis system.⁴²

The ESPD was created as a tool for economic operators and contracting authorities which would enable participants in a public procurement to centralize all their information in a reusable document. Up until 2016 the ESPD worked both electronically and on paper, being of electronic

³⁸ The Public Procurement Package of 2014, comprising Directive 2014/23/EU on the award of concession contracts; Directive 2014/24/EU on public procurement and Directive 2014/25/EU on the procurement by entities operating in the water, energy, transport and postal services sector. *Official Journal of the European Union*. L 94. 28.3.2014

³⁹ François Lichère, Roberto Caranta, Steen Treumer, (eds.) ‘Modernising Public Procurement : The New Directive’, (European Procurement Law Series, 1st edn, DJØF Publishing 2014) p. 4 Kirsi-Maria Halonen ‘Many faces of transparency in public procurement’ in Kirsi-Maria Halonen, Roberto Caranta and Albert Sánchez-Graells (eds) *Transparency in EU Procurements. Disclosure within public procurement and during contract execution*. (1st ed. Elgar 2019) p. 11

⁴⁰ According to Carri Ginter, Nele Parrest and Mari Ann Simovart, ‘Access to the Content of Public Procurement Contracts: The Case for a General EU-Law Duty of Disclosure’[2013] PPLR 4 156 p. 160 where they questioned the conformity of a lack of general disclosure with the general principles of public procurement (transparency, equal treatment etc...) especially in light of the current technical and digital improvements.

⁴¹ Vid Supra 32 p 26

⁴² On the functioning of eCertis and public procurement, see https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/e-certis/index_en.htm [Last accessed on August 31st 2020]

use only after the implementation period of Directive 2014/24/EU expired.⁴³ The main aim of the ESPD is to simplify public procurement processes and reduce the amount of documentation to be incorporated with the tender offer. As the bureaucracy required to enter in a public procurement contract was previously considered as an obstacle⁴⁴ to SMEs, the use of ESPD enhances the participation of smaller economic operators.

Among the benefits of using the ESPD, it assists public administration in verifying documentation from another Member State. Together with the virtual company dossier (VCD)⁴⁵, it allows economic operators and contracting authorities to have an interoperable system adapted to the conditions and criteria laid down in Directive 2014/24/EU.⁴⁶ This set of tools comprised by the ESPD, eCertis and VCD is aimed to serve as a tool to enhance communication between tenderers involved in a team⁴⁷ as well as ease the access of contracting authorities to documentation from other member states whilst checking whether economic operators have the necessary technical specifications to participate in a tender.

⁴³ Article 22 Directive 2014/24/EU: ‘Member States shall ensure that all communication and information exchange under this Directive, in particular electronic submission, are performed using electronic means of communication in accordance with the requirements of this Article. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators’ access to the procurement procedure’ in combination with article 90 Directive 2014/24/EU: ‘Notwithstanding paragraph 1 of this Article, Member States may postpone the application of Article 22(1) until 18 October 2018, except where use of electronic means is mandatory pursuant to Articles 34, 35 or 36, Article 37(3), Article 51(2) or Article 53. Notwithstanding paragraph 1 of this Article, Member States may postpone the application of Article 22(1) for central purchasing bodies until 18 April 2017’.

⁴⁴ Alfonso Sánchez García ‘La contratación pública electrónica en Italia: Evolución, análisis y propuestas de mejora’ (2019) (Doctoral dissertation, alma). p. 154

⁴⁵ See <https://joinup.ec.europa.eu/collection/pan-european-public-procurement-online-peppol/solution/vcd-virtual-company-dossier/about> [Last accessed September 15th, 2020]

⁴⁶ As part of the selection process before awarding a contract, a contracting authority may ask for prove of professional, technical or economic standing from the economic operators that ensures that they have the capacity to carry out a contract. See article 58 Directive 2014/24/EU.

⁴⁷ Sebastian Bobowski and Jan Gola, ‘E-procurement in the European Union’ (2018) *The Asia-Pacific Journal of European Union Studies* 17/1, 23

The use of the ESPD as well as other electronic means (VCD, eCertis) is included under the sphere of the Internal Market Information system (IMI).⁴⁸ The IMI constitutes an IT based information network that links public authorities across Member States. It enables quick and easy communication. The main features of IMI are the multilingual features that allow public authorities to identify counterparts in other country; the use of pre-translated questions and forms pulls down potential boundaries concerning administrative procedures, language and access to information.

Thus, the implementation of all the aforementioned mechanisms not only enhances the interoperability of public administrations but simplifies tremendously the administrative and language burdens faced by an economic operator.⁴⁹ Therefore, as a consequence of the above, the digitalisation of the tools used in public procurement systematically can potentially abolish bureaucratic barriers such as handling physical documentation, deadlines or even language barriers.⁵⁰ With such instruments as the one addressed, the public procurement market is closer to a digital market not limited by borders.⁵¹

Given that one of the conditions for the CJUE not to determine the existence of cross-border interest was precisely the existence of intrinsic bureaucratic and language barriers between member states, with the use of digital tools such barriers became extinct.

Section 4: A digital cross-border interest

⁴⁸ Single Market Scoreboard Report: Internal Market Information System (IMI) 01/2018-12/2018. Available at: https://ec.europa.eu/internal_market/scoreboard/_docs/2019/performance_by_governance_tool/imi_en.pdf [Last accessed December 15th, 2020])

⁴⁹ See recital 4 Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document [2016] OJ L 3/16

⁵⁰ On the potential of eProcurement and current issues see Albert Sánchez-Graells, 'EU Public Procurement Policy and the Fourth Industrial Revolution: Pushing and Pulling as One?' Presented on January 10th 2020 at the YEL Annual EU Law & Policy Conference 2020: 'EU Law in the era of the Fourth Industrial Revolution', Available at SSRN: <https://ssrn.com/abstract=3440554> or <http://dx.doi.org/10.2139/ssrn.3440554> Last accessed on March 17th 2021

⁵¹ Moreover, a digital market 'has the potential to create growth and employment by providing opportunities for investment and innovation, which leads to expanding markets and more choice in goods and services at lower prices' European Commission, Commission staff working document 'A digital single market strategy for Europe – analysis and evidence', Brussels, 6 May 2015, SWD(2015) 100 final, 3.

The combination of the two sections above result in a paradigm change in who we apply the rules that conform European public procurement legislation.

As advanced in section 2, in order for the provisions in the Directives to apply, the contract must be above certain pecuniary thresholds. However, certain provisions of the directive may still be rendered applicable due to the general principles of public procurement (among them, transparency) whenever a cross-border interest is present. From the cases outlined under section 2 we can determine ex-post the existence of cross-border interest based on some criteria: the value of the contract, the place where the contract is going to be executed, the technical characteristics of the contract and the existence of complains from foreign tenderers. In addition, on the basis of *Strong Segurança*⁵² and *Tecnoedi*⁵³ we can also define cross-border interest as ‘an element capable to attract foreign operators despite the intrinsic burdens of cross-border procurement and intended to enable undertakings from another Member State to examine the contract notice and submit a tender.’

Based on the wording of the Court, cross-border interest is any circumstance that enables an economic operator to have access to a contract notice and submit a tender.⁵⁴ The combination between such definition and the criteria traditionally ultimately converges on the idea that the exam of the presence of a cross-border interest is based on an assessment on the conditions of the contract. Such exam determines to what extent it is worthy for an economic operator to face the inherent constrains of a cross-border procedure. Among the burdens mentioned by the Court, there are administrative burdens and language requirements.⁵⁵ Opposed to those limitations, and following the same line of reasoning, the Court found as an indication for the existence of cross-border interest the use of international standards as a facilitator for the provision of certain supply contract.⁵⁶

⁵² Case C-95/10 *Strong Segurança* [2011] ECLI:EU:C:2011:161

⁵³ Case C-318/15 *Tecnoedi Construzioni Srl* [2016] ECLI:EU:C:2016:747

⁵⁴ *Strong Segurança* para 35

⁵⁵ See *Tecnoedi*

⁵⁶ See *Enterprise Focused Solutions*

The justification for this approach can be extracted from section 5, where a brief examination of the digitalisation process in public procurement was performed together with an approximation to the use of the ESPD and eCertis database.

The entry into place of Directive 2014/24/EU produced a renovation of how public procurement was conducted. With the use of the ESPD and the eCertis data base, administrative burdens and language limitations were abolished allowing economic operators engage to contracting authorities in an easier way. With the extension of the use of digital tools and ICT systems not only it is easier for contracting authorities to publish tender notices but it is also easier for economic operators to reply to those and understand the requirements governing the procurement process. This conclusion can also be extracted from the analysis of the increased percentage of cross-border procurement,⁵⁷ which –even when they are still low compared to national-only procurement- has increased since the entry into place of provisions regarding e-procurement. Therefore, considering not only the existence of cross-border interest but also the applicability of EU public procurement law on the basis of pecuniary values is outdated and it does not correspond with the reality of the available mechanisms. Taking as a starting point the definition provided above as well as the exam of the case law from the European Court of Justice the only logic conclusion is to understand that, as part of the natural developments of law and technology, European public procurement law must adapt to the changes. As part of the increase on digitalisation of public procurement, European principles should render automatically applicable.

Elaborating on the above, based on the definition of cross-border interest provided above, any facilitating elements that ease the access to information increase the likelihood of having a contract with cross-border interest. With the increase of digitalisation, it is undeniable that administrations have become more accessible thus the interaction with a contracting authority via public procurement should reflect that process. Additionally, the mechanisms addressed above in section

⁵⁷ Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, (2017) ‘Measurement of Impact of Cross-Border Penetration in Public Procurement’. Available at: <https://publications.europa.eu/en/publication-detail/-/publication/5c148423-39e2-11e7-a08e01aa75ed71a1>
Commission, DG Internal Market and Services (2011) ‘Cross-Border Procurement Above EU Thresholds. Available at: <https://op.europa.eu/en/publication-detail/-/publication/0e081ac5-8929-458d-b078-a20676009324> (Last accessed December 15th, 2020).

3 are directly aimed at increasing transparency and abolishing internal market barriers potentially arising from the difficulty to understand public procurement below the thresholds in a different member states.⁵⁸

‘If we look at a more general picture of digitalisation in the context of the European Union and the Single Digital Market we can also how the tools included in the Directive fulfil to certain extent those defined under the ISA² programme.⁵⁹ Under the ISA² Programme, it is acknowledged that ‘(i)nteroperability and, consequently, the solutions established and operated under the ISA² programme are instrumental to exploiting the potential of e-government and e-democracy to the full, by enabling the implementation of “one-stop shops” and the provision of end-to-end and transparent public services leading to fewer administrative burdens and lower costs’.⁶⁰

The digitalisation introduced by ISA² presupposes interoperability between administrations (or in the context of public procurement contracting authorities) and economic operators, re-using data.⁶¹ The same core principles are embedded in the provisions in the Directive and developing legal instruments pertaining the use of the ESPD and eCertis database. An example of such interoperability and re-usage of data can be seen in recital (55) Directive 2014/24/EU where such possibility is specifically provided for electronic catalogues. A similar point is raised in recital (85) *in fine*

⁵⁸ See *Tecnoedi*

⁵⁹ Decision (EU) No. 2015/2240, of the European Parliament and of the Council, 25th November 2015, establishing a programme on interoperability solutions and common frameworks for European public administrations, businesses and citizens (ISA2 programme) as a means for modernizing the public sector

⁶⁰ See Decision (EU) No. 2015/2240, Recital 30

⁶¹ *Ibid* article 2 on Definitions: (1) ‘interoperability’ means the ability of disparate and diverse organisations to interact towards mutually beneficial and agreed common goals, involving the sharing of information and knowledge between the organisations, through the business processes they support, by means of the exchange of data between their respective ICT systems.

‘[...] The Commission should therefore envisage promoting measures that could facilitate easy recourse to up-to-date information electronically, such as strengthening tools offering access to virtual company dossiers, or means of facilitating interoperability between databases or other such flanking measures’.

Based on the above, it is clear that the latest developments in both Administrative and Public Procurement law are aimed at achieving a full migration to online and ICT settings. Such digitalisation is articulated around interoperability and therefore it is no longer possible to stop and pretend a contract cannot have cross-border interest when digital tools are provided.

Section 5: Conclusion

The aim expressed at the beginning of this paper was to answer the question ‘can digitalisation expand the scope of European public procurement legislation based on the current definition of cross-border interest? And if so, why? Building on what has been discussed in the previous sections the first element of the proposed research question can be answered in an affirmative way.

This paper discussed the concept of cross border interest in public procurement and combined it with the latest developments in digitalisation of public procurement. Since cross-border interest is understood as an element capable to attract foreign operators despite the intrinsic burdens of cross-border procurement and intended to enable undertakings from another Member State to examine the contract notice and submit a tender, the inclusion of the mandatory use of electronic ESPD and eCertis repository makes a contract likely to automatically have cross-border interest.

An automatic determination of the presence of cross-border interest entails that the general principle of public procurement and primary EU law is applicable to the contract despite its law value. However, it is not clear whether that constitutes a significant enlargement of European Law therefore entering in the realm of national legal sovereignty.

Nevertheless, an example of the effect that the increase on digitalisation in public procurement may have can already be seen in the case of Spain. Article 1(1) of the Ley de Contratos del Sector

Público includes transparency as one of its core guiding principles.⁶² As a consequence, emphasis was made on creating a single digital tool enabling all contracting authorities to centralise and make accessible the information pertaining public contracts. Moreover, the general administrative legislation⁶³ includes digitalisation as part of the ‘hard core nucleus’ of Spanish legislative system.

Although this is only one case in the whole European Union, it is also an example of how digitalisation is changing the world around us and consequently the way we apply law. In the context of public procurement, the expansion of digitalisation is translating into a change of paradigms of how we apply European public procurement law and it is something to be taken into account and that calls for additional research in the upcoming years.

⁶² Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014 [2017] BOE 272

⁶³ Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas and Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público [2015] BOE 236. See also, Isaac Martín Delgado ‘La difusión e intercambio de información contractual a través de medios electrónicos. Publicidad, notificaciones y comunicaciones electrónicas’, in Isabel Gallego Córcoles and Eduardo Gamero Casado (eds) *Tratado de contratos del sector público* (vol. 2, Tirant lo Blanch 2018) p. 1910