REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 14, NR. 2, 51-68, PARIS LEGAL PUBLISHERS © 2021

A Digital Cross-border Interest in the Framework of Public Procurement 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 CJEU, 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.

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 (or CBI) –[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 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

* DOI 10.7590/18747982 1X16254887670883 1874-7981 2021 Review of European Administrative Law

1 The Court of Justice of the European Union (CJEU) 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'.

in the 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 a 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 and 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 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 fall below the scope of the Directives[4] due to their pecuniary value[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 EU 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

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

3 See Consolidated version of the Treaty on European Union [2016] OJ C202/15, arts 4 and 5.

4 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).

5 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, 65-242.

of Justice of the EU (CJEU)[6] has mostly focused on addressing elements that may serve as *ex-postindicia*.

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 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 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; 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 transparency[8] 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

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

7 See provisions on the freedom of services and Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/49 [TFEU], especially the provisions on the freedom of services under Title IV ch 3 and art 37. Under 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 foods 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 may not transpose literally the provisions included in the Directives.

procurement contract in another Member State. In this regard, it will be argued that the CJEU has provided for a clear definition of what constitutes CBI, despite having focused mostly on elements that may indicate the presence of CBI.

Secondly, in 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.

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 (Section 4). Lastly, Section 5 will offer concluding remarks.

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, on the one hand, 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

9 See 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, 65-242, specifically art 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 art 4: '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'.

out and, on the other hand, language requirements.[10] When the projected benefits of said contract outweigh the projected 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 CJEU has taken two approaches to the concept of CBI. In the first approach, identifying the existence of CBI is identified 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	Complains 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 (CJEU) (Own source)

In the second approach, the CJEU 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.

Regarding the first consideration – the presence of certain criteria – the CJEU 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.

10 See e.g. Case C-318/25 *Tecnoedi*, EU:C:2016:747, para 25.

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*, EU:C:2009:808; Case C-226/09 *Commission v Ireland*, EU:C:2010:697; Case C-358/12 *Libor*, EU:C:2014:2063; Case C-42/13 *Cartiera*, EU:C:2014:2345; Case C-425/14 *Edilux*, EU:C:2015:721 and Case C-221/12 *Belgacom*, EU:C:2013:736. Nevertheless, this does not mean that the CJEU cannot contravene the decision of the national courts. Despite stating repeatedly that the presence of a cross-border interest is up to national courts to determine, the Court has also denied the assessment made by both national courts and the European Commission on several occasions: see Case C-318/25 *Tecnoedi*, EU:C:2016:747 and Case C-187/16 *Commission v Austria*, 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 to public contracts/procurement. Both search results provided the same amount of cases, thus making the sample highly reliable. 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.

Beginning with the value of the contract, the CJEU has referred to it in seventeen[13] out of the total thirty-three cases where cross-border interest was mentioned. Whereas the CJEU has not provided for any explicit reference to the amount accounting as sufficient value to be considered of cross-border interest, in *Tecnoedi* it explicitly stated that the value of the contract 'does not reach even a quarter'.[14] In *Secap Santorso*,[15] the CJEU 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 criterion in fifteen[17] of the cases analyzed. The most relevant case in this regard is *Tecnoedi*, where the CJEU considered that the fact that the work was going to be performed two hundred kilometres away from the border was of no relevance for the existence of a cross-border interest.[18] 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 downsizes that an economic operator is forced to bear within a cross-border procurement:

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13 Namely, Joined Cases C-147/06 and C-148/08 *Secap Santorso*, EU:C:2008:277; Case C-160/08 *Commission v Germany*, EU:C:2010:230; Case C-531/10 *Commission v Slovak Republic*, EU:C:2011:232; Case C-159/11 *Azienda Sanitaria*, EU:C:2012:303; Case C-358/12 *Libor*, EU:C:2014:2063; Case C-42/13 *Cartiera*, EU:C:2014:2345; Case C-470/13 *Generali Providencia*, EU:C:2014:2469; Case C-113/13 *Azienda sanitaria locale n. 5 'Spezzino' and Others*, EU:C:2014:2440; Case C-278/14 *SC Enterprise Focused Solutions SRL*, EU:C:2015:228; Case C-318/25 *Tecnoedi*, EU:C:2016:747; Case C-298/15 *Borta*, EU:C:2017:266; Case C-486/17 *Olympus Italia*, EU:C:2017:899; Case C-187/16 *Commission v Austria*, EU:C:2018:194; Case C-65/17 *Oftalma*, EU:C:2018:263; Case C-699/17 *Allianz*, EU:C:2019:290; Case C-221/12 *Belgacom*, EU:C:2013:736 and Case T-384/10 *Commission v Spain*, EU:T:2013:277.

14 Case C-318/25 *Tecnoedi*, EU:C:2016:747, para 24.

15 Joined Cases C-147/06 and C-148/08 *Secap Santorso*, EU:C:2008:277.

16 ibid, para 26.

17 Namely, Joined Cases C-147/06 and C-148/08 *Secap Santorso*, EU:C:2008:277; Case C-159/11 *Azienda Sanitaria*, EU:C:2012:303; Case C-699/17 *Allianz*, EU:C:2019:290; Case C-221/12 *Belgacom*, EU:C:2013:736; Case T-384/10 *Commission v Spain*, EU:T:2013:277; Case C-358/12 *Libor*, EU:C:2014:2063; Case C-42/13 *Cartiera*, EU:C:2014:2345; Case C-470/13 *Generali Providencia*, EU:C:2014:2469; Case C-113/13 *Azienda sanitaria locale n. 5 'Spezzino' and Others*, EU:C:2014:2440; Case C-278/14 *SC Enterprise Focused Solutions SRL*, EU:C:2015:228; Case C-318/15 *Tecnoedi Construzioni Srl contra Comune di Fossano*, EU:C:2016:747; Case C-298/15 *Borta*, EU:C:2017:266; Case C-486/17 *Olympus Italia*, EU:C:2017:899; Case C-187/16 *Commission v Austria*, EU:C:2018:194 and Case C-65/17 *Oftalma*, EU:C:2018:263.

18 The reference to two hundred kilometres is not casual. In *Commission v Spain* (Case T-384/10 *Commission v Spain*, EU:T:2013:277) and *Secap Santorso* (Joined Cases C-147/06 and C-148/08 *Secap Santorso*, EU:C:2008:277), the CJEU 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.

(…) 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 nine[20] cases out of the total thirty-three, the most relevant one being *Enterprise Focused Solutions*:[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*'.[22] 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 a sufficiently clear and universal reference which could be of interest to every supplier regardless of their country of origin.

Lastly, the existence of complaints from foreign tenders was mentioned solely in five cases.[23]

The approach of the CJEU in the examination of complaints from foreign operators to determine the existence of cross-border interest has two different doctrinal lines of reasoning. On the one hand, we have cases where the CJEU 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 CJEU 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

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19 Case C-318/25 *Tecnoedi*, EU:C:2016:747, paras 21 and 25.

20 See Case C-298/15 *Borta*, EU:C:2017:266, para 44; Case C-531/10 *Commission v Slovak Republic*, EU:C:2011:232; Case C-278/14 *SC Enterprise Focused Solutions SRL*, EU:C:2015:228, paras 20-21; Joined Cases C-147/06 and C-148/08 *Secap Santorso*, EU:C:2008:277, para 24; Case C-113/13 *Azienda sanitaria locale n. 5 'Spezzino' and Others*, EU:C:2014:2440, para 49; Case C-221/12 *Belgacom*, EU:C:2013:736, para 29; Case C-65/17 *Oftalma*, EU:C:2018:263, para 40; Case C-486/17 *Olympus Italia*, EU:C:2017:899, para 18 and Case C-318/25 *Tecnoedi*, EU:C:2016:747, para 15.

21 Case C-278/14 *SC Enterprise Focused Solutions SRL*, EU:C:2015:228.

22 ibid, para 21 (emphasis added).

23 Case C-65/17 *Oftalma*, EU:C:2018:263; Case C-531/10 *Commission v Slovak Republic*, EU:C:2011:232; Case C-113/13 *Azienda sanitaria locale n. 5 'Spezzino' and Others*, EU:C:2014:2440; Case C-221/12 *Belgacom*, EU:C:2013:736 and Case C-425/14 *Edilux*, EU:C:2015:721.

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.[24]

The same argumentation is given in *Oftalma* and *Tecnoedi*.[25]

On the other hand, we have the opposite – and more rational – approach. In *Commission v Slovak Republic*, the CJEU 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 of 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.*[26]

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 established in other Member States would have manifested their interest had the contact been put out to tender.[27]

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*. 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 extra emphasis on the impact of transparency in public procurement, in particular, and the work of the administration, in general.

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24 Case C-113/13 *Azienda sanitaria locale n. 5 'Spezzino' and Others*, EU:C:2014:2440, para 49.

25 Case C-65/17 *Oftalma*, EU:C:2018:263, para 40 and Case C-318/25 *Tecnoedi*, EU:C:2016:747, 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'.

26 Case C-531/10 *Commission v Slovak Republic*,removed from registry EU:C:2011:232.

27 Case C-221/12 *Belgacom*, EU:C:2013:736, para 31.

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

Regard must first be had 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*.[28] In paragraph 35 of its judgment, the CJEU 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 in the cases *Germany v Commission*[29] and *Oftalma*.[30] In the former case (*Germany v Commission*), 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.[31] The latter (*Oftalma*)[32] elaborated on the definition provided by *Strong Segurança*, and added that the purpose of the 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 also understood that the existence of cross-border interest brings up an obligation to the contracting authority to have a sufficient degree of advertising which 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*.[33] The case 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 a sufficiently clear and universal reference which could be of interest to every supplier, regardless of their country of origin.

Based on the above, and considering that the access to a procurement contract must be of sufficient worth for an economic operator to go through the

28 Case C-95/10 *Strong Segurança*, EU:C:2011:161, paras 35 and 38.
29 Case T-258/06 *Commission v Germany*, EU:T:2010:214, para 40.
30 Case C-65/17 *Oftalma*, EU:C:2018:263.
31 T-258/06 *Germany v Commission*, EU:T:2010:214, para 40.
32 Case C-65/17 *Oftalma*, EU:C:2018:263, paras 35 and 36.
33 Case C-278/14 *SC Enterprise Focused Solutions SRL*, EU:C:2015:228.

inherent language and administrative burdens in 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.

In summarising the foregoing, based on the case law provided by the CJEU, 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'.

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 1990s. 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.[34] According to the European Commission,

[a] 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.[35]

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.[36] If already in the early 1970s public procurement was identified as a market where there could be a potentially 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

34 'A Europe fit for the digital age' (*European Commission*, — —) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en> accessed 15 December 2020.

35 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, 3.

36 P Lucian, 'A few considerations regarding the strategy for the digital single market' (2018) 70 Revista Economică 69.

of activities of the administrations in the European Union has be subject to a process of modernisation and digitalisation.[37]

As part of the aforementioned general trend of modernisation and promotion of e-administration and digitalisation,[38] 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 procurement[39] constituted a large step towards the modernization of public procurement and the continuation of an ongoing trend of promotion of transparency in procurement.[40] The modernisation of public procurement can be seen in two different – albeit 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.[41] In plain words, the current EU public procurement legislation demands more transparency from contracting authorities. It also limits the options for the contracting authorities to refuse being transparent and increases bureaucracy by giving them (digital) tools, thus increasing transparency by themselves.[42]

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37 See A Silveira and J Covelo de Abreu, 'Interoperability solutions under Digital Single Market: European e-Justice rethought under e-Government paradigm' (2018) 9(1)European Journal of Law and Technology.

38 Digitalisation is 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 A Sánchez Graells, 'Digital Technologies, Public Procurement and Sustainability: Some Exploratory Thoughts' (*How to Crack a Nut*, 8 November 2019) <www.howtocrackanut.com/blog/2019/11/6/digital-technologies-public-procurement-and-sustainability?rq=digital%20technologies> accessed 17 March 2021 and A Sánchez Graells, 'Governance, blockchain and transaction costs' (*How to Crack a Nut*, 22 March 2019). <www.howtocrackanut.com/blog/2019/3/22/governance-blockchain-and-transaction-costs> accessed 17 March 2021.

39 The Public Procurement Package of 2014, comprising Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1; 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 and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on the procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC [2014] OJ L94/243.

40 F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (European Procurement Law Series, 1st edn, DJØF Publishing 2014) 4 and K-M Halonen 'Many faces of transparency in public procurement' in K-M Halonen, R Caranta and A Sánchez-Graells (eds), *Transparency in EU Procurements. Disclosure within public procurement and during contract execution* (1st edn, Edward Elgar 2019) 11.

41 According to C Ginter, N Parrest and MA Simovart, 'Access to the Content of Public Procurement Contracts: The Case for a General EU-Law Duty of Disclosure' (2013) 4 Public Procurement Law Review 156, 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.

42 Case C-65/17 *Oftalma*, EU:C:2018:263, paras 35 and 36.

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.[43]

The ESPD was created as a tool for economic operators and contracting authorities which would enable participants in 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 use only after the implementation period of Directive 2014/24/EU expired.[44] 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 an obstacle to Small and Medium Enterprises (SMEs),[45] the use of ESPD enhances the participation of smaller economic operators.

One of the many benefits of using the ESPD is that it assists public administration in verifying documentation from another Member State. Together with the virtual company dossier (VCD),[46] 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.[47] This set of instruments – comprised by the ESPD, eCertis and VCD – aims to serve as a tool to enhance communication between tenderers involved in a team,[48] as well as to ease the

43 On the functioning of eCertis and public procurement, see 'Single Market Scoreboard' (*European Commission*, — —) <https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/e-certis/index_en.htm> accessed 31 August 2020.

44 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, art 22: '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' cjo art 90: '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'.

45 A Sánchez García 'La contratación pública electrónica en Italia: Evolución, análisis y propuestas de mejora' (Doctoral thesis, University of Bologna 2019) 154.

46 See 'About VCD – Virtual Company Dossier' (*Joinup*, — —) <https://joinup.ec.europa.eu/collection/pan-european-public-procurement-online-peppol/solution/vcd-virtual-company-dossier/about> accessed 15 September 2020.

47 As part of the selection process before awarding a contract, a contracting authority may ask for proof of professional, technical, or economic standing from the economic operators that ensures that they have the capacity to carry out a contract. See 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, art 58.

48 S Bobowski and J Gola, 'E-procurement in the European Union' (2018) 17 The Asia-Pacific Journal of European Union Studies 23.

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.

The use of the ESPD and other electronic means (VCD, eCertis) is included under the sphere of the Internal Market Information system (IMI).[49] 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: these allow public authorities to identify counterparts in other countries; 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; it also simplifies tremendously the administrative and language burdens faced by an economic operator.[50] Therefore, as a consequence of the above, the digitalisation of the tools systematically used in public procurement can potentially abolish bureaucratic barriers such as handling physical documentation, deadlines, or even language barriers.[51] With such instruments as the one addressed, the public procurement market is closer to a digital market not limited by borders.[52]

The existence of intrinsic bureaucratic and language barriers between Member States has been one of the conditions for the CJEU not to determine the existence of cross-border interest. With the use of digital tools it becames extinct as a barrier to determining cross-border interest.

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49 'Single Market Scoreboard Report: Internal Market Information System (IMI)' (*European Commission*, 5 June 2019) <https://ec.europa.eu/internal_market/scoreboard/_docs/2019/performance_by_governance_tool/imi_en.pdf> accessed 15 December 2020.

50 See Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document [2016] OJ L3/16, Recital 4.

51 On the potential of eProcurement and current issues, see A Sánchez-Graells, 'EU Public Procurement Policy and the Fourth Industrial Revolution: Pushing and Pulling as One?' (YEL Annual EU Law & Policy Conference 2020: 'EU Law in the era of the Fourth Industrial Revolution', Paris, 10 January 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440554> accessed 17 March 2021.

52 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' COM (2015)192 final, 3.

4. A digital cross-border interest

The combination of the two sections above result in a paradigm shift in which we apply the rules that conform to 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* and *Tecnoedi*,[53] we can also define cross-border interest as '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.'

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 and ultimately converges on the idea that the examination of the presence of a cross-border interest is based on an assessment of the conditions of the contract. Such an examination determines to what extent it is worthwhile 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 the use of international standards as a facilitator for the provision of certain supply contracts to be an indication for the existence of cross-border interest.[56]

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 database, administrative burdens and language limitations were abolished, thus

53 Case C-95/10 *Strong Segurança* [2011] ECLI:EU:C:2011:161 and Case C-318/15 *Tecnoedi Construzioni Srl* [2016] ECLI:EU:C:2016:747.
54 Case C-95/10 *Strong Segurança* [2011] ECLI:EU:C:2011:161, para 35.
55 See Case C-318/15 *Tecnoedi Construzioni Srl* [2016] ECLI:EU:C:2016:747.
56 See Case C-278/14 *SC Enterprise Focused Solutions SRL*, EU:C:2015:228.

allowing economic operators to engage with contracting authorities in an easier way. With the extension of the use of digital tools and ICT systems, not only is it easier for contracting authorities to publish tender notices; 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 still low compared to national-only procurement – has increased since the entry into place of provisions regarding e-procurement. Therefore, it is outdated to consider the existence of cross-border interest as well as the applicability of EU public procurement law on the basis of pecuniary values, and it does not correspond to the reality of the available mechanisms. Taking as a starting point the definition provided above and the examination of the case law from the CJEU, the only logical conclusion is to understand that, as part of the natural developments of law and technology, European public procurement law must adapt to the inclusion of new technology and digital tools. As part of the increase on digitalisation of public procurement, European principles should be rendered automatically applicable.

Elaborating on the above, based on the definition of cross-border interest, 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. The interaction with a contracting authority via public procurement should reflect that process. Additionally, the mechanisms addressed in Section 3 are directly aimed at, on the one hand, increasing transparency and, on the other hand, abolishing internal market barriers potentially arising from the difficulty to understand public procurement contracts falling below the threshold from a different Member State:[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 see how the tools included in Directive 2014/24/EU fulfil to a certain extent the interoperability criteria defined under the ISA² programme.[59] Under the ISA² Programme, it is acknowledged that

57 Commission, DG Internal Market, Industry, Entrepreneurship and SMEs, DG Single Market for Public Administrations, *Measurement of impact of cross-border penetration in public procurement. Final report. February 2017.* (Publications Office of the European Union 2017 <https://op.europa.eu/en/publication-detail/-/publication/5c148423-39e2-11e7-a08e-01aa75ed71a1> accessed 15 December 2020 and
Commission and DG Internal Market and Services, 'Final report. Cross-border procurement above EU thresholds'. (*Publications Office of the European Union*, March 2011 <https://op.europa.eu/en/publication-detail/-/publication/0e081ac5-8929-458d-b078-a206760093 24> accessed 15 December 2020.

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

59 Decision (EU) No. 2015/2240 of the European Parliament and of the Council of 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 [2015] OJ L318/1.

[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 and re-usage of data.[61] The same core principles are embedded in the provisions of Directive 2014/24/EU and other developing legal instruments pertaining the use of the ESPD and eCertis database.[62] An example of such interoperability and re-usage of data can be seen in Recital (55) of Directive 2014/24/EU, where such possibility is specifically provided for electronic catalogues. A similar point is raised in Recital (85) *in fine*:

(…) 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.[63]

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.

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60 See Decision (EU) No. 2015/2240 of the European Parliament and of the Council of 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 [2015] OJ L318/1, Recital 30.

61 ibid, art 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'.

62 Commission Implementing Regulation (EU) 2016/7 of 5th January 2016 establishing the standard form for the European Single Procurement Document [2016] OJ L3/16.

63 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, Recital 85.

5. Conclusion

The aim expressed at the beginning of this paper was to answer the following 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 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', 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 principles of public procurement and primary EU law are applicable to the contract despite its law value. However, it is not clear whether that constitutes a significant enlargement of European Law which therefore seeps into the realm of national legal sovereignty.

Nevertheless, an example of the potential effect of the increase on digitalisation in public procurement 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.[64] As a consequence, emphasis was made on creating a single digital tool to enable all contracting authorities to centralise and make accessible information pertaining to public contracts. Moreover, the general administrative legislation[65] includes digitalisation as part of the 'hard core nucleus' of the 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 the paradigms in which we apply

64 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. *BOE* núm.272, de 09/11/2017, páginas 107714 a 108007. Ref. BOE-A-2017-12902.

65 Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas. *BOE* núm.236, de 02/10/2015, páginas 89343 a 89410. Ref. BOE-A-2015- 10565 . See also IM Delgado, 'La difusión e intercambio de información contractual a través de medios electrónicos. Publicidad, notificaciones y comunicaciones electrónicas' in I Gallego Córcoles and E Gamero Casado (eds), *Tratado de contratos del sector público* (vol 2, Tirant lo Blanch 2018) 1910.

European public procurement law. This is something to be taken into account, and calls for additional research in the upcoming years.