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Horizontal Cross-Fertilization and Cryptotypes in EU Administrative Law

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Abstract

It is well known that comparative law can be a tool to interpret one's own national law by a cross-fertilization discourse with other legal systems or, more precisely, by verifying how judges or administrators in other legal systems have solved similar problems, since judges (and administrators) tend to apply similar policy considerations when cases are similar. This paper applies this method of horizontal cross-fertilization to the field of public procurements – where national case law is very broad – looking for the interpretation of Directives 17 and 18/2004 as developed in case law or the administrative practice of Member States. In particular, this paper refers to under-the-threshold public procurements, which seems a particularly fruitful and relatively easy field for the application of the proposed method under two perspectives.

The first is the analysis of different models of application in Member States: according to the extension model, the Directive application was also extended to under-the-threshold contracts; according to the non-extension model was not happen while the selective extension model only extended to under-the-threshold contracts some features of the Directives. The second is the presence in all national legislation of a 'cryptotype', not explicitly mentioned in the Directives, which is that of 'minor contracts', that is contracts under internal thresholds, lower than the EU thresholds, which are exempted by national legislations from any formality in the award procedure (i.e. they can be awarded on a private law basis).

The analysis conducted in this paper shows the creation of some common rules in Member States, not imposed by EU law, or by the Court of Justice. The result of this analysis can also be used in a more challenging way, proposing nationally shared interpretations of Directives as solutions to legal problems not yet tackled – or not yet solved – by the European Court of Justice (ECJ). The idea is that European institutions – and the ECJ above all – cannot ignore the common trends of administrative law developing at the national level – a sort of 'spontaneous jus commune' – and must take it into consideration when deciding 'hard' cases.

1 Introduction

1.1. It is well known that comparative law can be a tool to interpret one's own national law through a cross-fertilization discourse with other legal systems or, more precisely, through the 'voluntary use by judge (or counsel) of foreign law and foreign legal ideas as a means of shaping national law when this is unclear, contradictory or otherwise in need of reform'[1]. In order for this method to work properly, it is necessary to presuppose that 'the core issues that confront our European systems are the same, even though the answers they receive may be different':[2] only if faced with the same problem in two or more different legal systems, can the comparative lawyer find out different legal solutions to the same problem. It follows that the qualification of the common problem is one of the most important elements of the comparative analysis because if the starting point – the common problem – is not shared, there is no use in comparing solutions that different legal systems provide to different legal problems.

If this method is applied to EU-shaped administrative law in Member States it can be even more efficient because the starting points are not just common policy considerations, but a common text consisting of a Directive or a regulation.[3] Going further, public procurement is a field of EU administrative law in which this method can be applied with good results, simply because national case law on the application of Directives 17 and 18/2004 is very broad and practical problems which national authorities are faced with are usually very similar, so that legal solutions to similar problems can be easily compared.

The proposed comparative method can be considered an experiment in horizontal cross fertilization – as opposed to the classical bottom-up and top-down trends in European law – since it aims to fill the gaps in one nation's case law through recourse to the case law of another Member State. For example, a decision of the French Conseil d'Etat can be used by Belgian judges in the absence of national precedents, and *vice versa*, since the text to be applied is presumably similar because the two national legislations (French and Belgian) are implementing the same EU Directive. The similarity of the text to be applied derives

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1 B. Markesinis, *Comparative Law in the Courtroom and Classroom*, Oxford – Portland Oregon: Hart Publishing 2003, p. 157. However, for a critical analysis of circulation of legal models through judicial systems, see G. De Vergottini, *Oltreildialogotra le Corti*, Bologna: Il Mulino 2010 and, with specific reference to administrative law, Lichère, Potvin Solis & Raynouard (a cura di), *Le dialogue entre les jugeseuropéens et nationaux: incantation ouréalité?*, Bruxelles: Bruylant, 2002.

2 Markesinis, cit., p. 198.

3 There is obviously a relevant difference between directives and regulations as to their legal effect, but not so much – especially in administrative matters and even more in public procurement issues – in consideration of the highly detailed texts of directives which are often similar to regulations.

from the presumption that Directives on public procurements, being 'quasi' regulations, are basically implemented into national legislations with a simple transposition of the text, even if there are actually different techniques in the implementation of directives on public procurements between Member States.[4]

Possible linguistic differences in the text of the Directives, far from being an obstacle, enhance the efficiency of the comparative method, increasing the tools of the interpreter who must pick up the 'correct' linguistic version by comparing its own version with the other linguistic versions.[5] It is well known that, in case of different linguistic versions of the same Directive or Regulation, according to the ECJ: the need for a uniform interpretation of Community law makes it impossible for the text of a provision to be considered, in case of doubt, in isolation; on the contrary, it requires that it be interpreted also in the light of the versions existing in the other official languages (see Case 9/79 *Koschniske* [1979] ECR 2717, paragraph 6; Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 36; and Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 20) and by reference to the purpose and general scheme of the rules of which that provision forms part (Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14)'.[6] It follows that, the solution suggested by ECJ in case of doubt on the interpretation of a Directive or Regulation, consists of comparing the different linguistic versions of the Directive or Regulation with the scope to find out the common meaning, and this research is done with a linguistic comparative method which is parallel to that described above in the quotations from the book of Basil Markesinis: one unclear linguistic version can be interpreted through recourse to other linguistic versions. The desired result is, in fact, to find the 'correct' meaning of the Directive or Regulation (considered as one only piece of legislation, put in different linguistic versions) looking at the other linguistic version and thus suggesting that the 'correct' meaning of the Directive or Regulation is that shared by the highest number of linguistic versions, also taking into account the purpose and general scheme of the rules in which that provision takes part.

1.2. The recourse to comparative analysis for interpreting European Administrative Law[7] can also lead to a more challenging result, if nationally shared interpretations or applications of Directives are proposed as solutions to legal

4 S. Arrowsmith, 'Legal techniques for implementing Directives. A case study of public procurements', in: Craig-Harlow, *Lawmaking in the European Union*, London: Kluwer 1998, p. 491-513.

5 M. Derlén, *Multilingual interpretation of European Union Law*, Leiden: Wolters Kluwer 2009, p. 341-356.

6 Judgment of 17 September 2009, *Vorarlberger Gebietskrankenkasse* (C-347/08, ECR 2009, p. I-8661), par. 26.

7 European administrative Law is considered here to be the sum of Administrative Law of the EU and National Administrative legal systems: see Auby & Dutheil de la Rochère, 'Introduction générale', in: Auby & Dutheil de la Rochère (eds), *Droit administratif européen*, Bruxelles: Bruylant 2007, p. 3-6.

problems not yet tackled – or not yet solved – by the ECJ. The idea is that European institutions – and the ECJ above all – cannot ignore the common trends of administrative law developing at the national level – a sort of 'spontaneous *jus commune*' – and must take it into consideration when deciding 'hard' cases.

Here, the starting point is always a common problem in the application of European law (of public procurements), but the reasoning is more articulated because it implies three steps: (i) there is not a clear rule of European Law addressing this problem but (ii) there is a common rule shared by some national administrative systems and thus (iii) this common rule shared by national administrative systems should be considered, at EU level, as a possible solution to the problem to be adopted as *the* European law solution to that specific problem. The result is not, like in the case examined at point 1.1, a tool for interpreting national law through another national law, but a method for elaborating and proposing the adoption of EU rules through the discovery of rules shared by national administrative systems.

However, it is not very frequent that the common rule shared by national administrative systems is the result of a horizontal cross fertilization process: legal transplants are more often based on presumption than on clear evidence[8]. It happens more often, like in the case examined in this paper, that the existence of common rules in national administrative systems of Member States is due to chance or, more realistically, to the need for an efficient legal answer to similar problems existing in national administrative systems. The examples proposed in this paper will more clearly show the potential of this approach.

1.3. This paper will focus on public procurements under the threshold, which seems a particularly fruitful, and relatively easy, field for the application of the proposed method. In fact, the first (and main) question tackled approaching this field with a comparative method is the following: in the absence of a precise European legislation on public procurements below-the-threshold, and assuming that only Treaty principles have to be applied, as prescribed by the EU Commission communication of 2006[9] and stated by ECJ case law cited in the following paragraphs, what are the rules of the Directives that each national legal systems has deemed necessary to apply to below-the-threshold?

The question could be rephrased as follows: what are, in addition to what is already clear at EU level (frankly, not so much), the 'additional' legal devices that each national legal system applies to below-the-threshold, if any? Possible models can vary from a total application of EU Directives to below-the-threshold

8 A. Watson, *Legal transplants: an approach to comparative law*, Edinbourgh: Scottish Academic Press 1974.

9 Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions ofthe Public Procurement Directives (2006/C 179/02).

procurements, to the opposite, more liberal, scheme by which below-the-threshold procurements are ruled only by strictly necessary EU law (and case law), such as the Communication of 2006 and ECJ decisions (like the Secap case and a few others).

In between those two 'extreme' models, national legal systems can select rules of the Directives and decide to apply them to below-the-threshold public procurements.

The scope of this paper is to verify what the intermediate models are, and if there are one or more single features which are commonly applied by Member States to below-the-threshold, also if not imposed by EU law. If those common models not imposed by EU statutory law or case law do exist, the second step would be to verify whether they are simply the result of chance (for those who do not believe in chance: the necessary result of similar responses to similar problems), or, instead, a horizontal cross-fertilization.

The comparative data contained in this paper are the result of a study made by a research group on public procurements (European Procurements Law Series – EPLS), including national reports on the UK, Spain, Germany, France, Denmark, Romania, Italy and Poland which publish a yearly report on main issues in Public procurements. The 2012 report, yet to be published, focuses on public procurements below-the-thresholds.[10]

2 The Definition of Contracts Excluded from the Coverage of EU Directives

The EU Commission Communication of 2006 states that Public Procurement Directives do not apply to all public contracts; in particular, there remains a wide range of contracts that are not or only partially covered by them, such as:

- contracts below the thresholds for application of Public Procurement Directives;
- contracts for services listed in Annex II B to Directive 2004/18/EC;
- contracts for services listed in Annex XVII B to Directive 2004/17/EC.

Referring to these contracts, the EU Commission, first of all, underlines that contracting entities have to comply with the rules and principles of what is now the Treaty on the Functioning of the European Union (TFEU): mainly, the principles of equal treatment and non-discrimination which imply an obligation of transparency.

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[10] Dacian Dragos & Roberto Caranta (Eds), *Outside the Directives, inside the Treaty? Public procurement below thresholds and Annex II B services* (European Procurement Law series), Forthcoming.

This is why national legal systems of most of the EU countries analysed here decided in the last few years to extend the application of the rules in the public procurement Directives to contracts below-the-threshold, notably to guarantee the application of EU Treaty principles.

However, the EU Commission Communication of 2006 states that these standards derived from the TFEU must be applied only to contracts having a 'sufficient connection' with the function of the Internal Market. Therefore, the first question is which are the contracts that each Member State considers as having a 'sufficient connection with the Internal Market', and which are their evaluation of the individual circumstances of the case?

However, comparing the different national legal systems, it appears that no Member State has used the criteria of 'sufficient connection' in order to apply the Directives to contracts below the EU thresholds. All Member States have primarily considered the value of the contracts, not explaining the relationship between the value of the contracts and the 'sufficient connection'. This common solution raises a question about the respect of the principle of fair competition.

3 National Legal Regime for Contracts Below the Thresholds

When implementing the 2004 Directives, national legislators had two options: 1) extending Directive rules to all public contracts; 2) leaving them outside the implementation.

So, as it is shown in the introduction, the main question concerns if and how every national system extended the Directives regime of public procurement to below-the-thresholds contracts.

3.1.1 Extension of Directives to Below-Thresholds Contracts and the Problem of 'Gold Plating'

On the one hand, it is possible to have a full extension of EU Directives to contracts below-the-thresholds; this phenomenon could be defined referring to Article 2 of TFEU, according to which the Union shall have as its task the promotion of a harmonious, balanced and sustainable development of economic activities.

Minimum harmonization in EU law essentially means that the Member States have the power to lay down more stringent standards than those laid down by European legislation. So, this phenomenon refers to the practice of national bodies exceeding the terms of European Community Directives when implementing them into national law.

The 'gold plating' phenomenon – at least in its 'Italian' version – consists of the practice of national bodies exceeding the terms of European Community Directives when implementing them into national law. The question is if the

extension of public procurement Directives to below-thresholds contracts could be seen as a case of 'gold plating'.

This question arises because in Italy, Law. 28 November 2005 n. 246, art. 14 (24 bis) as recently modified by Law 12 November 2011, n. 183, art. 15 provides that implementation acts of the European Directives cannot require higher standards of regulation than those set by the Directives, except for exceptional circumstances. The national legislator also clarifies that 'higher standards' mean: (i) standards not strictly necessary for the European Directives implementation; (ii) the extension of the application of European rules; (iii) major sanctions and more onerous procedures of those strictly necessary for the European implementation.

Analysing this provision, it appears that the Italian legislator reads the phenomenon of the so-called 'gold plating', as forbidden, not only as a higher level of standards but also as an extension of the scope of European Directives.

Apart from 'gold plating', the extension of EU Directives to contracts below-the-thresholds can be problematic also in consideration of Article 114 TFUE, which provides that: 'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

Given that Directives 2004/18/EC and 2004/17/EC make express reference to Article 95 TCE (nowadays, Article 114 of TFUE) as its legal basis, it seems clear the intent of the European legislator is to remit to EU institution the approximation of the provision set by each Member State in the specific matter of public contracts. So, the scope of European Directives seems to be the uniformity of the different legislations, a sort of minimum harmonization made up by EU institutions.

3.1.2 The 'Non Extension' Model

However, in the implementation of the EU Directives, Member States can choose the opposite option of the 'non-extension' of these rules to contracts below-the-thresholds. But even if these contracts are outside the EU Directives, the national case-law and the Communication of the Commission require the application of general principles set by the same Directives and by the Treaty.

In fact, Article 2 of Directive 2004/18/EC lays down general principles of public contracts law, stating that 'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

The Court of Justice extensively interpreted this provision, applying the general principle of non discrimination and of equal treatment also to contracts

not covered by EU Directives;[11] in particular, this conclusion was also reached in reference to below-the-threshold contracts in *Vestergaard*,[12] and to list B contracts in the Case *Commission/Ireland*.[13]

In line with the Court of Justice, the EU Commission expressly indicated that these principles are applicable to the award of services concessions, to contracts below-the-thresholds and to contracts for list B services in respect to issues to which the Directives do not apply.

3.1.3 The 'Selective Extension' Model

The comparative analysis shows that most Member States followed a third solution, consisting of the extension of the Directives rules to below-threshold contracts, with some exceptions; so we can generally speak of 'selective extension'.

Analysing the national legal systems of EU countries, it is clear that there are some features which are commonly applied by Member States to below-the-thresholds.

The rules laid-down for contracts above EU thresholds and applied to below-threshold contracts concern the award criteria and namely technical specifications, abnormally low tenders, and remedies (standstill period and ineffectiveness). Most of Member States, and in particular Spain, Romania, France, Italy and Poland, extended the application of the above-mentioned rules to below-the-threshold contracts. Germany and UK decided not to extend the rules concerning remedies system and Denmark didn't extend the rules on abnormally law tender.[14]

This analysis doesn't take into consideration the so-called 'minor contracts', as defined in the following paragraph.

3.2 'Minor Contracts'

The EU Commission, in its 2006 interpretative communication, indicates that the standards derived from the EU Treaty apply only to contracts having a sufficient connection with the functioning of the Internal Market.

The Internal Market relevance of the contract depends on the different circumstances of each case, such as the subject matter of the contract and its estimated value.

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11 Case C- 324/98 *Telaustria* [2000] ECR I-10745.

12 Case C-59/00 *Vestergaard* [2001] ECR I-9505.

13 Case C-507/03 *Commission/Ireland* [2007] ECR I-9777.

14 In Germany, contracts below the thresholds are regulated in local statutes, while in the UK they are regulated according to policies determined at national and at local level.

ECJ considered that in individual cases 'such as a very modest economic interest at stake', a contract award would be of no interest to economic operators located in other Member States.[15]

Therefore, the ECJ seems to give a hint about the possibility to set minor thresholds for contracts without cross-border interest, but is not clear whether the exclusion of the cross-border interest also requires other elements in addition to the value of the contract.

In fact, Member States have set domestic thresholds, providing that below these internal thresholds the contracts can be awarded directly, without any competitive procedure and without any obligation of publicity. Among the EU countries, only the UK and Germany have not set any thresholds at the national level, leaving this to the competence of local authorities, while, in the other Member States analysed in this book, domestic thresholds have been set at national level.

In the UK, local authorities can set thresholds below which no procedural rule will apply, but this possibility is highly exceptional even if traditionally, contracts below £1000 are awarded without any formal procedures. Germany also has no federal rules, but there are internal local thresholds which currently allow the use of more flexible and less bureaucratic procedures, like individual invitations to tender and restricted invitations to tender procedure.

The Spanish system provides that work contracts under 50 000 Euros and services and supplies contracts under 18 000 Euros can be awarded directly, without competitive procedures and without publicity.

The French threshold under which there is no duty to advertise and no obligation of publicity is nowadays assessed at 15 000 Euros(originally it was 20 000 Euros; then, it was reduced at 4000 Euros). Referring to award procedures, the French Public Contacts Code allows an 'adapted procedure' that can be freely designed by the awarding authority. Similar thresholds have been set by Poland and Romania, even if the latter represents a peculiar system because direct procurement below 15 000 Euros is also mandatory.

Higher thresholds are set by Denmark and Italy. In Denmark for services and supplies contracts below 67 000 Euros and for works contracts below 400 000 Euros there is no obligation to advertise or use a competitive procedure. In Italy, there is an internal thresholds set for direct award of contracts (40 000 Euros).

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15 Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20: 'With regard to the case in the main proceedings, it is not apparent from the file that, because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in a Member State other than that of the Comune di Cingia de' Botti would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to arrant the conclusion that they may have been infringed.'

Thus, it appears that Member States seems to give similar answers to the same problem, e.g. awarding public contracts below their domestic thresholds directly, even if these domestic thresholds are only slightly different one another.

This practice raises the question of the legitimacy of specific rules for minor contracts in the light of the TFEU principles – and notably with the transparency and non-discrimination principles –, especially where the value of the thresholds is higher, such as is the case in Italy, Spain, and Denmark.

Even if at first glance it appears that EU principles should be applied to all kinds of public contracts, it is clear that the direct award of minor contracts doesn't respect those principles, regardless of what is indicated by the EU Commission.

EU Directives are only applicable to above-the-threshold contracts and initially it was implicitly considered that the thresholds defined the boundary between contracts with and without cross-border interest. Therefore, contracts below EU thresholds were considered without cross-border interest. However, the ECJ held that this assumption was wrong because the cross-border nature of the contract depends on an evaluation of the individual circumstances of each case.[16]

The Interpretative Communication of the Commission also specified that the above-mentioned individual circumstances are: the subject matter of the contract; its estimated value; the specifics of the sector concerned and the geographic location of the place of performance.

The main question concerns the implementation at national level of this indication and consists of determining which are the criteria to make a contract of cross-border interest.

The Court of Justice holds that 'It is permissible, however, for legislation to lay down objective criteria, at national or local level, indicating that there is certain cross-border interest. Such criteria could be, inter alia, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out. The possibility of such an interest may also be excluded in a case, for example, where the economic interest at stake in the contract in question is very modest (see, to that effect, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20). However, in certain cases, account must be taken of the fact that the borders straddle conurbations which are situated in the territory of different Member States and that, in those circumstances, even low-value contracts may be of certain cross-border interest'.[17]

This quite generic indication, which doesn't really say anything specific about the concept of 'cross-border interest' and which gives to the national legislation the possibility to establish 'objective criteria' to determine when a

16 Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565.
17 Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565.

contract can be of cross-border interest, seems to be uniformly interpreted by EU Member States. Most of them have, in fact, decided to set a domestic threshold, under which the contracts are considered of no cross-border interest, so that for these contracts general principles of the Treaty do not apply.

A relevant instance is given by French *Conseil d'Etat*,[18] which struck down the internal threshold of 20 000 Euros considering that it was contrary to the transparency principle, but a decree of 2011[19] reintroduced the national threshold stating that for public contracts below 15 000 Euros there is no obligation of publicity and the award procedure can be freely chosen by contracting entities provided that it is an 'adapted procedure'.

A few months later, on January 19, 2012, the Ministry of Finance issued a guideline dealing with cross-border interest of a public contract. On the one hand, the guideline insists on the fact that the cross-border interest does not depend exclusively on the situation of the contract, i.e. on the proximity to a border, although it has to be taken into account. On the other hand, the guideline nonetheless states that it is unlikely that such a requirement is applicable for public contracts below 15 000 Euro, as they do not 'manifestly' have a cross-border effect.

Even German courts, when monitoring the contracting authority's assessment decision about the contract having Internal Market relevance do examine its value; notably, the State of Hessen passed rules presuming that service contracts below 80 000 Euros and works contracts below 1 000 000 Euros were of no cross-border interest but recently the local courts hold that the contract value is only one of the determining criteria, but not the only one.[20]

The existence of French and German case law about this specific issue (i.e. about the legitimacy of 'minor contracts') could be a good starting point for fostering an horizontal cross-fertilization in other Member States since it seems – judging from the information in the EPLS book in public procurements under-the-threshold – that in other Member States there are not decided cases in that issue.

It appears clear that the contract value remains the key element for the evaluation of a cross-border interest contract, notwithstanding what the Courts and the EU commission have stated. It also appears clear that the examined Member States examined have set a common rule – that on minor contracts – which is not included in EU Directive, nor in EU case law, but is, however, well rooted and can perhaps be explained not (yet) by an horizontal cross-fertilization, but more probably by making reference to a shared need of simplification and quickness.

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18 CE 10 February 2010, *Perez*, n. 399100.

19 Decree n. 1853 of 9 December 2011.

20 OLG Dresden of 12 October 2010, W Verg 0009/10; VK Sachsen of 9 July 2010, 1/SVK/021-10.

4 Conclusion

The scope of this paper is to test the comparative method of cross-fertilization in the field of public procurements and, in particular, of public procurements above-the-threshold.

The analysis of case law and administrative practices of Member States underlines the creation of some common rules, not imposed by EU law, nor by the ECJ, which can be considered as an example of 'spontaneous' *ius commune*, probably generated by a common answer to common problems.

We have found two main examples of this phenomenon:

a. the extension (or in the most of the cases, the 'selective extension') of the application of Public procurement Directives also to below-the-threshold procurements and

b. the setting of 'internal' thresholds for 'minor contracts', that is of thresholds under which national legislation allows the contracting Authorities to award the contract directly, without publicity and other formalities, for contracts between the EU threshold and the internal threshold.

These two rules are much interconnected.

On one side, Member States legislations are stricter than EU legislation, deciding to apply, as a general rule, EU Directives also to procurements under-the-threshold, while EU Directives are explicitly applicable only to procurements above-the-thresholds.

On the other hand, national legislators provided for 'minor contracts', awarded directly without taking into account any procedural rule and, thus, in a way, forcing the ECJ and the EU Commission interpretation, where they say that the value of the contract cannot be considered as the only criterion for assessing the absence of cross-border interest.

Referring to those 'minor contracts', the analysis of case law and administrative practice of Member States shows the creation of some common rules, not imposed by EU law, or by the Court of Justice.

This phenomenon consists of the setting of domestic thresholds that are thresholds under which national legislation allows the contracting Authorities to award the contract directly, without publicity and other formalities.

Member States have set some domestic thresholds deciding that under those thresholds no publicity rules apply, and thus pursuing a loose interpretation of the Commission communication of 2006, which pretends to also apply Treaty principles to public procurements under the threshold, irrespective of their value.

Domestic thresholds set by Member States are surprisingly similar among them, but the hypothesis of a circulation of a common model through scholarly channels or through case law seems unlikely. It is more likely that each Member State found a similar practical solution to a similar problem: all the national contracting authorities have the problem to speed up awarding procedures for minor contracts and thus national legislators responded to this common problem

with the simpler legal solution available, that is by setting internal thresholds below which no procedural rules are applied, on the implicit presumption that below these internal thresholds there is no cross-border interest.

Even if it is verbalized in national statutes, the rule on 'minor contracts' can be perhaps considered a 'cryptotype' because, in the absence of case law (except for one decision of the French *Conseil d'Etat* and a couple of decisions in Germany) it is implicitly considered 'obvious' by legal scholarship.[21] In this case, the 'cryptotype' could consist of the belief that public procurements under internal thresholds do not have any cross-border influence and can therefore be awarded without any formality. No Member State legislation mentions this argument for justifying internal thresholds, but it seems that this can be the only rational justification to internal thresholds. However, being such a widespread practice in Member States, the Court of Justice could not avoid taking it into consideration, when, and if, it will be asked to decide on internal thresholds.

A solution at the EU level would be decisive for the legitimacy of the direct award of contracts, in compliance with the Treaty's principles, but a decision at the EU level – be it through statute law or case law - could not disregard what can be perceived as an already existing *ius commune* – even if not completely self-conscious – among Member States.

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[21] The recourse to cryptotypes in comparative law is well explained by R. Sacco, 'Legal Formants: A Dynamic Approach in Comparative Law (Installment II of II)', *The American Journal of Comparative law*, vol. 39, p. 343-410, 384.