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### **Paper:**

Telles, P. (2013). The Good, the Bad and the Ugly: EU's Internal Market, Public Procurement Thresholds and Cross-Border Interest (with Editor's Note). *Public Contract Law Journal*, 43, 3-25.

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## EDITOR'S NOTE: REFLECTIONS ON COMPARATIVE PUBLIC PROCUREMENT LAW

*Steven L. Schooner*

The editors of the *Public Contract Law Journal* understand that some readers may hesitate before delving into an article discussing the seemingly arcane evolution, implementation, and judicial review of the European Union Procurement Directives. But we encourage you to sample our ever-expanding offerings in comparative public procurement law for a host of reasons. Each year we see additional evidence that both markets and supply chains have become increasingly global, membership in the World Trade Organization's (WTO) Government Procurement Agreement (GPA) continues to grow (with China and its massive market marching steadily down the free-trade path), and international contracting has become less, well, *foreign* to all of us. So, go ahead and take the plunge.

If you start with Pedro Telles' intriguing piece about thresholds in European Union (EU) procurements, *The Good, the Bad, and the Ugly: The EU's Internal Market, Public Procurement Thresholds, and Cross-Border Interest*, you will not be disappointed. The article offers a case study or anecdote into another (large, diverse) public procurement regime's struggles to reconcile a host of the types of issues that will resonate with U.S. procurement experts: protectionism and harmonization, efficiency and complexity (versus, of course, simplicity), uniformity and transparency, and, of course, the role of—and externalities generated by—judicial oversight in a heavily regulated environment. As we know from our own experience, and as Telles aptly demonstrates in the EU context, implementation of significant policies that determine the private sector's access to lucrative marketplaces rarely proves as simple as anticipated.

The EU model offers unique insights to the extent that—as Americans—we might envision the Founding Fathers attempting to conceive of and create a unified procurement regime among the colonies (and, ultimately, the fifty states). Of course, we already know that—while many state procurement codes follow the federal model (or, generally, align with the ABA's Model Procurement Code), the FAR Council makes no effort to reconcile the various state procurement regimes, and the federal courts have no hand in mandating consistency between them. In that context, most American readers are taken aback when initially exposed to efforts of the EU's central governing

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authorities to mandate consistent procurement practices throughout the European states, regions, and even municipalities.

So, just imagine a federal court becoming involved in a New York State procurement to the extent that the federal court mandated CICA-like procedures *below* the New York State simplified purchasing threshold (similar to the simplified acquisition thresholds under Part 13), to ensure that non-New York contractors could compete for certain lower-dollar-value procurements. Then consider that—despite the simple elegance of familiar thresholds (e.g., \$100,000)—the federal courts began to concur that these agreed-upon thresholds would not apply where an ill-defined “cross-border” interest might exist. In other words, Contracting Officers throughout the fifty states would be implicitly tasked with conducting (prospective) market research before making a below-threshold (and, thus, simplified acquisition) purchase, or risk having their procurement interrupted and/or sanctioned by a federal court. *Toto, I’ve a feeling we’re not in Kansas anymore!*<sup>1</sup>

For those of you that read, or at least peruse, the *Journal* in order, you will notice that the comparative thread continues. Collin Swan compares (and contrasts) the evolution of disappointed offeror (or bid protest) litigation in the United States and the EU in his article, *Lessons from Across the Pond: Comparable Approaches to Balancing Contractual Efficiency and Accountability in the U.S. Bid Protest and European Procurement Review Systems*. The *Journal* then turns the focus inward, as Keith Lusby examines U.S. subcentral domestic government procurement challenge procedures in his article, *Improving the Effectiveness of State Bid Protest Forums: Going Above and Beyond the Agreement on Government Procurement and Adopting the ABA’s Model Procurement Code*.

The more I learn about public procurement regimes abroad, the better I understand the longstanding policies we take for granted and the difficult choices and complex trade-offs inherent in acquisition reform. For that reason, I hope you take the time to sample these pieces and other comparative offerings forthcoming in the *Public Contract Law Journal*.

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1. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

THE GOOD, THE BAD, AND THE UGLY: THE EU'S  
INTERNAL MARKET, PUBLIC PROCUREMENT  
THRESHOLDS, AND CROSS-BORDER INTEREST

*Pedro Telles*

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I. INTRODUCTION

The primary law applicable to public procurement in Europe can be found in the Treaty on the Functioning of the European Union (TFEU or Treaty).<sup>1</sup> The European Union (EU) regulations regarding public procurement were enacted to help create a European Internal Market.<sup>2</sup>

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1. See *generally* Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TFEU].

2. The Internal Market aims to integrate the different Member States' markets into a single European market. Its legal framework is set in Article 26 of the Treaty. See *id.* art. 26, at 59. For a discussion on the Internal Market, see DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: CASES AND MATERIALS 674–711 (2d ed. 2010); PAUL CRAIG & GRAÏNNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 581–610 (5th ed. 2011); Kamiel Mortelmans, *The Common Market, the*

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Although the Treaty does not specifically address public procurement, to ensure the achievement of the EU's Internal Market,<sup>3</sup> certain principles contained in it are applicable to public procurement.<sup>4</sup> Articles 34, 49, 55, and 56 of the Treaty enshrine principles such as equality and nondiscrimination, free movement of goods and services, and establishment, all of which are applicable to public procurement.<sup>5</sup> These principles—key tenets underpinning the EU regulatory framework of public procurement—impose negative obligations on contracting authorities to ensure they do not discriminate against undertakings based in other EU Member States.<sup>6</sup> The Treaty principles by themselves, however, were insufficient to develop a policy and more comprehensive regulation was required.<sup>7</sup>

More comprehensive regulation was achieved via two methods: case law from the Court of Justice of the European Union (Court of Justice), which has developed the principles over the last fifty years; and secondary legislation in the form of public procurement Directives.<sup>8</sup> The first round of public procurement Directives was adopted in the 1970s;<sup>9</sup> resulting regulations, derived from the Directives, have been updated roughly once a decade. The current procurement Directives, commenced in 2004,<sup>10</sup> are cur-

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*Internal Market and the Single Market, What's in a Market?*, 35 COMMON MKT. L. REV. 101 (1998); Christopher Bovis, *The Regulation of Public Procurement as a Key Element of European Economic Law*, 4 EUR. L.J. 220, 220–29 (1998).

3. For a discussion of the purposes of European Union (EU) regulation in public procurement, see Sue Arrowsmith, *The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies*, in 14 CAMBRIDGE YEARBOOK EUR. LEGAL STUDIES 1, 1–47 (2012) [hereinafter Arrowsmith, *The Purpose of the EU Procurement Directives*]; Martin Trybus, *Public Contracts in European Union Internal Market Law: Foundations and Requirements*, in COMPARATIVE LAW ON PUBLIC CONTRACTS 81, 81–121 (Rozen Noguellou & Ulrich Stelkens eds., 2010); Sue Arrowsmith, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?*, 35 PUB. CONT. L.J. 337, 339 (2006) [hereinafter Arrowsmith, *The Past and Future Evolution of EC Procurement Law*]; Berend Jan Drijber & Hélène Stergiou, *Public Procurement Law and Internal Market Law*, 46 COMMON MKT. L. REV. 805 (2009).

4. See TFEU, *supra* note 1, arts. 34, 49, 55 & 56, at 61, 67, 69–70.

5. *Id.*

6. See SUE ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT* 181, 209–211 (2d ed. 2005).

7. See generally JOSÉ M. FERNÁNDEZ MARTÍN, *THE EC PUBLIC PROCUREMENT RULES: A CRITICAL ANALYSIS* 4–37 (1996); ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT*, *supra* note 6, at 181–218; PETER TREPTE, *PUBLIC PROCUREMENT IN THE EU: A PRACTITIONERS GUIDE* 1–27 (2d ed. 2007).

8. Directives impose obligations on the Member States to achieve stated objectives. Sue Arrowsmith, *Introduction to the EU*, in *EU PUBLIC PROCUREMENT LAW: AN INTRODUCTION* 28 (Sue Arrowsmith ed., 2010). Each Member State must transpose the Directives into their national law and comply with the stated objectives, but the Member States have a degree of discretion on how to achieve such objectives. *Id.*

9. See, e.g., Council Directive 71/305, 1971 O.J. (L 185) 682 (EC). For a background on the historical evolution of public procurement regulation in Europe, see ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT*, *supra* note 6, at 119–61.

10. See Council Directive 2004/17, 2004 O.J. (L 134) 1 (EC) (the Utilities Directive); Council Directive 2004/18, 2004 O.J. (L 134) 114 (EC) (the Public Sector Directive or Classical Directive). There are other Directives applicable to public procurement. See, e.g., Council Directive 92/13, 1992 O.J. (L 76) 14 (EC) (effectiveness of review procedures concerning the award of

rently being revised and a final version is expected before the end of 2013.<sup>11</sup> The Directives' scope has expanded to cover more contracts and sectors, and they have become increasingly more detailed, to the point that Member States, such as the United Kingdom and Denmark, have transposed the 2004 Directives into their national legislation with minimal alterations.<sup>12</sup> Indeed, to say a contract is covered by EU public procurement regulations is to say that it is covered by the substantive public procurement Directives.<sup>13</sup>

Crucially, the regulations are only applicable to contracts over certain financial thresholds.<sup>14</sup> There are different thresholds, however, and determining which particular one applies depends on three factors: the sector (general or utilities), the contract nature (works, goods, or services), and the contracting authority (central government or others).<sup>15</sup> These different thresholds will be examined in more detail in Part II. Below the thresholds, Member States are free to regulate procurement and all of them do so in one way or another.<sup>16</sup> The exceptions to this rule are contracts that fall below the financial threshold but that have a "cross-border interest."<sup>17</sup> The Treaty principles are applicable to these contracts and function, ultimately, as a constraint on national rules.<sup>18</sup>

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public contracts); Council Directive 2009/81, 2009 O.J. (L 216) 76 (EC) (defense sector); Council Directive 2007/66, 2007 O.J. (L 335) 31 (EC) (remedies). For background on Council Directive 2007/66 (remedies), see Roberto Caranta, *Many Different Paths, But Are They All Leading to Effectiveness?*, in 3 ENFORCEMENT OF THE EU PUBLIC PROCUREMENT RULES (Steen Treumer & François Lichère eds., 2011).

11. Current reform is focused on the substantive Classical and Utilities Directives. See *Proposal for a Directive of the European Parliament and of the Council on Public Procurement*, COM (2011) 896 final (Dec. 20, 2011); *Proposal for a Directive of the European Parliament and of the Council on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors*, COM (2011) 895 final (Dec. 20, 2011). The Commission also plans to propose a Directive on service concessions in the near future. *Proposal for a Directive of the European Parliament and of the Council on the Award of Concession Contracts*, COM (2011) 897 final (Dec. 20, 2011).

12. See generally ASHURST, UK PUBLIC PROCUREMENT 1–2 (2012) (describing EU and United Kingdom (UK) legislation on procurement and stating that “[i]n the UK, national legislation on public procurement implements the Directives”); MOALEM WEITEMEYER BENDTSEN, DANISH REGULATION OF PUBLIC PROCUREMENTS, <http://www.mwblaw.dk/da-dk/Doing%20Business%20in%20Denmark/~media/Doing%20Business%202013/Danish%20Regulation%20of%20Public%20Procurements.ashx> (last visited Oct. 1, 2013) (“Directive 2004/18/EC on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal service sectors are both implemented into Danish law.”).

13. See generally Arrowsmith, *The Purpose of the EU Procurement Directives*, *supra* note 3, at 4–5 (emphasizing the importance of the Directives and their role in filling in gaps created by the TFEU).

14. See *Commission Interpretive Communication on the Community Law Applicable to Contract Awards Not or Not Fully Subject to the Provisions of the Public Procurement Directives*, 2006 O.J. (C 179) 2, 2 & n.2 [hereinafter *Commission Interpretive Communication*] (“Threshold values are set in Article 7 of Directive 2004/18/EC and Article 16 of Directive 2004/17/EC.”).

15. See *infra* Tables 1–4.

16. See Sue Arrowsmith, *The Public Sector Directive 2004/18: Scope of Coverage*, in EU PUBLIC PROCUREMENT LAW: AN INTRODUCTION, *supra* note 8, at 100–01.

17. See discussion *infra* Part IV.

18. See ARROWSMITH, THE LAW OF PUBLIC AND UTILITIES PROCUREMENT, *supra* note 6, at 209.

Under the current system, the thresholds are so high that only 17.7% of all procurement expenditures are covered by the EU public procurement Directives.<sup>19</sup> Thus, over eighty percent of all money that is spent on public procurement in the EU is not governed by European law.<sup>20</sup> If EU procurement regulation is important for fulfilling the Internal Market objective, why is this ratio skewed against the Directives?<sup>21</sup> Further complicating the issue, the Court of Justice has been attempting to define “cross-border interest” for almost fifteen years but has failed to supply a definition that provides any degree of legal certainty.<sup>22</sup> The Court of Justice proposes an evolving concept of cross-border interest, but rather than fully define cross-border interest, the Court only provides examples. For instance, whereas originally the simple *potential* of cross-border interest by foreign undertakings was sufficient to satisfy the test, currently the Court appears to demand that such interest needs to be *real*, not hypothetical.<sup>23</sup> The test, however, is impossible to carry out reliably in advance of bidding. This lack of legal certainty<sup>24</sup> is, therefore, the primary drawback of the cross-border interest test as created by the Court of Justice.

This Article acknowledges that the Court of Justice was correct to consider that there is an Internal Market composed of contracts whose financial value falls below the EU thresholds. But the correct approach for achieving the Internal Market objective would be to lower the thresholds, and thereby apply all EU law (Treaty Principles and Directives’ rules) to most contracts tendered. This should be done in conjunction with simplifying the open procedure<sup>25</sup> for small-value contracts to avoid increasing transaction and opportunity costs.

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19. For the percentage of public contracts advertised in the *Official Journal of the European Union* (O.J.) in 2011, see EUROPEAN COMMISSION, PUBLIC PROCUREMENT INDICATORS 2011, at 6 (Dec. 5, 2012), available at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/public-procurement-indicators-2011\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/public-procurement-indicators-2011_en.pdf) (hereinafter PUBLIC PROCUREMENT INDICATORS 2011).

20. See *id.*

21. See generally *id.*

22. See Adrian Brown, *EU Primary Law Requirements in Practice: Advertising, Procedures and Remedies for Public Contracts Outside the Procurement Directives*, 19 PUB. PROCUREMENT L. REV. 169, 170 (2010).

23. See discussion *infra* Part IV.B.

24. See *id.* (“The manner in which public contracts must be awarded to comply with the general principles of EU law is not always clear.”).

25. The current Public Sector Directive establishes that, by default, contracting authorities should use either the open or restricted procedures to award contracts. Council Directive 2004/18, *supra* note 10, at 13411. Both of these procedures have strong transparency and equal treatment safeguards to ensure that participants are not discriminated against. See PWC ET AL., PUBLIC PROCUREMENT IN EUROPE: COST AND EFFECTIVENESS REPORT 15 (2011) [hereinafter COST AND EFFECTIVENESS REPORT] (describing the equal treatment safeguards). The difference between the open and restricted procedure lies in the way that participants are admitted to present bids. ORG. FOR ECON. CO-OPERATION & DEV., SIGMA PAPERS No. 45, PUBLIC PROCUREMENT IN EU MEMBER STATES—THE REGULATION OF CONTRACT BELOW THE EU THRESHOLDS AND IN AREAS NOT COVERED BY THE DETAILED RULES OF THE EU DIRECTIVES 16 (2010) [hereinafter THE REGULATION OF CONTRACT BELOW THE EU THRESHOLDS] (stating a difference in time periods between the two systems). In the restricted procedure, only the best

## II. CURRENT THRESHOLDS

The different EU public procurement thresholds are set every two years by the European Commission via Regulations.<sup>26</sup> The current thresholds were set by Regulation EC 1251/2011 and are valid for 2012 and 2013.<sup>27</sup> The proposed Directives will establish thresholds going forward; the overall values remain unaltered, other than adding a new threshold for social care services at €750,000.<sup>28</sup>

**Table 1. Current Threshold Values for Contracts Covered by the Public Sector and Defense Directives<sup>29</sup>**

Public Sector and Defense	Threshold Value
Works	\$6,640,000 (€5,000,000)
Annex B Services	\$265,000 (€200,000)
Supplies and Services (Central Government)	\$172,000 (€130,000)
Certain Supplies in the Field of Defense	\$265,000 (€200,000)
Supplies and Services (Sub-central Government)	\$265,000 (€200,000)

**Table 2. Current Threshold Values for Contracts Covered by the Utilities Directive<sup>30</sup>**

Utilities Sector	Threshold Value
Works	\$6,640,000 (€5,000,000)
Supplies and Services	\$530,000 (€400,000)

“x” candidates are invited to present bids, whereas in the open procedure any participant that satisfies the minimum selection criteria (financial standing, technical capacity, and experience) must be allowed to submit tenders. COST AND EFFECTIVENESS REPORT, *supra*, at 15. The safeguards, timescales, and overall bureaucracy render the open procedure as established by the Public Sector Directive inadequate for the tendering of low-value contracts. *See generally id.*

26. SWEETT GRP., A USER’S GUIDE TO EU PROCUREMENT RULES 10 (2012).

27. Alistair Maughan, *UK Public Procurement Law Digest: New Threshold Values for 2012 & 2013*, MORRISON FOERSTER 1 (Dec. 19, 2011), <http://www.mofo.com/files/uploads/images/111219-uk-public-procurement-law-digest.pdf>.

28. ASHURT LLP, EUROPEAN COMMISSION PUBLISHES NEW LEGISLATIVE PROPOSALS ON PUBLIC PROCUREMENT (2012). The thresholds within the Public Sector Directive will come into force on June 30, 2014. *Id.*

29. Maughan, *supra* note 27, at 1.

30. Maughan, *supra* note 27, at 1–3.

**Table 3. Current Government Procurement Agreement (GPA) Threshold Values for Contracts Tendered by European Central Contracting Authorities<sup>31</sup>**

Government Procurement Agreement (Central authorities)	Value (Special Drawing Rights)	Threshold Value
Works	SDR 5,000,000	\$7,538,000 (€5,680,000)
Supplies	SDR 130,000	\$196,006 (€148,000)
Services	SDR 130,000	\$196,006 (€148,000)

**Table 4. Current GPA Threshold Values for Contracts Tendered by European Sub-central Contracting Authorities<sup>32</sup>**

GPA (Sub-central authorities)	Value (Special Drawing Rights)	Threshold Value
Works	SDR 5,000,000	\$7,538,000 (€5,680,000)
Supplies	SDR 200,000	\$301,548 (€227,000)
Services	SDR 200,000	\$301,548 (€227,000)

Comparing Tables 1 and 2 with Tables 3 and 4, the financial thresholds applicable to EU public procurement are slightly lower than the GPA thresholds. Arguably, the GPA agreement values establish an upper boundary for the EU thresholds; if the EU thresholds were higher, then the EU would not be compliant with its own GPA commitments. It is worth noting that the EU thresholds are neither identical to the GPA threshold values nor much lower, but rather are just close enough to be within a similar value bracket. Furthermore, while the current EU thresholds are limited on their upper boundary by the GPA, nothing impedes the EU from setting lower thresholds.

Tables 1 and 2 also illustrate that multiple thresholds can be applied to a contract. The actual threshold applicable depends on the type of contract and contracting authority.<sup>33</sup> This makes the application of EU rules unnecessarily complex. The same substantive contract may be subject to different

31. *Annex to the Proposal for a Council Decision on the Conclusion of the Protocol Amending the Agreement on Government Procurement*, at 60, COM (2013) 143 final (Mar. 22, 2013). SDR (special drawing rights)–Euro exchange rate as of September 30, 2013, rounded to the nearest thousand. *Currency Units per SDR for July 2013*, INT’L MONETARY FUND, [http://www.imf.org/external/np/fin/data/rms\\_mth.aspx?SelectDate=2013-07-31&reportType=CVSDR](http://www.imf.org/external/np/fin/data/rms_mth.aspx?SelectDate=2013-07-31&reportType=CVSDR) (last visited Oct. 1, 2013). The same exchange rates are used in all figures hereinafter.

32. *Annex to the Proposal for a Council Decision on the Conclusion of the Protocol Amending the Agreement on Government Procurement*, *supra* note 31, at 60; *Currency Units per SDR for July 2013*, *supra* note 31.

33. COST AND EFFECTIVENESS REPORT, *supra* note 25, at 69.

thresholds, depending on the nature of the contracting authority awarding it.<sup>34</sup> For example, servicing a piece of equipment by a contracting authority covered by the Utilities regime will only have to be advertised if valued over €400,000.<sup>35</sup> An identical contract for the same piece of equipment, if tendered by a local government, must only be advertised if valued over €200,000 and if tendered by the Central Government, the threshold is only €130,000.<sup>36</sup> It is illogical to set three different thresholds to govern contracts that are identical, in almost every sense, except for their source. Is the contract not equally important for the Internal Market, regardless of its source?

The procurement framework would benefit from a simplification of the threshold system and unification of thresholds across the whole spectrum.<sup>37</sup> Authors Sue Arrowsmith and Rosemary Boyle, however, suggest that the threshold unification should be achieved by increasing the threshold values of the Public Service and Defence Directives to match that of the Utilities Directive.<sup>38</sup> This proposal would have a limited effect in practice because the thresholds are currently so high that they exclude “as much as [eighty] percent of” the public procurement expenditures, in the EU, from regulation by the EU Directives.<sup>39</sup>

### III. CONTRACTS ABOVE THE EU THRESHOLDS

In 2011, only 17.7% of all public procurement expenditures in the EU were advertised in the *Official Journal of the European Union* (O.J.).<sup>40</sup> This percentage is predominantly comprised of contracts with a value above the EU thresholds (thus covered by the procurement Directives), and some with a value below the EU thresholds but having a cross-border interest.<sup>41</sup> Service concessions and contracts with a value below the thresholds can also fall within this latter category.<sup>42</sup> This begs the question: if the objective

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34. *Id.*

35. *See supra* Table 2.

36. *See supra* Table 1.

37. Sue Arrowsmith, *Modernising the European Union's Public Procurement Regime: A Blueprint for Real Simplicity and Flexibility*, 21 PUB. PROCUREMENT L. REV. 71, 73 (2012) [hereinafter Arrowsmith, *Modernising the European Union's Public Procurement Regime*].

38. *See id.* at 72–73; Rosemary Boyle, *EU Procurement Green Paper on the Modernisation of EU Public Procurement Policy: A Personal Response*, 20 PUB. PROCUREMENT L. REV. NAI71, NAI81 (2011).

39. *See* COST AND EFFECTIVENESS REPORT, *supra* note 25, at 91. Even if the thresholds were to be raised by fifty percent, it would reduce the scope of the Directives five percent per value and twelve percent in the number of contracts. *Id.* at 5.

40. PUBLIC PROCUREMENT INDICATORS 2011, *supra* note 19, at 6 (showing the percentage of public contracts advertised in the O.J. in 2011). In addition to the paper format, information on tenders is also published online. *See Tenders Electronic Daily*, EUROPA, <http://ted.europa.eu> (last visited Oct. 01, 2013).

41. *See generally* PUBLIC PROCUREMENT INDICATORS 2011, *supra* note 19.

42. *See generally* COST AND EFFECTIVENESS REPORT, *supra* note 25, at 69. For notices on the O.J. between 2006 and 2010, as found by the Commission, where perhaps eighteen percent

of EU public procurement regulation is to protect and help achieve the Internal Market, why are over eighty percent of public contracts exempt from most EU procurement rules? The Internal Market for public procurement is surely larger than the 17.7% of the total amount of public contracts advertised inside the EU.

There is no obvious reason for this disparity between the Internal Market objective and the regulation of less than twenty percent of its public procurement expenditures.<sup>43</sup> Two different justifications, however, may be put forward. First, regarding public procurement, the EU only has jurisdiction to regulate areas covered by the Internal Market.<sup>44</sup> Therefore, in theory, national laws should not solely regulate a public contract of a national nature.<sup>45</sup> Second, international politics may be at play; namely, the desire by Member States to have thresholds as high as possible to function as a de facto protectionist regime.<sup>46</sup>

Regarding the first justification, it is a well-established tenet that EU law can only apply to situations where the EU treaties confer upon it either an exclusive or joint competence to regulate.<sup>47</sup> The development of the Internal Market is an area of EU competence; therefore, EU law can only regulate the contracts that have a cross-border interest.<sup>48</sup> Contracts outside the Internal Market, i.e., without cross-border interest, remain within Member States' power to regulate.<sup>49</sup>

There is no certainty, however, that the above-threshold contracts covered by the Directives are actually part of the Internal Market.<sup>50</sup> These contracts potentially could not have cross-border interest, but they are governed nonetheless by EU and not national law.<sup>51</sup> The EU thresholds are blunt, binary instruments: over the thresholds, EU provisions contained in the public procurement Directives are fully applicable, but below the thresholds they

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of such notices are for contracts under the EU thresholds, see *id.* at 69. For a discussion of relevant case law and practical options for advertising contracts and concessions, see Brown, *supra* note 22, at 169–76.

43. See PUBLIC PROCUREMENT INDICATORS 2011, *supra* note 19, at 6; COST AND EFFECTIVENESS REPORT, *supra* note 25, at 13.

44. See generally TFEU, *supra* note 1, art. 5 at 18; Arrowsmith, *The Purpose of the EU Procurement Directives*, *supra* note 3, at 4–15; Sue Arrowsmith, *The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach*, 27 EUR. L. REV. 3, 4–5 (2002) (describing the European Commission Treaty and Directives that regulate the Internal Market).

45. See Arrowsmith, *Modernising the European Union's Public Procurement Regime*, *supra* note 37, at 72.

46. See discussion *infra* Part IV.

47. EU Law, EUROPA, <http://europa.eu/eu-law/> (last visited Oct. 1, 2013) (“[E]very action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU member countries.”).

48. See Brown, *supra* note 22, at 170; Sue Arrowsmith, *The TFEU Rules, in EU PUBLIC PROCUREMENT LAW: AN INTRODUCTION*, *supra* note 8, at 78 (“TFEU obligations will apply only to contracts that are considered of ‘certain cross-border interest.’”).

49. See THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 5, 12.

50. See *id.*

51. *Id.*

are not.<sup>52</sup> Crucially, for above-threshold contracts, there is no assessment of their impact on the Internal Market.<sup>53</sup> Curiously, no above-threshold contract is ever checked for cross-border interest.<sup>54</sup> Presumably it is assumed that by definition, such a contract has cross-border interest.<sup>55</sup> The rules are simply applicable without questioning.<sup>56</sup> There is a different approach, however, for the contracts falling below the thresholds.<sup>57</sup> For below-threshold contracts, the cross-border interest is the “litmus test” justifying the application or nonapplication of EU law;<sup>58</sup> specifically, the EU Treaty principles discussed in Part I.

For above-threshold contracts, Member States appear to have traded the purity of the EU legal regime—that would demand a cross-border interest test—for convenience and legal certainty.<sup>59</sup> It is much more convenient to know, at a glance, if a certain legal regime is applicable rather than conduct a detailed analysis, in advance, to determine the applicable regime.<sup>60</sup> Member States just assume that contracts over a certain value are, in theory, relevant to the Internal Market for the benefit of legal certainty and clarity.<sup>61</sup> This trade-off is reasonable; one of the consequences of the EU regulation of public procurement is the harmonization of legislation in twenty-eight Member States, each with competing interests and legal traditions.<sup>62</sup> As such, the legal certainty produced by this trade-off is beneficial, particularly in comparison with the cross-border interest test that the Court of Justice has tried to develop for contracts falling under the EU thresholds.<sup>63</sup>

It appears that EU law is, in reality, being applied to contracts that may have no cross-border interest and therefore no connection with the Internal Market.<sup>64</sup> Consequently, the conclusion can only be that the EU threshold values are arbitrary and influenced by politics.<sup>65</sup> For example, the European Commission’s proposal for the original Works Directive contended that

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52. *See id.*

53. *Accord* Case C-87/94, *Comm’n v. Belgium*, 1996 E.C.R. I-2043, I-2080.

54. *See id.*

55. *See* Arrowsmith, *supra* note 44, at 4–5 (“[Public Procurement Directives] apply to contracts above certain financial thresholds, intended to identify contracts of cross-border interest.”).

56. *See id.*

57. *See* THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 12.

58. *See infra* Part IV.

59. CARINA RISVIG HANSEN, CONTRACTS NOT COVERED, OR NOT FULLY COVERED, BY THE PUBLIC SECTOR DIRECTIVE 108 (2012).

60. *See id.* at 121–22.

61. *See* Roberto Caranta, *The Borders of EU Public Procurement Law*, in 4 OUTSIDE THE EU PROCUREMENT DIRECTIVES—INSIDE THE TREATY? 25, 40, 44–48 (Roberto Caranta & Dacian Dragos eds., 2012); *cf.* RISVIG HANSEN, *supra* note 59, at 121–22.

62. *See* Caranta, *supra* note 61, at 44.

63. *See* discussion *infra* Part IV.

64. *See* RISVIG HANSEN, *supra* note 59, at 106–07.

65. *See id.* at 106–07 (explaining that the thresholds are based on assumptions and concerns over practicality); Case C-412/04, *Comm’n v. Italy*, 2008 E.C.R. I-619, I-638–39.

publicity for all contracts would not be practical.<sup>66</sup> The EU thresholds arise from an acceptable compromise between Member States to open their national markets to the competition of foreign economic providers.<sup>67</sup> They are essentially a de facto nontariff trade barrier for the contracts falling below them.<sup>68</sup>

#### IV. LIFE BELOW THE EU THRESHOLDS: THE (R)EVOLVING JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Below the EU thresholds, one would expect the rules to be as clear as above: only national rules would be applicable. In reality, national rules only apply when the contract at issue has no cross-border interest.<sup>69</sup> This is where difficulties arise.

The Court of Justice concluded, almost fifteen years ago in *Telaustria*,<sup>70</sup> *RI.SAN.*,<sup>71</sup> and *Unitron*,<sup>72</sup> that contracts with a cross-border interest should be subject to the Treaty principles even if their value was under the thresholds;<sup>73</sup> Member States previously applied national rules to such contracts.<sup>74</sup> Particularly, until *Telaustria*, the system was simple: above the thresholds, EU law applied to the contract; below, only national rules applied.<sup>75</sup>

66. *Proposal for a First Directive of the Council on the Co-ordination of Procedures for the Conclusion of Public Works Contracts*, at 12, COM (64) 233 final (July 23, 1964).

67. *Commission White Paper for the Completion of the Internal Market*, at 7, COM (85) 310 final (June 14, 1985).

68. *Id.*

69. For more information on this topic, see RISVIG HANSEN, *supra* note 59; Caranta, *supra* note 62, at 26–28; Erik Pijnacker Hordijk & Maarten Meulenbelt, *A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender Outside the Scope of the Public Procurement Directives Should Be Dismissed*, 14 PUB. PROCUREMENT L. REV. 123, 123–30 (2005); Brown, *supra* note 22, at 170; Sylvia De Mars, *The Limits of General Principles: A Procurement Case Study*, 38 EUR. L. REV. 316, 317 (2013); Peter Braun, *A Matter of Principle(s)—The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives*, 9 PUB. PROCUREMENT L. REV. 39, 40–44 (2000).

70. See Case C-324/98, *Telaustria Verlags GmbH v. Telekom Austria AG*, 2000 E.C.R. I-10745, I-10746.

71. *Cf.* Case C-108/98, *RI.SAN. Srl v. Comune di Ischia*, 1999 E.C.R. I-5219, I-5224, I-5248 (stating that “Article 55 of the EC Treaty (now Article 45 EC) does not apply” if all of the facts are contained in one Member state).

72. See Case C-275/98, *Unitron Scandinavia A/S v. Ministeriet for Fødevarer, Landbrug og Fiskeri*, 1999 E.C.R. I-8291, I-8317–18.

73. See Case C-59/00, *Bent Moustén Vestergaard v. Spøttrup Boligselskab*, 2001 E.C.R. I-9505, I-9513–14; Case C-264/03, *Comm’n v. France*, 2005 E.C.R. I-8831, I-8832; Joined Cases C-147/06 & C-148/06, *SECAP SpA v. Comune di Torino*, 2008 E.C.R. I-3565, I-3566; Case C-412/04, *Comm’n v. Italy*, 2008 E.C.R. I-619, I-638–39.

74. The argument to include contracts with cross-border interest that are otherwise excluded from the application of the Treaty principles is valid as well for other excluded contracts, such as services concessions, which are not the object of this paper. It should be noted, however, there are plans for a new Directive for concessions to be introduced after the reform process of the current procurement Directives is concluded.

75. See Case C-324/98, *Telaustria*, 2000 E.C.R. at I-10746.

Following *Telaustria*, in *Coname* and *Parking Brixen*, the Court held that even if contracts are excluded from the Directives, they might still have a cross-border interest for undertakings from other Member States and, as such, require application of the Treaty principles.<sup>76</sup> The Court, however, failed to explain if that interest needed to be direct or indirect, or real or hypothetical.<sup>77</sup> Additionally, the Court has been inconsistent in its jurisprudence. Until recently, the Court of Justice had expanded the reach of the Treaty principles to contracts not covered by the Directives.<sup>78</sup> It has thus contributed to the creation of an increasingly complex legal regime applicable to contracts falling below the thresholds, the precise contracts that would benefit from less burdensome and clearer regulation.<sup>79</sup> Moreover, academics have expressed their concerns about the expanding reach of the Court of Justice<sup>80</sup> and highlighted, inter alia, the costs to achieving legal certainty.<sup>81</sup>

In 2006, the European Commission reminded the Member States of their ongoing obligation of compliance with Treaty principles in an Interpretive Communication and explained the implications of the existing case law for Member States.<sup>82</sup> This interpretive communication, however, did not move the discussion regarding achieving legal certainty forward; instead, it led Germany to initiate unsuccessful proceedings against the Commission.<sup>83</sup>

#### A. Direct or Indirect Cross-Border Interest?

In *Coname* and *Parking Brixen* the Court of Justice held that a contract must have a *direct* cross-border interest in order for the Treaty principles

76. See Case C-231/03, *Conorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti*, 2005 E.C.R. I-7287, I-7294-95; Case C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG*, 2005 E.C.R. I-8585, I-8595, I-8598; see also Dermot Cahill, *The Ebb and Flow, the Doldrums and the Raging Tide: Single Market Law's Ebb and Flow over Services of General Economic Interest, the Legal Doldrums over Services of General Interest, and the Raging Tide of Article 106(2) (ex Art 86(2)) over State Aid & Public Procurement*, 21 EUR. BUS. L. REV. 629, 632-33 (2010).

77. See C-231/03, *Coname*, 2005 E.C.R. at I-7295; Case C-458/03, *Parking Brixen*, 2005 E.C.R. at I-8590.

78. Compare Case C-324/98, *Telaustria*, 2000 E.C.R. at I-10746 (solidifying that contracts with cross-border interest should be subject to Treaty principles), and Case C-231/03, *Coname*, 2005 E.C.R. at I-7294-95, and Case C-458/03, *Parking Brixen*, 2005 E.C.R. at I-8586, with Case C-95/10, *Strong Segurança SA v. Município de Sintra*, 2011 E.C.R. I-1867, I-1883 (limiting the influence of Treaty principles as applied to contracts with cross-border interests).

79. See Case C-324/98, *Telaustria*, 2000 E.C.R. at I-10746; Case C-231/03, *Coname*, 2005 E.C.R. at I-7294-95; Case C-458/03, *Parking Brixen*, 2005 E.C.R. at I-8586-87.

80. See Caranta, *supra* note 62, at 46-47.

81. See *id.* at 47; Adrian Brown, *Seeing Through Transparency: The Requirements to Advertise Public Contracts and Concessions Under the EC Treaty*, 16 PUB. PROCUREMENT L. REV. 1, 19-20 (2007); Pijnacker Hordijk & Meulenbelt, *supra* note 69, at 127.

82. See *Commission Interpretive Communication*, *supra* note 14.

83. See Case T-258/06, *Comm'n v Germany*, 2010 E.C.R. II-2033, II-2046-50 (in which Germany argued, first, that the Commission was not merely explaining the case law but instead attempting to create new rules and, second, that only national law should be applicable to below-threshold contracts); see also Zsófia Petersen, *Below-Threshold Contract Awards Under EU Primary Law: Federal Republic of Germany v Commission (T-258/06)*, 19 PUB. PROCUREMENT L. REV. NA215, NA215 (2010).

to be applicable.<sup>84</sup> The EU Treaty principles will, therefore, apply when there is an interest by an undertaking, based in a foreign Member State, in bidding directly on a contract.<sup>85</sup>

Conversely, indirect cross-border interest is based on the *possibility* of a domestic undertaking deciding to supply the contracting authority with goods produced in a second Member State or a foreign undertaking using a local subsidiary to bid for the contract.<sup>86</sup> The indirect cross-border interest is, arguably, a problem for the freedom of movement of goods and establishment; while applicable as a principle to public procurement, it impacts more than just this field of law.<sup>87</sup> Consequently, regardless of the nature of the buyer, whether a contracting authority or a private legal person, the aforementioned Treaty principles would always be applicable.<sup>88</sup> The cross-border interest test should only apply, therefore, to undertakings bidding directly on a contract tendered by a contracting authority based in another Member State (i.e., to direct cross-border interests).<sup>89</sup>

### B. *Real or Potential Cross-Border Interest?*

A second issue of concern regarding the cross-border interest requirement is the lack of clarity regarding whether the test must be applied only to *real* interests by a foreign undertaking to participate in the contract, or also to hypothetical ones. This lack of clarity presents a problem for the contracting authority that must make a decision on the cross-border interest issue before tender. It also illustrates the inconsistency of the Court of Justice's jurisprudence and the consequences of legal uncertainty.

In *Coname* and *Parking Brixen* the Court held that the interest test could be hypothetical.<sup>90</sup> Therefore, if a contract could potentially be of interest to undertakings based in other Member States, then the Treaty principles, including the need to advertise the contract, would apply.<sup>91</sup> Under this approach, the contracting authority would need to determine if a contract could *potentially* be of interest and act accordingly before starting the procurement procedure.<sup>92</sup> For example, a contracting authority could review

84. See Case C-231/03, *Coname*, 2005 E.C.R. at I-7316-17, I-7320; Case C-458/03, *Parking Brixen*, 2005 E.C.R. at I-8586, I-8598.

85. See Case C-231/03, *Coname*, 2005 E.C.R. at I-7316-17, I-7320; Case C-458/03, *Parking Brixen*, 2005 E.C.R. at I-8586, I-8598.

86. See RAMBOLL MGMT. CONSULTING, CROSS-BORDER PROCUREMENT ABOVE EU THRESHOLDS 9 (2011), available at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/cross-border-procurement\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf) [hereinafter FINAL REPORT].

87. See RISVIG HANSEN, *supra* note 59, at 128-29.

88. For a dissenting view, see ARROWSMITH, THE LAW OF PUBLIC AND UTILITIES PROCUREMENT, *supra* note 6, at 193, 209 (presenting the argument that the Treaty advertisement requirements are not applicable to "situations with no cross-border element," but there is no such restriction on the Directives).

89. See RISVIG HANSEN, *supra* note 59, at 128 n.18.

90. See Case C-231/03, *Coname*, 2005 E.C.R. at I-7295.

91. Case C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG*, 2005 E.C.R. I-8585, I-8586, I-8598.

92. See Case C-231/03, *Coname*, 2005 E.C.R. at I-7308.

previous experiences with similar contracts to guide his or her decision. This approach, however, is replete with uncertainty for four reasons: (1) past participation by foreign undertakings is not an indication of future interest or lack thereof; (2) if a contracting authority is tendering a contract for the first time, it will not have a basis for comparison; (3) the contracting authority may be unfamiliar with the broader European market to decide on the prospective, hypothetical interests that foreign undertakings might have in its contract; and (4) it leaves the contracting authority at the mercy of the market. Thus, this approach presents the risk that if the contracting authority determined that there was no hypothetical cross-border interest—and consequently did not follow EU law—but that determination was later found to be erroneous, the contracting authority may have violated its nondiscrimination obligation.<sup>93</sup>

In more recent decisions such as *Commission v. Ireland*, the Court has highlighted situations where the cross-border interest was *real*; indeed, the contract was advertised and foreign undertakings submitted bids.<sup>94</sup> In those situations, there was no doubt that the contracts had cross-border interest.<sup>95</sup> It is only relatively easy, however, to determine a real cross-border interest in hindsight, *after* a contract is advertised.<sup>96</sup> The true underlying issue here is identifying, *in advance*, the situations where cross-border interest exists and to consequently know what principles and rules govern the contract.<sup>97</sup>

### C. *Certain or Uncertain Cross-Border Interest?*

In *Commission v. Ireland* and *Strong Segurança*, the Court held that contracts needed to have a *certain* cross-border interest and implied that there needs to be a qualified interest in the contract for Treaty principles to apply.<sup>98</sup> The Court's reasoning restricts the application of the Treaty principles to fewer contracts by demanding a concrete interest from a foreign undertaking.<sup>99</sup> This jurisprudence was maintained in *SECAP*, where the Court held that the contract value, location, and technical complexity justified the

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93. See *Commission Interpretive Communication*, *supra* note 14, at 3 (noting that the principle of nondiscrimination implies an obligation of transparency, requiring “that an undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to express its interest in obtaining that contract”).

94. Case C-226/09, *Comm'n v. Ireland*, 2010 E.C.R. I-11824, I-11830.

95. See *id.* at I-11830, I-11833.

96. See *id.* at I-11833.

97. See Braun, *supra* note 69, at 40–42; see also Case C-226/09, *Comm'n v. Ireland*, 2010 E.C.R. at I-11830, I-11833 (addressing situations with real cross-border interest, but declining to resolve the issue of advance identification of cross-border interest).

98. See Case C-507/03, *Comm'n v. Ireland*, 2007 E.C.R. I-9777, I-9807–08; Case C-95/10, *Strong Segurança SA v. Município de Sintra*, 2011 E.C.R. I-1867, I-1880, I-1883.

99. See Case C-507/03, *Comm'n v. Ireland*, 2007 E.C.R. at I-9807–08; Case C-95/10, *Strong Segurança*, 2011 E.C.R. at I-1880, I-1883.

possibility of direct interest by foreign undertakings.<sup>100</sup> The Court added, in some circumstances, even low-value contracts could contain cross-border interest, negating the presumption that low-value contracts were of no relevance to the Internal Market.<sup>101</sup>

There are a number of objections to the test proposed by the Court of Justice, all of which are connected to the lack of legal certainty regarding the cross-border interest test.<sup>102</sup> First, the issue of advance identification of a contract's cross-border interest remains unresolved.<sup>103</sup> In essence, the Court is asking contracting authorities to predict with complete accuracy that the contract being tendered will not spark interest from a foreign undertaking.<sup>104</sup> Not only is this impossible to determine in advance, but also it is almost impossible to assess afterwards; if the contract were not advertised at all, how would anyone know about it and express an interest?<sup>105</sup>

Second, identical contracts tendered by the same contracting authority on different dates may affect whether it has a cross-border interest. Because the economic climate is constantly changing, a contract that would not have attracted international interest in the past might do so today, particularly as new companies come into the market or competition becomes fiercer due to the difficult economic environment.

Third, identical contracts tendered by two contracting authorities at the same time may or may not have cross-border interest. For example, two hypothetical French local contracting authorities based near the border with Germany could issue identical contracts on the same date. A German company bids for the first but not the second contract. According to the jurisprudence of the Court of Justice, the first contract will need to follow the EU Treaty principles, whereas the second does not.<sup>106</sup> This leads to the paradox that the identical contracts issued by similar organizations might or might not concurrently have a cross-border interest.

In addition to the issues discussed *supra*, the Court of Justice's jurisprudence has yet to answer three remaining questions. First, what if a foreign undertaking looks at the contract and decides not to participate? Second, what if the foreign undertaking submits the selection documents but does not submit a bid? Do either of these scenarios constitute a certain and real cross-border interest? Finally, should not the rules be defined *before* the start of the procedure; indeed, how can they depend on the actual participation by an undertaking?

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100. See Joined Cases C-147/06 & C-148/06, SECAP SpA v. Comune di Torino, 2008 E.C.R. I-3565, I-3566, I-3596.

101. See *id.*

102. See *supra* Part I for a description of the cross-border interest test.

103. See *supra* note 97 and accompanying text.

104. See Case C-507/03, *Comm'n v. Ireland*, 2007 E.C.R. at I-9807-08 (implying that there must be a certain qualified cross-border interest for Treaty principles to apply).

105. For similar views on the difficulties raised, see Caranta, *supra* note 62, at 47-48.

106. See *supra* notes 98-99 and accompanying text.

Perhaps the lack of participation raised in the first question would be sufficient proof to ascertain that there is no certain cross-border interest.<sup>107</sup> The second and third questions, however, are more complex. The rules should be defined at the start of the procurement procedure and cannot depend on the actual participation or withdrawal of participants during the procedure; they should not be subject to change.<sup>108</sup> The *certain* cross-border interest test must, therefore, always be hypothetical and require a value judgment by a contracting authority with the information reasonably available to it at the time.<sup>109</sup> But even then, the underlying issue of limited legal certainty would still remain.<sup>110</sup>

#### D. *Impact of the Court of Justice (R)evolving Jurisprudence*

It becomes clear from the prior discussion that the most obvious criticism to be made regarding the jurisprudence of the Court of Justice is the lack of legal certainty with the cross-border interest test. Indeed, the Court itself has modified the test over the last few years, perhaps precisely due to its difficult nature. The Court's evolving jurisprudence demonstrates a case-by-case approach and uncertainty regarding how key elements can be analyzed in advance.<sup>111</sup> The Court is correct in extending the application of EU law to low-value contracts, but it has failed to resolve the legal uncertainty arising from the cross-border interest test.

In the EU, there is currently a two-tier system in public procurement:<sup>112</sup> the above-the-thresholds approach ensures that all stakeholders know that the EU procurement Directives are applicable<sup>113</sup> and thus provides legal certainty, but the below-the-thresholds approach is rife with legal uncertainty created by the cross-border interest test and increases transaction costs and compliance risks associated with public procurement.<sup>114</sup>

In addition, even if it were possible to carry out the cross-border interest test reliably in advance, it still would not solve the underlying problem that contracts under the thresholds are not harmonized, with each Member State's regulating them as they see fit.<sup>115</sup> For example, the Hungarian thresh-

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107. See *id.* at 16, 87 (noting that seventy-two percent of surveyed businesses with experience in EU public procurement had "not engaged in cross-border tendering at all in the past three years").

108. See *Chandler v. Camden LBC*, [2010] 1 C.M.L.R. 19, [30], [66].

109. See *id.*

110. See *id.*

111. See *supra* Part IV.A-C.

112. See *Brown*, *supra* note 81, at 19-21.

113. *Commission Interpretive Communication*, *supra* note 14, at 2 (specifying that the Procurement Directives do not apply to contracts below certain thresholds).

114. Pedro Telles, *Low Value Procurement and Transparency: Squaring Circle*, in 5TH INTERNATIONAL PROCUREMENT CONFERENCE PAPERS 1376, 1387 (2012), available at [http://www.ippa.org/ippc5\\_proceedings6.html](http://www.ippa.org/ippc5_proceedings6.html); Arrowsmith, *Modernising the European Union's Public Procurement Regime*, *supra* note 37, at 73-79.

115. See THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 14-15 ("Hungary requires publication for contracts above EUR 27,000").

old for national advertising is \$35,000, but the country “allows negotiations if indicated in the contract notices.”<sup>116</sup> Since 2011, France has mandated national advertising for contracts over \$20,000.<sup>117</sup> Portugal only sets the advertising threshold for goods and services contracts at over \$100,000.<sup>118</sup> Since 2011, the United Kingdom (UK) purchasing bodies under control of the Westminster Government must advertise all contracts over \$16,000.<sup>119</sup> Moreover, the regulations can vary, even within each Member State.<sup>120</sup> In the UK, contracting authorities in England are bound by the \$16,000 threshold, but authorities in Scotland, Wales, and Northern Ireland are not.<sup>121</sup>

In sum, the cross-border interest test appears to be a legal construction by the Court of Justice to try solving the problem of applying EU law (even if only the Treaty principles) to contracts excluded from the Procurement Directives.<sup>122</sup> The problem for low-value contracts remains the current thresholds regime. The Court has been unable to resolve this conundrum because of the uncertainty created by the cross-border test for the contracting authority.<sup>123</sup> This begs the question: what would happen if the EU thresholds were lowered to cover most EU public procurement contracts?

#### V. LOWERING THE EU THRESHOLDS

The EU should lower the threshold values to encompass the majority of contracts awarded. In other words, the current 80/20 split between regulating contracts above and below thresholds should be inverted to ensure that

116. *Id.* at 15.

117. CODE DES MARCHÉS PUBLICS, art. 28 (Fr.) (requiring advertising for contracts over €15,000). The threshold sat at €4000 previously. See De Mars, *supra* note 69, at 330–31.

118. PUBLIC CONTRACTS CODE 2008, art. 21(1)(a) (Port.). Between 2010 and 2012, contracting authorities were authorized under the national law to award goods and services contracts without advertising for contracts above the EU thresholds in clear violation of EU law. See Miguel Assis Raimundo, *Direct Award of Public Contracts: The New Portuguese Public Contracts Code in Light of EU Law*, 19 PUB. PROCUREMENT L. REV. 155, 157, 159 (2010).

119. CABINET OFFICE, TRANSPARENCY: PUBLICATION OF TENDER DOCUMENTATION GUIDANCE NOTE, 2011, at 2 (U.K.) [hereinafter PUBLICATION OF TENDER DOCUMENTATION] (requiring publication for contracts valued over £10,000); CABINET OFFICE, TRANSPARENCY: PUBLICATION OF NEW CENTRAL GOVERNMENT CONTRACTS GUIDANCE NOTE, 2012, at 6–7; Kate Creelman, *The UK Cabinet Office's Initiative on Small and Medium Enterprises*, 21 PUB. PROCUREMENT L. REV. NA293, NA293 (2012).

120. See *infra* note 136.

121. PUBLICATION OF TENDER DOCUMENTATION, *supra* note 119, at 3, 13.

122. See THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 12.

Member States have developed their framework of below-threshold policies, rules and procedures against the background of a number of rulings by the European Court of Justice (ECJ). These rulings state that contracting authorities and entities concluding contracts outside of the scope of the Public Procurement Directives must comply with the fundamental principles of the EU Treaty in general and the principle of non-discrimination on grounds of nationality in particular, where those contracts are of certain cross-border interest.

*Id.*

123. See *supra* Part III.A–C.

EU rules apply to a larger percentage of the EU Internal Market for public procurement.<sup>124</sup>

If the thresholds were lowered to capture most public procurement contracts, four consequences can be expected. First, the perceived Internal Market would expand and incorporate more contracts, requiring more tenders to be advertised across Europe and follow standardized EU procedures.<sup>125</sup> Second, there would be an increase in transparency, competition, and nondiscrimination<sup>126</sup>—the precise goals that justified the initial adoption of the EU public procurement Directives.<sup>127</sup> Third, legal certainty would increase as the need to use the cross-border test diminished.<sup>128</sup> Fourth, the bulk of EU procurement would be subject to similar, harmonized rules just as those over the EU thresholds.<sup>129</sup>

#### A. *Recognizing That Contracts Below the Thresholds Are Already Part of the Internal Market*

EU public procurement rules rely on the TFEU and, more specifically, on the development of the Internal Market.<sup>130</sup> Lowering the thresholds and applying the full scope of EU law to a much larger base of contracts would increase the perceived size of the Internal Market's public procurement component.<sup>131</sup> Conversely, one could argue, as Germany argued in *Commission v Germany*, that low-value contracts, by definition, have no relevance to the Internal Market and are inherently national affairs.<sup>132</sup> Most contracts below the thresholds, thus far, have been of national interest as the thresholds function as a nontariff trade barrier against foreign undertakings.<sup>133</sup> This barrier effect on contracts below the thresholds is due to the

124. See *supra* Part I.

125. All contracts above the threshold are subject to the requirements of the public procurement Directives, including requirements for the advertisement of tenders in the O.J. and provisions standardizing procurement procedures. For early efforts, see Council Directive 71/305, *supra* note 9. For current requirements, see Council Directive 2004/17, *supra* note 10.

126. Transparency International has argued the same on their submission to the 2011 public consultation on the reform of EU public procurement. TRANSPARENCY INT'L, TRANSPARENCY INTERNATIONAL'S CONTRIBUTION TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON MODERNISING PUBLIC PROCUREMENT POLICY IN THE EU (2010).

127. See, e.g., Arrowsmith, *The Past and Future Evolution of EC Procurement Law*, *supra* note 3, at 339–40.

128. The number of contracts subject to the cross-border test will decrease as the threshold is lowered. See *supra* Part I.

129. Contracts above the threshold are subject to regulations unifying procurement procedures within the EU. See *supra* Part I.

130. See *supra* Part I.

131. While public procurement is not specifically addressed in Internal Market provisions of the TFEU, see TFEU, *supra* note 1, arts. 3, 26 at 17, 51, 59, it is mentioned in the Introduction as essential to the achievement of Internal Market objectives, see *supra* Part I.

132. See Case T-258/06, *Comm'n v Germany*, 2010 E.C.R. II-2033, II-2048. The Court of Justice dispelled this presumption in *SECAP*. See generally *Joined Cases C-147/06 & C-148/06, SECAP SpA v. Comune di Torino*, 2008 E.C.R. I-3565, I-3566, I-3596.

133. However, the issue of cross-border procurement deserves further investigation as EU cross-border wins are extremely rare. See PUBLIC PROCUREMENT INDICATORS 2011, *supra*

lack of advertising across the EU and the lack of harmonized rules.<sup>134</sup> Under national regulations for contracts below the threshold, Member States can either advertise them—solely at the national level—or not at all.<sup>135</sup> Moreover, each Member State establishes its own rules and practices; these do not necessarily need to be similar to other Member States.<sup>136</sup> Additionally, the cross-border interest test has been applied in only a limited number of cases. Who knows what would happen if more contracts had followed EU-wide advertising requirements and similar rules?

The cross-border interest test, however, demonstrates that there is an Internal Market for contracts below the thresholds;<sup>137</sup> the existence of this Internal Market would justify the Court of Justice's creation of the cross-border test. Despite the lack of specific legal support, a perplexing cross-border interest test, and no harmonized regulations, there are still low-value contracts that are deemed to be significant enough to the Internal Market.<sup>138</sup> This "below-thresholds Internal Market" warrants regulation by the same EU procurement rules as the contracts above the thresholds.

The EU thresholds were introduced in the Works Directive in 1977 and created before the Internet became part of the economy, which, in turn, reduced transaction and opportunity costs.<sup>139</sup> As such, the thresholds have never taken into consideration the cost reduction created by Internet transactions. Now, arguably, it is economically viable to conduct cross-border transactions with lower costs than before the introduction of the Internet. Thirty-five years ago it would have been unthinkable to buy goods online from foreign suppliers or hire the services of a foreign consultant for values below the thresholds. Now, service contracts can be performed *ex situ* and goods or supplies can be transported at much lower costs; such examples exemplify contracts that now belong to the Internal Market.

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note 19, at 97 (reporting that only three percent of 540,000 procurements reviewed were awarded to foreign undertakings).

134. National publication requirements vary widely across Member States with practices further fragmented by States through the use of additional "bands" below the Internal Market threshold. See THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 14–16.

135. See *id.*

136. See generally *id.*

137. See THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 12 (noting that the cross-border interest test is an extension of the antidiscrimination principles embodied in the TFEU, suggesting a similarity of the markets both above and below the thresholds).

138. See *supra* Part IV (discussing precedential cases, including *Telaustria*, *Coname*, and *Parking Brixen*) and Parts IV.A–C (discussing the nature of the cross-border interest required to trigger Internal Market mechanisms).

139. See ORG. FOR ECON. CO-OPERATION & DEV., THE INTERNET AND BUSINESS PERFORMANCE 10–11 (2002), available at <http://www.oecd.org/sti/ind/2731209.pdf> (exploring the effects of the emergence of the Internet on business enterprises and highlighting policy issues implicated for governments).

It seems imprudent to set thresholds for public procurement contracts affecting the Internal Market in Europe at \$172,000 for services or \$6,642,000 for works.<sup>140</sup> Or, alternatively, one should ask, if the thresholds were being created today for the first time, would they be set at such values and what compromise would the Member States strike? The compromise for thresholds, if formulated today, would almost certainly set lower threshold values than originally established. Essentially, the original EU and GPA thresholds have functioned as an “anchor” to be used as a starting point for any negotiations. The thresholds have thus survived the paradigm shift caused by the Internet without any renovation.

The full adoption of e-procurement could rebalance the equation regarding transaction costs for advertising low-value contracts.<sup>141</sup> In fact, the European Commission is further promoting e-procurement by recommending the implementation of “end-to-end e-procurement”<sup>142</sup> and mandating the use of electronic means in procurement procedures by 2016.<sup>143</sup> Portugal has already implemented the recommendations and has mandated, since 2010, that all procurement, irrespective of value, be conducted through electronic methods.<sup>144</sup>

### B. Added Transparency and Competition

Member States such as France,<sup>145</sup> Ireland,<sup>146</sup> and the United Kingdom<sup>147</sup>—understanding the value of increased transparency and open markets—require

140. See Table 1, *supra* Part II.

141. See *Green Paper on Expanding the Use of E-Procurement in the EU*, at 4, SEC (2010) 1214 final (Oct. 18, 2010) (noting that electronic public procurement can “reduce administrative costs and speed up individual procurement procedures”).

142. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on End-to-End E-Procurement to Modernise Public Administration*, at 2, COM (2013) 453 final (Jun. 26, 2013) [hereinafter *End-to-End E-Procurement to Modernise Public Administration*].

143. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A Strategy for E-Procurement*, at 3, COM (2012) 179 final (Apr. 20, 2012) [hereinafter *A Strategy for E-Procurement*]. In addition, the European Commission presented in June 2013 a draft Directive on electronic invoicing in public procurement, which is yet to be agreed to by the Council and the European Parliament. Press Release, European Comm’n, E-Invoicing in Public Procurement: Another Step Towards End-to-End E-Procurement and E-Government in Europe (June 26, 2013) (on file with author).

144. See *Study on the Evaluation of the Action Plan for the Implementation of the Legal Framework for Electronic Procurement* (Phase II), at 27 (July 9, 2010), available at [http://ec.europa.eu/internal\\_market/consultations/docs/2010/e-procurement/siemens-study\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/e-procurement/siemens-study_en.pdf).

145. See Francois Lichère, *Public Procurement Contracts Below EU Thresholds and Annex II B Services in France*, in 4 OUTSIDE THE EU PROCUREMENT DIRECTIVES, *supra* note 61, at 97, 100; De Mars, *supra* note 69, at 330–31.

146. GOV’T OF IR., DEP’T OF FIN., CIRCULAR 10/10: FACILITATING SME PARTICIPATION IN PUBLIC PROCUREMENT 5 (2010). This circular mandated all contracting authorities in Ireland to advertise contracts over €25,000, but its enforceability is unclear in cases of noncompliance by Irish contracting authorities. See *id.*

147. See Luke Butler, *Below Threshold and Annex II B Service Contracts in the United Kingdom: A Common Law Approach*, in 4 OUTSIDE THE EU PROCUREMENT DIRECTIVES, *supra* note 61, at 283, 294; Telles, *supra* note 114, at 1378–79.

contracts over \$20,000, \$12,000, and \$15,000, respectively, to be advertised via national public procurement portals.<sup>148</sup> This development, requested by industry at least in the UK,<sup>149</sup> only solves part of the EU procurement problem; indeed, e-procurement is beneficial for national suppliers, but it does not ensure equal treatment or harmonized rules across different Member States.<sup>150</sup>

Lowering the thresholds will also be beneficial because such action will lead to increased competition for public procurement.<sup>151</sup> Higher contract visibility increases the possibility of an undertaking showing interest in a certain contract and presenting a bid.<sup>152</sup> This increased visibility, however, can also create three potential risks. First, in the UK there is a perception that if a contracting authority uses the open procedure to advertise low-value contracts, it may be inundated with offers. This scenario has not occurred yet.<sup>153</sup> Second, there is the risk that increased transparency can lead to collusion by tenderers.<sup>154</sup> Although this risk cannot be discounted, collusion is already present in both contracts over the current thresholds and below the thresholds that are advertised solely via national or regional official journals and portals.<sup>155</sup> But increasing contract advertising across the EU could raise the potential of foreign undertakings bidding for contracts and the possibility of collusion.<sup>156</sup>

Third, the EU procurement procedures could potentially increase transaction and opportunity costs, which would negatively impact competition.<sup>157</sup> In the past, however, EU-regulated procedures have required excessive and extensive compliance; current transaction and opportunity costs for low-value contracts<sup>158</sup> do not indicate future values will remain constant. There are also multiple ways to reduce the transaction costs associated

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148. Lichère, *supra* note 145, at 100; GOV'T OF IR., *supra* note 146, at 5; Butler, *supra* note 147, at 294; Telles, *supra* note 114, at 1376–77.

149. See UNIV. OF GLAMORGAN, BARRIERS TO PROCUREMENT: OPPORTUNITY RESEARCH 49 (2009); see also FED'N OF SMALL BUSINESSES, LOCAL PROCUREMENT: MAKING THE MOST OF SMALL BUSINESS 5 (2012).

150. See *infra* Part V.D (discussing the merits of harmonization of procurement regimes).

151. See TRANSPARENCY INT'L, *supra* note 126 (discussing the benefits of lowering the thresholds, including lower risk of misuse and corruption).

152. See *A Strategy for E-Procurement*, *supra* note 143, at 3 (noting that increased transparency through e-procurement will improve access to procurement opportunities).

153. Neither in the contracts subject to mandatory advertising over €12,000 in England, nor in the author's experience in Wales on a pilot study of a simplified open procedure, has there been an overabundance of bids.

154. ALBERT SÁNCHEZ GRAELLS, PUBLIC PROCUREMENT AND THE EU COMPETITION RULES 358 (2011).

155. See generally *id.*

156. See *A Strategy for E-Procurement*, *supra* note 143, at 3.

157. See Arrowsmith, *Modernising the European Union's Public Procurement Regime*, *supra* note 37, at 75; Boyle, *supra* note 38, at NA175 (stating that costs of current procedures are already high).

158. COST AND EFFECTIVENESS REPORT, *supra* note 25, at 7 (describing restricted procedures). The number of person days involved on a public procurement procedure remains unrelated to the value of the contract. *Id.* at 91.

with existing procedures. Indeed, as part of the ongoing procurement reform, the European Commission has proposed streamlining the selection stage in the open procedure<sup>159</sup> via the European Single Procurement Document and self-declarations.<sup>160</sup> Lower transaction and opportunity costs for the benefit of competition can be achieved by simplification of processes.<sup>161</sup> Introducing a number of changes in the procedure, timescales, and practice makes it possible to reduce the duration of a procedure from an average of 120 days in the UK to approximately thirty-eight to forty days.<sup>162</sup> Thus, reforms to reduce the costs for both contracting authorities and suppliers should be implemented.

### C. Legal Certainty

The last fifteen years have provided evidence that the current regime fails to work because of legal uncertainty in the cross-border interest test and a solution, as of yet, has not been identified.<sup>163</sup> Additionally, the Court of Justice has applied the cross-border interest test to low-value contracts, contracts that are typically omitted for being under the EU thresholds.<sup>164</sup> If the cross-border interest test is such a key feature of the EU public procurement regime, then it should be applied to all contracts including ones covered by the EU Directives. Moreover, the EU has adopted a measure that reduces legal uncertainty and lowers compliance costs for larger

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159. See *Proposal for a Directive of the European Parliament and of the Council on Public Procurement*, *supra* note 11, at 55–56.

160. More, however, should have been achieved such as allowing for shorter timescales for the open procedure than the forty days proposed for bid submissions. See *id.* at 85–86.

161. See Christine Boch, *The Implementation of the Public Procurement Directives in the United Kingdom: Devolution or Divergence?* 16 PUB. PROCUREMENT L. REV. 410, 431 (2007) (arguing for the importance of low transaction costs from an SME perspective); see also DG ENTER. & INDUS., EVALUATION OF SMEs' ACCESS TO PUBLIC PROCUREMENT MARKETS IN THE EU (2010) (studying the impact of certain factors on SMEs' likelihood of winning public contracts and SMEs' experience with electronic tools such as e-procurement solutions). This author has extensive experience in piloting a simplified open procedure for low-value contracts in the UK. His work included the Winning in Tendering project with three Welsh contracting authorities. See "Winning in Tendering" *Public Procurement Research Project*, BANGOR UNIV., <http://www.bangor.ac.uk/law/winningintendering.php.en> (last visited Oct. 1, 2013). Although the original pilot was to devise a procedure that could be applicable to the €6000–60,000 bracket, two pilot authorities are considering rolling out the use to contracts up to the thresholds, due to the satisfaction of procurers, internal stakeholders, and suppliers. See generally TELLES, *supra* note 114, at 1378–79.

162. Pedro Telles, *Surprise, Surprise: The UK Has the Most Expensive Procurement System in Europe*, PROCUREMENT INSIGHTS (Aug. 19, 2013), <http://procureinsights.wordpress.com/2013/08/19/surprise-surprise-the-uk-has-the-most-expensive-public-procurement-system-in-europe-by-dr-pedro-telles/>. Cyprus is also using a simplified open procedure for the purposes of speeding up the procedure and reducing transaction and opportunity costs. THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 14. Outside the EU, Albania has a simplified procedure as well for contracts above ALL 2,000,000, or just over €14,000. See Marco Rocca, *The New Albanian Law on Public Procurement*, 17 PUB. PROCUREMENT L. REV. NA153, NA156 (2008). Canada has looked into this issue. See OFFICE OF THE PROCUREMENT OMBUDSMAN, DIRECTED CONTRACTS UNDER \$25,000—A RISK-BASED STUDY, at ii (2010).

163. See *supra* Part IV.C.

164. See *supra* Part IV.

contracts; by the same logic, smaller contracts could benefit from similar measures.<sup>165</sup>

#### D. Harmonization and Simplification

The final consequence of lowering the thresholds would be the harmonization of legislation applicable to the majority of public procurement in Europe. While legal requirements imposed by EU law have filtered down to contracts below the thresholds in a number of Member States,<sup>166</sup> it is inconsistent across the EU.<sup>167</sup> For example, in 2010 the Organization for Economic Co-operation and Development (OECD) observed, inter alia, that in areas such as remedies, methods of submission of applications and tenders, award criteria, and design of technical specifications, rules were similar in most Member States, and implies that this is a generalized practice.<sup>168</sup> Portugal, for example, does not distinguish between contracts above or below the thresholds in access to remedies,<sup>169</sup> and Spain has merged the substantive legal regime above and below the thresholds.<sup>170</sup> Essentially, it appears that Member States do not differentiate between the two different legal regimes for contracts above and below the thresholds and are merging the categories to create a unified regime.<sup>171</sup> Each Member State, however, has done this individually and generally applies only parts of the above-threshold legal regime.<sup>172</sup>

The EU legal regime would be simplified if the threshold levels were reduced; undertakings would be able to expect similar procedures and remedies across all Member States instead of the current maze of legal regimes and practices.<sup>173</sup> The counter-argument against this simplification is that applying EU law and procedures to low-value contracts would actually increase compliance, transaction, and opportunity costs.<sup>174</sup> In essence, it is the same overarching argument proffered by Arrowsmith and Boyle to increase the

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165. See *infra* Part V.D.

166. See THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 15. This could be another explanation of why the European Commission found that eighteen percent of the supplies and services contracts procured by central government and advertised in the O.J. had a value below thresholds. PUBLIC PROCUREMENT INDICATORS 2011, *supra* note 19, at 69.

167. THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 15.

168. *Id.* at 8–9.

169. See generally ORG. FOR ECON. CO-OPERATION & DEV., SIGMA PAPERS NO. 41, PUBLIC PROCUREMENT REVIEW AND REMEDIES SYSTEMS IN THE EUROPEAN UNION 95 (2007) (discussing the remedies available in Portugal's public procurement system).

170. Albeit Spain has a specific regime for contracts below €50,000. See Albert Sanchez Gràells, *Public Procurement Below EU Thresholds in Spain*, in 4 OUTSIDE THE EU PROCUREMENT DIRECTIVES, *supra* note 61, at 259, 261.

171. See THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 8–9, 13–19.

172. See *id.* at 8–9.

173. See Arrowsmith, *Modernising the European Union's Public Procurement Regime*, *supra* note 37, at 78.

174. *Id.* at 81.

thresholds.<sup>175</sup> Although this risk does exist, the harmonization of legal regimes already seen for contracts above the thresholds demonstrates that successful implementation could be achieved in the Member States.<sup>176</sup>

Harmonization below thresholds should not, however, be done identically to what was done above thresholds. This Article acknowledges that some rules, from the Procurement Directives requirements to national practices,<sup>177</sup> for above the thresholds are indeed terribly onerous for all participants.<sup>178</sup> For example, the UK is the only Member State that uses the more burdensome restricted procedure<sup>179</sup> more often than the open procedure<sup>180</sup> because the former imposes a full-fledged selection stage before tenders are to be submitted.<sup>181</sup> In addition, even when the UK decided to mandate the use of the open procedure for certain contracts, it did not fine-tune the procedure for low-value contracts.<sup>182</sup> Rather, it retained the identical structure and practice used for contracts above the EU thresholds.<sup>183</sup> Moreover, it is still aiming to undertake an open procedure in 120 days,<sup>184</sup> when low-value contracts can be completed in around forty.<sup>185</sup> The decision not to optimize the procedure for such contracts is based in particular national policy and cannot be justified by any EU-law-related obligation.<sup>186</sup>

## VI. CONCLUSION

This Article has explored the status quo of public procurement regulation in the EU and the two-tier system for contracts above and below thresholds. In 2011, only 17.7%<sup>187</sup> of contracts in Europe were above thresholds and fully subject to EU law via the TFEU Treaty Principles and the public procurement Directives. The bulk of the money spent in public procurement in the EU escapes such regulation. The remainder is subject to a confusing sys-

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175. See *id.*; Boyle, *supra* note 38, at NA181.

176. See Arrowsmith, *Introduction to the EU*, *supra* note 8, at 27–33 (describing the above-threshold legal framework that creates such harmonization). See also Arrowsmith, *Modernising the European Union's Public Procurement Regime*, *supra* note 37, at 82.

177. COST AND EFFECTIVENESS REPORT, *supra* note 25, at 34 (noting the differences among member states in the frequency with which they use open procurement procedures).

178. See *id.* at 117.

179. Council Directive 2004/18, *supra* note 10, at 127 (supplying the definition of restricted procedure).

180. The UK is the Member State where the restricted procedure is more used as a percentage of total procurement procedures, representing forty-four percent of the total procedure use in the EU. COST AND EFFECTIVENESS REPORT, *supra* note 25, at 30, 105.

181. See *id.* at 78.

182. See Jason Waterman & Clifford McCue, *Lean Thinking Within Public Sector Purchasing Department: The Case of the UK Public Service*, 12 J. PUB. PROCUREMENT 505, 516–18 (2012).

183. *Id.* at 514, 516–18.

184. CABINET OFFICE, GOVERNMENT SOURCING: A NEW APPROACH USING LEAN, 2012, at 4 (U.K.). It has, however, introduced the ContractsFinder portal ([www.contractsfinder.co.uk](http://www.contractsfinder.co.uk)) and also tried to reduce the use of the restricted and competitive dialogue procedures. *Id.* at 3.

185. See *id.* at 4, 6; Telles, *supra* note 162.

186. See THE REGULATION OF CONTRACT BELOW THE EU THRESHOLD, *supra* note 25, at 12.

187. PUBLIC PROCUREMENT INDICATORS 2011, *supra* note 19, at 6.

tem mixing national law and EU Treaty principles. Effective regulation of public procurement at the European level depends on the achievement of the Internal Market, but this small percentage makes the public procurement side of that market look very small. Because the Treaty principles apply in cases where the contract is expected to have a cross-border interest, resolving the uncertainties around cross-border interests is critical to expanding the reach of EU law.

It has become clear that a decade of jurisprudence by the Court of Justice of the European Union, from *Telaustria* to *Strong Segurança*, has not solved the legal issues surrounding the cross-border interest test. The Court was right in extending the concept of the Internal Market to contracts below the thresholds, but it has extended the test in piecemeal fashion and it is therefore prone to legal uncertainty. Lowering the thresholds and recognizing that most public procurement contracts are part of the EU Internal Market would address the problems exacerbated by the Court's jurisprudence. The current thresholds were set at levels deemed convenient by Member States through political expediency; they are not based on the real impact of each contract on the Internal Market. Because the current threshold levels lack any legal justification, there is also no reason why lower-value contracts should be treated differently from contracts above the threshold.

The current threshold levels may have been reasonable thirty or forty years ago when initially introduced, but their financial values are still rooted in the preconception that cross-border transactions have high transaction and opportunity costs by definition. In light of the effects the Internet has had on cross-border trade and the ongoing push for more e-procurement, including "end-to-end e-procurement" advocated by the European Commission,<sup>188</sup> the thresholds should be reconsidered and reformatted. As transaction and opportunity costs have decreased over time, the equilibrium that justified the original threshold levels no longer applies. As such, today there is no economic reason not to apply the bulk of EU procurement regulation to lower-valued contracts.

Although there are still risks associated with lowering the thresholds, such as the potential for increased collusion or higher transaction and opportunity costs in some instances, the overall benefits outweigh the risks. The potential downside would be due to practices by Member States and contracting authorities, not to mandatory legal requirements. It is time, in light of modern procurement practices, for thresholds to be lowered to a value that captures the large majority of the value spent in public procurement within the EU.

Lowering the thresholds would provide numerous advantages. Covering most public contracts would recognize that lower-valued contracts are part of the modern day Internal Market. Further, the same justification for applying detailed EU rules via the public procurement Directives (currently applied to above-threshold contracts) could be extended to lower-value

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188. See *End-to-End E-Procurement to Modernise Public Administration*, *supra* note 142, at 5.

contracts—it would increase transparency and competition. Also, the legal uncertainty raised by the cross-border interest test would be solved.

Finally, Member States already regulate contracts below thresholds. In many Member States, specific parts of the above-threshold legal regime, such as remedies, means of submission of applications and tenders, award criteria, and technical specifications, have filtered down to contracts below the thresholds. This, however, is being done on an ad hoc basis without any consistency across different Member States. Having a single harmonized legal regime for contracts currently below threshold would create more legal certainty for contracting authorities.