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**Public procurement financial thresholds in the EU and their
relationship with the GPA
Dr. Pedro Telles¹**

Abstract

The regulation of procurement within the European Union is binary: above certain financial thresholds, contracts are subject to full EU regulation, whereas below they are only subject to national rules (in general). First introduced in the 1970s, the financial thresholds are arbitrary without a clear justification for their specific values. Thresholds remained fairly stable in nominal terms and over the years became solely dependent on the commitments assumed in the various revisions of multilateral procurement agreements, currently the Government Procurement Agreement (GPA) 2014. In consequence, the external market access commitments accepted by the EU in the GPA determine today the size of public procurement internal market.

While it is true that inflation and currency fluctuations have progressively reduced the real term value of thresholds, no proactive reductions have been undertaken by EU lawmakers, contrary to what was done with trade tariffs. In consequence, current threshold levels do not reflect any productivity improvements or transaction cost reductions achieved during the last 40 years. By remaining stable in nominal and changing only due to external pressures and inflation inertia, the thresholds have effectively functioned as a ceiling and a floor to the concept of internal market in public procurement within the EU.

1. Introduction

General financial thresholds have been part of European public procurement regulation since the early 1970s. These thresholds determine what contracts are covered or not by the various rounds of Directives applicable to public procurement. In consequence, it can be argued that the adoption of these general financial thresholds has a binary effect, splitting public contracts into those fully subject to EU law and those which are not. As such, today contracts valued above financial thresholds are automatically

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part of the EU internal market,² whereas the ones below-thresholds are not. Contracts below-thresholds are subject, in general, only to national rules. They may, however, be subject to EU primary law, that is the Treaty on the Functioning of the European Union principles and rules³ in case they have cross-border interest.⁴ Even with cross-border interest, these lower value contracts are not subject to EU secondary law, that is the various iterations of public procurement Directives. During the period analysed in this paper (1970s - 2015) EU substantive rules applicable to public procurement changed substantially, growing in scope and detail with each iteration. Financial thresholds, however, remained fairly stable over the years bar a couple of alterations. Today, they are accepted as “received wisdom” and their existence never questioned. The traditional view of *why* we have financial thresholds at all in the EU, *how* they came about and the *why* behind their value has not been entirely established.

The binary division afforded by the threshold system is based upon the implicit assumption that *only* contracts above certain financial count towards the internal market and thus, are worthy of EU regulation under the form of harmonization Directives.⁵ The arguments justifying the threshold system are

2 Due to the way that the EU and Member States divide and share competencies, European public procurement rules are based on the objective of achieving an internal market, common to the 28 Member States. The aim of the internal market is to integrate the Member States’ national markets into a single European market.. On this topic please see, for all, Kaczorowska, *European Union Law*, 3rd edition 2014, p. 477 - 602; Craig and De Burca, *EU Law: Text, Cases and Materials*, 6th edition 2015, p. 607-637; Kamiel Mortelmans, *The Common Market, the Internal Market and the Single Market, What’s in a Market?*, 35 COMMON MKT. L. REV. 101 (1998);

3 Treaty on the Functioning of the European Union, Articles 34, 49, 55 and 56. On this topic see, D Dragos and R Vornicu, *Public Procurement Below Thresholds in the European Union: EU Law Principles and National Responses*, *European Procurement & Public-Private Partnership Law Review*, 10, 3 (2015) p.187 -206.

4 See *generally* Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TFEU]. Since the *Telaustria* case in 2000 (Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* ECLI:EU:C:2000:669. However, the definition of what constitutes “cross-border interest” has fluctuated over the years and is yet to be settled. Even the most recent decisions by the CJEU from 2012-2015, although referring to concessions where the cross-border issue is also relevant, have fluctuated between various degrees of certainty for what constitutes cross-border interest: C-338/12 *Comune di Ancona v Regione Marche* ECLI:EU:C2013:535; C-221/12 *Belgacom NV v INTEGAN* ECLI:EU:C:2013:736; C-113/13, *Spezzino Azienda sanitaria locale n.5 “Spezzino” and Others*, EU:C:2014:2240 and C-278/14 *Enterprise Focused Solutions SRL v Spitalul Judetean de Urgenta Alba Iulia* ECLI:EU:C2015:228. The conflicting case law highlights the difficulties raised by the cross-border interest test.

5 On the objectives of 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)

two-fold: first, EU rules impose an administrative cost due to the formal tendering rules they prescribe;⁶ second, compliance and transaction costs on contracting authorities and suppliers, therefore they should be limited only to the contracts which are more likely to generate competition from suppliers based in other Member States.⁷

This paper will be focused only on the general financial thresholds applicable to works, services and supplies contracts, currently regulated by Directive 2014/24/EU. It will leave aside thresholds applicable to all other contracts governed by EU law such as the ones applicable to utilities,⁸ concessions,⁹ defence,¹⁰ “Part B services”,¹¹ or the new social and other services contracts.¹² It will show first that financial threshold values are arbitrary and have no substantive reason for their specific levels today other than the compromise between the different interests of EU integration, international agreements such as the 1981 Tokyo Code, the 1994 Government Procurement Agreement and the protection of national interests and industries. Furthermore, this paper will highlight that they have remained reasonably stable in nominal terms over the years and that the only changes in real terms were essentially brought by inflation. Finally, this paper will also raise the discussion that the justifications for the current threshold system and values no longer hold true and that the 2014 reform missed the opportunity to significantly revise the thresholds and completely ignored the digital economy. Directive 2014/24/EU however, finally contains a revision clause for threshold values which implying their reconsideration in accordance with levels of cross-border procurement, SME participation, transaction costs, cost-benefit trade-offs and inflation.¹³ The Directive implies that the future revision should be upwards, a position this author contests and that goes against the text of the revised Government Procurement Agreement from 2012.

This paper is divided into four main sections, covering different historical

6 Sue Arrowsmith, *The Law of Public and Utilities Procurement - Regulation in the EU and UK*, Volume 1, 3rd Edition, 2014 p, 448. Although perhaps it would have been preferable to divide the costs into transaction and opportunity costs.

7 *ibid*, p. 448. As will be demonstrated in section 4 below, these arguments have been used over the years to justify the threshold levels.

8 Regulated today by Directive 2014/25/EU.

9 As regulated today by Directive 2014/23/EU.

10 Regulated by Directive 2009/81/EC.

11 As they were regulated in Directive 2004/18/EC.

12 Regulated in Directive 2014/24/EU, Article 74 - 77.

13 Article 92 and Recital 134 of Directive 2014/24/EU.

periods. The first covers the period 1971 – 1993, coinciding with the creation of the thresholds and the progressive extension of European rules to different contract types: works (1971), supplies (1979) and services (1992). The second sections focus on the period between 1993 and 1999, covering the accession to the 1994 GPA agreement and ending before the euro's adoption. The third section goes from 1999 to 2014, covering the euro years. The final section is focused on today and the near future, particularly the implications from the threshold revision clause introduced by Directive 2014/24/EU.

2. Financial threshold's evolution 1971 - 1993: From Units of Account, to European Units of Account (EUA) to European Currency Units (ECU)

The history of the financial thresholds applicable in European public procurement can be traced through the different measuring units used for their calculation. In the early 1970s, the thresholds were calculated based on a unit of account. This unit of account was known also as the “gold standard unit of account” and was based in the gold standard abolished after the Smithsonian Agreement signed by the G10¹⁴ in December 1971 and subsequent financial instability.¹⁵ The “European Unit of Account” (EUA) replaced the unit of account in the European Economic Community in 1975.¹⁶ The EUA was based on a sum of 9 different European currencies at fixed rates.¹⁷ Its value changed daily in accordance with market fluctuations of the participating currencies and was established daily by the European Commission using daily market exchange rates.¹⁸ The EUA, however, was short lived and in 1979 it was replaced at parity by the European Currency Unit (ECU), which in conjunction with the European Exchange Rate Mechanism aimed to reduce the currency fluctuations within the European Economic Community.¹⁹ The ECU value - as the EUA before it - was determined by a weighted average of its participating currencies, which

14 Composed by Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, United Kingdom and United States.

15 European Commission, *European Union Public Finance*, 4th Edition 2008, p. 198.

16 Decision 75/250/EEC

17 Decision 75/250/EEC, Article 1.

18 Decision 75/250/EEC, Article 2.

19 Both introduced in the Brussels Council Meeting of December 1978, Resolution of the European Council of 5 December 1978 on the establishment of the European Monetary System (EMS) and related matters.

varied between 1979 and 1999, with the weighting changing in 1984 and 1989 as the currencies for Greece, Spain, Portugal and Luxembourg were added. In 1999 the ECU was replaced by the Euro, again at parity. The Euro, in addition to being the single currency today for 19 Member States is also the currency currently used within the European Union for the determination of financial values including calculating financial thresholds in public procurement.

2.1 Financial thresholds in public procurement: works

The first instance of thresholds applicable to public procurement rules is to be found in Directive 71/305/EEC. This Directive established the first public procurement legal regime creating positive obligations for Member States of the then European Economic Community, covering exclusively public works and demanding that such contracts had to have a pecuniary consideration.²⁰ Article 7 of Directive 71/305/EEC stated that the rules contained therein would only be applicable to contracts above 1,000,000 units of account. Recital 15 of this Directive, however, established that “the Commission will at a later date submit to the Council a new proposal for a Directive whose aim is to lower the threshold for the application of co-ordination measures to public works contracts.” As we shall see, this reduction in thresholds never happened.

Directive 71/305/EEC was amended in 1978 by Directive 78/669/EEC replacing the 1,000,000 units of account threshold with EUA 1,000,000, thus maintaining parity but leaving Recital 15 of Directive 71/305/EEC unfulfilled. The threshold was revised upwards in the late 1980s when Directive 89/440/EEC raised the thresholds to ECU 5,000,000.²¹ According to Recital 17 of Directive 89/440/EEC, the change was due to “the rise in the cost of construction work and the interest of small and medium-sized firms in bidding for medium-sized contracts”. The consequence of raising the threshold five-fold was a significant reduction in the scope of the EU internal

²⁰ This Directive was preceded by the Liberalisation Directives 70/32 and 71/304 which aimed at eliminating restrictions and discriminatory measures against tenderers from other Member States but without being particularly successful. The Liberalisation Directives followed from the General Programme for the abolition of restrictions on freedom to provide services (JO 2/32, English special edition, Series II, Vol IX) and the General Programme for the abolition of restrictions on freedom of establishment (JO 2/36, English special edition, Series II, Vol IX). These General Programmes represented the first foray of the Commission on the regulation of public procurement. On these, see Trepte, *Public Procurement in the EU*, 2nd edition, p. 27-30.

²¹ Directive 89/440/EEC Article 6.

market for works contracts. From July 1990 onwards,²² contracts valued between 1,000,000 and 5,000,000 ECU were subject to national rules only.²³ The increase introduced by Directive 89/440/EEC remains to this day the only significant increase in threshold levels in EU public procurement law.²⁴

Neither the Recital nor the main body of Directive 89/440/EC provided any further explanations for what effectively amounted to be a significant restriction in the scope of application of EEC rules to public procurement. Additionally, it can be argued that Recital 17 of Directive 89/440/EEC was in direct contradiction with Recital 18 as the latter stated that “it is necessary to improve the access of contractors to procedures for the award of contracts;” thus begging the question of how it would be achieved for the now excluded contracts between ECU 1,000,000 and 5,000,000. This line argument is furthered by the admission by the European Commission in 1985 that to complete the EEC internal market, the various procurement thresholds need to be lower.²⁵ Furthermore, as Directive 89/440/EEC did not repeal Directive 71/305, but simply amended it, Recital 15 and its promise of lower thresholds remained in place, although void of any useful effect.

Barring currency swings, the five-fold increase introduced by Directive 89/440/EEC is the only instance where the general procurement thresholds were revised upwards since their introduction in the 1970s. It is worth noting that these thresholds went significantly up in a sector not covered by a multilateral agreement and allegedly to protect SMEs from that sector. This leads to the question (as below with supplies contracts) of how furthering the public procurement internal market can be achieved by means of an exogenous factor like multilateral agreements instead of endogenous ones such as interest by EEC/EU bodies or the Member States.

Irrespective of the wording in Recital 17 of Directive 89/440/EEC, the increase is probably due to policy/political pressure from Member States to protect their national markets or perhaps an anticipation of the inclusion of public works in the future multilateral trade agreement. To the author these two possibilities taken together appear to be a leading explanation for the increase as works contracts were not part of the Tokyo Agreement on

22 The deadline for the Directive to be transposed by Member States was one year from the date of publication (July 18th, 1989), Directive 89/440/EEC Article 3.

23 Although, as argued above in footnote 4 above, the Court of Justice moved over the years to subject some of those below-threshold contracts to EU primary law only.

24 However, it will be shown in section 2.2 below that the Directive 88/295/EEC, applicable to supplies contracts, introduced an increase from EUA 140,000 to ECU 200,000 for some contracts tendered by specific contracting authorities.

25 Commission, Completing the internal market COM(85) 310 final, para 85 p.24.

Government Procurement, as they were added only in the 1994 Government Procurement Agreement (1994 GPA). Furthermore, the European Community commitment for works contracts under the 1994 GPA was precisely at the ECU/SDR 5,000,000 mark. Therefore, from 1994 onwards the exposure of a national works market at the ECU/SR 1,000,000 would be significantly larger as any GPA signatory party with a similar commitment would benefit from reciprocity in market access.

Other arguments or explanations such as exchange rates fluctuations or inflation can be explored and put to the side. First, the increase was certainly not due to exchange rate pressures as the ECU did not fluctuate significantly against the dollar.²⁶ Another explanation for the increase may be found in inflation figures. Using the French Consumer Price Index or the UK Consumer Price Index to calculate inflation between March 1979 and July 1989 yields only a 2x price increase.²⁷ As such, the difference between the inflation and the actual 5x increase can only be attributed to other factors. In addition, had the increase been due to inflation it would be the only instance between 1971 and 2015 that any threshold for works, supplies or services contracts increased due to inflation. Finally, there was no mention of inflation as an explanation for the increase in Directive 89/440/EEC itself.

Whatever the reasons, it is safe to argue that they were not (direct) economic reasons and were based on other objectives be them political, national or a compromise between Member States. The Commission argued in its 1985 paper on the completion of the internal market that contracting authorities had a tendency “to keep their purchases and contracts within their own country.”²⁸ Raising the thresholds and thus restricting the number of contracts covered by Directive 71/305 is a sure way to avoid having to apply any European rules whatsoever and ensuring a higher probability that the affected contracts would be won by national suppliers.

2.2 Financial thresholds in public procurement: supplies

26 The ECU devalued around 20% against the USD (the other main SDR based component) between March 13th, 1979 and July 18th, 1989. Having said that, the ECU between 1984 and 1985 did indeed drop significantly against the dollar, but most of the fall had been recovered by early 1987, <http://fxtop.com/en/currency-converter-past.php?A=1&C1=USD&C2=XEU&DD=13&MM=03&YYYY=1979&B=1&P=&I=1&btnOK=Go%21>, accessed April 10th, 2015

27 <http://fxtop.com/en/inflation-calculator.php?A=100&C1=GBP&INDICE=UKCPI2005&DD1=13&MM1=03&YYYY1=1979&DD2=18&MM2=07&YYYY2=1989&btnOK=Compute+actual+value>, accessed May 26th, 2015.

28 Commission, Completing the internal market COM(85) 310 final, para 81 p.23.

Financial thresholds for the public procurement of goods (supplies) first appeared in the 1970s in Directive 77/62/EEC. Article 5(1)(a)(b) defined that Directive 77/62/EEC was applicable to contracts with a value over EUA 200,000. Article 1(a) of this Directive also referred to the need for “pecuniary consideration” in the definition of public supply contract. In 1980 Articles 2 and 3 of Directive 80/767/EEC amended Directive 77/62/EEC, reducing the threshold levels to EUA 140,000 for some supplies contracts, though not all.²⁹ This change was due to the adherence to the 1979 Tokyo Code Agreement on Government Procurement,³⁰ which came into force in 1981³¹ and included limited provisions to subject only part of procurement to international competition.³² More importantly, the Code was only applicable to contracts valued at above SDR 150,000,³³ leaving out any contracts with a lower value.³⁴

The change introduced by Directive 80/767/EEC constitutes the first instance where thresholds were changed due to trade agreement compliance requirements. First, the Directive recognised in its preamble that the changes were due to the 1981 Code and conceded the Commission powers to periodically review the threshold levels in accordance with Article I (1) (b) of the Code.³⁵ Second, the agreement covered only the contracting authorities specifically included in a list of participating authorities. Third, on its original

29 This reduction was applicable only to purchase contracts (Article 2, first sub-paragraph) and some contracts in the sector of defence (Article 2, second sub-paragraph).

30 Decision 80/271/EEC. For a full analysis of the evolution of international procurement negotiations, please see Marceau and Blank, History of the government procurement negotiations since 1945, Public Procurement Law Review 4 1996, p. 77 - 147.

31 To which the European Economic Community was party, thus representing the then 10 Member States - Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands and United Kingdom. Portugal and Spain acceded later.

32 On this topic please see, Hoekman and Mavroidis, The World Trade Organisation's Agreement on Government Procurement - Expanding Disciplines, Declining Membership?, World Bank Policy Research Working Paper, 1995.

33 Article I (1)(b).

34 The Code included a footnote in Article I stating that “[f]or contracts below the threshold, the Parties shall consider, in accordance with paragraph 6 of Article IX, the application in whole or part of this Agreement. In particular, they shall review the procurement practices and procedures utilised and the application of non-discrimination and transparency for such contracts in connection with the possible inclusion of contracts below the threshold in this agreement.” Thus indicating that, the parties had an obligation (“shall”) of looking into the possibility of extending some of the obligations into contracts with a value below-thresholds. At the very least this footnote, and Article IX (6) when read together with it, indicated an interest in periodically deepening the achievements by applying these principles to lower valued contracts and to periodically revise the Agreement.

35 Directive 80/767/EEC Article 3.

version, only the procurement of goods was covered, leaving out both services and works.³⁶ Fourth, it has been argued that in the 1980s, the revisions introduced to the EEC rules in public procurement were mostly driven by the need to adapt them to the 1981 Code.³⁷

Directive 88/295/EEC introduced some significant changes to the regime of Directive 77/62/EEC as amended by Directive 80/767/EEC. First, references to EUA were replaced with ECU in Article 5(1)(a). Second, two clear thresholds were established: ECU 200,000 and 130,000. The higher threshold was applicable only to the contracting authorities mentioned in Article 1(b) of the Directive,³⁸ which were not covered by the revised Code Agreement on Government Procurement. These authorities roughly correspond to what we call today sub-central contracting authorities.

The lower threshold of ECU 130,000 was applicable to the contracting authorities referred to in Annex I to the Directive. This list is identical to the one provided by the revised Code Agreement on Government Procurement, which came into force also in 1988. The revision of the code is not particularly significant except for the fact that the threshold value was reduced from SDR 150,000 to SDR 130,000 for the entities included in the scope of Article I (1)(b) of the Agreement.³⁹

The division between contracting authorities subject to different threshold levels according to their coverage status under the Code Agreement on Public Procurement indicates the importance of the external commitments undertaken by the EEC in determining the scope of the internal market for public procurement. In consequence, it can be argued that the engine of public procurement single market integration is an external multilateral agreement and not the internal pressure coming from either the EEC institutions or the Member States.

The segregation between central and sub-central contracting authorities introduced by Directive 88/295/EEC constitutes first instance where the general thresholds depended on the nature of the contracting authority, as in Directive 80/767/EEC the 200,000/140,000 threshold depended on the nature of the contract instead. The segregation based on contracting authority nature remains to this day and is still present in the current Directive

36 Except services essential to the procurement of those goods.

37 Fernandez Martin, (1996) The EC Public Procurement Rules, p.16

38 State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or bodies governed by public law.

39 The footnote remained in place as well. Text of the agreement available: https://www.wto.org/english/tratop_e/gproc_e/gpa_rev_text_1988_e.pdf, accessed April 10th, 2015.

2014/24/EU. It is interesting to note however, that while law makers decided to treat differently sub-central contracting authorities when it came down to supplies contracts, the same logic was never applied in works contracts. To this day there is only a single threshold for works contracts, irrespective of the central or sub-central nature of the contracting authority, whereas for goods and services the distinction and differing thresholds remains.

The final main change introduced by Directive 88/295/EEC in what concerns thresholds was the periodical revision mechanism,⁴⁰ which remains in place to this day albeit with alterations. This provision established that thresholds should be revised every two years from 1988 by calculating the average daily values of national currencies in ECU and then of the ECU in SDR over (more or less) that two-year period. The revision mechanism provides us with another clue about the importance of the multilateral agreement commitments entered into by the EEC as the only reason for the revisions is simply the volatility of the ECU/SDR exchange rate. As argued in the works section above, inflation is neither cited as a reason to revise the thresholds, nor included in the revision mechanism.

Directive 77/62/EEC was finally repealed and replaced by Directive 93/36/EEC which did not introduce major changes to the thresholds.

2.3 Financial thresholds in public procurement: services

Services in themselves were only regulated by a public procurement Directive in 1992 with Directive 92/50/EEC.⁴¹ Before this Directive, services were not subject to secondary legislation at European level.

Article 7 of Directive 92/50/EEC established an ECU 200,000 threshold and expressly referred to the need of contracts having a “pecuniary interest”,⁴² instead of pecuniary consideration as in Directives 71/305/EEC and 77/62/EEC. The new reference to pecuniary interest was carried over to Directives 93/36/EEC and 93/37/EEC and is an important element for the operation of the threshold system as without attributing a value it is impossible to analyse if contracts are above or below the thresholds.

2.4 Inflation impact on thresholds from 1979 to 1993

40 Article 5(1)(c) Directive 88/295/EEC.

41 On this Directive please see Trepte, Extension of the EC procurement regime to public services contracts: an overview of the Services Directive, PPLR (2) 1993 p.1- 12

42 Article 1(a).

By 1993 the EU had a complete public procurement system covering works, goods/supplies and service contracts. Each contract type had finally a threshold level which was reasonably stable and subject to correction only every two years in accordance with exchange fluctuations.

The 1980s was a period of high inflation, certainly higher than recently, and using the French Consumer Price Index (CPI) as a benchmark it is possible to measure the effects of inflation in the public procurement thresholds. As the conversions between European Units of Account and ECU were done at parity,⁴³ it is possible to have an idea of the impact inflation had on the thresholds between 1979 and 1993. 1979 is used as a starting date for the calculation since that is the year when supplies were subject to thresholds and the Unit of Account had just been replaced with the EUA in 1978.

	1979	1993 nominal values	1993 real or inflation adjusted values	Inflation adjusted difference between 1978 and 1993
Works	1,000,000	5,000,000	2,900,000	172%
Supplies (not covered by Revised Tokyo Agreement)	200,000	200,000	116,000	58%
Supplies (Covered by Revised Tokyo Agreement)	200,000	130,000	75,000	37%
Services	-	200,000	200,000	-

Table 1 - Inflation effects on thresholds between March, 1979 and January, 1993. Data computed using French Consumer Price Index which yielded a 2.4x inflation rate between those dates. All values in EUA and ECU.

Between 1979 and 1993 the French CPI index rose 2.4x,⁴⁴ contributing to

⁴³ The author was unable to confirm if the conversion of the Units of Account into European Units of Account was done at parity.

⁴⁴ <http://fxtop.com/en/inflation-calculator.php?A=100&C1=GBP&INDICE=UKCPI2005&DD1=13&MM1=03&YYYY1=1979&DD2=18&MM2=07&YYYY2=1989&btnOK=Compute+actual+value>, accessed June 2nd, 2015.

erode significantly in real terms the thresholds of supplies. As argued above when looking at the 1978-1988 period, for works the nominal increase was higher than inflation, its real value was not eroded at all. In fact, in 1993 it was 2.9 times higher than originally, contributing as argued above for a contraction of the scope of the public procurement internal market.

3. Financial threshold’s evolution 1993 - 1999: Uniformisation with the GPA

During the negotiations for the GATT Uruguay Round, procurement was back in the agenda and a new Government Procurement Agreement was agreed in Marrakech in 1994.⁴⁵ This new GPA entered into force in 1996 and expanded the coverage from supplies and ancillary services to include works and services as well.⁴⁶

The 1994 GPA does not establish the thresholds in the main body of the agreement, contrary to what happened in the 1981 Tokyo Code on Government Procurement. They are included on a country-by-country approach by each member on Annex I and Annex II. In its Annex, the European Community (EC),⁴⁷ representing all Member States, established the following thresholds for its procurement market:

	Central (Annex I)	Authorities Sub-Central (Annex II)	Authorities
Works	SDR 5,000,000	SDR 5,000,000	
Supplies	SDR 130,000	SDR 200,000	

45 On this process see, Marceau and Blank, History of government procurement negotiations since 1945, PPLR (1996) 4, p. 77-147, Mavroidis and Hoekman, The WTOs Agreement on Government Procurement: expanding disciplines, declining membership? PPLR 1995 2 p. 63 -79; Trepte The GATT GPA and the Community procurement rules: realignment and modification, PPLR (3) 1995 CS42 - 44 and Trepte, The GPA and the Community procurement rules: update on the legislative process, PPLR 1996 (6) CS159-162.

46 On this agreement see, Arrowsmith and Anderson (eds), The WTO Regime on Government Procurement, Cambridge University Press, 2011 and for a critical analysis, Liang, Government Procurement at Gatt/WTO: 25 Years of Multilateral Framework. Asian Journal of WTO & International Health Law and Policy, Vol. 1, No. 2, pp. 277-290.

47 Council Decision 94/800/EC, 22 December 1994.

Services

SDR 130,000

SDR 200,000

Table 2: 1994 GPA EC commitments

As mentioned in section 2, the works thresholds increased five-fold between 1979 and 1993 and the value in Directive 93/37/EEC, in force at the time of approval of the Marrakech agreement, was ECU 5,000,000. In the same period of time, supplies thresholds were reduced from ECU 200,000 to ECU 130,000 but only for central contracting authorities, with sub-central contracting authorities remaining at ECU 200,000. It has to be too much of a coincidence that the nominal thresholds⁴⁸ would become exactly identical both for intra-community and third country access between 1992 and 1994, when both the Directives and the GPA agreement were being concluded.⁴⁹

Arrowsmith mentions that the GPA regulates the relationship between the EC and other signatory parties, not the internal relationship between EC Member States.⁵⁰ In strictly theoretical legal terms that is correct, but in face of the evidence it certainly appears that those external commitments have shaped the size and scope of the internal market, therefore indirectly determining the internal relationship between Member States. There are no coincidences when European Commission decides in 1995 to standardise all thresholds at the exact same levels as those of the GPA,⁵¹ by making direct reference to SDR values instead of ECUs. The work of the European Commission paved the way to the adoption of the Directive 97/52/EC which amended Directives 92/50/EEC, 93/36/EEC and 93/37/EEC. In what concerns thresholds, one of the main changes introduced by Directive 97/52/EC was to refer to the thresholds in ECU as “SDR-equivalent”, effectively anchoring the real threshold values to set by the GPA in those three Directives.⁵² If doubts

⁴⁸ That is, before fluctuations in the ECU/SDR exchange rates are taken into account.

⁴⁹ The same finding hold true as well for the Utilities Directive 93/38/CEE 14(1) and Annex III of the GPA 1994, where the thresholds are SDR/ECU 400,000 (services and goods) and 5,000,000 (works). Contracts with public telecommunications networks are in apparent conflict as the threshold in the Directive was ECU600,000, but they were never included by European Community in the negotiations and as such are not part of the of the 1994 GPA. In any case, telecommunications were excluded from the subsequent Directive 2004/17/EC and are no longer regulated by public procurement.

⁵⁰ Arrowsmith, *The Law of Public and Utilities Procurement*, First Edition 1996, p. 160.

⁵¹ Commission, COM (95) 107 Final

⁵² There is a significant exception to this rule introduced by Directive 97/52/EC. For service contracts included in Annex IB to Directive 92/50/EC, colloquially known as “Part B services” which are not covered by the GPA, nor object of this paper. The revised drafting of Directive 92/50/EC Article 7(1)(a) states that the threshold for these contracts is 200,000 ECU, omitting any reference to “SDR-equivalent” values. Once more, for contracts not covered by the multilateral procurement agreements there appears to be little appetite for further

remained as to where the incentive for Directive 97/52/EC came from, Recital 1 and 3 state clearly the influence of the 1994 GPA in leading to the need to create this Directive.

Directive 97/52/EC provides another argument in favour of the line that the various iterations of multilateral agreements applicable to public procurement drove the changes in the scope of EU public procurement rules. Recital 5 candidly admits that “certain provisions of the [Government Procurement] Agreement introduce more favourable conditions for tenderers than those laid down in Directives 92/50/EEC, 93/36/EEC and 93/37/EEC”, with Recital 5 arguing for an equivalence in what concerns opportunities for access to the contracts covered by the 1992/1993 Directives and the GPA as well.

The “SDR-equivalent” approach adopted in Directive 97/52/EC provides one of the best arguments in favour of the equivalence between the internal market and external commitment. The fact they are identical reduces the system’s complexity for practitioners. A single set of thresholds is easier to apprehend than multiple sets. However, this argument should be taken to its logical conclusion, that a single threshold is better than the 5 different ones which existed then and as shown on Table 2. Furthermore, as mentioned earlier those 5 different thresholds are not internally consistent nor follow a logical structure: whereas for supplies and services, the thresholds vary in accordance with the nature of the contracting authority (central or sub-central), the same does not happen when it comes down to works, as the threshold is identical for all contracting authorities. In here lies evidence of three lines of thought that the author considers to be behind the various thresholds in the 1990s: first, their actual values are intimately connected with the commitments undertaken with the multilateral agreements in procurement, particularly the 1994 GPA; second, they are a political construct built on compromises and are not based on a substantive reason that justifies their specific value; third, those compromises affected any possibility of internal consistency among the different thresholds, hence the multiple thresholds for supplies and services which are dependent on the nature of the contracting authority and works which do not.

4. Financial threshold’s evolution 1999 - 2014: the Euro years

4.1 Between 1999 and 2004

The Euro was introduced in 1999 and, once more, the conversion from ECU to Euro was done at parity. As for the public procurement thresholds these remained unchanged until the reform process for Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concluded. These three Directives were replaced by Directive 2004/18/EC. During the reform process, thresholds were one of the topics of debate right from the start.

The European Commission published a Green Paper⁵³ in 1996 to kickstart the public procurement reform process. This Green Paper stated that the then current threshold levels of approximately ECU 200,000, ECU 130,000 and ECU 5,000,000 were set in part due to the need to comply with the 1994 GPA agreement.⁵⁴ The European Commission posited as well that “[t]hese thresholds are defined with a view to ensuring the competitive procurement rules apply to contracts likely to interest suppliers from other Member States while allowing administrative and procedure costs on smaller contracts to be kept to a minimum.”⁵⁵ This explanation for the threshold levels by the European Commission is important in four levels. First, it recognises that at least some thresholds are set not because of intrinsic reasons but because of the commitments assumed in the 1994 GPA agreement. For the contracts covered by the 1994 GPA agreement, the reason for their threshold value is simply the commitments made by the European Community and nothing else.

Second, the European Commission suggested that those threshold levels ensure that contracts that are *likely* to interest suppliers based in other Member States are available to them. But the European Commission is implying another thing here: by linking the possible foreign interest to the value of the contract, it is doing so not only for suppliers based in other Member States, but also for those based in GPA signatory parties. The latter, of course are not part of the European single market, but benefit from access to it in conditions of reciprocity. The assumption that higher value contracts imply a higher intrinsic interest was provided without providing any evidence of a correlation (let alone causation) that higher value contracts are

53 Commission, Green Paper Public Procurement in the European Union - Exploring the way forward, COM(96) 583 final.

54 Ibid, p.50.

55 Ibid, p. 50.

intrinsically more interesting for foreign suppliers. That may well be the case, but it is being taken as received wisdom instead of as a consequence of analysing real data.

Third, the European Commission failed to provide any justification for the binary approach whereby all contracts above thresholds are subject to the full might of EU regulation and those below are not.⁵⁶ What is the reason that makes contracts above an arbitrary value relevant for the internal market and as such subject to that EU regulation?

Finally, the European Commission also recognised that the threshold levels provided a cost/benefit balance so that administrative and procedural costs on smaller contracts can be kept to a minimum. One must not forget however the historical context of the Green Paper. It was published in 1996 when the internet was still in its infancy and the subsequent reductions in cross-border trade transaction costs or its effect on improving total factor productivity were yet to come to pass. In a sense, we can see reflected in the Green Paper the pre-internet logic that disregarded its potential as a communication tool and a driver to reduce administrative and procedural costs when e-procurement is used. The justifications of the European Commission also predate the simplification work carried out in the 2004 and the 2014 reforms, particularly the latter.⁵⁷ However, it is interesting to note that these arguments about transaction costs in small contracts as a last resort defence for thresholds remained constant over the last 20 years and they are present even today in Article 92 of Directive 2014/24/EU as will be discussed in the final section of this paper.

In the Explanatory Memorandum accompanying the proposal for a new Public Sector Directive⁵⁸ published in 2000, the European Commission suggested that the threshold system spread across three different Directives was not “straightforward or user-friendly” and suggested that perhaps it would be preferable to have thresholds in Euro accompanied with the powers for the Commission to periodically review them,⁵⁹ to ensure they did not

56 It is important to note that this Green Paper is prior to *Telaustria* (Case C-324/98) and the creation by the Court of Justice of the cross-border interest test to define if Treaty principles are applicable to contracts not covered by the Directives.

57 Electronic procurement is not mandatory in the EU until 2018. Directive 2014/24/EU, Article 90.

58 European Commission, Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts COM(2000) 275 final. In this proposal the thresholds remained unchanged other than being a fixed euro amount instead of a SDR indexed value as before.

59 Explanatory Memorandum accompanying the proposal for a Directive of the European

deviate much from the SDR commitment assumed with the GPA 1994. In other words, having just moved in 1997 to set the thresholds set in “SDR equivalent”, the European Commission probably concluded that forcing contracting authorities to calculate the thresholds on a case-by-case basis was more complex than anticipated.⁶⁰

In the subsequent legislative drafting process⁶¹ different suggestions about thresholds were made. Many suggested an increase in comparison with the values proposed by the European Commission at the start of the legislative process. Absent from the discussions appear to be any substantive reasons for raising or lowering the thresholds, as well as any interest in using inflation as a guiding element for the suggestions. For example, the Member of the European Parliament (MEP) Maria Berger suggested that the thresholds should roughly double to €250,000 (goods and services for central authorities), €500,000 (goods and services sub-central authorities) and €10,000,000 (works) with the argument that the then current threshold levels did not result in “any increase in cross-border trade in the area of public contracts.”⁶² This view was echoed by other MEPs such as Bert Doorn and Toine Manders, who suggested an increase in thresholds with the justification that the then current thresholds were not offset by the benefits and imposed a disproportionate burden on smaller suppliers and authorities.⁶³ Furthermore, Joachim Wuermeling suggested a more limited increase, arguing that it would “take account of the objective of opening the internal market.”⁶⁴ It seems strange that the internal market objective would be better served by raising the thresholds and thus reducing the overall size of said market as well as hindering the access to the same internal market for smaller suppliers. The limited increase proposed by Wuermeling (€200,000, €300,000 and €7,000,000) was, however taken up by the

Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts COM(2000) 275 final, Article 8.

⁶⁰ Suggesting a return to SDR denominated thresholds, Arrowsmith, *The Law of Public and Utilities Procurement*, Third Edition 2014, p. 450.

⁶¹ The legislative process at EU level is always started by the European Commission, but the final decision is taken in conjunction between the Council and the European Parliament. The 2004 reform followed the old legislative co-decision procedure. With the entry into force of the Treaty of Lisbon in 2009, this is now known as the ordinary procedure (Article 294 TFEU).

⁶² Hebly, *European Public Procurement - Legislative History of the “Classic” Directive 2004/18/EC*, p. 463-464

⁶³ *Ibid*, p. 464

⁶⁴ *Ibid*, p. 466

European Parliament in the first reading.⁶⁵ The subsequent Council Common Position indicated a compromise and suggested €162,000, €249,000 and €6,242,000.⁶⁶ These compromise threshold values were adopted for the original version of Article 7 of the Directive 2004/18/EC. Furthermore, Recital 17 of Directive 2004/18/EC stated that multiple thresholds “complicates matters” and that establishing them in euro would contribute to the simplification of the regime. This Recital also called for the periodic review of the thresholds to ensure compatibility with the 1994 GPA commitments, with the periodic review process for thresholds established in Article 78 of Directive 2004/18/EC. This is to be undertaken by the European Commission every two years and is indexed to the €/SDR average exchange rate over a period of 24 months.⁶⁷ This constitutes yet another clear indication that threshold levels are simply determined by the 1994 GPA commitments and do not have a substantive reason to exist directly connected with the EU’s internal market.

4.2 From 2004 to 2014

The thresholds adopted in the original drafting of Directive 2004/18/EC Article 7 were higher than the prevailing SDR/EUR exchange rate and as they were now set directly in EUR and as such subject to fluctuations in exchange rates.⁶⁸ Therefore, in accordance with Article 78 of the Directive 2004/18/EC, the European Commission initiated in late 2004 the first process of periodically reviewing the thresholds every two years to ensure compliance with the 1994 GPA commitments, following the two-year revision mechanism included in the GPA and adopted in the Directive 2004/18/EC. The new thresholds were published in late 2004⁶⁹ and their value was almost identical to the original thresholds set by the European Commission for 2004.⁷⁰ Therefore it can be safely argued that 1994 GPA commitments overruled the compromise achieved between the European Parliament and the Council during the legislative process that led to the approval of Directive 2004/18/EC.

65 Ibid, p. 469.

66 Ibid, p 471

67 Arrowsmith, *The Law of Public and Utilities Procurement - Regulation in the EU and UK*, Volume 1, 3rd Edition, 2014, p. 449.

68 Arguing that this was done for political reasons, Arrowsmith, *The Law of Public and Utilities Procurement - Regulation in the EU and UK*, Volume 1, 3rd Edition, 2014, p. 450.

69 Commission Regulation (EC) No 2083/2005.

70 Information 2003/C 309/07 14.

Between 2004 and today, the thresholds have been updated every two years as requested by Directive 2004/18/EC and the 1994 GPA agreement. The various alterations between 2004 and 2014 are summarised in Table 3.

	2004-05 original	Directive 2004/18/EC	2004-05 subsequent	2006-07	2008-09	2010-11	2012-13	2014-15
Services and supplies (central)	154,014	162,000	154,000	137,000	133,000	125,000	130,000	134,000
Services and supplies (sub-central)	236,945	249,000	236,000	211,000	206,000	193,000	200,000	207,000
Works	5,923,624	6,242,000	5,923,000	5,278,000	5,150,000	4,845,000	5,000,000	5,186,000

Table 3- Nominal threshold values from 2004 to 2014. All values in euros.

In the period analysed, nominal thresholds have remained relatively steady. Nominal values between the end of 2004 and 2014 dropped around 13%. This reduction is due to the fluctuations in the €/SDR exchange rate only, a finding that can be easily attested by the fact all thresholds dropped by the same amount in percentage terms. Inflation, however, as had a significant erosion effect in the in the decade to 2014, effectively reducing the thresholds by 29.39% in the same period.⁷¹ Combining inflation with the nominal reduction between 2004 and 2014 leads us to a 34% drop, as can be seen in table 4.

⁷¹ UKCPI data, <http://fxtop.com/en/inflation-calculator.php?A=5923000&C1=GBP&INDICE=UKCPI2005&DD1=01&MM1=01&YYYY1=2005&DD2=31&MM2=12&YYYY2=2014&btnOK=Compute+actual+value>

	2004/2005 final values	2014 nominal values	2014 inflation adjusted values	Inflation between 2004 and 2014 (compounde d)	Adjusted difference between 2004/200 5 and 2014
Works	5,923,000	5,186,000	7,663,000	29.39%	34%
Supplies & Services (not covered by Tokyo Agreement or GPA)	236,000	207,000	305,000	29.39%	34%
Supplies & Services (covered by Tokyo Agreement or GPA)	154,000	134,000	199,000	29.39%	34%

Table 4 - Inflation effects between March 2004 and December 2014. UKCPI data used. All values in euros.

4.4 Inflation and currency fluctuation effects between 1979 and 2014

Having established in tables 2 and 4 the effects of inflation for the 1979-1993 and 2004-2014 periods, it is relevant to assess the cumulative effect of inflation in works and supplies thresholds for the 1979 to 2014 period.

	1979 original values	2014 nominal values	2014 inflation adjusted values	Inflation adjusted difference between 1979 and 2014
Works	1,000,000	5,186,000	3,683,000	162%
Supplies (not covered by Tokyo Agreement or GPA)	200,000	207,000	736,000	28%
Supplies (covered by Tokyo Agreement or GPA)	200,000	134,000	75,000	18%
Average	466,000	1,842,000	1,498,000	69%

Table 5 - Inflation effects between March 1979 and December 2014. UKCPI data used and all values in euros. Services contracts were not included in as they were only regulated in 1992.

The table above provides a good indication of the effects of inflation over time. Comparing the thresholds between 1979 and 2014 yields a significant decrease for supplies (not covered by Revised Tokyo Agreement or GPA) the only threshold that never changed in nominal terms over time: its real value has been eroded to 28% of the original value. For supplies covered by the Revised Tokyo Agreement or GPA the erosion is even more substantial with a reduction to 18% of the original value. The odd one out are works

contracts thresholds, as due to the 1980s increase, their current value is still significantly higher than the original 1970s threshold.

Table 5 however does not include the effects of exchange fluctuation as none of the thresholds in 1979 was determined by commitments in the Tokyo Agreement and as such there was no currency fluctuation related to SDR, although both the EUA and the ECU were composed by baskets of currencies and as such the thresholds were already back then subject to the vagaries of currency exchanges. Table 4 should be enough to provide an indication of the effects produced by the €/SDR exchange rate and as such it can be argued that at least part of the difference shown in Table 5 is due to nominal reductions imposed by the commitments of the GPA 1994 and 2012.

The change in threshold values shown in tables 4 and 5 is thus explained (mostly) from inflation and a (partly) from the natural fluctuation of foreign exchange rates between the units of currency used for the threshold calculation and SDRs. None of the changes in the 35 year period were due to a re-thinking of the threshold system or a proactive approach by either the European Commission or the Member States in furthering the single market for public procurement. In conclusion, the scope and size of the EU's public procurement internal market today is not defined by substantive reasons. There is no reason why a €125,000 goods contract was subject to the EU rules in 2010/11 but excluded in 2014/15.⁷² The scope of the EU public procurement internal market depends on two exogenous factors: the GPA commitments and the exchange rate fluctuations between the euro and SDRs. Changes to the size and scope of the market occur passively every two years.

As a comparison, it is interesting to highlight what the EU did in terms of foreign trade in a similar period. Between 1988 and 2010 the EU had no problem in proactively reducing the average most favoured nation tariff from 8.8% to 2.8%,⁷³ thus meaning the current tariff values are on average today 31% of what they were in the late 1980s. Therefore, whereby the furthering of the public procurement internal market has happened passively, the EU has taken proactive steps to improve trade with foreign countries by bringing tariffs down.

72 The same argument can be made of intra-EU currency fluctuations, as the euro is only used as official currency by 19 of the 28 Member States.β

73 World Bank, Trends in Average MFN Applied Tariff Rates in Developing and Industrial Countries, 1981-2010 (Unweighted %), available at: <http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/tar2010.xls>, last accessed June 8th, 2015.

5. Financial thresholds today: a near future revision forced by the GPA and Directive 2014/24/EU

The GPA was revised recently in 2012,⁷⁴ entering into force in April 2014. It did not introduce any significant changes to the headline threshold values,⁷⁵ with the European Union maintaining the same values for Annex I, II and III. However, Article XXII(7) of the Revised GPA includes a provision stating that the agreement shall be subject to further threshold negotiations within three years of it coming into force “with a view to improving this Agreement, *progressively reducing and eliminating discriminatory measures*, and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, taking into consideration the needs of developing countries.” [emphasis by the author] From the text of the revised GPA it appears that the “direction of travel” of the thresholds is down, as it happened with other trade barriers, including the tariffs imposed by the EU on goods imported which have been reduced significantly between 1988 and 2010 as mentioned in Section 4.

Directive 2004/18/EC was replaced by Directive 2014/24/EU in 2014.⁷⁶ This new Directive regulates thresholds in Articles 4 and 92 and in what concerns the general threshold rules, it has not introduced any significant changes, although, as with the process leading up to Directive 2004/18/EC the topic of thresholds was subject to debate.⁷⁷ In the author’s opinion this was a wasted opportunity for reviewing the current threshold situation.

⁷⁴ On this agreement see, Anderson, The coming into force of the revised WTO Agreement on Government Procurement, and related developments, *Public Procurement Law Review* 2014 5 NA160-163, Anderson, The conclusion of the renegotiation of the World Trade Organisation Agreement on Government Procurement: what it means for the Agreement and for the world economy, *Public Procurement Law Review*, 2012, 3 p. 83-94 and Anderson, Schooner and Swan, The WTO’s revised Government Procurement Agreement – An important milestone toward greater market access and transparency in global public procurement markets, *The Government Contractor*, 2012 1.

⁷⁵ Sue Arrowsmith, *The Law of Public and Utilities Procurement - Regulation in the EU and UK*, Volume 1, 3rd Edition, 2014 p, 454.

⁷⁶ On this Directive in general see, Lichere, Caranta and Treumer (eds): *Modernising Public Procurement: The New Directive (European Procurement Law Series)*, 2014 and Semple, *A Practical Guide to Public Procurement Law*, 2015. The deadline for transposition by Member States is March 2016, so most are yet to adapt their legal systems to the new Directive. For England, Wales and Northern Ireland (though not Scotland), the Directive was transposed in early 2015 via the *Public Contracts Regulations 2015*.

⁷⁷ Sue Arrowsmith, *The Law of Public and Utilities Procurement - Regulation in the EU and UK*, Volume 1, 3rd Edition, 2014 p, 455

Article 6 defines rules for the calculation of thresholds and a revision mechanism similar to what Articles 7 and 78 of Directive 2004/18/EC offered. Article 92, goes further, however, by mandating mandates the European Commission to review the economic effects on the internal market by 2019, particularly cross-border procurement and the transaction costs imposed by the EU legal system in procurement.

Thresholds are also mentioned in Recital 18 of Directive 2014/24/EU where once more the relationship between them and the GPA is made patently clear once more. Recital 18 it mentions the need to periodically review the thresholds to make sure that the GPA obligations are complied with, similar to what was set in Directive 2004/18/EC. Furthermore, Recital 18 also includes a statement of intent: “[a]n increase in the thresholds set in the GPA should be explored during the next round of negotiations thereof.” It is interesting to note that the Directive would include such a remark, albeit in a Recital, as it indicates what may be the future evolutions for thresholds: upwards. This is problematic as according to Article XXII(7) of the GPA, renegotiation should occur every three years⁷⁸ and it would likely imply as well an identical increase in the intra-EU thresholds, something that has already been suggested by authors as a way forward to bring simplicity and flexibility into public procurement.⁷⁹ Although the possibility of having a specific regime for *very* high value contracts with more flexible rules should not be discarded completely, even bearing in mind the innovations brought by Directive 2014/24/EU itself, said regime should not come at the expense of the rest of the internal market. Currently, it is estimated that only 18.5% of all the procurement spend including contracts below thresholds is covered by the general thresholds.⁸⁰ Assuming a power law distribution of contracts, for example doubling the thresholds would simply reduce the number of contracts subject to the bulk of EU law by a much higher margin.⁸¹ While it may make sense to have a principles-based legal regime for the top 1% of contracts, as these tend to be high risk and one assumes, tendered by contracting authorities with more capacity and access to advice which would

78 And Recital 134 of Directive 2014/24/EU.

79 With this view, Sue Arrowsmith *Modernising the European Union’s Public Procurement Regime: A Blueprint for Real Simplicity and Flexibility*, 21 *Public Procurement Law Review*, 2012 p.71-73 and Rosemary Boyle, *EU Procurement Green Paper on the Modernisation of EU Public Procurement Policy: A Personal Response*, 20 *Public Procurement Law Review*, 2011, NA171-181.

80 Commission, (2014) *Public Procurement Indicators 2012*, p. 10. Utilities, however were excluded from the calculation, so the overall percentage is actually higher than 18.5%.

81 “In fact, the 1% of the largest notices accounted for more than 50% of the total value published in TED in 2012 and in all years between 2009 and 2012.” *Ibid*, p. 4 and 5

indeed benefit from the increased flexibility, it does not hold that we should restrict the internal market to that same 1% of contracts. In the author's opinion, an "internal market" composed of 1% of all public contracts tendered in the EU makes a mockery of such concept. Covering 1% of public procurement contracts does not an "internal market" make. The consequence would be to leave all other contracts subject simply to national rules and the difficulties of establishing what constitutes "cross-border interest".⁸² How easy would then be for micro and small companies which compose 98.7%⁸³ of all companies in the EU to win contracts that are not transparent or subject to equal treatment and non-discrimination?

The fears exposed above are strengthened by Recital 134 of Directive 2014/24/EU. This Recital builds upon Article 92 and the obligation of the European Commission to review the effects on the internal market of the thresholds and to take into account facts such as the level of cross-border procurement, SME participation, transaction costs, the cost-benefit trade-off and inflation. These are all reasons one would expect would justify the definition of what contracts should be included or not by default in the internal market for the purposes of applying the full EU public procurement rules, and the author welcomes this recent desire in making the system dependant in endogenous instead of exogenous factors. However, those reasons appear almost as theoretical in face of the detailed argumentation in the second paragraph of the same Recital, where it is stated that the thresholds should be examined in the near future as per. As we have seen above, the GPA article appears to imply that the thresholds should go down. Looking at Recital 134, however, it seems the objective is different: the thresholds should be revised accordance with inflation thus implying they should go up in the near future and not down. It is interesting to note that looking at Table 4, inflation has had a limited effect over the last decade and that is even before one takes into account other factors which Recital 134 forgets to mention. For example, productivity advances are not mentioned. What has been the impact of multi factor productivity (MTF)⁸⁴ in public

82 On this issue of the difficulties of establishing cross-border interest with certainty, see Pedro Telles, *The Good, the Bad and the Ugly*, *Public Contract Law Journal*, 43 (2013) p3-26 and Piotr Bogdanowicz, *(Still) Qualitative Approach to a Cross-Border Interest and Application European Union Law to Concessions? Some Remarks on C-388/12 Comune di Ancona Judgment*, 2015 24 PPLR p. NA22-27.

83 Commission, (2014) *A Recovery in the Horizon - Annual Report on European SMEs 2012/2013*, p.10. Micro and small enterprises are those with less than 50 employees, €10 million yearly turnover and €10 million total balance sheet, *ibid.* p. 9.

84 On multi factor productivity or total factor productivity, see Hulten, *Total Factor Productivity - A Short Biography*, in *New Developments in Productivity Analysis*, Hulten,

procurement over the years for example? Potential improvements harnessed by the deployment of e-procurement could also play a factor (and yield MTF advances similar to the ones registered in the decade between 1995 and 2005 in the USA.⁸⁵ Recital 134 also steers clear from the most important question of them all: what kind of internal market do we want in public procurement? With the current threshold levels, even if eroded due to inflation and exchange fluctuations, only around 20% of the whole procurement spend is covered by EU procurement rules, so do we want an exclusive or inclusive internal market? Raising the thresholds would lead to an exclusive internal market and this author remains firmly in the camp that the public procurement internal market should be inclusive instead.⁸⁶

Having said all that Article 92, more so than Recital 134, does give some hope that in the future the threshold levels will be determined by intrinsic elements defined by the concept of internal market the EU wants to have instead of the commitments done in the GPA.

6. Conclusion

This article showed that from the introduction of the first financial thresholds in public procurement during the 1970s until today, their nominal value did not change significantly, except for the works contracts, whose thresholds were increased five-fold in the 1980s. From the moment the European Economic Community joined the 1981 Tokyo Code on Government Procurement and its successors that the threshold levels for contracts covered by these multilateral agreements have remained identical for both internal and external suppliers. It can thus be said that the size and scope of the EU's public procurement internal market is determined by these external commitments and not intra-EU actions. Since that period there has been no thorough review or consideration for what would be the most appropriate level for the thresholds to be set at.

Although the threshold levels have remained stable for a significant period of time, their real value has changed. Inflation and currency

Dean and Harper (eds) 2001 and Syverson, What Determines Productivity?, *Journal of Economic Literature* 2011, 49:2, p.326-365.

⁸⁵ Cardarelli and Lusinyan, US Total Factor Productivity Slowdown: Evidence from the U.S. States, IMF Working Paper (2015) WP/15/116 and Fernald and Ramnath, The acceleration in U.S. total factor productivity after 1995: The role of information technology, *Economic Perspectives*, 2004Vol 28 (1), p. 53 - 67..

⁸⁶ Pedro Telles, The Good, the Bad and the Ugly, *Public Contract Law Journal*, 43 (2013) p3-26.

fluctuations have contributed for their progressive erosion over time. Nonetheless, even with this erosion effect, the current thresholds levels exclude over 80% of procurement spend from being covered by the EU public procurement Directives and being part of the internal market. By remaining stable in nominal and changing only due to external pressures and inflation inertia, the thresholds have effectively functioned as a ceiling and a floor to the concept of internal market in public procurement within the EU.

Threshold levels were set in a period before the advent of the internet and do not take into account increases in productivity, particularly multi factor productivity that came to pass over the last three decades. Threshold levels will finally be reviewed in the near future, firstly because Article XXII(7) of the Revised GPA so determines and secondly, because Article 92 of Directive 2014/24/EU also so demands.