Buying Transatlantic:
How Government Regulations Define the U.S.-EU Public Procurement Landscape

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Abstract

This paper surveys the contemporary international public procurement landscape to identify the U.S. and European Union (EU) procurement policies that determine access by private foreign firms to their respective public purchasing opportunities. The paper finds that smaller EU countries tend to be more open to foreign procurement than large ones as a result of having smaller domestic industries from which to source government purchases. It also finds that defense, transportation, and services are the sectors most affected by national procurement policies. Furthermore, while the U.S. and EU markets are moderately open to procurement from foreign venders, they also seek mutual procurement liberalization to expand export and investment opportunities for their respective domestic firms. These findings are based on an examination of quantitative and qualitative analyses of foreign vendor participation in U.S. and EU procurement opportunities, a review of relevant U.S. and EU laws on procurement sourcing and domestic content, and a survey of notable regulations concerning cross-border procurement and their actual application. Finally, this paper analyzes existing procurement data and proposes a research plan to develop a comprehensive estimate of U.S. and European procurement openness through further quantitative analysis. Extended research and macroeconomic modeling based on current levels of procurement openness could attempt to determine the probable economic impact of expanding mutual preferential access to the U.S. and EU public procurement markets, whether through a smaller procurement-specific agreement or through a free trade agreement such as the Transatlantic Trade and Investment Partnership or a similar framework.

Introduction

Public procurement issues involving international trade in goods and services have been a point of contention and negotiation between the United States and the European Union (EU) in recent years. The United States and several U.S. states have an array of laws and guidelines that shape the circumstances under which foreign goods or services are granted access to U.S. public procurement markets. Various EU member states have similar legislation intended to safeguard domestic manufacturers and service providers from foreign competition. In recent years, the EU has been critical of what it perceives as a low rate of foreign vendor access to U.S. public procurement opportunities, arguing that roughly 85 percent of European public procurement opportunities are open to U.S. or other foreign competition, while only 32 percent of the U.S. public procurement market is open to EU or other foreign competition.[1]

However, evidence presented later in this paper shows that certain countries and industries in the European Union are more open to foreign participation in procurement opportunities than others, just as regulations vary between jurisdictions, agencies, and industries within the United States. Furthermore, the methodologies used to calculate procurement openness differ significantly from one study to the next, and the majority of contemporary research on US-EU public procurement liberalization is written from a European perspective.

While this paper examines the cross-border economic effects of procurement regimes, it must also be noted that procurement regulations in the United States and the EU at times affect the participation of local vendors within their respective borders. For example, policies that sometimes prevent European companies from bidding on contracts in neighboring countries have affected cross-border public procurement among EU member states. Such an environment could pose even greater challenges to firms in the United States and other non-EU countries, which do not benefit from EU domestic preference.[2] A similar dynamic can be seen at times in the United States, such as in the existence of preference margins for state and municipal procurement that incentivize the purchase of goods and services from local companies rather than from out-of-state companies.[3]

The core challenge for procurement officers, trade negotiators, and prospective contractors in this situation is the complex relationship between the multiple layers of government that are often involved, as well as the unique national and subnational economic characteristics that lead government entities to issue a diverse range of policies and legislation affecting procurement spending. For the United States the primary issue is federalism, which allows sub-federal entities to control some aspects of procurement legislation. For the EU, the blend of intergovernmental and supranational governance inherent in its institutions and constituent countries is a key driver of complexity in procurement. In the United States, the federal government has broad responsibility for international trade policy, but state and municipal governments retain control over a significant number of decisions that affect the functioning of their local economies. Likewise, procurement policies in certain EU countries may differ significantly from those of neighboring countries due to their unique economic circumstances and existing trading relationships. This

[1] European Commission, "External Public Procurement Initiative: Frequently Asked Questions," March 21, 2012; Philippe Juvin, question posed before the European Parliament, November 6, 2014.
[2] Traynor, Chrisafis, and Hooper, "Critics Insist UK Government to Blame," July 6, 2011.
[3] Indiana Department of Administration, "Buy Indiana," (accessed February 16, 2017).

patchwork of policies can add complexity for U.S. firms hoping to participate in the EU procurement market, and vice versa.

Public procurement trade between the United States and other countries has fluctuated over the years as the U.S. federal government has sought to respond to economic trends by limiting or expanding market access. During the Great Depression and the post-2007 recession, the government leaned toward strengthening domestic preference, while throughout the 1990s and 2010s, the federal government sought to relax procurement regulations through bilateral and multilateral agreements. Efforts to facilitate trade by liberalizing procurement rules in the United States and Europe have aimed at such goals as securing more access to foreign public procurement markets, ensuring that procurement liberalization does not harm import-sensitive domestic industries or displace jobs (especially during periods of recession or slow growth), and using taxpayer money efficiently while avoiding market distortions. However, these policies may become contradictory if all three are pursued simultaneously; with greater mutual access to procurement markets, governments can enter into inexpensive contracts, but domestic vendors may suffer as a result. Due to their scale and their importance to national security and economic development, industries such as defense and transportation infrastructure raise special issues for governments pursuing trade liberalization.

Openness to Foreign Vendor Participation

Public procurement refers to the process by which governments issue public tenders or solicitations to contract with businesses or individuals to purchase goods or services from them for public use.[4] Various types of public tenders exist, including for sole-source and competitive contracts. Common examples of public procurement include military purchases of aircraft from defense contractors; contracts between municipal governments and various equipment providers and construction firms to build transportation, water, electric, or waste infrastructure; or a contract for a consulting firm to audit a government agency's finances or train its personnel.

Measuring Market Access

The complexities of public procurement have made it the subject of government-funded research and of several publications by nonprofit organizations and industry associations. In particular, discovering the extent to which public procurement opportunities in the United States and the EU are open to foreign vendors is challenging, for several reasons. Foremost among these factors is the fact that the United States and the EU are not monoliths, but rather are fragmented markets with numerous regional differences. In the United States, procurement takes place at the federal, state, county, and municipal levels, with heterogeneous procurement policies at each level that reflect the unique characteristics and histories of their respective economies. The EU has a similar dynamic, with various procurement policies at play depending on the level of government in question. With 28 constituent nations, procurement policies in the EU will inherently differ between countries due to differences in industrial capacity, the presence of preferred local contractors, the size of the economy, and the economy's overall orientation in terms of market structure and the relative emphasis on services or manufacturing. At the same time, the EU's

[4] "Government" in this sense refers to governments at the municipal, state/provincial, regional, national, or supranational/multilateral levels.

supranational institutions issue their own solicitations for public goods and services, with these procurements occurring independently of those taking place at the member state level.

International public procurement trade might be substantially simpler if there were a free trade agreement (FTA) between the United States and the EU. The U.S. FTAs with Australia and Colombia, for example, contain state-specific procurement provisions.[5] However, both the United States and the EU are members of the Agreement on Government Procurement (GPA) under the World Trade Organization (WTO). The GPA, which entered into force in 1996 and was revised in 2012, liberalizes cross-border public procurement between the United States, the EU, and 13 other industrialized nations.[6] GPA signatories commit to providing "national treatment[7] and non-discrimination to goods, services and suppliers" from other participating countries. Moreover, signatories must enact measures allowing contractors to appeal decisions where discrimination has occurred or is perceived as having occurred.[8] By providing for mutual national treatment between the participating parties with regard to cross-border procurement, the GPA liberalizes US-EU procurement and counteracts the trend for tariff reductions to be offset by at least some increases in nontariff measures (NTMs).[9]

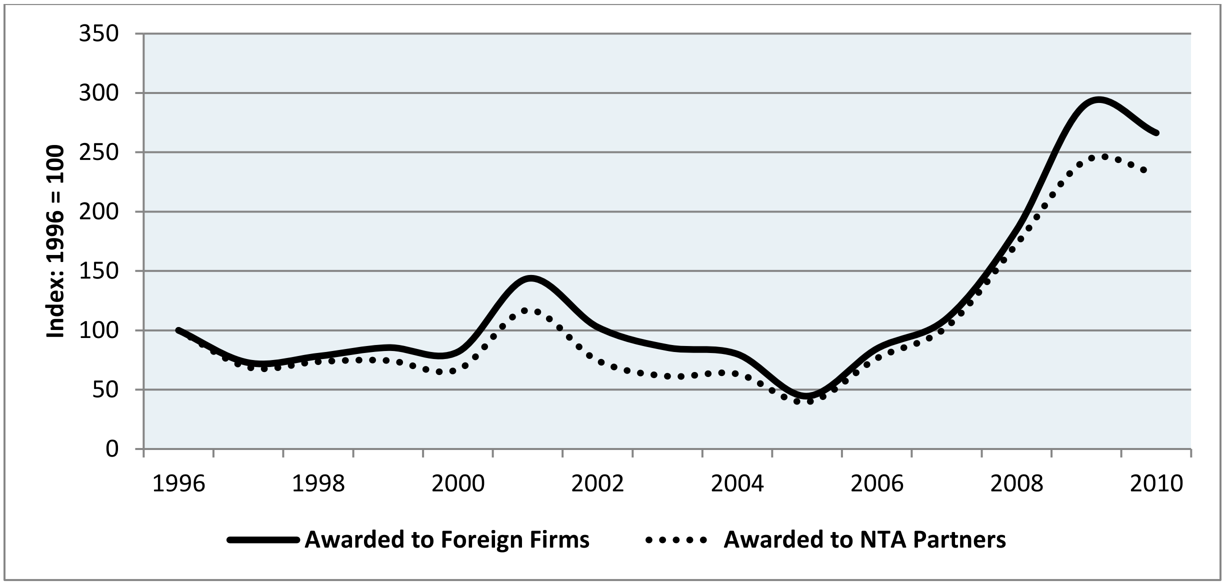
In the United States, the presence of procurement agreements guaranteeing national treatment increases the likelihood that federal purchasing authorities will purchase from partner countries rather than non-partner countries. An analysis of U.S. procurement award recipients between 1996 and 2010 finds that foreign recipients tend to share several notable characteristics.[10] A strong correlation exists between the year-on-year rate of change in contracts awarded to foreign firms as a share of total U.S. government tenders and the year-on-year rate of change in contracts awarded to firms domiciled in countries with which the United States has a national treatment agreement (NTA), a category which includes the GPA (see figure 1 on page 5) and FTAs with national treatment provisions. This demonstrates that a majority of all new procurement awarded to foreign vendors each year was secured by NTA partners rather than non-affiliated countries. However, the two data series diverge during recessions, with non-NTA firms experiencing larger growth in gaining new contracts than firms from NTA partner countries.

While the number of U.S. NTA partners grew from 22 to 43 between 1996 and 2010, the total share of contracts awarded to foreign firms nearly tripled (from 1.10 percent to 2.93 percent of total contracts). Further extrapolation to include countries party to negotiations for the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) (based on respective weights of the member state gross domestic products, or GDPs) could show further gains. However, it must be noted that the share of contracts awarded to foreign firms has proven volatile from year to year, and seems to demonstrate a loose negative relationship with the business cycle. Contracts awarded to foreign firms as a share of total contracts peaked during the recessionary periods of 2001 and 2009. In contrast, the share of contracts awarded to foreign firms dropped to near-negligible numbers during times of relative economic health, such as the 1997–2000 and 2002–2007 periods, with a record low in 2005. If this trend holds, the

[5] GAO, "Government Procurement Agreements Contain Similar Provisions," September 2016, 22.
[6] USTR, "WTO Government Procurement Agreement," accessed May 30, 2018.
[7] In the context of imports of goods and services and the commercial presence of foreign contractors in countries other than their home country, whether temporary or via a permanent subsidiary, the WTO defines national treatment as the "principle of giving others the same treatment as one's own nationals." World Trade Organization, "Glossary," accessed September 7, 2017.
[8] European Commission, "The WTO Agreement on Government Procurement," April 10, 2003.
[9] Rickard and Kono, "Think Globally, Buy Locally," 2014, 333.
[10] Fronk, "Do Procurement Agreements Increase Partners' Trade?" February 2, 2015, 27.

proportion of total U.S. contracts awarded to foreign firms could increase again the next time the United States experiences a recession.

Figure 1. Index of contracts awarded to foreign firms (United States)



Source: Jared Fronk, "Do Procurement Agreements Increase Partners' Trade?" February 2, 2015, 27.

Countries with GPA membership appear to have fuller access than either those with no procurement agreement with the United States or members of the North American Free Trade Agreement (NAFTA), which does not address state-level procurement.[11] However, the GPA provides less access than that proposed by the European Commission in draft position papers on the TTIP procurement chapter.[12] Various U.S. federal agencies also maintain "public interest" exemptions to the Buy American Act of 1933 and other U.S. procurement policies (see table 1 on page 11), offering GPA and FTA members more access to federal procurement opportunities.

However, this coverage is not universal below the federal level. Among the key differences between U.S. and European procurement regimes is that U.S. states enjoy far more procurement autonomy than EU members, as shown by state-level opt-outs from the GPA and the procurement chapters of certain trade agreements.[13] These opt-outs are further described below in the section "Procurement Liberalization in a Sub-federal Context." Also, the majority of U.S. states have adopted legislation modeled on federal "Buy American" rules, applying them to locally funded projects. Furthermore, many states and local governments receive federal funding for a significant number of projects, to which both federal and local procurement regulations apply.[14]

European countries, on the other hand, enjoy less independence from EU-level procurement regulations than U.S. states do from federal policy. Notably, EU member states are legally bound by EU legislation passed in early 2016, which consolidated procurement policies and placed limits on certain domestic

[11] USDOC, ITA, "NAFTA Chapter 10 Guide," (accessed December 6, 2016).
[12] European Commission Directorate-General for Trade, "Public Procurement: Initial EU Position Paper," July 2013, 1.
[13] *Economist,* "Transatlantic Trading," February 2, 2013.
[14] Yukins and Prieß, "The European Procurement Directives," 2014, 4–5.

preference policies.[15] While these restrictions might suggest that European countries are categorically more open to foreign procurement, this is not necessarily the case. It is true that there is a greater devolution of procurement powers to individual U.S. states, but they typically act similarly when working with cross-border contractors. In the EU, on the other hand, there are significant regional differences in procurement practices, despite some standardization at the supranational level.

Any effort to measure market access is further complicated by the fact that international public procurement takes place across at least three modalities, as proposed by European Commission economists Lucian Cernat and Zornitsa Kutlina-Dimitrova: (1) direct cross-border international procurement; (2) commercial presence procurement via foreign subsidiaries or affiliates; and (3) value-added indirect international procurement.[16] These modalities will be referred to in this article as direct procurement, commercial presence procurement, and value-added procurement.[17] While many policies affecting foreign vendor participation in the U.S. and EU public procurement markets concern direct procurement, which is relatively well documented, Cernat and Kutlina-Dimitrova acknowledge that reliable data for commercial presence procurement and value-added procurement are scarce. For example, a 2011 study conducted for the European Commission found that 13.4 percent of the EU procurement market is awarded to EU subsidiaries of foreign companies,[18] while Cernat and Kutlina-Dimitrova found that foreign subsidiaries of U.S. companies capture 25 percent of non-EU markets.[19] However, Cernat and Kutlina-Dimitrova stated that data are unavailable for the share of U.S. contracts awarded to U.S. subsidiaries or affiliates of EU companies.[20]

The fact that multiple modalities exist and can occur even within a given contract is another complicating factor.[21] This complexity, combined with the lack of data, makes it difficult to measure the market share that is de facto open to foreign vendor bidding or that foreign competitors have successfully secured. In lieu of specific data, a partial estimate of the relative openness of each region's procurement authorities can be achieved by calculating the total share of international participation in domestic contracting.[22] In the United States, the Federal Procurement Data System records procurement data at the federal level and publishes the results in the *Top 100 Contractors Report*.[23] This report displays the top 100 foreign and

[15] EU Business, "EU Public Procurement Changes Come into Force," April 19, 2016.
[16] Cernat and Kutlina-Dimitrova, "TTIP and Public Procurement: Going Beyond," March 9, 2016, 2.
[17] *Direct cross-border international procurement* entails the direct purchase of goods or services from a firm in one country by the government of a different country. The fulfillment of a purchase of goods taking place through the export of such goods. The fulfillment of a purchase of services takes place through the remote performance of tasks (such as consulting or data management) by a service provider or through a service provider's temporary physical presence in the purchasing country for the purpose of executing the contract's deliverables. *Commercial presence procurement* entails the indirect purchase of goods or services from a firm in one country by the government of a different country through a locally domiciled proxy. For example, the supplier may be the bidding firm's subsidiary, which maintains a permanent legal presence in the country for which the goods or services are to be provided. *Value-added indirect international procurement* entails a firm's indirect participation in a contract between a foreign or domestic firm and a foreign or domestic company through the provision of goods or services to the contracting firm, composing a value-added portion of the contract's total value.
[18] Sylvest et al., "Cross-border procurement above EU thresholds," March 2011.
[19] Cernat and Kutlina-Dimitrova, "TTIP and Public Procurement: Going Beyond," March 9, 2016, 4.
[20] Cernat and Kutlina-Dimitrova, "TTIP and Public Procurement: Going Beyond," March 9, 2016, 4.
[21] Multimodal procurement could include a U.S. subsidiary of one European company sourcing certain components from a firm in a second European country—an example of commercial presence procurement and value-added procurement occurring in concert.
[22] This method flags all foreign-owned firms that have participated in U.S. public procurement contracts. But as the data are not disaggregated, the approach omits value-added procurement entirely and is blind to whether such participation constitutes direct cross-border procurement or commercial presence procurement.
[23] Federal Procurement Data System, *Top 100 Contractors Report (2016),* 2017.

domestic firms in terms of total federal procurement funding obligated to each firm, with a minimum of $522 million per firm. The top 100 firms accounted for $262.1 billion in federal funding, or 55.4 percent of total federal procurement funding in 2016.[24]

These reports do not say whether the firms listed in them are foreign or domestic or are U.S. subsidiaries of foreign firms, nor do they contain information on individual contracts and project budgets that would reveal value-added procurement.[25] However, a rough estimate based on a cross-comparison of *Top 100 Contractors* data against private third-party data indicates that among the top 100 firms in 2016, 10 were either foreign firms (direct procurement) or U.S. subsidiaries of foreign firms (commercial presence).[26] These 10 firms captured $12.4 billion in federal contracts and represented 2.9 percent of total federal contracting dollars.[27] Of this subset, 8 firms originated in the EU, including 4 from the United Kingdom, 1 from the Netherlands, 1 from Italy, 1 from Ireland, and 1 from France. These contracts covered petroleum products, pharmaceuticals, defense and aerospace products, and professional services.

Cernat and Kutlina-Dimitrova argue that commercial presence and value-added procurement represent a much larger share of public procurement in the EU than direct procurement. They further allege that this pattern demonstrates a higher level of European openness to international public procurement than analysis from the European Centre for International Political Economy (ECIPE) would suggest. Other observers argue that the EU is roughly equal to the United States in terms of openness to direct cross-border procurement. Patrick Messerlin, currently affiliated with ECIPE and the French university Sciences Po, calculates that openness to foreign participation[28] in EU and U.S. public procurement markets is roughly 3.5 to 4.5 percent. He finds that the United States is slightly more open to foreign procurement than France and Germany but slightly less open than the EU average due to the high procurement openness that is typical of the small economies in Eastern Europe.[29] However, being large economies, both the United States and the EU have some states or constituent countries that are more open, and others less so, than the average of their peers within the parent economy.

It may be helpful to consider some World Bank data on total imports and services as a percentage of GDP. While not conclusive due to a lack of specific figures on imports as a share of government procurement, the data support Messerlin's assertion that import penetration in large European economies (France, 31.2 percent; Italy, 26.5 percent; United Kingdom, 30.0 percent; Germany, 38.4 percent) is lower than that of smaller EU members (e.g. Ireland, 96.7 percent; Belgium, 82.1 percent; Estonia, 75.6 percent).[30] That is, the governments of large countries are less likely to procure goods and services from abroad because their domestic industries already have enough capacity to meet government demands. Meanwhile, very small countries (such as Luxembourg) and less economically developed countries (such as Bulgaria and Romania) are more likely to procure from abroad because they have a smaller domestic manufacturing base and a smaller services talent pool.

[24] These data are aggregated at the firm level, so individual contract values are not available.

[25] While the ability to collect and process such data could facilitate policymaking, it would be impractical to contain it in a coherent manner within a single database. Moreover, it would likely lead to data security issues concerning the proper handling and potential public accessibility of confidential business information.

[26] In this paper, a firm is considered to be foreign based on where its headquarters, holding company, or majority shareholders are domiciled.

[27] Corporate ownership information is sourced from Bureau van Dijk's Orbis business intelligence database.

[28] Messerlin refers to procurement of goods or services from non-U.S. and non-EU firms by the United States and EU.

[29] Messerlin, "Openness in Public Procurement Markets," February 2013, 5.

[30] World Bank, "Imports of Goods and Services (% of GDP)," in World Development Indicators (accessed July 7, 2017).

Correlation between Population and Openness to Cross-border Procurement

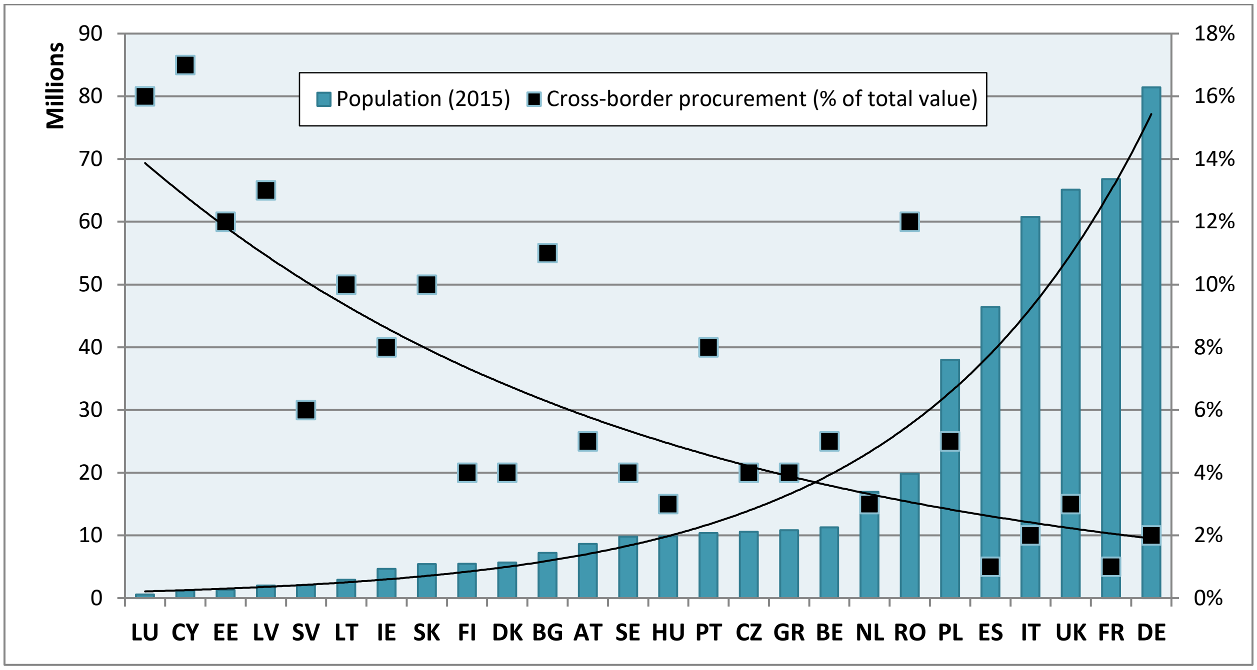
A comparison of data on direct cross-border procurement compiled by the European Commission and population figures provided by the World Bank shows a correlation between large populations and a propensity for procurement from domestic sources (see figure 2 on page 9).[31] Direct cross-border procurement (omitting commercial presence and value-added procurement) was most prevalent in small countries such as Luxembourg, Cyprus, and the Baltic states, where it accounted for 10 to 17 percent of total procurement. It was least prevalent in the EU's five largest member states, where the figure was between 1 and 3 percent. Countries such as Romania and the Netherlands are notable exceptions to this trend, though in very different ways, because their economies are disproportionate to their populations when compared to other European countries. Although Romania is the EU's seventh-largest country by population, the small size of its economy means that it relies on cross-border procurement as much as significantly less populous countries such as Estonia and Latvia. The strong economy of the Netherlands, on the other hand, allows it to procure from within its own borders to the same extent as the United Kingdom, a much more heavily populated country.

In addition to varying domestic preferences, this difference is likely the result of differences in industrial capacity that are linked to population size and economic diversity. Countries such as Germany, France, and the United Kingdom have significant manufacturing sectors capable of producing transportation infrastructure and equipment, defense-related products, and other complex, capital-intensive goods on a large scale. Smaller countries without a large manufacturing base, on the other hand, are more likely to procure from larger neighboring countries due to the unique characteristics of their own economies, including their significant gaps.

In 2012, *The Economist* reported that roughly €350 billion[32] of EU contracts were open to foreign vendors,[33] while Lisa Brandt (now Lisa Brandt McGuirk), formerly of ECIPE, stated in the same year that imports represent 7.5 percent of total EU public procurement funding awarded.[34] However, Brandt indicated that this figure includes intra-EU public procurement, meaning that goods or services from both Germany and the United States, for example, would be counted as procurement imports in France. If these figures were to be recalculated to include only imports from the United States or other non-EU countries, import penetration as a share of public procurement would be less than 3 percent in certain large EU countries.[35] In marked contrast, Brandt stated that €178 billion[36] of procurement offers are open to foreign bidders in the United States,[37] which equates to roughly 45.6 percent[38] of the roughly $511.4 billion in federal contracting dollars obligated in 2012.[39]

[31] Kutlina-Dimitrova and Lakatos, "Determinants of Direct Cross-Border Public Procurement in EU," July 2014, 8–9.
[32] $462 billion at March 2012 average conversion rates (OANDA Corporation).
[33] *Economist*, "Unfree Trade," March 24, 2012.
[34] Brandt, "Life beyond Reciprocity," December 2012, 1.
[35] Brandt, "Life beyond Reciprocity," December 2012, 2.
[36] $233 billion at December 2012 average conversion rates (OANDA Corporation).
[37] Brandt, "Life beyond Reciprocity," December 2012, 2.
[38] True openness to foreign vendor participation may be lower than 45.6 percent, for two reasons. First, this calculation fails to capture the total value of contracts originally offered, which inherently exceeds contracts actually executed. Second, actual import penetration and potential import penetration are likely to diverge significantly due to independent factors. For example, informal preferences or special relationships may influence the procurement process outside of existing rules, causing national bias even if no explicit policies exclude qualified foreign vendors.
[39] Federal Procurement Data System, "Top 100 Contractors Report (2012)," 2012.

Figure 2. Percent of contracts awarded to foreign cross-border contractors (EU)



Source (cross-border procurement percentages): Zornitsa Kutlina-Dimitrova and Csilla Lakatos, "Determinants of direct cross-border public procurement in EU member states," European Commission Directorate-General for Trade, July 2014, 9.
Source (population): "Population, total," in World Development Indicators, World Bank (accessed October 31, 2016).

The same trend is highlighted in figure 2, which shows that the governments of the bloc's five largest member states (in terms of population) each procure 3 percent or less of goods and services from cross-border suppliers. The EU's midsized countries, on the other hand, display two diverging trends. While wealthier countries such as Finland and Denmark procure 4 percent of goods and services from cross-border suppliers, these figures exceed 10 percent in Romania and Bulgaria. The latter countries' lower per capita GDPs limit local production relative to their wealthier neighbors; their small local production, in turn, limits domestic procurement opportunities. Finally, the EU's smallest member states are the most likely to procure goods from cross-border sources regardless of GDP, as their economies are increasingly service-oriented and lack the manufacturing base present in larger countries. For example, Luxembourg and Estonia have populations of less than 1.5 million, but very dissimilar per capita GDPs of $102,831 and $17,574, respectively.[40] Yet procurement from cross-border sources in both countries exceeds 12 percent, six times that of Germany.

In terms of recent and future limits on market access, Messerlin discusses a proposed EU policy that would implement procurement restrictions against countries where it perceives an imbalance in market access,[41] while Cernat and Kutlina-Dimitrova highlight a number of domestic preference policies implemented in the United States following the 2008 financial crisis and the subsequent recession.[42] Considering that procurement policies can affect international competition in public procurement markets, it is likely also true that European companies tend to operate through U.S. subsidiaries as an alternative to directly exporting finished goods or services to the United States. This recalls Cernat and Kutlina-

[40] World Bank, "GDP per Capita (Current US$)," in World Development Indicators (accessed July 7, 2017).
[41] Messerlin, "Openness in Public Procurement Markets," February 2013, 1.
[42] Cernat and Kutlina-Dimitrova, "TTIP and Public Procurement: Going Beyond," 2016, 1.

Dimitrova's finding that commercial presence and value-added procurement play a larger role in EU public procurement than direct procurement (see page 7). In essence, the debate can be framed in terms of whether one modality is more likely than another to facilitate access to a particular public procurement market. For example, firms operating in the United States may find it easier to sell to European public purchasers if they relocate production to an EU member state, and vice versa. This means that some companies may find it necessary to alter their supply chains if they wish to gain substantive access to public procurement opportunities in their respective foreign markets.[43]

So far the discussion in this paper has focused on the relative proportions of direct and commercial presence procurement in procurement-related trade, as well as whether U.S. or EU regulations cause firms to relocate more often than the other. However, Cernat and Kutlina-Dimitrova argue that U.S. policies affect "all modalities" and that the United States still favors "truly domestic" companies despite the fact that many foreign-owned companies operate U.S. facilities with American employees. According to Swedish researchers Gunnar Alexandersson and Staffan Hultén, European governments have likewise shown domestic preference, having attempted to promote "national champions" in the transportation industry to compete with American and Japanese firms attempting to gain a foothold in this critical sector.[44]

Forthcoming research conducted by an independent consultancy for the European Commission supports this idea, indicating that U.S. firms are most likely to secure contracts in the EU through commercial presence procurement, rather than direct procurement. One of the report's authors claims that intra-EU commercial presence procurement is 10 times larger than direct cross-border procurement, with U.S. firms being "about 50 times more likely to win a public contract in the EU through a subsidiary than [through] a direct cross-border transaction."[45] The Office of the U.S. Trade Representative (USTR) supports this finding, citing a 2011 EU study which found that U.S. firms lacking commercial presence in the EU "received just 0.016 percent of total EU direct cross-border procurement awards."[46] In dollar terms, U.S. access to cross-border procurement exceeds 0.016 percent because some contracts are significantly more valuable than others, but this fact nevertheless demonstrates the challenges that foreign contractors face in the European market.

While this assertion conflicts with Cernat and Kutlina-Dimitrova's argument that the EU is more open to procurement trade than the United States, it reinforces their position on the role of commercial presence procurement. Furthermore, it draws attention to the possibility that although setting up local affiliates helps ensure market access, this may be a suboptimal outcome for some businesses, driving a rift between actual and potential procurement efficiency.[47]

Regulations Affecting Access to International Public Procurement

The United States and the EU each have a wide range of regulations that can pose market access challenges for contractors hoping to engage in cross-border procurement. U.S. and European vendors

[43] Lauer and Ducourtieux, "Traité transatlantique: des avancées et des doutes" [Transatlantic treaty: progress and doubts], April 30, 2016.
[44] Alexandersson and Hultén, "Public Procurement and the Rise of National Champions," January 2005, 2.
[45] Paula Ramada, London Economics Ltd, email message to the author, December 5, 2016.
[46] USTR, *2017 National Trade Estimate Report on Foreign Trade Barriers*, March 31, 2017, 174.
[47] European Commission, "External Public Procurement Initiative: Frequently Asked Questions," March 21, 2012.

attempting to access one another's government procurement markets must consider a range of factors, including the aforementioned coexistence of federal and local procurement policies, strong local content preferences or mandates, partial devolution of authority to the states, and various technical and procedural policies concerning the contract notification and bidding process, in addition to the idiosyncratic presence of 28 national procurement policies within the EU. Moreover, economist Jared Fronk argues that the majority of countries worldwide "[maintain] preference policies that skew procurement toward domestic suppliers," aside from a select few countries whose procurement policies lie at the extremes, demonstrating either complete liberalization (with home bias effectively eliminated) or autarky (whether absolute or only exempting FTA partners).[48] According to the European Commission, procurement opportunities in both the U.S. and EU markets are "restricted due to de jure and de facto preferences favouring local suppliers."[49] These policies can range from "obfuscatory bureaucratic requirements meant to deter foreign bidders" that constitute a de facto preference to "explicit preference margins in favor of domestic firms" that constitute a de jure preference.[50]

Regulations for the U.S. Market

Notable regulations affecting access to U.S. government procurement opportunities include those concerning the defense and transportation sectors, as well as various procurement mechanisms intended to expand federal business opportunities to a broader range of firms, such as small business set-asides and minority business set-asides.[51] According to Christopher Yukins, a professor of government procurement law at the George Washington University Law School, preference for domestic small businesses excludes foreign companies from 25 percent of more than $500 million in federal procurement opportunities.[52] The European Commission and certain European business associations have expressed an interest in securing exemptions from U.S. laws forbidding foreign contractors, particularly in the shipping and apparel industries, to sell or provide services to certain U.S. government purchasers. Such exemptions could hypothetically be granted through either a broader procurement agreement or specific legislation.[53]

The chief reason for the federal government's inability to "force states to open tenders to foreign bidders"[54] is that the GPA does not cover several U.S. states and cities. Furthermore, most states have enacted "Buy America" legislation with unique local content preferences or foreign content restrictions affecting a variety of industries. The magnitude of the challenges posed by this state-by-state variance in procurement policies becomes more apparent when one looks at the numbers. The United States spent an average of $1.7 trillion per year on procurement between 2008 and 2012, according to Government Accountability Office estimates.[55] Because this included an average of $523.4 billion per year in federal procurement spending,[56] this implies that roughly $1.2 trillion in annual procurement spending during 2008–12 was obligated at the state and municipal levels, whether through local funding or locally

[48] Fronk, "Do Procurement Agreements Increase Partners' Trade?" February 2, 2015, 3.
[49] Directorate General for Internal Policies, European Commission, "TTIP: Opportunities and Challenges," June 2015, 6.
[50] Fronk, "Do Procurement Agreements Increase Partners' Trade?" February 2, 2015, 62.
[51] Hanson, *Limits to Free Trade*, 2010, 60.
[52] Christopher Yukins, testimony submitted to the European Parliament Committee on the Internal Market and Consumer Protection and the Committee on International Trade, April 20, 2016, 6.
[53] Ships and Maritime Equipment Association, "SEA Europe Input," April 5, 2013.
[54] *Economist*, "Transatlantic Trading," February 2, 2013.
[55] GAO, "The United States and European Union Are the Two Largest," July 2015, 2.
[56] Federal Procurement Data System, "Top 100 Contractors Report," 2008–12.

administered federal grants. In other words, roughly 64 percent of procurement opportunities take place at the state or local level, versus 36 percent at the federal level.[57]

Table 1. Notable U.S. Procurement Regulations

Title	Effect
Merchant Marine Act of 1920	Requires that transportation of freight and passengers between two or more U.S. ports be conducted by vessels constructed and registered in the United States and crewed by citizens thereof
Buy American Act of 1933	Requires that supplies purchased by the government be produced in the United States unless suitable foreign alternatives are less expensive than an “unreasonable” lowest domestic offer
Berry Amendment (1941 and subsequent revisions)	Requires the Department of Defense to procure domestically produced textile and apparel goods and certain other items, with some exceptions
Buy America Act of 1982	Not to be confused with the similarly named 1933 law, the Buy America Act specifically addresses public procurement activities relating to road and rail infrastructure and goes beyond the original 1933 Buy American Act by covering sub-federal procurement carried out using grant funding supplied by the federal government
American Recovery and Reinvestment Act of 2009	Requires that construction materials “predominantly of iron and steel” for public works be produced in the United States

Regulations for the European Market

While navigating the ambiguities of state-level procurement regulations can be difficult for some European contractors competing for U.S. contracts, de jure regulations, de facto preferences, and other informal practices in European countries can also hinder procurement opportunities for aspiring U.S. firms. U.S. vendors have “proactively voiced concerns over a lack of transparency” when seeking procurement opportunities in Southern and Eastern Europe in particular, citing “overly-narrow definition of tenders, language and documentation barriers, and implicit biases toward local vendors and state-owned enterprises.”[58] In certain EU member states, U.S. firms have identified strict and insufficient deadlines for bid preparation, the use of technical standards that are incompatible with U.S. goods, and local partnership requirements as major challenges in the public contracting process.

These complaints have not changed significantly since the late 1980s, when a U.S. International Trade Commission report stated that U.S. firms “are not notified of upcoming defense-related contracts in the [European Union]” and were likewise unable to participate in drafting bid specifications. Moreover, U.S. firms could not develop competitive bids due to restrictive timelines or insufficient tender documentation, and lacked “regular opportunities to prove their capabilities to [EU] public purchasers” as well as access to fair channels of protest.[59] Examples of such practices, according to the USITC report, include the partitioning of tenders in components that fall under thresholds for open competition, technical specifications that favor a particular vendor, or insufficient public notification of upcoming bid solicitations.[60] More recently, the *Economist* reported that a significant number of EU member state

[57] Bertok et al., “Public Procurement,” July 2015, 136.
[58] USTR, *2017 National Trade Estimate Report on Foreign Trade Barriers*, March 31, 2017, 174.
[59] USITC, *The Effects of Greater Economic Integration*, 1989, Sec. 4, page 7.
[60] USITC, *The Effects of Greater Economic Integration*, Sec. 4, page 10.

tenders are still structured in a way that limits or discourages foreign participation, with many of the aforementioned practices still in use today.[61]

Sector-specific Trends

As noted earlier, certain economic sectors are of particular importance to government policy makers in the United States and the EU. As a result, regulations specific to those sectors, as well as unique economic and structural characteristics that differentiate those sectors in each market, significantly influence the procurement landscape. Defense and transportation are especially noteworthy due to the share of government spending they attract and the framework of regulations that have grown around them, while services provide a compelling example of a sector that has become significantly globalized and integrated in both markets.

Defense: United States

U.S. defense procurement opportunities are significantly limited for European vendors, according to David Hanson, professor of international business at Duquesne University, who argues that a significant number of tenders are classified and that the majority of European vendors are considered ineligible for the security clearance needed to access these tenders.[62] Furthermore, these contracts generally require that defense-related goods be produced in the United States and also frequently restrict technology transfer between the U.S. affiliate and the European parent company or other firms. Hanson argues that this discourages European companies from introducing products into the U.S. market for fear that any commercial application of their products or technology would be restricted.[63]

Technical and legal requirements aside, some European analysts have stated that the "dominance of big national military-industrial conglomerates over most of the federal public tendering market has resulted virtually in an oligopoly which prevents the entrance of foreign bidders."[64] While European firms have successfully penetrated the U.S. defense market via all three modalities,[65] available data indicate that U.S.-based defense contractors are widely successful in the domestic procurement market, with the top five defense contractors collectively attracting 23.2 percent of total U.S. federal procurement spending in 2016 and 32.5 percent of total U.S. defense spending in 2016.[66] Overall, defense contracts represented 63.0 percent of total federal procurement spending.[67] Taking into consideration the very substantial resource requirements involved in defense procurement, Hanson claims that "[U.S. government] project officers usually work with a limited number of companies in the development of new proposals" and are closely protective of these business relationships.[68]

Despite these difficulties, European defense contractors have been able to access the U.S. market through all modalities. British firms BAE Systems and Rolls-Royce, as well as the multinational consortium

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[61] *Economist*, "Procurement Spending: Rigging the Bids," November 19, 2016.
[62] Hanson, *Limits to Free Trade*, 2010, 66.
[63] Hanson, *Limits to Free Trade*, 2010, 66-67.
[64] Álvarez-Fernández and Brandstrup, "The Access of Third Countries," 2013, 17.
[65] For example, the U.S. Air Force's F-35 combat jet include engine components produced by Rolls-Royce and fuel systems and electronic components designed by BAE Systems, both British firms with major U.S. subsidiaries.
[66] Federal Procurement Data System, "Top 100 Contractors Report (2016)," 2017.
[67] Federal Procurement Data System, "Top 100 Contractors Report (2016)," 2017.
[68] Hanson, *Limits to Free Trade*, 2010, 55.

EADS/Airbus, together accounted for roughly 1.4 percent of total U.S. federal procurement in 2015.[69] This figure does not encompass all European access to U.S. defense procurement opportunities, as several European firms with smaller defense-related contracts are absent from databases on top contractors ranked by contract value. (Examples include German, Austrian, and Belgian firms that sell small arms to the U.S. military and local police forces through a combination of imports and U.S. domestic production.) However, the European Commission's statistical division and the government statistics departments of individual EU member states do not currently offer procurement statistics at the same level of granularity that the U.S. federal government does. The current level of bilateral access to defense procurement opportunities between the United States and the EU is therefore unknown, especially where subcontracting and value-added procurement occur.

Defense: Europe

National defense is a critical sector for government procurement and is thus the subject of heightened regulation and domestic preference. While national politics drive some procurement regulations within the EU, a German Marshall Fund policy brief argues that the current state of European politics has eroded the region's efforts toward collaboration in the defense-industrial sector. This trend undermines procurement opportunities not only for major U.S. defense contractors, but also for European firms wishing to bid on the public tenders of other EU member states.[70] The policy brief states that pro-national bias in defense procurement "has led to unnecessary but costly duplications of defense industrial capacities, like more than 20 producers of armored vehicles, all products very similar in design."[71] It is true that procurement preferences can be highly useful in supporting the domestic defense manufacturing base and satisfying national security concerns about the ready availability of necessary equipment and the protection of sensitive information. However, such duplication can also erode procurement efficiency and increase taxpayer burden in the EU.

As a large country, the United States lacks these internal redundancies; moreover, it has successfully exported a large volume of defense-related goods to European government purchasers. Countries like the United Kingdom and the Netherlands are key U.S. partners on the F-35 jet, while Belgium is a major operator of American F-16 jets; these countries are expected to continue sourcing these and other U.S.-made defense products in the future.[72] British defense companies remain open to value-added procurement (in terms of third parties contributing components to defense goods produced by British companies for the British government) when non-EU products "demonstrate better value than domestic alternatives."[73] However, German defense spending is largely oriented toward domestic products.[74] France is likewise a challenging market, as the country has "one of the world's leading defense manufacturing sectors."[75]

Although Hanson points to alleged interdependence between the federal government and defense contractors as a market access issue for European contractors seeking to export to the U.S. market, this dynamic is not unique to the United States. The German, French, and Spanish governments maintain

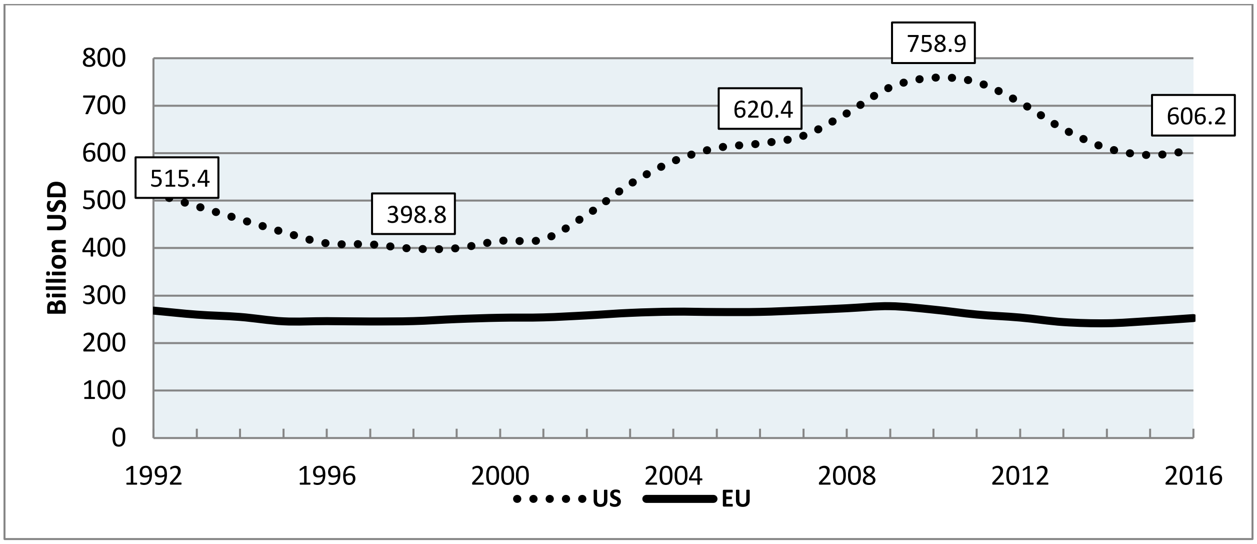
[69] Federal Procurement Data System, "Top 100 Contractors Report (2015)," 2016.
[70] Major and Mölling, "For a 'New Realism' in European Defense," 2016, 3–4.
[71] Major and Mölling, "For a 'New Realism' in European Defense," 2016, 4.
[72] USDOC, ITA, "2016 Defense Markets Report," June 2016, 13.
[73] USDOC, ITA, "2016 Defense Markets Report," June 2016, 13-15.
[74] USDOC, ITA, "2016 Defense Markets Report," June 2016, 13-15.
[75] USDOC, ITA, "2016 Defense Markets Report," June 2016, 15.

partial ownership of European aviation and defense consortium Airbus, at 11.1 percent each for Germany and France and 4.2 percent for Spain.[76] France also owns larger shares of other French defense contractors; for U.S. and third-country firms attempting to compete for French defense procurement opportunities, strong domestic preferences, partial government ownership of firms, and subsidies reduce opportunities for non-EU firms, and "even when the competition is among EU suppliers, French companies are often selected as prime contractors."[77] In cases where EU member states have selected U.S. vendors over European vendors for defense contracts, intra-EU disputes have arisen on occasion.[78] More generally, procurement guidelines in Greece and Portugal limit access for U.S. and third-country vendors unless they partner with local manufacturers or service providers to establish a joint venture.[79]

One additional constraint on U.S. access to the European defense procurement market is the disparity in defense spending between the United States and the sum of EU member states. During the 1990s, European defense spending for the EU-28[80] was roughly three-quarters of the $400 billion annual defense budget in the United States in constant 2015 dollars, according to spending data compiled by the Stockholm International Peace Research Institute.[81] These data indicate that U.S. spending accelerated sharply after the September 11, 2001, attacks and again after the military's troop surge in Iraq in 2007, reaching a peak of $759 billion in 2010 before settling back to $606 billion in 2016 (see figure 3). European defense spending, by contrast, has remained relatively constant overall, with U.S. defense spending per capita in 2016 being 3.8 times that of EU defense spending. This suggests that while U.S. and European vendors have increased opportunities in the U.S. market due to ongoing overseas military operations, vendors attempting to gain access to European contracts face flat demand. While not strictly a market access issue, the smaller number of overall contracting opportunities (compared to the United States) resulting from flat defense spending means that selling in the European market can be challenging, especially where the domestic industry is competitive.

[76] According to investment research service Morningstar, the remaining 73.6 percent of shares are publicly traded, with mutual funds holding 28.9 percent of shares, other major institutional investors holding 28 percent, and individuals and other smaller investors holding the remaining 16.7 percent.
[77] "2015 National Trade Estimate Report on Foreign Trade Barriers," *Office of the United States Trade Representative*, 145-147.
[78] Christopher Jasper and Maciej Martewicz, "Airbus Left Fuming as Poland Hands Helicopter Deal to Lockheed," *Bloomberg,* October 11, 2016.
[79] "2015 National Trade Estimate Report on Foreign Trade Barriers," *Office of the United States Trade Representative*, 145-146.
[80] While the EU only had 15 member states between 1995 and 2004, the SIPRI database covers defense expenditures for all current EU member states before and after their EU accession. Therefore, the data show aggregate defense expenditures for existing and future EU member states, whereas a depiction of the data that only included existing member states would show sharp growth during accession years (1995, 2004, 2007, 2013) as new member states were added to the aggregate.
[81] Stockholm International Peace Research Institute, SIPRI Military Expenditure Database, 2017.

Figure 3. U.S. and EU defense spending (billions in constant 2015 U.S. dollars)



Transportation: United States

International procurement of transportation infrastructure and equipment has historically been limited by explicit market access restrictions and by incompatible local technical standards requiring prospective vendors to tailor their proposals to differences in electric supply or rail gauge.[82] In the United States, public procurement decisions in transportation have been shaped by federal and local legislation that mandate varying degrees of local content and by inconsistent GPA coverage that limits guaranteed access to certain states, most municipalities, and certain sectors. Yukins states that "European negotiators want the United States to dismantle 'Buy American' requirements, especially in transportation markets, and to allow broader access to sub-central (state) markets in the United States."[83] Yukins argues that "pressure from organized labor and the American political left" makes it difficult for sub-federal governments to expand procurement market access to foreign vendors.[84]

"Buy America(n)" restrictions have influenced the way public procurement is conducted within the United States. With certain exceptions, these restrictions generally "require that transit agencies using Federal funds purchase vehicles that have been assembled in the United States, and that at least 60 percent of the cost of the vehicles' components be made in the United States."[85] This stipulation promotes local sourcing rather direct procurement via imports. Foreign vendors thus have strong reasons to expand foreign direct investment in the United States to take advantage of commercial presence procurement opportunities. A notable example is German manufacturer Siemens, whose S70 tram cars, including components and final assembly, are produced at the company's facilities in California and Georgia to take

[82] USITC, *The Effects of Greater Economic Integration*, 1989, Sec. 4, page 30.
[83] Yukins and Prieß, "The European Procurement Directives," 2014, 2.
[84] Yukins and Prieß, "The European Procurement Directives," 2014, 5.
[85] According to a previous USITC report, "*Buy American* legislation regulates Federal spending on activities like defense. The main *Buy American* requirements are listed in 41 U.S.C. 10(a)-10(c). '*Buy America*' programs include a series of Federal restrictions on spending by Federal grantees (typically, State and local governments). This legislation is usually contained in overall government procurement guidelines for a specific activity like highway construction." USITC, *The Economic Effects of Significant U.S. Import Restraints,* 2004, 105–9.

advantage of municipal public transportation tenders.[86] Siemens' rail products now operate in light rail and streetcar networks in 17 U.S. and Canadian cities.[87]

Transportation: Europe

Direct procurement in the European transportation sector is often problematic for U.S. firms. Like the United States, the EU's Utilities Directive[88] imposes a domestic content requirement for procurement opportunities in the urban transport sector; in the EU's case, the minimum is 50 percent of the contract value. Infrastructure types covered by this directive include ground-based mass transit such as rail, tram, bus, and cable car systems, both automated and manually operated, but exclude intercity, rural, or international rail networks, as well as air or watercraft transport located in or serving urban areas.[89] Depending on the share of U.S. content allowed in a given transportation procurement opportunity, such restrictions may keep U.S. vendors from accessing major markets with large populations and significant mass transit demands, such as Paris, London, Berlin, and Madrid. At best, a U.S. vendor might act as a partner to a European prime contractor, but could not have a majority stake in any significant transportation infrastructure project.

Furthermore, procurement in sectors such as rail has tended to be a joint effort between "the national railway administrations and their traditional suppliers," limiting opportunities for firms from the United States and the other EU member states.[90] However, in terms of commercial presence procurement via EU-based subsidiaries, a European Commission report describes U.S. firms as the "most significant suppliers."[91] For example, the American manufacturer Greenbrier has a Polish subsidiary, Wagony Swidnica S.A., which produces freight rail cars for the European market.[92]

Services

Professional accounting, consulting, and technology services are highly integrated between the United States and the EU. A significant share of accounting and consulting services were historically carried out by the "Big Eight," now consolidated to the "Big Four" firms—Deloitte, PwC, EY, and KPMG.[93] These companies operate through extensive networks of national subsidiaries that act as members of their respective parent organizations; subsidiaries are independent of each other and are "structured in accordance with national laws [and regulations.]"[94] With a global footprint that covers the U.S. and EU member states, these firms have significant access to U.S. and EU public procurement opportunities, including independent government auditing.

Writing for the Centre for European Policy Studies, Stephen Woolcock and Jean Grier argue that the EU's openness to international procurement of services, especially involving information and communications technology, could be improved by using a negative list system like that found in many

[86] Renner and Gardner, "Global Competitiveness in the Rail and Transit Industry," September 2010, 14.
[87] Siemens USA, "Light Rail Vehicles and Streetcars," (accessed October 18, 2016).
[88] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors [2014] OJ L 94/243.
[89] USTR, *2015 National Trade Estimate Report on Foreign Trade Barriers*, 2015, 144.
[90] USITC, *The Effects of Greater Economic Integration*, 1989, Sec. 4, page 30.
[91] Woolcock, "TTIP: Opportunities and Challenges," June 2015, 8–9.
[92] Greenbrier Companies, "Railcar Manufacturing," n.d., http://www.gbrx.com/products-services/railcar-manufacturing/
[93] GAO, *Public Accounting Firms: Mandated Study*, July 2003, 1.
[94] Deloitte, "Learn about Our Global Network of Member Firms," (accessed April 10, 2017).

trade agreements to which the United States is a party. The EU's current positive list system does not automatically account for new technologies and service categories, and thus could exclude U.S. service providers from bidding on solicitations for the public purchase of new and innovative services.[95]

Potential Steps toward Public Procurement Liberalization

A number of business organizations on both sides of the Atlantic, as well as the U.S. government and the European Commission, have expressed an interest in streamlining certain public procurement regulations to achieve a degree of regulatory harmonization. The U.S. Chamber of Commerce, for example, has discussed modifying local content requirements that extend to value-added procurement and assuring that local procurement rules are similar to national procurement rules,[96] while its counterpart in Europe, Eurochambres, has likewise called for an expansion of market access at the local, regional, and federal levels.[97] In addition to the broader sector-based regulations affecting procurement market access, several technical, bureaucratic, and geopolitical factors contribute to the complexity of procurement liberalization. These factors center on the practicality of tender announcement platforms, the applicability of existing procurement regulations under a future liberalized procurement framework, and subnational procurement.

Harmonizing Tender Platforms to Facilitate Access

Public procurement opportunities in the United States and the EU are published via *Federal Business Opportunities* (FBO)[98] and the *Tenders Electronic Daily* (TED),[99] respectively. While both systems serve as centralized portals for firms to search for tenders and to submit proposals, they differ significantly in comprehensiveness and ease of access. As evidenced by its name, FBO covers procurement opportunities at the U.S. federal level only, while TED offers access to both supranational and member state procurement opportunities in the EU. It also gives access to tenders from EU candidate countries, such as the former Yugoslav countries, and other non-EU regional partners such as Norway and Switzerland.

The FBO's limitations were addressed by the U.S.-EU High Level Working Group on Jobs and Growth as part of the discussions on procurement liberalization held during the July 2016 negotiating round for the TTIP. The European Commission emphasized the value of creating "a single point of access to information on procurement opportunities" that exceeds the current scope of FBO.[100] The Commission specifically cited TED as a model, envisioning an FBO system that can "facilitate the participation of European SMEs [small and medium-sized enterprises] in the U.S. procurement procedures, also with regard to procurement contracts at sub-federal level," which FBO currently does not cover.[101]

However, TED is not a complete source for procurement opportunities. While some tenders in EU member states appear within TED, individual member states still maintain national procurement portals.

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[95] Woolcock and Grier, "Public Procurement in the Transatlantic Trade and Investment Partnership," February 2015, 24.
[96] Finiello, "TTIP Stakeholder Presentation Round 5: Procurement," May 21, 2014.
[97] Eurochambres, "Transatlantic Trade and Investment Partnership Position Paper," December 6, 2013.
[98] GSA, "Federal Business Opportunities," https://www.fbo.gov/.
[99] European Union, *Tenders Electronic Daily (TED),* Supplement to the Official Journal of the EU, http://ted.europa.eu/TED/main/HomePage.do.
[100] European Commission, "Public Report of the 14th Round of Negotiations," July 2016, 4.
[101] European Commission, "Public Report of the 14th Round of Negotiations," July 2016, 4.

In some cases, procurement autonomy exists at the subnational level, such as in the United Kingdom, where Scotland, Wales, and Northern Ireland maintain separate public sector procurement portals.[102]

In addition to the fragmented nature of procurement portals, language barriers also arise. While TED includes access to tenders in all 24 official EU languages, the quality of each posting is generally highest in its original language. FBO listings are almost exclusively in English, with the exception of local-language translations of certain solicitations for goods or services that are administered by federal agencies operating abroad. This poses a challenge for non-English speaking vendors in Europe, not to mention the more than 37.5 million Spanish speakers in the United States, of whom 16.3 million have limited English proficiency.[103] Potential options to facilitate access for EU vendors could include automated translation of FBO tenders into EU languages, while more detailed English-language listings could improve the TED experience for U.S. vendors.

EU Concerns with U.S. Set-asides and Preference Rules

Another core change promoted by the EU for U.S. procurement is to liberalize set-asides, domestic preference rules, and Buy America(n) legislation.[104] The reality of the matter, however, is that these rules can be difficult to interpret and are administered by a range of federal and local agencies. With regard to set-asides for women-owned small businesses (WOSBs), 48 CFR 52.219-30 explicitly states that companies bidding on such contracts must be owned and managed by one or more female U.S. citizens. Another example to consider is the applicability of set-asides for minority-owned small businesses. According to U.S. Census data for July 2015, at least 37.9 percent of the U.S. population identified as other than "White alone, not Hispanic or Latino."[105] Business owners identifying as belonging to racial minorities, including "African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and Subcontinent Asian Americans," can compete in minority-owned small business set-asides.[106]

However, demographic differences between the United States and the EU could make it more difficult for European countries to establish these types of programs; likewise, European contractors not meeting the criteria for such set-asides in the U.S. would have limited access to certain procurement opportunities. While several European countries do not record statistics on racial identity,[107] in many EU countries most citizens are of Caucasian descent, possibly precluding small-business owners in this demographic from competing for current U.S. set-asides for minority-owned firms, or indeed making this type of set-aside inadministrable in a future U.S.-EU procurement framework. However, as certain countries such as the United Kingdom, Spain, and France have sizable populations of South Asian, Middle Eastern, or African heritage, these groups could conceivably benefit from a U.S.-EU procurement framework that maintains existing U.S. set-asides.

Although the EU has criticized U.S. small business set-asides in the past, it has historically had set-aside programs of its own, though the numbers are limited; these set-asides are designed to benefit SMEs by reserving contracts under a certain value threshold for SMEs, as well as allowing groups of SMEs to bid

[102] Crown Commercial Service (UK), "Contracts Finder," https://www.gov.uk/contracts-finder.
[103] U.S. Census, "Detailed Languages Spoken at Home," October 2015.
[104] European Commission Directorate-General for Trade, "Public Procurement: Initial EU Position Paper," July 2013, 2.
[105] U.S. Census, "Population estimates, July 1, 2015," (accessed November 23, 2016).
[106] SBA, "Minority-Owned Businesses," (accessed November 23, 2016).
[107] *Economist*, "France's Ethnic Minorities: To Count or Not to Count," March 26, 2009.

on larger contracts as a consortium and requiring prime contractors on larger contracts to subcontract some work to SMEs.[108] According to the Organisation for Economic Co-operation and Development (OECD), SMEs comprise 60 to 70 percent of total employment in most member economies, including all but four EU member states. The European Commission states that SMEs are underrepresented in European procurement markets and that further efforts should be made to improve SME access to key sectors, such as defense.[109] Furthermore, the governments of certain EU member states have called for a greater emphasis on procurement preferences favoring SMEs for intra-EU public procurement contracts.[110] Other set-asides at the member state level are designed to benefit volunteer groups and businesses owned by women and minorities, with the United Kingdom having several of these programs.[111]

Procurement Liberalization in a Sub-federal Context

As discussed earlier, both the United States and EU have demonstrated an interest in expanding market access through procurement liberalization while also ensuring the protection of domestic interests. The European Commission characterizes the pursuit of liberalization as a "key EU offensive interest,"[112] with its primary emphasis being the harmonization of U.S. federal and sub-federal procurement policies and the relaxation of U.S. domestic preference rules, value thresholds, and set-asides. While the EU's position on federal and sub-federal harmonization involves developing a "GPA plus" framework to secure competitive market access for European firms,[113] it also seeks to secure exemptions from U.S. set-asides that may potentially restrict procurement opportunities for foreign entities.[114]

On the U.S. side, USTR states that it seeks "to expand market access opportunities" for U.S. goods and services in European public procurement markets, as well as ensuring "fair, transparent, and predictable conduct of government procurement" that grants U.S. vendors treatment equaling that afforded to EU and third-country vendors.[115] According to USTR, specific interests for negotiators include expanded access to procurement opportunities concerning "construction, engineering, and medical devices."

While 37 U.S. states are bound by the GPA, fewer and fewer states have agreed to participate in the public procurement liberalization measures set forth in more recent trade agreements with Central and South American countries.[116] As the U.S. Government Accountability Office explains, each state may "independently [determine] whether to have its procurement covered under a trade agreement."[117] State opt-outs from procurement liberalization with these countries could be partially rooted in the fact that these countries have comparatively low production costs and could displace domestic vendors. The opt-outs suggest that a large number of states could oppose further procurement liberalization and significantly limit any new procurement opportunities for EU vendors at the sub-federal level.

[108] Kidalov, "Small Business Contracting in the United States and Europe," 2011, 19–20.
[109] European Commission Directorate General for Internal Market, "Public Procurement Strategy," updated December 14, 2016.
[110] Kidalov, "Small Business Contracting in the United States and Europe," 2011, 20.
[111] Kidalov, "Small Business Contracting in the United States and Europe," 2011, 22.
[112] European Commission Directorate-General for Trade, "Report of the 14th Round of Negotiations," July 2016, 4.
[113] European Commission Directorate-General for Trade, "Public Procurement: Initial EU Position Paper," July 2013, 1.
[114] European Commission Directorate-General for Trade, "Public Procurement: Initial EU Position Paper," July 2013, 2.
[115] USTR, "U.S. Objectives, U.S. Benefits," March 2014.
[116] Hansen-Kuhn, "Local Economies on the Table," November 2014, 5.
[117] GAO, "Government Procurement Agreements Contain Similar Provisions," September 2016, 23.

A survey of public procurement data prepared by the OECD[118] reveals several noteworthy trends regarding national and subnational procurement among OECD countries, including EU member states and the United States.[119] The EU has a mix of procurement systems, with some member states conducting most procurement through municipal or regional governments and others conducting the majority through national governments.[120] In Greece, Hungary, Ireland, Portugal, and Slovakia, procurement spending through central government entities was more than double that of local governments in 2015, whereas the majority of procurement spending in Germany, Italy, and Spain occurred at the sub-national level during the same period.[121]

EU member states likely spent around $2,192.7 billion in procurement in 2015, assuming that public procurement spending as a share of national GDP remained stable from 2013 to 2015. This share was relatively low for EU countries that have struggled with high deficits and government debt and subsequently implemented austerity measures and/or received bailouts administered by the European Central Bank and International Monetary Fund.[122] Such countries had a share of 10 percent or less, compared to the regional average of 13.5 percent.[123]

Table 2. Public procurement spending in top five EU countries by GDP (billion dollars)

Country	GDP (2015)	Total spending	Percent of GDP	Central spending	Sub-central spending
Germany	$3,363.6	$504.2	15.0	$118.7	$385.5
United Kingdom	$2,858.0	$404.4	14.2	$252.9	$151.5
France	$2,418.9	$365.5	15.1	$147.0	$218.5
Italy	$1,821.6	$194.2	10.7	$42.2	$151.9
Spain	$1,199.1	$121.2	10.1	$20.0	$101.3

Source: OECD, *Government at a Glance 2015* (accessed October 14, 2016).

Analysis conducted by the Peterson Institute for International Economics cites the U.S. and EU agreements with South Korea as potential models for a practical "GPA plus" framework. Both agreements had demonstrable effects liberalizing market access: the U.S.-South Korea agreement lowered procurement thresholds, while the EU-South Korea agreement improved local procurement access.[124] The EU's goal under a "GPA plus" framework thus involves broadening GPA-style coverage through commitments by sub-federal entities to liberalize local procurement policies.[125] According to one memo prepared by the European Commission's Directorate-General for Trade, the EU hopes to access procurement opportunities in states with high economic activity (including Ohio, New Jersey, Virginia, and several others that have opted out of the GPA).[126] Another memo states that the EU is "seeking commitments by all state government executive agencies, including counties with a population over [500,000], state capitals and other cities with over 250,000 inhabitants, as well as public universities with

[118] The OECD defines public procurement as "the sum of intermediate consumption (goods and services purchased by governments for their own use, such as accounting or information technology services), gross fixed capital formation (acquisition of capital excluding sales of fixed assets, such as building new roads) and social transfers in kind via market producers (purchases by general government of goods and services produced by market producers and supplied to households)."
[119] Bertok et al., "Public Procurement," July 2015, 136.
[120] Bertok et al., "Public Procurement," July 2015, 136.
[121] Bertok et al., "Public Procurement," July 2015, 136.
[122] Portugal, Ireland, Greece, and Spain.
[123] Bertok et al., "General government procurement as percentage of GDP," July 2015.
[124] Schott and Cimino, "Crafting a Transatlantic Trade and Investment Partnership," March 2013, 16–17.
[125] Craven, "The Public Procurement Chapter of the TTIP," 2015, 62.
[126] Hufbauer and Burki, "Sustaining Reform with a US-Pakistan Free Trade Agreement," October 2006, 175.

enrollment [of more than] 10,000 students and public hospitals with more than 500 beds."[127] The EU's interest in expanding access to cities with populations exceeding 250,000 reflects a desire among European firms for clearer procurement procedures and more access to municipal contracts in some of the United States' largest metropolitan areas, such as New York, Los Angeles, and Chicago, which are likewise not explicitly covered by the GPA.[128]

These markets are important to European firms due to their share of total U.S. commerce. For example, the gross metropolitan product (GMP)—that is, the gross domestic product by metropolitan area—of the New York-Newark-Jersey City statistical area was $1.6 trillion in 2015, $149 billion of which involved federal, state, and local government economic activity. During the same year, the respective GMPs for the Los Angeles and Chicago metropolitan areas were $930.8 billion and $640.7 billion.[129] Italy's GDP is only slightly larger than that of the New York metropolitan area at $1.8 trillion in 2015, while the GMP of Los Angeles is roughly equal to the combined GDPs of Poland and Belgium, and the GMP of Chicago is roughly $20 billion larger than the combined GDPs of Finland, Portugal, and Greece.[130]

Despite the EU's push for more access to state and municipal contracts, access to sub-federal procurement opportunities may not necessarily increase under new trade agreements. As with NAFTA, the completed text of the Trans-Pacific Partnership (TPP) contained no U.S. commitments to expand sub-federal procurement.[131] This omission was influenced by the fact that in the view of many experts, such commitments by the federal government would require the explicit consent of all covered parties.[132] Economists Gary Hufbauer and Tyler Moran disagree, arguing that the U.S. Constitution provides for the federal regulation of international procurement at the sub-federal level, thus allowing for FTA-implementing legislation to supersede domestic preferences or other procurement regulations maintained by state and municipal governments.[133] Regardless, the federal government has not exercised this ability when negotiating past trade agreements, and is unlikely to do so under a future FTA or procurement agreement.

Arguing that the EU is unlikely to secure concessions on direct access to sub-federal contracts, Yukins and Hans-Joachim Prieß instead suggest that the European Commission "might [instead] seek to leverage existing U.S. law to gain better access to procurements carried out at sub-central levels using federal grant dollars."[134] Rather than establishing de jure access to sub-federal contracts, it would instead involve coordination between federal and sub-federal entities and European vendors to ensure that the maximum amount of federal procurement spending, whether implemented by the federal government or by a sub-federal entity, remains available for open competition by European vendors. The U.S. negotiating position in TPP maintained Buy America requirements and the previously discussed set-asides.[135] A liberalized public procurement framework, according to Prieß, could "erect a permanent cooperative structure" that works to "resolve regulatory anomalies that themselves create burdensome . . . barriers to procurement

[127] Hansen-Kuhn, "Local Economies on the Table," November 2014, 5.
[128] European Commission Directorate General for Internal Policies, "TTIP: Opportunities and Challenges," June 2015, 5.
[129] USDOC, BEA, "Regional Data, GDP in Current Dollars, All Industries, 2015."
[130] World Bank, "GDP in current dollars, 2015," World Development Indicators (accessed October 24, 2015).
[131] USTR, "Government Procurement" (Trans-Pacific Partnership Chapter 15 Summary), n.d.
[132] GAO, "Government Procurement Agreements Contain Similar Provisions," September 2016, 23.
[133] Hufbauer and Moran, "Government Procurement in U.S. Trade Agreements," October 2015, 4.
[134] Yukins and Prieß, "Breaking the Impasse in the Transatlantic Trade and Investment Partnership (TTIP) Negotiations: Rethinking Priorities in Procurement," GWU Law School Public Law Research Paper No. 2014–36, July 23, 2014, abstract.
[135] USTR, "Government Procurement" (Trans-Pacific Partnership Chapter 15 Summary)," n.d.

markets" rather than aiming to dismantle or secure exemptions from the Buy American Act and other legislation that determine the level of access afforded to foreign firms in domestic public procurement.[136]

Potential Economic Outcomes under Proposed Liberalization Scenarios

Although opening procurement to reduce import restrictions may pose risks for less productive firms in the United States and the EU, it could also provide significant benefits to competitive firms with strong export potential. It could also benefit governments and taxpayers who can stretch their procurement funding further, allowing for more efficient procurement and the possibility of funding other critical government activities.

Some economists have argued that domestic preference policies are economically inefficient. Fronk cites two models of the trade effects of U.S. domestic preference policies as proposed by Baldwin and Richardson (1972) and Lowinger (1976). When analyzed together, these studies suggest that the cost to government of local content requirements and similar policies in the previous decade had exceeded the total gains to domestic parties in terms of total imports avoided.[137] More recent studies have argued that aggregate welfare gains in the U.S. stemming from such policies during the 1980s were effectively nullified by the increased cost of domestic sourcing.[138] Similarly, discussing EU national procurement policies, Albert Sánchez Graells of the Universidad Pontificia Comillas states that "the economic rent generated by procurement regulations will mainly dissipate in welfare losses as a result of inappropriate or excessive regulation of market activity." He goes on to argue that regulations favoring more competition in the tendering process would increase welfare for the market at large, and potentially for the public purchaser itself.[139]

Exactly how the pattern of government contract awards would shift under a mutually liberalized public procurement regime is difficult to determine, given that such liberalization would involve 29 countries, each with a unique vision for the role of foreign and domestic companies in public procurement. Nonetheless, liberalization's potential impact can be examined using procurement scenarios with common assumptions about the extent to which certain procurement regulations are eliminated or harmonized. A widely cited analysis conducted by the London-based Center for Economic Policy Research, for example, assumes a 50 percent reduction of procurement-related nontariff measures under the Transatlantic Trade and Investment Partnership (TTIP), if implemented.[140] However, this and other percentage-based analyses of barrier reduction fail to adequately explain how reductions in nontariff measures are calculated and do not present their methodology transparently.

Additionally, how far a U.S.-EU procurement agreement would increase cross-border procurement above current levels is questionable. As of 2010, the United States had procurement agreements involving national treatment (NTAs) with 43 countries.[141] As noted earlier, a majority of U.S. procurement from foreign firms involves firms based in countries that are NTA partners. Moreover, there is a loose correlation between growth in procurement from foreign firms as a share of total U.S. public procurement and growth in the total number of the United States' NTA partners (appendix 1). This suggests that

[136] Baeverstroem, "TTIP & Public Procurement," June 3, 2015, 2.
[137] Fronk, "Do Procurement Agreements Increase Partners' Trade?" February 2, 2015, 7.
[138] Fronk, "Do Procurement Agreements Increase Partners' Trade?" February 2, 2015, 7.
[139] Sánchez Graells, "Distortions of Competition Generated by the Public (Power) Buyer," 2009, 13.
[140] Ecorys, "Trade Sustainability Impact Assessment," July 2016.
[141] Fronk, "Do Procurement Agreements Increase Partners' Trade?" February 2, 2015, 6.

procurement from foreign firms will further expand as new NTA partners are added. However, it is important to note that most countries that would have benefited from the unratified TPP and incomplete TTIP agreements, respectively, already have NTAs with the United States. This leaves Croatia and Romania (for TTIP) and Vietnam, Malaysia, New Zealand, and Brunei Darussalam (for TPP) as the only countries that could have secured new procurement opportunities through national treatment under these agreements.[142]

[142] Fronk, "Do Procurement Agreements Increase Partners' Trade?" February 2, 2015, 47–48.

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