The University of Nottingham

PUBLIC PROCUREMENT IN THE U.S. FEDERAL GOVERNMENT AND THE EUROPEAN UNION: HIDDEN NON-TARIFF BARRIERS

Daniel Schoeni
MA, JD, LLM, LLM
Dayton, Ohio, USA

Thesis submitted to the University of Nottingham
for the degree of Doctor of Philosophy in Law

May 2022

Abstract

This work imagines a hypothetical in which the Transatlantic Trade and Investment Partnership (TTIP) has been enacted and de jure barriers to the public procurement markets in the US federal government and the EU Member States have been removed. It considers what non-tariff barriers would endure based on the US's and the EU's divergence of laws and 'embedded legal cultures'. These remaining barriers, it argues, would be significant. To remove such de facto barriers, the first step is to understand them. Employing an extended thought experiment about what barriers a European supplier would find in US federal procurement and an American supplier would find when selling to Member States (viewing them from an aggregated, 'unified European outlook'), it attempts to deepen mutual understanding of the two systems and to encourage further research. Of a secondary benefit, such an analysis may help us to see better what is in front of our noses.

Acknowledgements

I would like to thank the following:

my supervisors, Professors Peter Trepte and Craig Rotherham, for their unerring guidance and reassurance throughout the writing and researching process;

Baudouin Heuninckx, for invaluable collaboration on European defence procurement;

Michael Bowsher, Luke Butler, Pascal Friton, François Lichère, Anna Caroline Müller, Andrea Sundstrand, and Patricia Valcárcel Fernández for valuable conversations about EU procurement;

on this side of the Atlantic, Nathan Castellano, Stanley Dees, Dan Gordon, James Nagle, Chris Yukins, for priceless feedback, and Karen Thornton, who made introductions to several of these procurement law experts and whose thesis writing course was of incalculable value to this effort;

participants at the 2017 and 2019 research presentation days, especially Sue Arrowsmith and Richard Craven, whose comments led me to rethink and later substantially rewrite earlier drafts;

participants at the Global Revolution in Public Procurement conferences (2017 and 2019), for discussions of parts of an earlier draft of this work and treasured words of encouragement from Robert Anderson, Aris Georgopoulos, Bill Kovacic, John Linarelli, and Sope Williams-Elegbe;

the US state and EU Member State procurement officials who assisted in gathering figures about bid protests, who are too numerous to be listed here (but will be named in forthcoming works);

the staff at Nottingham, GW, Harvard, Yale, Virginia, Iowa, and Arizona law libraries, especially Jessie Eaton and the indefatigable Mary Kate Hunter;

Katie Smith, an LLM classmate and friend, whose example alerted me to the possibility of doing a part-time research degree;

the Honourable Jerry Larson, who took a chance on me and whose letter of recommendation afforded me a USAF commission and the opportunity to specialize in public procurement law;

the Honourable Stephanos Bibas, Ken Kress, and Dwight Sullivan, three mentors and friends who urged me to pursue doctoral studies;

Donald Holmes, whose intercession course in 2001 at the University of Iowa College of Law sparked an interest in public procurement;

David Jensen, a teacher and mentor of the highest order, whose courses made a lasting impression on my reading, thinking, and writing;

and not least, Alicia and Audrée and loving parents, for their abiding patience with and support for a husband, father, and son, who has for several years been a little distracted with this research.

Preface

This work generally follows the *Oxford Standard for Citation of Legal Authorities* (OSCOLA), Fourth Edition. However, because (1) the author is more familiar with the American *Bluebook* citation method, (2) this is a comparative work and US legal sources are cited extensively, and (3) the *Bluebook* provides more detailed guidance than does OSCOLA, I have followed certain *Bluebook* conventions where the OSCOLA is silent.

Also, I am aware that not all Europeans are citizens of EU Member States, but for the sake of variety I sometimes uses the terms 'Europe' and 'Europeans' in the narrower sense. Similarly, although US citizens are clearly not the only residents of the Americas and our neighbours often take umbrage when US citizens call themselves 'Americans' to the exclusion of other nationalities, I use this term when referring to US citizens for convenience. However, no offence is intended.

Last, it bears mentioning that in 2016 voters in the UK opted to leave the EU and 'Brexit' became official in 2020. Because the UK had been part of the common market for 47 years, this work will continue to reference useful historical examples from when Britain *was* an EU Member State. But I will not state the obvious each time that I cite such an example: that the UK has since left.

Abbreviations

ABA	American Bar Association
ADRA	Administrative Dispute Resolution Act
AGP	Agreement on Government Procurement (1981)
APA	Administrative Procedures Act of 1946
ASPA	Armed Services Procurement Act of 1947
CICA	The Competition in Contracting Act of 1984
CJEU	Court of Justice for the European Union
COFC	US Court of Federal Claims
DFARS	Defense Federal Acquisition Regulation Supplement
DoD	US Department of Defense
EEC	European Economic Community
EU	European Union
FAR	Federal Acquisition Regulation
FASA	Federal Acquisition Streamlining Act of 1994
FSS	Federal Supply Schedule
GAO*	US Government Accountability Office
GPA	World Trade Organization's Agreement on Government Procurement (1994)
GSA	General Services Administration
GWAC	Government Wide Acquisition Contracts
IDIQ	Indefinite Delivery/Indefinite Quantity
IT	Information Technology
LPTA	Lowest Price Technically Acceptable
MAC	Multiagency Award Contracts
MAS	Multiple Award Schedule
MPC	(ABA) Model Procurement Code for State and Local Government
MEAT	Most Economically Advantageous Tender
NTB	Non-Tariff Barrier
OCI	Organisational Conflicts of Interest
R&D	Research and Development
TEU	Treaty on the European Union
TFEU	Treaty of the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
US†	United States of America

* For the GAO's first 83 years the Government *Accounting* Office, but in 2004 it was renamed the Government *Accountability* Office. Pub L 108-271, 118 Stat 811.

† In American academic writing, 'US' is an adjective. 'United States' is the preferred abbreviation. I have adopted the conventional abbreviation used abroad here (US).

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Chapter I: Introduction

> A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed than in examining the laws and customs of foreign nations.
>
> – Samuel Johnson[1]

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[1] Boswell at 89.

I. Introduction

With a combined Gross Domestic Product in excess of $37 trillion, the United States of America (US) and the European Union (EU) constitute almost half the world's total output.[2] Their combined public procurement sectors are similarly impressive: $3.9 trillion.[3] Indeed, each of these is larger than the balance of the World Trade Organization's Agreement on Government Procurement's (GPA) combined membership.[4] As procurement has long been among the most protected sectors,[5] liberalisation is alluring, especially between these two transatlantic Leviathans.

This work takes for granted matters about trade that, understandably, some would dispute.[6] It assumes that free trade is good. It also assumes that *more* trade is better: that even continental-sized free trades zones like America and Europe would benefit from freer trade with one another.[7] It assumes that their procurement markets are no exception and that governments would benefit from lower prices and better value if the transatlantic market were more open.[8] And it also assumes there is a commercial interest in greater access to such procurement markets. It assumes, therefore, that the current obstacles to the transatlantic free trade in this sector are suboptimal. These assumptions are not uncontroversial; another thesis could be written about each subject. But these are not the focus. This work concentrates instead on identifying and understanding some of the subtle barriers to free trade. It posits that the longstanding efforts to liberalise the transatlantic procurement market are sufficient evidence of the inherent value of this endeavour.[9]

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[2] Amadeo, using the World Bank's 2019 figures and combining Member States' GDPs.
[3] European Commission, 'Public Procurement', €2 trillion; Makgill, Yeung, and Marchessault, US $1.8 trillion.
[4] GAO-19-414 at 7.
[5] Schede at 161. See also Yukins, 'Context' (2017) at 282, suggesting a 'stubborn reluctance' exists in this sector; Cernat and Kutlina-Dimitrova (2017) at 533–34, describing inefficiencies caused by 'home bias' in procurement.
[6] I am grateful to Dan Gordon and Nathan Castellano for raising such objections in comments on an earlier draft.
[7] Studies discussed in Chapter 4, Section III.A suggest that cross-border procurement within the EU has been disappointing. Public sector trade flows are less than half that of the private market. B-1049(2017) at xi, 16–17.
[8] McAffee and McMillan at 293, 298, 302, arguing that domestic competition for public contracts is imperfect and savings are realised only if five or more firms compete. Cf Cernat and Kutlina-Dimitrova (2017) at 538–39.
[9] Marceau and Blank.

Not only is the value of free trade in procurement controversial, there is also disagreement about basic facts regarding the levels of transatlantic trade and which side restricts trade more. In 2019, the US Government Accountability Office (GAO) issued a report claiming that the US government awarded EU suppliers contracts worth $2.8 billion, whereas the Member States purchased only $300 million from US suppliers.[10] In 2020, two economists from the European Commission retorted that the GAO's methodology was flawed in that it considered only direct cross-border transactions, omitting indirect transactions with subsidiaries and subcontracting. When all three 'modalities' are included,[11] they argue, the correct figure for EU public purchases from US suppliers would be €11 billion.[12] I contacted the author of the GAO study, Kimberly Gianopoulos, to discuss the Commission's economists' rebuttal. Although I found her answer persuasive,[13] adjudicating between these duelling accounts is a challenging enterprise given that the methodologies and the datasets employed are so different that they are nearly incompatible.[14]

Despite seven decades of efforts to liberalise this transatlantic market, obstacles persist.[15] One study laments that although US federal procurement is ostensibly open to competition, its unique laws and regulations are barriers for foreign firms.[16] US firms pursuing business in EU Member States face similar barriers to entry,[17] notwithstanding the European Commission's longstanding claims that Europe's procurement markets are more open than America's.[18]

[10] GAO-19-414 at 13, 21.
[11] See below note 47.
[12] Cernat and Kutlina-Dimitrova (2020) at 3–5.
[13] Gianopoulos and I exchanged emails on Apr 22, 2022. Her team was aware of their counterparts' disagreements and had sought the opportunity to discuss their methodological differences. Correspondence on file with author.
[14] Anderson, Pelletier, Osei-Lah, and Müller (2011) at 13.
[15] Marceau and Blank.
[16] Dawar at 26.
[17] Verdeaux at 719.
[18] Messerlin at 548, 558–59, suggesting there is a great divergence between rhetoric and reality about the openness of Member States' procurement markets to competition from contractors hailing from non-EU countries.

Trade barriers come in two varieties: tariff and non-tariff (NTB).[19] In procurement, the latter are more consequential.[20] Some of these are easily identified, others harder to isolate.[21] Most of the easily removed barriers have already been addressed with trade agreements such as the GPA.[22] The remaining NTBs include domestic preferences, collateral policies, illegitimate practices, and commercial policies,[23] a handful of which do the most harm. In America, the main impediments are the Buy American Act and Balance of Payments Program.[24] Europe has mostly eschewed legislation to close its markets,[25] but perhaps an EU counterpart would be the 2014 Utilities Directive's provision allowing officials to reject non-EU bids if the proportion of goods from non-EU states exceeds 50% or to favour local suppliers if their prices are within 3% of non-EU suppliers.[26] Another, under consideration since 2012 and nearing formal adoption, is the International Procurement Instrument, which would threaten to impose retaliatory barriers.[27] Last, there are entities and sectors otherwise covered under the EU's GPA commitments to which it denies US firms access: utilities, concessions, construction, engineering, and medical devices sectors and more than 200 of the Member States' assorted central government entities.[28]

NTBs can also assume subtler forms.[29] Examples include collateral objectives that favour domestic suppliers and measures designed to improve efficiency.[30] Among these lie a class of

[19] Reich at 8–10, 14.
[20] Hoekman at 570; Bialos, et al at 65, 68.
[21] Trepte (2004) at 236.
[22] Woolcock and Grier at 317–18, 323, 335. See also Arrowsmith (2018) at 832; Bialos, et al at 57.
[23] Arrowsmith (2003) at 14–18. See also Bialos, and others at 56, describing NTBs as a 'range of government policies, practices and attitudes that create procedural and institutional roadblocks'; Trepte (2004) at 235, observing that the variety of barriers is 'limited only by the inventiveness of the governments that erect them.'
[24] Golub and Fenske at 573; Yukins and Green (2019) at 151–53. Cf Forman, Cliffe, Choi, and Curran at 194. See also below notes 55–56, discussing the various "little" Buy American Acts-type domestic preferences.
[25] Anderson, Pelletier, Osei-Lah, and Müller (2012) at 128. Although the directives do not prevent non-EU firms from competing for contracts, Members States' rules may restrict access. Gilliam, Rainey, Dwyer, and Rose at 83.
[26] Directive 2014/25/EU, Article 85 (3).
[27] European Commission, Press Release (2022); European Commission, Press Release (2016); Dawar 44–46.
[28] Woolcock and Grier at 308, 322–23.
[29] Decision and U.S.-Crest at 8.
[30] Yukins and Schooner at 545; Arrowsmith (2003) at 15–18.

NTB that Sue Arrowsmith calls 'structural restrictions',[31] which concern not deliberate policies but the *environment* in which procurement takes place.[32] These can have a disproportionate effect on foreign suppliers. Such restrictions 'raise practical barriers to entry as foreign vendors run headlong into dense and alien procurement regimes'.[33] Divergent regulations can themselves create de facto discrimination against foreign competition.[34] These less obvious forms of discrimination comprise the main barriers to procurement trade.[35] Such barriers may obstruct trade even if the de jure barriers are eliminated.[36] Here, these will be called 'hidden barriers'.[37] This work studies two forms of hidden barriers: those arising from the simple divergence of laws and procedures and from what will be called 'embedded legal culture'.[38] These are taken in turn.

First, hidden barriers arise from procedural divergences.[39] When the divide between two systems is wide enough, this has a chilling effect.[40] As the UNCITRAL Model Law observes, 'the ability and willingness of suppliers and contractors to sell to foreign governments is hampered by the . . . divergent state of national procurement legislation in many countries.'[41] Suppliers will choose to compete for foreign contracts only if the expected value surpasses the cost. And the procedural divergence of an unfamiliar regime surely imposes transactions costs.[42]

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[31] Arrowsmith (2003) at 18–19. Often, such 'invisible' procedural obstacles pose a greater challenge. Reich at 14.
[32] Arrowsmith (2003) at 18.
[33] Yukins and Schooner at 558.
[34] Hoekman at 570.
[35] Woolcock and Grier at 317.
[36] Reich at 9–10.
[37] Yukins and Schooner at 571.
[38] Although I have coined this term and assigned it a particular meaning, variations can be found in Watson at 13 ('embedded'), 108 ('particular legal culture'), and 118 ('legal culture'). Another author calls this same phenomenon 'cultural overhang'. Mashaw at 516–18.
[39] Hoekman at 570, 591–96, arguing that the 'rules of the game' have a significant impact on procurement trade.
[40] Davies (2017) at 27–28.
[41] UNCITRAL Law on Public Procurement, Guide to Enactment (2011) at 2, ¶2.
[42] Former WTO Director-General Pascal Lamy has said that that to further free markets, it is not enough merely to remove *obstacles*; addressing divergent *rules* is an essential counterpart to such efforts. Anderson (2012) at 91.

Second, hidden barriers can also result from the misunderstanding of a foreign legal system's culture and objectives. Again, this will be called 'embedded legal culture', which signifies that each system has a culture, history, and tradition affecting how its laws apply in practice.[43] Laws may be formally harmonised with common standards, but embedded legal culture persists.[44] Such features can have a considerable effect on trade.[45] One study suggests that divergences among Member States' legal cultures have had a sizeable impact on non-domestic participation even within the common market.[46] If minor variations in the implementation of the directives are enough to disrupt trade *within* the common market, how much more do the wider and deeper US-EU differences hinder the transatlantic procurement market? Perhaps a better understanding of their embedded legal cultures may illuminate this divide and provide some provisional answers.

In order to examine the hidden barriers, this work uses two heuristics. First, it assumes a hypothetical wherein overt barriers have been removed, which is described in the next section. Second, it compares the two systems from the perspective of either an American or a European supplier who is considering whether to tender, which is described in the section after that. These heuristics enable the analysis to concentrate on hidden barriers and their ramifications for trade.

II. An Imperfect Solution: Local Subsidiaries, Representatives, and Joint Ventures

There is an important objection to this work's entire enterprise that must be answered.[47] Firms often compete abroad using three familiar tools. First, they establish or acquire subsidiaries staffed by locals familiar with the domestic procurement market's idiosyncrasies. Second, they hire local counsel or other representatives to bridge the gap. Third, they enter joint ventures with

[43] Watson at 97.
[44] Myant and O'Brien at 11–12, noting that TTIP would still not make America a fully 'embedded' EU member.
[45] Dawar at 50, listing among the de facto obstacles to market entry nepotistic, linguistic, cultural, and legal barriers.
[46] B-1049 (2017) at xiii, reporting that 32% of suppliers who chose not to compete for cross-border procurement contracts attributed their decision to 'unfamiliar legal contexts' that caused entry barriers.
[47] I am indebted to Dan Gordon for raising this objection to an earlier draft of this work.

local firms.[48] Often, these present effective solutions.[49] For, example a local subsidiary would probably not encounter the same challenges as a supplier located abroad. If these obstacles are easily circumvented, why should it matter that firms lacking such local support would struggle?[50]

The answer is that such solutions are costly and inefficient. Establishing local subsidiaries, hiring local representatives, or creating joint ventures all impose significant transaction costs. Such costs are especially burdensome when suppliers are competing for procurements in systems that are decentralised, whose contracts are often small, and have tight margins that cannot justify substantial transaction costs. This means that, often, smaller firms with fewer resources may choose not to compete abroad, surrendering the field to domestic suppliers.[51]

Larger firms with ample resources and experience competing abroad will often circumvent the barriers described here. This work may thus seem to be of interest primarily to firms competing for smaller procurements for which subsidiaries, local representatives, or joint ventures would not be cost effective. However, this research may also apply to larger firms operating at the margin, where transaction costs and potential gains are equipoised. Even large contractors, with deep pockets and plentiful experience abroad, will sometimes find the transaction costs associated with competing for a foreign procurement too burdensome. This makes the questions considered here relevant to competitors of all sizes, for public procurements both large and small.

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[48] These three fall under the second category of what have been called the three 'modalities' of foreign procurement: (1) direct cross-border procurement, (2) commercial presence procurement, and (3) indirect international procurement or subcontracting. Cernat and Kutlina-Dimitrova (2017) at 543–45. Establishing subsidiaries, hiring local representatives, and forming joint ventures are forms of commercial presence.

[49] Reich 9–10, 15.

[50] This question is perhaps of greater relevance for US firms competing in Europe than for EU firms in America. That is because indirect purchases from US firms by Member States (that is, through foreign-owned subsidiaries) exceed direct purchases from US firms by Member States by a factor of more than five (3.8% versus 21.8%). B-1049(2017) at 48–49. Comparable numbers were the *inverse* in America: US purchases from foreign suppliers were three times higher from firms that were foreign owned and operated than from firms using local subsidiaries ($3.6 versus $11.8 billion). GAO-19-414 at 16. In short, US suppliers often work through local subsidiaries in Europe, but the US government's foreign purchase usually go directly to the foreign supplier, not a local subsidiary.

[51] Reich at 15. Most public procurement contracts within the EU are too small to justify such transaction costs except for defence, railways, and telecommunications. Ibid, citing Cost of Non-Europe (1988) at 19.

Setting aside the question of suppliers' commercial interests, forgoing competition in order to favour domestic contractors is also consequential for other parties. Domestic suppliers insulated from competition need not attain the wider world's standards of quality and efficiency. Foreign competition encourages higher quality and lower prices. If only the largest procurements attract foreign competition, taxpayers and end-users will suffer.[52]

III. The TTIP Hypothetical

This work proceeds under a hypothetical in which a robust form of the Transatlantic Trade and Investment Partnership (TTIP) has been adopted and all 'de jure' barriers to the procurement trade have been removed. But the larger argument does not depend on the success of the actual TTIP negotiations, which in recent years have either been scuttled or at best indefinitely postponed. 'TTIP' is used here as a shorthand for a hypothetical wherein several de jure barriers are gone. In America, it assumes away the two impediments mentioned above, the Buy American Act and the Balance of Payments Program.[53] Their worst effects are already mitigated for GPA members such as the EU, but not all.[54] The hypothetical covers these also. Moreover, it assumes away lesser-known barriers, including an assortment of laws sometimes called the 'Little' Buy American Acts,[55] whose myriad preferences include food, clothing, metals, shipyard construction, and supercomputers.[56] In Europe, it assumes away the 2014 Utilities Directive and the International Procurement Instrument mentioned above. On both sides, it would also remove the security and the general exceptions to the GPA, which are the two main barriers for fellow

[52] Reich at 15. Cf McAffee and McMillan at 293, 298, 302; Cernat and Kutlina-Dimitrova (2017) at 538–39.
[53] Golub and Fenske at 573.
[54] Hufbauer and Moran at 290.
[55] Luckey at 2–16. See also Carpenter and Murrill at 1–2, 12–25; Woolcock and Grier at 318–19.
[56] Cibinic, Nash, and Yukins at 1624–32.

GPA signatories.[57] Last it would remove the derogations found in the GPA country annexes.[58] The hypothetical would thus remove from consideration all outward-facing or de jure restrictions that have been erected to favour local contractors at the expense of foreign competition.[59] Both sides are ostensibly free and open, and yet presently enough de jure barriers remain to substantially curb transatlantic participation.[60] Such an agreement would therefore constitute a major step forward.

What this hypothetical does not assume is deep harmonisation, either of procedures or embedded legal culture. Such de facto restrictions comprise the core objects of this study. The hypothetical enables an examination of the seemingly innocent, inward-facing laws that control, order, and systematise each procurement system. Understanding their internal workings is essential: even if their laws were harmonised, their distinctiveness would still cause differences in application. This is the essence of embedded legal culture. Since differences between these two cultures runs deep, attempts to summarily dismiss their immutable distinctiveness would founder.

IV. The Transatlantic Supplier Thought Experiment

To test what effect divergent regulations and legal culture may have on the procurement trade, a thought experiment is undertaken involving a contractor that is familiar with its domestic system but unfamiliar with its transatlantic counterpart, which is 'shrouded' in complexity.[61] Each divergence or artefact of embedded legal culture is then reviewed, *ceteris paribus*, asking how such a seasoned domestic contractor would (mis)understand such differences and how that

[57] Revised WTO GPA, Article III.1 and .2. See also Arrowsmith (2018) at 848–49.
[58] Revised WTO GPA, US Appendix 1, at 411–33, limiting coverage of state-owned utilities (¶ 3), goods (¶4), services (¶5), and construction (¶6) and exempting small businesses; ibid, EU Appendix I, at 79–254, carving out extensive national derogations. See also Dawar at 47; Craven (2015) at 66–67; Woolcock and Grier at 321–23.
[59] Cernat and Kutlina-Dimitrova (2020) at 8. See also Woolcock and Grier at 318–19.
[60] Dawar at 26, 47.
[61] Craven (2015) at 63.

(mis)understanding would affect the likelihood or character of that firm's participation abroad – or in the case of Chapter 5, the likelihood or character of lodging a foreign bid protest.[62]

One postulate of this experiment is that the imagined supplier is not only familiar with its domestic system but will often expect the foreign system to function in a similar fashion. Often that expectation of similarity will serve the supplier well because the systems are not so dissimilar. But sometimes it may be misleading. This postulate is not too far-fetched. One often brings a 'perceptual bias' to a foreign legal system – expectations, assumptions, and values gained from experience with one's own system.[63] The experiment ignores suppliers who are unfamiliar with their own systems because they are start-ups or operate only in the private sector. Yet, because officials favour incumbents,[64] this is not an issue: one suspects that rarely will a supplier attempt to sell to a foreign government when it has not already mastered selling to its own government.

The object of this experiment is three-fold. It illustrates three problems for the domestic supplier considering whether to tender for transatlantic government contracts. First, sometimes barriers may discourage participation ex ante, and firms may err in choosing not to tender when they should have done. Second, sometimes it is the other way around, and firms will compete and only recognise ex post that hidden barriers made their tenders uncompetitive, wasting time and resources bidding on contracts that could not have been won. Third, sometimes the supplier will bid for contracts but will do so in an uncompetitive fashion because of barriers that it may never understand. In all three cases, the experiment is premised on an experienced contractor making assumptions about the foreign system based on experience operating in its own system. Whether firms tender when they should not have done, fail to tender when they should have

[62] See below Chapter 5, Section I.
[63] Gerber at 968–69. Psychologists call this 'pareidolia', or the tendency to see what one is predisposed to see.
[64] Estrin Gilman at 599–600.

done, or tender poorly, the result is suboptimal. In the first case, the result is a suboptimal because the firm wastes efforts on unwinnable bids. In the second, it is suboptimal because the firm forgoes bidding for a winnable contract. And in the third case, it is suboptimal because the contractor competes poorly, wasting resources and perhaps losing contracts it should have won.

There is something artificial about this approach. Its merit is fostering the analysis of each element of the two systems separately. But a real foreign supplier would not consider its prospects in so piecemeal a fashion. The overriding question would be the aggregate compliance costs: How much would it cost to reorganise our business to be in compliance with local regulations? That is a practical question for local counsel. But the method employed here serves its purpose, which is to understand how the particulars of each system may function as barriers to free trade.[65]

V. The Comparative Enterprise

A. Superficiality, Inclusions, and Omissions

Comparative law tends to be somewhat superficial.[66] If a comprehensive comparison were attempted, I would 'soon lose [my]self in the sands of scholarship.'[67] '[I]t is hard enough,' Watson writes, 'to know in detail one branch of law of one system,' but to understand 'its relationship with that of another system . . . is well nigh impossible.' Even the careful comparatist will sometimes err about the details of a foreign system – which, despite alertness to this tendency, has been a constant struggle here. Apart from superficiality, there is also the impossibility of a systematic treatment. Thus, comparative law must be selective.[68] If not, superficiality increases. Some explanation for points of comparison chosen here seem necessary. Three criteria were used.

[65] I am indebted to Nathan Castellano for sharing experiences in private practice that led me to add this paragraph.
[66] Watson at 10.
[67] Lawson at 2.
[68] Watson at 10–11, 102, 'Too much has to be taken on trust from other writers, including other comparatists, too often knowledge is derived from too few original sources, and too frequently linguistic barriers interpose a formidable barrier between the scholar and his subject.' See also Buckland and McNair at XII.

First, only elements that both systems consider essential to the procurement process were chosen. This criterion justifies inclusion of the material in Chapters 3–5, whose subject-matter lies at the core of both systems: qualification/award, competition, and remedies procedures. Other themes central in one system are thought peripheral to the other. Entity coverage is a vital topic the in the EU but scarcely mentioned in US procurement.[69] Contract administration,[70] pricing,[71] and intellectual property,[72] are essential in America but omitted from the EU directives. Only procedures thought essential to both systems were included.

A second filter was to consider only procedures where the two systems are similar enough so that comparison was possible. For example, both consider suspensions and debarments important, but the EU has not established a common regime.[73] Because this programme is implemented in an idiosyncratic manner among, it is not well suited for comparison with the US.

Third, only procedures that have existed for long enough for a genuine jurisprudence to have emerged were chosen. For example, the 2014 Procurement Directive strengthened measures on electronic and aggregated procurements, innovation, and efficiency.[74] But because these are all new initiatives and their meaning is still being determined, these procedures were not included.

Apart from the application of these criteria for inclusion, another omission was necessary. While Section IV argues that a 'common code' is emerging, such a 'unified European outlook' has not yet coalesced.[75] For now, there is no single 'EU' procurement system. There are 27 varieties. Failing to explore this diversity risks doing a comparative analysis that is too superficial.

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[69] Gilliam, Rainey, Dwyer, and Rose at 76–79; Steinicke and Vesterdorf (2018), Chapter 1; Arrowsmith (2014), Chapters 5 and 6; Trepte (2007), Chapter 2.
[70] Cibinic, Nagle, and Nash. See also Verdeaux at 735; Astor at 6.
[71] Manos.
[72] McEwen and others; Nash and Rawicz.
[73] Yukins and Kania.
[74] Directive 2014/24/EU, Recital 3, Recital 47, Article 31, and Chapter II.
[75] Schebesta at 3.

An interesting thesis could have been written on the local varieties of EU procurement;[76] however, that approach would not have left space for the sort of transatlantic comparison attempted here.

B. Approach to Comparative Law

Functionalism is the mainstream in comparative law.[77] Two prominent scholars say that it is the 'basic methodological principle of all comparative law.'[78] Indeed, it is often a shorthand for the traditional approach. While there are various sub-schools,[79] all of these share certain features that enable comparisons.[80] First, they concentrate not only on the rules but on their effects. Second, they aver that law's relationship with society is dualistic: law serves a utilitarian purpose and exists as an artefact of society. Last, they claim that institutions, even in disparate systems, can be compared insofar as they perform analogous functions. That is the approach taken here.

One criticism of functionalism is that it is too dogmatic in the presumption of similarity.[81] This work supplements a pure functionalist approach with insights from 'legal culture' studies. Definitions are contested,[82] but the concept of 'legal culture' is indisputably useful.[83] It connotes that the law is situated in a broader milieu.[84] Adherents are thus attentive to the context in which law is applied.[85] Because culturalists warn that formidable difficulties are implicated and perfect comparisons impossible,[86] the hope here is to avoid the reductionism associated with a simplistic form of functionalism.[87]

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[76] The value of intra-EU comparative law is increasingly recognised. Caranta (2009). Some emphasise the value in studying the 'resilient individuality' of Member States' unique implementation of EU law. Caruso at 192.
[77] Michaels (2019) at 346, listing eight varieties of functionalism. See also Cotterrell (2019) at 713.
[78] Zweigert and Kötz at 34.
[79] Michaels (2019) at 347, 350–67, saying the definite article is misleading, listing several functionalist approaches.
[80] Ibid at 372; Cotterrell (2019) at 712.
[81] Ibid at 375; Cotterrell (2019) at 712.
[82] For example, compare Cotterrell (1997) with Friedman.
[83] Engle Merry at 40–41. See also Cotterrell (2019) at 723, saying this is a portmanteau for aggregated phenomena.
[84] Cotterrell (2019) at 711–12.
[85] Ibid at 721; Dannemann at 404.
[86] Curran at 91.
[87] Cotterrell (2019) at 712, 729.

What is often missing in comparative law is a sense of what has been called a legal system's 'cognitive structure' or 'institutional culture'. These include the 'web of beliefs' within which the black-letter rules are embedded. Legal culture also encompasses 'prevailing attitudes towards the courts, the legislature, legal scholarship, legal education, legal practice, jurisprudence, the basic constitutional rights, and so on.' In short, often absent in comparative law are *explanations*.[88] Such context is provided here in the form of what, again, will be called 'embedded legal culture', heavily steeped in history – because comparative law cannot be done without history.[89]

C. Emphasis on Similarity or Difference

Like a pendulum, the emphasis in comparative law swings between similarity and difference. Before the creation of the modern state, the presumption of similarity had been a given.[90] That changed in the eighteenth century with Montesquieu.[91] The pendulum swung back again in the late nineteenth century, when there was renewed interest in finding similarity.[92] Emphasis on similarity has been the mainstream ever since.[93] Notwithstanding the dominance of similarity, with an eye toward harmonisation, there is a rear-guard movement that concentrates on differences.[94] This movement claims that traditional comparative law is too concerned with superficial similarities[95] or 'illusory comparison'.[96] It favours instead what one scholar calls

[88] Ewald at 1948, 1986–87.
[89] Pringsheim at 349. Cf Gordley at 754–55, 762.
[90] Dannemann at 392.
[91] Montesquieu at xliii, recommending 'not to consider as similar cases with real differences or to overlook differences in those which appear similar.'
[92] Dannemann at 392.
[93] Ibid at 392–93. See also Michaels (2019) at 346; Cotterrell (2019) at 712–13.
[94] Dannemann at 395–98; Cotterrell (2019) at 724–30.
[95] Damaška at 1.
[96] Gutteridge at 73.

comparaison contrastée, in which prominence is given to the opposition between legal systems.[97] Such scholars stress that one must not mistake similar terminology for equivalent legal systems.[98]

Overemphasis on similarity is of particular interest here because there is in the procurement literature a similar exaggeration about the ease of harmonisation for the US and the EU systems, at least in some quarters.[99] Indeed, one author has suggested that such the remaining differences are 'minor, almost vestigial'.[100] This work places greater emphasis on their differences, thereby enabling a better description of the hidden barriers that make harmonisation a daunting challenge.

Rodolfo Sacco offers a distinction between what he calls 'legal formants' and 'cryptotypes'. Legal formants are the 'rules of rules' that govern legal systems. These rules account for two legal systems applying the same law in a different manner.[101] When these rules are hidden, he calls them cryptotypes.[102] Practitioners use these conventions without being aware of their presence.[103] Differing legal formants will be hard enough for to master, but the prospect of cryptotypes – rules that are unstated, often hidden – will be even more vexing. The lesson is that much of what we need to know about how a legal system works lies beneath the surface. This applies as much to procurement as to other fields. At a symposium at George Washington University on drafting procurement laws for developing nations, one US practitioner shared the following observation:

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[97] Ancel at 65.
[98] Großfeld at 106–07. That common terminology can be misleading has also been recognised in procurement. Trepte (2006) at 378; Trepte (2004) at 4.
[99] For example, see Yukins, 'Context' (2017) at 264–65, arguing that there is a 'convergent evolution' toward the US system; Yukins (2014) at 15, observing that *Pressetext Nachrichtenagentur GmbH v Rupublik Österreich*, C-454/06 (2008) adopted the functional equivalent of the US's cardinal change doctrine. Yukins is not alone his description of some version of this thesis. Grier at 1-1, 1-6; Kovacs at 15–16; Nwogwugwu at 137–38; Casavola at 60–61; Schwartz (2003) at 39–43. Cf Folliot-Lalliot (2019) at 98; Schwartz (2019) at 77.
[100] Yukins, 'Context' (2017) at 265.
[101] Sacco, 'Part I' (1991) at 21–25.
[102] Sacco, 'Part II' (1991) at 384–87. He borrows the term from linguistics. Ibid at 384–85. It was introduced in the field in 1937, the complement to this cryptotypic grammar being *phenotypic* grammar. Whorf at 1–2. Scholars consider cryptotypes 'among the major contributions of twentieth-century linguistics'. Halliday at 188.
[103] Cotterrell (2019) at 721, explaining that such background elements are 'unstated, taken-for-granted, yet vital.' See also Dannemann at 397; Curran at 45, 51, 57–58, 66, 91.

> Maybe our system depends more than we realize on subtle traditions and tacit assumptions. We take these so much for granted, they almost defy expression. Having to explain our system to outsiders forces us back to the basics, so it's an educational process for us, too.[104]

This work as a whole attempts to identify and examine the unstated, foundational assumptions in the US and EU procurement systems. So comparing these two is essential to this endeavour.[105]

Without adopting Sacco's terminology or engaging directly with his writings, this work attempts to understand the two systems using this general idea. That is, that such rules of rules – sometimes explicit, sometimes hidden – which are here simply called embedded legal culture, will help explain how the two public procurement systems in question differ from one another.

D. Mainstream Comparative Law's Malaise

Some claim that mainstream comparative law suffers from a 'malaise'.[106] This diagnosis includes the perils discussed above, including concerns for superficiality, disorganisation, and a propensity for error. But it also encompasses a reductionism that displaces explanation and analysis with a 'spray of facts' in which one is presented with an overwhelming amount of detail about a foreign system's rules without being given a simplified overview. The narrowing of the aperture to a mere description of rules causes this malaise. Such an approach attempts to 'match' rules from one system with those from another without a proper consideration of the history, ideas, or institutions that underlie such rules. This might be a called a crude functionalism. Without more context, the rules themselves do not tell us all that we need to know; something more elusive and fundamental is missing.[107]

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[104] Joseph Petrillo, quoted in Schooner, 'Introduction' (2002) at 102.
[105] Sacco, 'Part II' (1991) at 385. See also Nelken at 6.
[106] Ewald at 1961, 1963, calling the current situation a malaise; Cotterrell (2019) at 713, calling this malaise deep.
[107] Above Section III.A. Cf Ewald at 1963, 1968, 1986, 1990, observing that comparative law is often considered superficial, unsystematic, arid, futile, and misleading; Mayda at 443, describing its use of imprecise pseudoscience, reliance on unmoored philosophical speculation, and a preoccupation with irrelevant problems.

Related to the malaise in the *method* is a malaise of *purpose* in the 'overwhelming focus' of comparative law on harmonisation. Although not inherently so, such efforts have often tended to neglect in-depth understanding and to be overly technical.[108] One author labels the view that the substantive rules of most modern legal systems are not so different, or are at least moving toward common rules, the 'convergence thesis'.[109] As mentioned above, a similar view is prevalent in the procurement commentary.[110] This work avoids such tendentious debates, limiting itself mainly to identifying and describing the hidden barriers to the transatlantic procurement trade.

VI. The Level of Comparison

Comparative studies of the two systems could be done on at least three levels, contrasting

- US states with EU Member States (e.g., Florida with Italy),
- relationships between Member States' central governments and their subsidiaries (e.g., how implementation of the directives differs in, say, Poland versus France), or
- their 'federal' levels – that is, the US Federal Acquisition Regulation (FAR) system versus the EU system under the Financial Regulations.

This work is perhaps a hybrid of the second and third. It compares US federal procurement with the EU's emerging 'common code'[111] or 'unified European outlook'[112] that increasingly governs all procurement within the Member States.[113] Consideration of this emerging common EU-level 'legal order'[114] is a topic that is rich for investigation.[115]

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[108] Cotterrell (2019) at 712. See also Dannemann at 407–08.
[109] Ewald at 1966.
[110] See above note 99.
[111] Arrowsmith (2006).
[112] Schebesta at 3. See also Arrowsmith (2006) at 284.
[113] Trepte, 'Foreword' in Sanchez-Graells (2015) at viii, saying the directives become more detailed regulations with each iteration; Arrowsmith (2014) at 177–78, noting that the space for local discretion has been 'substantially diminished' since the directives were first issued and this has continued apace with the 2014 Directive; Arrowsmith and Treumer at 33–34, noting that Member States are increasingly transposing the directives verbatim.
[114] It is the 'established mainstream account' that the CJEU 'constitutionalised' the treaties and created a 'European' legal order that is federal in nature. Davies and Rasmussen at 307-08. Cf Stein at 1, arguing that the Court has fashioned a 'federal-type structure'; Weiler at 19–29, claiming that a 'working constitutional order' was established.
[115] Caruso at 198.

Not long ago, such a comparison would have been fanciful because the directives provided only a framework for the Member States to implement at their discretion.[116] Over time, however, what was once a mere framework has come to look more like a detailed code.[117] Indeed, less room is available for local variation, and in some areas EU public procurement has even become 'substantially harmonised'.[118] This is not only true of procurement, but some have argued there is an emerging common EU 'legal consciousness'[119] or the makings of a 'proto-federal' order.[120]

Yet there is a sense in which this sort of comparison is disanalogous. The EU itself does some purchasing, but most procurement happens at the Member State level or below.[121] In fact, the EU's spending constitutes a mere 2% of European public spending.[122] In contrast, US federal spending is almost on par with the state and local procurement spending.[123] Further, the two systems' arrangements are incongruous: the directives *indirectly* control how Member States and sub-central authorities do procurement but has different set of rules for its internal purchases; the FAR *directly* controls federal purchasing but has no bearing on state or local procurement.[124]

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[116] Astor at 6, explaining in a newsletter written for a US audience in 1991 that the directives at that time were 'extremely short, substantively rudimentary, and atrociously written'.
[117] Arrowsmith (2006) at 338, 349. Such convergence encompasses procedural rules, ibid at 350–64, the coverage of those procedural rules, ibid at 364–75, and especially remedies that are available to suppliers, ibid at 375–79. See also Boerger and Rasmussen at 210–12, recounting two 'revolutionary' decisions whereby the Court created EU-level remedies and established 'a new legal order'. Others agree that the directives are of constructing a detailed code, more like the UNCITRAL model law than the WTO GPA. Gordon and Racca at 118.
[118] Advocate General Jääskinen, *Consorci Sanitari del Maresme v Coporació de Salut del Maresme I la Selva*, C-203/14 (2015). Cf Priess and Friton at 511; Treumer, *Enforcement* (2011) at 17, 49; Pachnou (2000) at 55.
[119] Nicola at 1183–84, arguing that in the recent decades that a coherent EU 'legal consciousness' has coalesced.
[120] Rasmussen at 1188, 1191, 1202. The EU has established 'a new legal order of international law'. *Van Gen den Loos v Nederlands Administratie der Belastingen*, C-26/62 (1963). There is a growing recognition that EU law is not international but a 'federal' framework. This originated with an article in 1981 in the *American Journal of International Law*. Stein. Since then, international journals have ceased publishing articles about EU law because it has since been considered *constitutional* not international. Weiler at 297.
[121] The EU Financial Regulations also controls the management of the European Development Fund.
[122] Moravcsik at 35. See also Pisani-Ferry at 153, noting that the EU is not equipped with a meaningful budget.
[123] Federal procurement spending averages about $500 billion, and about double that if grants are included; state and local governments spend about $1 trillion on procurement each year.
[124] Harutyunyan at 456.

A solution has been suggested in that the EU is developing, effectively, a 'common code'. Member States do the purchasing, but increasingly they do it in much the same fashion under a common set of rules. Member States function somewhat analogously to US executive agencies, each operating under the FAR with only minor, sector-specific differences, and less like sovereign nations, each idiosyncratically implementing the directives. Since Member States are increasingly subordinate to a common code, the problems with comparisons along these lines are diminishing.

Another problem with the mode of comparison attempted here is that the EU is sui generis, a hybrid system that resists comparison with other polities.[125] The US is a rather straightforward federation, but the EU is neither fish nor fowl. It contains some features of an international organization, some features of a federation.[126] It 'is neither a simple free trade area nor a federal community' but instead 'an original construction with no equivalent in the world.'[127] Yet while this presents challenges, comparison of these two 'federal' systems remains of much interest.[128] Chapter 2 revisits this issue and argues that a fundamental difference between the two systems is that the US procurement system is domestic and the EU's is more like an international system.

Last, to the extent that EU and US central governments can be compared in a meaningful way, their coverage is disparate. As mentioned, the FAR governs federal acquisitions and has little to do with state or local procurement.[129] The procurement directives do not govern the EU's own purchases but are mandates for the Member States to implement.[130] Further, the two

[125] Jacobs at 526; Trevor Hartley at 11–12; Jacobs and Karst at 171.
[126] Trevor Hartley at 11–12. See also Weiler at 29, arguing that the EU has become its own 'constitutional order'.
[127] Verdeaux at 719.
[128] Jacobs at 551–52. Cf Young at 190, warning that the 'historical arcs' of US and EU federalism may be too dissimilar for straightforward comparison.
[129] Schooner (2013) at 1–2, saying Americans are taken aback upon learning that the procurement directives create standard practices not only for the national level but also for regional and municipal levels.
[130] The Financial Regulations govern the EU's internal appropriations, making them more analogous to the FAR than are the directives. In fact, comparing the FAR and EU directives risks a category mistake. Yet because most procurement happens at the Member State level and below, this work nevertheless opts for this level of comparison.

systems also resist comparison because until recently the directives were not directly applicable and only established a framework,[131] basic standards that each state implemented its own way.[132] Distinct coverage regimes result in different compositions of purchases, especially as to defence, and this subject is explored in Chapter 2, Section V.

Despite the challenges with the approach taken here, it also has several merits. The core of this work involves careful examination of divergences of law and of legal culture. Exploring such divergences requires side-by-side comparisons of each system. The first virtue of the sort of comparison, then, is that it facilitates simple, one-to-one assessments of this kind. Whereas, if one attempted to compare 50 states with 27 Member States, the analysis of so many possible permutations would be both unwieldy and, given the space limitations here, impractical.

Second, this level of comparison is more consistent with the realities about US federalism, at least as it is currently interpreted. Even if the US government ratifies TTIP, US states may choose not to participate, just as one-third declined to sign onto the GPA. It is thus preferable to do a comparative analysis only at the federal level, which TTIP would almost certainly cover, than to engage in vacuous speculation about what would happen at the state and local level, which any version acceptable to US trade negotiators, and to their constituents, would not fully cover.[133]

Third, although the FAR does not control subcentral government procurement in America in the same manner that the directives mandate implementation in local legislation in Europe, this code is influential across all 50 states. Many state and local governments have modelled their procurement codes on the FAR.[134] The federal system exercises further influence since the ABA's

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[131] Verdeaux at 722.
[132] Yukins, 'IDIQs' (2008) at 551.
[133] Hufbauer and Moran at 290, 297–98.
[134] I am indebted to James Nagle for this observation. When commenting on an earlier draft, he observed: 'many state and local governments also follow the FAR. That makes eminent sense because why reinvent the wheel when the federal government has already spent a lot of time and effort to put together such a comprehensive document?' Correspondence on file with the author. For more on this, see below Chapter 2, Section IV, especially note 157.

Model Procurement Code (MPC) for State and Local Government is also based on the FAR.[135] Nine states have adopted the MPC in full,[136] and another 16 plus the District of Columbia have modelled their procurement codes on it.[137] So comparison at the federal level provides the added benefit of insight into the standard model on which US state and local procurement are based.[138]

Despite the merits to the methodology of comparison employed, some differences between the two systems cannot be reconciled. The enumerated differences exist, are inescapable, and make comparisons problematic. Because the two are asymmetrical if not incommensurable, the approach taken may yield results that are at times informative, at other times highly misleading.[139] The author is aware of these challenges and insofar as possible has attempted to avoid such errors.

The ultimate justification offered for the approach taken is that this mode of comparison presents a valuable picture, however incomplete it may be. This piece 'is meant to be only *one* of Monet's paintings of the Cathedral at Rouen'; a complete understanding would require a study of all of his paintings. Because 'a fully integrated approach is probably impossible,' this piece introduces 'only one possible way of looking at and analyzing the legal problems' in question. The level of comparison undertaken provides one view of the cathedral and the author recognises the need for continued comparative dialogue and research.[140]

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[135] Copeland at 248.
[136] Alaska, Arizona, Arkansas, Colorado, Indiana, Kentucky, Louisiana, Massachusetts, Pennsylvania. Ibid at 18, 35, 42, 62, 182, 205, 224, 254, 436.
[137] Connecticut, Georgia, Hawaii, Idaho, Maine, Maryland, Montana, New Hampshire, New Mexico, New York, Oklahoma, Oregon, South Carolina, and Virginia. Ibid at 73, 123, 137, 146, 240–41, 248, 301, 323, 342, 349, 417, 427, 469, 483, 546, 565.
[138] I am also indebted to Dan Gordon for his suggestion to discuss the similarities of the state procurement systems when he commented on an earlier draft. Correspondence on file with the author.
[139] Harutyunyan at 456.
[140] Calabresi and Melamed at 1128, 1089–90, n 2, citing Hamilton at 4–5, 19–20, 27.

VII. The Taxonomy of Embedded Legal Culture

As noted, in the comparative law literature 'legal culture' broadly encompasses 'ideas, values, expectations, and attitudes towards the law and legal institutions'.[141] This section explains how that applies to comparisons of procurement systems and introduces a 'taxonomy' within which the next four chapters are framed. For purposes of comparing these two systems, 'embedded legal culture' refers to the internal workings of the 'procurement culture'[142] and 'external environment' in which it operates.[143] With two and a half centuries' history, the embedded culture of the US system is extensive, yet this fertile line of inquiry has been mostly unexplored.[144] Although the EU procurement system was established more recently, a distinct legal culture has begun to coalesce in recent decades.[145] This also merits further study.

For organisational purposes, embedded legal culture is grouped into three subcategories: constitutional character, legal traditions, and policy objectives. There is overlap among them and, like all such taxonomies, there is something arbitrary about where lines were drawn. This section explains what separates them and how they may organise the material in a sensible fashion.

A. Constitutional Character

Constitutional character is the environment in which a legal system functions. This would include written constitutions, as its name implies, but would also embody institutional structures more broadly. Such institutional structures are upstream of laws, sometimes providing reasons – social, political, historical, or cultural – for the adoption of particular legal rules or systems.[146] This character is deeply embedded and cannot be amended easily in the short or medium term.

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[141] Friedman at 34.
[142] Kelman (1990) at 44, 101, 188.
[143] Mashaw at 518.
[144] Whelan and Pearson at 298. See also Schooner (2001) at 675, stating that the literature is 'strangely silent'; Yukins 'Editor's Note' (2008) at 269, stating that norms are recognised among practitioners but often unstated.
[145] Caruso at 198, observing that an EU 'legal order' has developed over seven decades and is worthy investigation.
[146] Butler at 317–18, using the term 'constitutional features'.

In America, constitutional character would of course include the constitution of 1787. Few provisions directly related to procurement are to be found there.[147] Yet it does define key features of institutional relationships, establishing states as coequal sovereigns and forbidding federal meddling in affairs reserved to the states.[148] Some doctrines have been valued for centuries and were honoured long before codification in statutes such as the Competition in Contracting Act of 1984 (CICA).[149] These are so enduring as to be counted as nearly 'constitutional', even if the America's founders never actually wrote them down: integrity, transparency, and competition.[150]

In Europe, this category encompasses the treaties and derivative principles, such as the four freedoms.[151] It also includes the principle of subsidiarity and the division of labour between the EU and Member States. Specific to procurement, a key structural feature is that the directives apply not only to national governments but also to sub-central contracting authorities.[152] A long history also inform the EU's constitutional character, and Chapter 2 shows this has had a major impact on the composition of purchases in Europe, especially for defence. In brief, centuries of armed conflict and two recent world wars inaugurated the EU project and still inform its aims.

B. Legal Traditions

Legal traditions concern the web of precedent, canons of interpretation, and informal norms that have accrued over time. Such traditions do not rise to the level of constitutional character but nonetheless exercise a strong influence. As one treatise has said about the US system, statutes and regulations are insufficient to express the culture and language unique to government contracts. Only case law can transmit this 'contextual richness' of the deeper legal

[147] Schwartz (2010) at 628.
[148] Steinicke (2001) at 334.
[149] Coy at 81.
[150] Schooner and Whiteman at 217–223, 229.
[151] Gilliam, Rainey, Dwyer, and Rose at 74; Bovis at 58–59.
[152] Schooner (2013) at 1–2.

traditions.[153] Legal traditions can of course change as statutes or regulations are amended, but such traditions can nonetheless endure through the medium term and sometimes will resist change entirely. If constitutional character spans centuries, such traditions can endure decades.

One observer provides a good example from US procurement of the tension between black-letter law and legal traditions. The FAR mandates strict adherence to procedural rules, even if that disadvantages firms who are new to this sector, in order to promote efficient outcomes.[154] Yet, he argues, courts have often taken the opposite approach, favouring equality over efficiency, sometimes in violation of FAR.[155] This example illustrates how the legal traditions underlying judges' reasoning (principles, conventions, assumptions) may lead courts to overturn the plain meaning of statutes or regulations and profoundly influence how the law is applied in practice.[156]

Before continuing, one should re-emphasize that there is considerable overlap between these three. As noted above, this taxonomy attempts to impose some order on this work, but admittedly there is something arbitrary about these categories, especially at the margins. That is perhaps especially true for the distinction between constitutional character and legal traditions.

C. Policy Objectives

Policy objectives are the goals that a procurement system pursues. They are often set forth explicitly in statutes or regulations and are therefore amenable to changes in the near term. These are the 'desiderata' that each system must rank: competition, integrity, transparency, efficiency, best value, wealth distribution, risk avoidance.[157] Sometimes, however, objectives are derived not from statute or regulation but from constitutional character or legal tradition. When this is the

[153] Tiefer and Shook at 4.
[154] Dekel at 260.
[155] Ibid at 260–61.
[156] See below Chapter 2, Section III.
[157] Schooner, 'Desiderata' (2002) at 103.

case, these objectives are not so amenable to change. Depending on their source, therefore, the policy objectives are sometimes enduring, sometime more ephemeral.

The US and EU procurement systems have 'divergent systemic goals'.[158] Identifying their goals is a crucial step toward mutual comprehension.[159] Indeed, determining the reasons for and objectives of procurement regulation is crucial to an understanding of the meaning of particular rules and how they will apply in practice.[160] Because comparing the US's and EU's divergent goals is a core theme in this work, it is necessary to outline some of their contrasting objectives.

In America, 'no biblical stone tablets proclaim the desiderata'. [161] Objectives are rarely stated. Even when they are,[162] determining the hierarchy among conflicting goals is challenging, especially with a 'constantly changing patchwork of statutes.'[163] Some common objectives are often listed: integrity, transparency, competition, best value.[164] But these 'objectives' sometimes confuse means with ends.[165] For example, competition is not so much an enduring objective as it is a means to best value, which is the true objective[166] or 'prime function'.[167] Apart from best value, America pursues, secondarily, multifarious and protean socio-economic goals.[168] This two-fold objective is consistent with what one would expect from a domestic procurement system.[169]

In Europe, non-discrimination is the objective.[170] Because non-discrimination tends to be the emphasis in international systems, this is playing to type.[171] This objective also derives from

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[158] Harutyunyan at 454. See also Bruneau and Feehily at 76–77.
[159] Yukins (2013) at 2-5, arguing divergence of purposes poses a 'real obstacle' to harmonisation.
[160] Trepte (2004) at 6–7.
[161] Schooner (2001) at 675.
[162] FAR 1.102.
[163] Schooner (2001) at 675. See also Forman, Cliffe, Choi, and Curran at 189.
[164] Schooner and Whiteman at 217–23, 229.
[165] Trepte (2004) at 3, 7, arguing the commonly listed procurement desiderata are *mechanisms*, not objectives.
[166] Schoeni and Yukins at 114–17.
[167] Whelan and Pearson at 302.
[168] Schoeni and Yukins at 117–18.
[169] Trepte (2004) at 317.
[170] Green Paper (2011) at 10; Trepte (2007) at 319–20.
[171] Trepte (2004) at 6–7, 317. See below Chapter 2, Section III.

the EU's overarching goals. Perhaps the clearest statement of post-war Europe's aims was the Schuman Declaration made in 1950, when the EU's predecessor, the European Coal and Steel Community, was still the primary institution binding Europe together. Its purpose was to end Franco-German rivalry, entangling their economies so that war would be 'not merely unthinkable, but materially impossible.'[172] Consistent with this wider objective, then, is the EU's longstanding determination to eliminate barriers to cross-border procurement.[173] The directives' main purpose, hence, was to further the common market. Individually, States may pursue value for money, yet that is not the EU's goal.[174] Its purpose is more than liberalisation but also extends to the creation of an integrated market that would forever bind Europe together.[175] So unlike the US, Brussels seeks not best value or diverse socioeconomic goals but instead to achieve European integration.

VIII. Conclusion

Setting aside the economic benefits that would accrue if transatlantic public procurement trade were liberalised, the US and the EU have much to learn from each other[176] – and not only because the overwhelming majority of procurement scholarship originates from these regions.[177] Several essays have been devoted to outlining the two systems for foreign audiences, but these have been limited to high-level summaries.[178] They attempt comparative analysis of neither the two systems' procedures nor their embedded legal cultures. These studies have thus been too superficial to answer the questions raised here.

[172] Schuman Declaration, May 9, 1950. See also Arrowsmith (2014) at 150; Trepte (2004) at 208–09, 250.
[173] Piga and Treumer at 1; Trepte (2007) at 330.
[174] Arrowsmith (2014) at 164, 167. See also Arrowsmith (2006) at 351–52.
[175] Trepte (2004) at 33.
[176] Trybus (2003) at 645.
[177] Flynn and Davis at 171.
[178] For example, Yukins, 'Introduction' (2017); Schwartz (2010); Verdeaux; Arrowsmith (2006).

Many differences between US and EU systems are semantic. Although they sometimes use the same or similar terms, their denotations are frequently 'wildly dissimilar'.[179] Such problems are consistent with the broader challenges in comparative of procurement law, where 'the lack of consistency in terminology is a major cause of confusion since similar terms are used for different procedures and different descriptions are used for essentially identical procedures'.[180] This work attempts to resolve such confusion. The problem, however, is not merely semantic.[181] Although procurement systems are often similar at a superficial level, this can divert our attention from even more profound differences in their nature and objectives.[182] This work, therefore, will consider not only the words the two systems use but also the underlying concepts and objectives and their function within each system's embedded legal culture.

The object here is not comparison for comparison's sake. Rather, it is to determine whether hidden barriers would be substantially removed with passage of TTIP or if 'nagging problems' would persist that would discourage participation.[183] It is submitted that although removing the de jure NTBs would be a considerable achievement, significant de facto barriers would remain in the form of divergent procedures and incompatible legal cultures. This work will therefore argue that American and European suppliers will often misunderstand the respective foreign system based on expectations acquired from their own domestic experience, which may frustrate effective competition from abroad or subvert the motive for transatlantic participation in the first place. Such challenges will surely persist unless a better mutual understanding is developed. This work thus endeavours to uncover barriers hidden from view, to present the systems from what could

[179] Craven (2015) at 64.
[180] Trepte (2004) at 270.
[181] Were the problem merely semantic, the EU's proposed GPA-plus would solve it. Craven (2015) at 64–65.
[182] Trepte (2004) at 3–5, observing that the universality of terminology (such as efficiency, transparency, non-discrimination, value, contestability) is unquestioned and noting that such terms often have different meanings. Indeed, it would be surprising if the same term were used consistently in different procurement systems. Ibid at 4.
[183] Yukins and Schooner at 569.

be called a 'bilingual' perspective – in other words, it attempts to elucidate what is concealed, even from procurement specialists, on either side of the Atlantic.

Chapter 2: Embedded Legal Culture: Recurring Themes

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I. Introduction

When considering the embedded legal culture in the US and the EU, certain themes emerge. First, that the US system is older than the EU's. Second, that US procurement is a domestic system, while the EU's is in some sense an international regime. Third, that America is more end-user oriented and Europe more supplier oriented. Last, that their composition of purchases diverges, with defence predominating in US procurement but constituting only a small share of Member States' covered purchases. These themes will re-emerge in the next three chapters, where particulars of the two systems' procedures are considered. Presenting them at the outset establishes the distinctiveness of each system and provides context. This chapter compares salient features of the two regimes, describes their embedded legal cultures, and thereby presents a succinct version of this work's overall argument.

II. Enlightenment or Post-War Origin

One of the fundamental differences between the two systems is that America's procurement regime dates to the late eighteenth century, whereas the EU founding treaties in the mid twentieth.[1] More is settled in the former, less in the latter. However, this must be qualified. *Member States* procedures often predate the US's founding. For example, in France qualification and exclusion procedures date to the construction of Versailles under Louis XIV, two centuries before the US government existed.[2] Yet what is being compared is not Member States' systems but the EU's system, which is of a more recent vintage. In this narrow sense, the US system is 'older' than that found in the EU – where common European standards are still being articulated.

[1] Klay at 440.
[2] Lichère (2016) at 43–44.

A. Qualification and Award Procedures

Compared with the EU, little debate surrounds US qualification or award procedures. Some developments are more recent, but many of its contours have been settled for two centuries. Although the modern doctrine of responsibility was not formalized until 1948,[3] the government had forbidden awarding contracts to unqualified firms for much longer.[4] Indeed, the origins of the rule that contracts should be awarded only to responsible suppliers can be traced to continental army regulations during the Revolutionary War.[5] The first US statute mandating that contracts be made with only 'responsible' bidders was enacted in 1809.[6] In 1857, the Army mandated that awarded would go only to 'responsible' bidders, which was later codified in 1860.[7]

Although there were major reforms after World War II, their meaning has been mostly settled for decades. In 1962, Congress extended responsibility to negotiated contracts. In 1984, the lodestar of America's contemporary federal procurement system, CICA, featured a renewed emphasis on responsibility. After high-profile misconduct in Iraq and Afghanistan in the 2000s, heightened requirements were enacted.[8] The meaning of even these new rules is uncontroversial.

Authority to refrain from awarding contracts based on a supplier's insufficient qualifications has a long pedigree and derives from the government's broad discretion in choosing with whom it does business.[9] There is a shibboleth that the US government must buy from the lowest bidder.[10] That is outmoded in that sealed bidding has been uncommon for several

[3] Cibinic, Nash, and Yukins at 409–10. See also Manuel (2013) at 2, n 6.
[4] Cibinic, Nash, and Yukins at 409, citing 7 Comptroller General 547 (A-21012) (1928); *O'Brien v Carney*, 6 FSupp 761 (DC Mass, 1934).
[5] Nagle (1999) at 49–50; Manuel (2013) at 1.
[6] vom Baur at 19 (1958); Kelman (1990) at 15.
[7] Dees at 2, citing Nagle (1999) at 165–67.
[8] Manuel (2013) at 13–15.
[9] *Perkins v Lukins Steel Co*, 310 US 113, 127 (1940). See also Shealey at 171.
[10] Astronaut John Glenn perpetuated this myth when he quipped that he was uneasy hurtling through space atop a rocket made of two million parts 'all built by the lowest bidder on a government contract'. Tickner at 167.

decades.[11] Even when it was the dominant procedure, contracting officers had a countervailing duty to make a responsibility determination: that is, to ensure that contracts are awarded only to 'responsible' parties.[12] This vested officials with broad discretion,[13] compelling them to make subjective judgements about responsibility.[14]

Year zero for the EU was the signing of the Treaty of Rome in 1957, and the first directives on procurement were not issued until the 1970s. Qualification and award criteria are still much debated.[15] The CJEU has drawn a distinction between these two that is hard to maintain in practice.[16] However, the 2014 Directive introduced a fundamental change that collapses that distinction so that qualification and experience, under some conditions, can be considered as award criteria.[17] The details are considered later, but this is a good example of an unsettled area.[18] It is not the only one.[19]

For American suppliers deciding whether to compete in the EU, the unsettled nature of this area of law may discourage participation. Similarly, though for different reasons, European firms may find the accumulation of two centuries of cases, statutes, and regulations daunting;[20] given the lifespan of the US system, simply *finding* the controlling rules may present difficulties. This may reduce both the quality and the probability of European participation. Some questions remain unsettled in the EU, but at least the sources of law are easily identified: a few directives, their local implementing laws, and a few decades of precedent.

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[11] See below Chapter 4, Section III.B.
[12] FAR 9.103(a).
[13] Donnelley at 201.
[14] Bodenheimer at 1.
[15] Piga and Treumer at 1, 3–4.
[16] *Gebroeders Beentjes BV v State of the Netherlands* (C-31/87) [1988] ECR 4635.
[17] Directive 2014/24/EU, Article 67(2)(b). See also Piga and Treumer at 3–4.
[18] Chapter 3, Section II.F.2.
[19] Sanchez-Graells and De Koninck at 28.
[20] The US system is "extraordinarily spacious"; no index to this expansive corpus exists. Whelan (1993) at 16.

B. Competitive Procedures

Understanding the distinct notions of competition in US and EU procurement requires an appreciation of their relative longevities: while competition through open procedures has been a signal objective in the US since colonial times, its role in regulating procurement is of a much more recent origin in much of Europe, where competitive procedures were less common until the directives first validated the open procedure method and a few decades later mandated its use.[21] These pedigrees are fundamental to understanding how the two system differ.

One could object that although the two systems have distinct pedigrees, this is true but trivial: *of course* everything is newer in that the EU has only existed in its present form for three decades, and its predecessor started regulating procurement only in 1970. While it is obvious that the US has been doing procurement longer because it is the older of the two political systems, this tautology is not the point. Their relative ages may affect participation. The US procurement system is encrusted with two and a half centuries of tradition. Such accumulation may be barriers to European vendors. Contrariwise, this will be a lesser problem for American firms in Europe.

For much of the EU, competitive procedures are somewhat novel. Not so for the US, which incorporated competition long before international mandates existed and served as a model.[22] The earliest reference to sealed bidding, for example, predates the American Declaration of Independence.[23] Although such open procedures existed in Roman times, this practice seems to have fallen into disuse.[24] Purveyance was common in medieval times, under which the crown

[21] Davies (2008) at 59; Todd Washington at 13; Peterson at 4; Marceau and Blank at 102.
[22] Davies (2008) at 59. The Dutch were an exception, but for much of Europe competitive procedures were new.
[23] Wittie at 1, citing *Journals of the Continental Congress*, vol 3 (Nov 20, 1775) 360, mandating sealed bidding for the purchase of supplies for two New Jersey battalions during the Revolution.
[24] The Romans found that public tenders were an effective procedure for securing low prices. Malmendier at 1091. Livy reports that public auctions were common in 214 BC. Ibid at 1086. Cicero says that such auctions were required for the sale of tax collection contracts that two centuries later. Ibid at 1087.

set below-market prices by fiat.[25] Rather than consulting the market to determine prices, this subverted competition. Americans were alert to the danger of officials overpaying but equally wary of settings prices that were unaligned with market signals. Sealed bidding was their solution.[26] This ensured that the government paid a fair price but, unlike purveyance, not less than the market would bear. For much of US history, sealed bidding was the only approved competitive procedure.[27] With only a few exceptions, it has been mandated for two centuries.[28]

The Royal Navy's use of sealed bidding in 1699 was apparently the first in modern times.[29] America likely borrowed this practice,[30] along with its adoption of English common law.[31] It then generalised the practice across federal procurement,[32] a step that Britain did not take until 1784.[33] If Britain was the first modern state to adopt open procedures in the Royal Navy, perhaps the US was the first state to institutionalise the practice across the whole of government.[34]

Not only was the Continental Congress among the first to mandate competitive procedures, national legislatures under the Articles of Confederation (1781)[35] and current Constitution (1787)[36] continued enacting statutes requiring competitive procedures down to the present.[37]

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[25] Jones at 300, 303, 313–14.
[26] Kelman (1990) at 15.
[27] Wittie 20–21, 28; Cohen at 13; Peterson at 36–37, 86–87; Archibald and others at 5, 7–8; Rich at 6–8. See also Tiefer and Shook at 57; Cibinic, Nash, and Yukins at 331; Keyes at 351; Todd Washington at 13; Barnes at 537; Kelman (1990) at 15; Shealey at 162–63.
[28] Davies (2008) at 59, contrasting the UK where competition was thought a good practice but was not mandated.
[29] Braddick at 264; Alsop and Dick at 395–97. Samuel Pepys introduced many procurement reforms at the Royal Navy in the seventeenth century, but it does not seem that he introduced public tendering. Schiavo-Campo at 200.
[30] Fighting with regulars in the Seven Years' War introduced Americans to British methods. Nagle (1999) at 13.
[31] 1 Bl Comm at 102, describing how the common law travelled; Dale at 553, observing that the 'whole system is predicated upon a body of laws not found in any books published on this side of the Atlantic'. Starting with Virginia in 1776, states passed 'reception' laws. Hall at 797–800. But incorporation was not wholesale. Americans 'adopted only that portion that was applicable to their situation.' *Van Ness v Pacard*, 27 US 137, 144 (1829).
[32] See below notes 35–38.
[33] One of William Pitt's priorities was to free public contracts from patronage. Dietz at 44.
[34] America's great innovation was distilling principles from England's 'cultural peculiarities' developed over the course of a millennium and '*then writing them down.*' Goldberg at 95–97 (emphasis original).
[35] Manuel (2011) at 2; Nagle (1999) at 49.
[36] Act of Feb 20, 1792, ch 7, § 6, first post-war law requiring public advertising for contracts.
[37] Mayer at 272, 187, describing competition as an 'enduring belief' and 'recurring theme'.

Such laws were also passed in 1792, 1809, 1815, 1842, and 1852.[38] Foremost among these was the 1809 statute mandating that all purchases be made using competitive procedures.[39]

In much of Europe, competition in public procurement, whether domestic or international, is not much older than the 1981 World Trade Organisation Agreement on Government Procurement (AGP).[40] France, for example, did not require any competitive procedures for local authorities until 1993.[41] Competition, whether extra-or intra-European, was unwelcome. Thus, when the US sought to eliminate barriers to the procurement trade in 1946, Europe resisted.[42] Negotiations over the OECD's procurement guidelines in 1967 further illustrates the divide over the role of competition.[43] The EU favoured merely generic non-discrimination rules,[44] because its objectives lay outside of procurement, whereas the US insisted on a detailed code to ensure competitive procedures were enforceable.[45] The US also sought to add a tendering requirement still foreign to much of the continent. Further, Europe opposed a proposal for ex post award publication, which Americans considered essential to genuine competition. Although some European nations had a long tradition of competition, for others it was not until the signing of the AGP in 1981 that competition was introduced.[46] This is more than a vacuous observation that US has been competitive for longer because the US is older. The point is that some Member States had little experience with competition in procurement before joining the EU.

From a European vendor's perspective, the antiquity of America's 'competition' mandate will be of special interest given the term's polysemous nature. Does 'competition' require sealed

[38] Wittie at 1–5.
[39] Act of Mar 3, 1809, ch 28, § 5.
[40] Marceau and Blank at 102.
[41] Yvrande-Billon at 458.
[42] Marceau and Blank at 79–80.
[43] Negotiations over OECD guidelines laid foundation for the AGP debate. Reich at 107–10; Pomeranz at 140.
[44] Pomeranz at 142–43.
[45] Reich at 106–107.
[46] Marceau and Blank at 92–94, 100, 102.

bidding? Does it include competitive negotiation? Does it cover the other five competitive procedures that the Congress has deemed 'competitive' by decree?[47] What of the seven exceptions to competition? Are these also competitive since they require solicitation from as many sources as is practicable?[48] For the European supplier, this presents a bewildering variety, making it hard to know if a contract is protestable based on the failure to use the correct competitive procedure.

For US vendors in Europe, perhaps the definition of competitive procedures is easier to grasp. Local variations may complicate sales to Member States, but at the EU level the meaning of 'competitive procedures' is clear and sources of law are easily identifiable. Perhaps confusion about such matters will not reduce the quality or volume of American participation to the same degree that US competitive procedures may bewilder or dispirit European suppliers in America.

C. Challenge Procedures

American protests date to the beginning of the republic.[49] Originally, jurisdiction resided with the Treasury.[50] A few decades later, Congress assumed jurisdiction, although most of the litigation in question was not protests but claims against the government.[51] Deciding such claims was burdensome. Several prominent figures weighed in, advocating the creation of a specialised court.[52] Whether a court could be given jurisdiction was contentious since many believed the

[47] Cibinic, Nash, and Yukins at 337. See also Gordon and Kang at 231; Schwartz (2010) at 636.
[48] 10 USC 3204(d); 41 USC 3304(d).
[49] Metzger and Lyons at 1228. See also 3 Section 809 Panel Report at 346, describing protests before the Court of Claims dating to the nineteenth century, citing *Schillinger v US*, 24 Ct Cl 278, 287 (1889); 4 Report of the Commission on Government Procurement, Part G at 36, suggesting that an 1853 complaint made to the President about a Department of the Interior contract award was the first bid protest, citing 6 Op Att'y Gen 226 (1853).
[50] Cibinic and Lasken at 352, citing Act of Sept 2, 1789, ch 12, sec 3, 1 Stat 65, 66 (1789).
[51] Keyes at 736, citing Act of Mar 3, 1817, ch 45, 3 Stat 366, explaining that, prior to the Budget and Accounting Act of 1921, the executive branch's Department of Treasury decided government contract cases.
[52] John Quincy Adams said, 'There ought to be no private business before Congress' and settling accounts is purely 'judicial business.' 'One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative Assembly is the worst of all tribunals for the administration of justice.' Adams, Feb 23, 1832 entry. Abraham Lincoln also supported delegating such matters to courts and criticised Congress's parsimonious grant of jurisdiction. Cong Globe, 37th Cong, 2d Sess App 2 (1862).

delegation of such fiscal matters unconstitutional.[53] Yet Congress was overwhelmed. Because legislative review was found impractical, concern for constitutional niceties eventually subsided.[54]

In 1855, Congress established the Court of Claims, the first court with jurisdiction for claims against the government, including public contracts. With the passage of the Tucker Act in 1887, this court became well established.[55] Although most suits in the early years concerned completed contracts,[56] there were some protests.[57] Yet not until 1956 in *Heyer Products Co* did it assume jurisdiction over protests.[58] It was granted equitable powers in 1982,[59] renamed as the Court of Federal Claims (COFC) in 1996,[60] and since 2001 has been the only judicial forum.[61]

Three decades before the Court of Claims assumed jurisdiction in *Heyer*, the GAO started hearing protests. Congress created the GAO in 1921.[62] It was initially authorised to settle claims but not to consider protests.[63] The origins of the latter authority are murky,[64] but it first exercised this jurisdiction in the *Panama Canal* decision.[65] Some claim this was the origin of US federal protests,[66] despite some antecedents suggesting that these procedures originated earlier.[67]

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[53] See below Chapter 5, Section III.A.1.
[54] Swan (2014) at 107–09, recounting that from 1838 to 1848, 17,538 petitions were brought to Congress but that the legislature acted on barely half (8,948) and that both houses approved only 910 of these.
[55] Ibid at 107–8. Legislative history suggests its purpose was to bring the US in line with other nations, where citizens could sue their governments. 18 Cong Rec 2680 (Mar 3, 1887). Justice Oliver Wendall Holmes called it the 'great act of justice'. *US v Emery, Bird, Thayer Realty Co*, 237 US 28, 32 (1915).
[56] Cf Swan (2014) at 113, claiming judicial remedies in 1800s exclusively involved disputes over existing contracts.
[57] For example, *Schillinger v US*, 24 Ct Cl 278 (1889), where the bidder protested based on the infringement of his property rights. Some protests were even successful because the Court found that contracts awarded in violation of procurement law were not binding. *Schneider v US*, 19 Ct Cl 547 (1884); *US v Ellicott*, 223 US 524 (1912).
[58] 140 F Supp 409, 412 (Ct Cl 1956).
[59] Federal Courts Improvement Act of 1982, Pub L No 97-164, § 133, 96 Stat at 40. Cf Swan (2014) at 115.
[60] 3 Section 809 Panel Report at 347.
[61] James Nelson at 591.
[62] The Budget and Accounting Act of 1921, Pub L No 67-13, 42 Stat 20 codified at 31 USC 701. See also Gordon (2004) at NA149, explaining that the GAO inherited the powers and duties of the Comptroller General.
[63] Keyes at 736–37.
[64] Metzger and Lyons at 1228.
[65] *Letter to the Gov, the Panama Canal*, 5 Comp Gen Dec 712 (1926). Some disagreement exists as to which protest was the first. Sometimes *Panama Canal* is cited, sometimes the *English Construction Company*, 11 Comp Gen Dec A-4471 (1924) (unpublished), and sometimes *Autocar Sales & Serv Co*, 5 Comp Gen Dec 712 (1926).
[66] Gordon (2004) at NA149; Swan (2014) at 112–13.
[67] Above notes 49 and 57. See also Metzger and Lyons at 1228; Whelan (1992) at 217–18.

One striking feature about the GAO's central part in procurement oversight is that, like the common law, this developed organically.[68] In fact, the GAO operated without statutory authority over protests until 1984,[69] when CICA formalised this role.[70] Its piecemeal development reflected an 'uncoordinated chain of judicial and legislative actions' and a 'tangled web of legal confusion'.[71] Comprehending such a system thus requires familiarity not just with statutes and regulations but with precedent spanning two centuries.[72]

As noted, some protests were also brought before federal district courts starting in the mid-1800s.[73] Nevertheless, in 1940 the Supreme Court held in *Perkins* that losing bidders lacked standing because the law 'was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.'[74] In 1956, the Court of Claims distinguished *Perkins* and held that the Tucker Act created an implied contract with bidders, a promise to consider bids in good faith, which granted the court qualified protest jurisdiction.[75] In 1970, in *Scanwell Laboratories*, the DC Circuit overturned nearly two centuries of precedent, finding that federal courts had full jurisdiction under the Administrative Procedures Act (APA).[76] For three decades, protests were heard before the 94 federal district courts.[77] Starting in 2001, Congress consolidated jurisdiction into the three forums that exist today: the agencies, the GAO, and COFC.[78]

Given the EU's shorter existence, an historical account of its review procedures is briefer. Yet there are some important insights to be gained from this exercise. Historical idiosyncrasies

[68] 4 Report of the Commission on Government Procurement, Part G at 36; 3 Section 809 Panel Report at 340; Maser, Subbotin, and Thompson at 142
[69] Cibinic, Nash, and Yukins at 1688.
[70] 31 USC 3551, et seq.
[71] Nash and Cibinic (1987) at ¶25.
[72] Gordon, 'Dissecting' (2014) at 1; Nash, Cibinic, and O'Brien at xxxvi; Tiefer and Shook at 4.
[73] See above notes 49 and 57.
[74] 310 US 113, 126 (1940).
[75] *Heyer Products Co v US*, 140 F Supp 409 (Ct Cl 1956), modified, 177 F Supp 251 (Ct Cl 1959).
[76] 424 F2d 859 (DC Cir 1970).
[77] *Impreza Construzioni Geom Domenico Garufi v US*, 238 F3d 1324, 1332 (Fed Cir 2001).
[78] The Administrative Dispute Resolution Act of 1996, 5 USC 571–84.

about review procedures may constitute obstacles in their own right and impede US suppliers attempting to sell in the European procurement market.

The European Economic Community's (EEC's) first foray into procurement commenced with the classic directives.[79] For the first two decades, the Commission was the 'guardian of the treaties' and initiated many proceedings.[80] Yet compliance remained poor as other enforcement tools were absent.[81] The classic directive neglected to even mention protests.[82] Protests were still unmentioned until the Remedies Directive's enactment in 1989.[83] Not all Member States lacked review procedures; some had them, others did not.[84] Before 1989, their remedies varied widely.[85]

The passage of the Remedies Directive signalled a shift toward national review bodies, and the Commission's enforcement efforts became more selective.[86] Because its resources are only sufficient for policing major infringements,[87] the EU came to rely on challenges before national courts and review bodies for monitoring.[88] Yet as discussed below, the Commission has not given up its longstanding goal of establishing a centralised regime for monitoring procurement.[89]

The Remedies Directives marked an important transition.[90] For several Member States, this was the first time that challenges procedures had been available.[91] Domestic complaints had been scarce,[92] but they became more common with the introduction of this directive.[93] At first,

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[79] Directives 71/304/EEC and 71/305/EEC (public works); Directive 77/62/EEC (supplies).
[80] Trepte (2007) at 531. Such direct involvement was consistent with a white paper urging 'more visible action by the Commission in policing compliance with existing law'. COM(85) 310 at 24.
[81] Priess and Friton at 513–14; Fernández Martín (1996) at 205. See also Astor at 27.
[82] Gordon (2013) at 492.
[83] Directive 89/665/EEC, Article 1.
[84] Ibid, preamble, observing that existing remedies were 'not always adequate to ensure compliance'.
[85] COM (96) 583 final at 15.
[86] Ibid at 16.
[87] Arrowsmith, Linarelli, and Wallace at 851–54.
[88] Perhaps such monitoring came from France, where protests were long in use. Caranta, 'Paths' (2011) at 55–57.
[89] See below Chapter 5, Section III.B.2.
[90] Directive 89/665/EEC; Directive 92/13/EEC.
[91] Davies (2008) at 128–29.
[92] CCO/88/73.
[93] COM (96) 583 final at 6, 14–17.

despite emphasis on domestic review, successful protests were rare and damages scarce.[94] Today, not only are review procedures in general use,[95] but successful challenges are also more common.[96]

The Court of Justice for the European Union (CJEU) has interpreted the Remedies Directive in a 'dynamic manner'.[97] It has insisted on its full transposition into national legislation so that contractors know their rights.[98] In particular, the Court has addressed two flaws in the classic Directive: the 'race to sign' due to a strict application of the *pacta sunt servanda* doctrine and illegal direct awards.[99] At first, under the original Remedies Directive, damages were the only remedy 'after the conclusion of a contract following its award'.[100] Because in some Member States, such as the UK and Austria, award and conclusion are simultaneous, a protest could not be brought after award. Compounding this problem, strict enforcement of *pacta sunt servanda* meant that signed contracts could not be overturned. Hence the race to sign, whereby authorities were incentivised to finalise procurements speedily to avoid effective challenges.[101] In *Alcatel*, the Court thus introduced a 'standstill' between conclusion and award.[102]

In 2006, the Commission reported that authorities were awarding contracts without prior publication.[103] Such illegal direct awards were the second gap in the original Remedies Directive. Beginning in the 1990s, the CJEU addressed this problem with a line of cases on the principle of effectiveness holding that Member States were not only required to have a remedies systems but that their systems should also be *effective* in curbing violations of the substantive directives.[104]

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[94] Brown (1998) at 92–93, saying a 'striking feature' was the near total absence of successful actions for damages.
[95] MARKT/2013/072/C, Final Study at 12, 15.
[96] Treumer, *Enforcement* (2011) at 37.
[97] Ibid at 17. See also Pachnou (2000) at 61–63, accurately predicting that the CJEU would impose 'stringent control' using the principle of effectiveness, which is discussed below in Chapter 5, Section III.A.3.
[98] Sanchez-Graells (2018) at 496, citing *Commission v Germany*, C-433/93 (1993).
[99] Matei at 352.
[100] Directive 89/665/EEC, Article 2(6).
[101] Priess and Friton at 525.
[102] *Alcatel Austria AG and Others v Bundesministerium für Wissenschaft und Verkehr*, C-81/98 (1999).
[103] COM (2006) 195 final at 2–3.
[104] Pachnou (2000) at 61–63.

The two remedies directives were updated in 2007 with a single document.[105] Despite the introduction of this new directive, the original mechanisms under the 1989/92 directives remain in effect and are still commonly used.[106] Among other things, the updated directives codified the aforementioned remedies from the case law and added one further remedy.[107]

For EU suppliers considering a protest in America, the system's age and attendant complexity may discourage litigation. For US suppliers deciding whether to protest in Europe, the absence of voluminous precedent over a lengthier period may be heartening. However, that could prove to be a mistake. Less precedent perhaps entails less uncertainty, but being newer does not mean the procedures are simpler or make the prospects for success more favourable. Longevity is a useful data point. But taken alone it is insufficient for deciding whether to protest.

III. Domestic or Supranational

Perhaps the most important distinction between US and EU procurement is also the simplest and most obvious: the former is a domestic system, the latter supranational (or quasi-international).[108] One distinction between domestic and international systems also applies here: the former concentrate on best value, whereas the latter concentrate on access.[109] Thus, for the US, value is foremost; for the EU, non-discrimination is. Often, these goals are not incompatible. Not infrequently, a non-discriminatory system may also facilitate value. Yet these are sometimes mutually exclusive, especially if securing value requires granting the discretion to discriminate.[110]

[105] Directive 2007/66/EC, preamble, ¶ (1).
[106] Caranta, 'Paths' (2011) at 63.
[107] Directive 2007/66/EC, Article 2a (standstill), Article 2d (ineffectiveness), Article 2e (alternative penalties).
[108] Neumayr at 215–16. See also Bruneau and Feehily at 76–77.
[109] Trepte (2004) at 6–7, 317. This reflects the tension between equality and efficiency. Dekel at 257–59.
[110] Neumayr at 232–33.

For two centuries, the US has sought to please the end-user in terms of best value.[111] Today, the FAR defines 'best value' in a somewhat circular fashion,[112] as 'securing the most advantageous contract for the government'.[113] Americans assume that value accrues from competition,[114] especially competition that involves wide participation.[115] Costs increase if firms are excluded.[116] The US's orientation is to protect the end user.[117] Equal treatment and equal opportunity go unmentioned.[118] Best value is the objective.[119]

The EU concentrates on non-discrimination.[120] In the past, the EU entirely refrained from pursuing best value, as such objectives are domestic in nature and because it lacked competency.[121] Such restraints have faded, though, and the latest Procurement Directive includes objectives that were once considered Member States' exclusive domain.[122] The contrast is fading; however, a key distinction can still be made between the US's domestic and the EU's international orientations, with the latter resembling organisations like the GPA.[123]

So far, this section has used the terms 'equality', 'equal opportunity', or 'equal treatment' interchangeably, consistent with how these terms are sometimes understood outside of Europe.[124] Such terms may seem equivalent to non-discrimination. In the EU, however, they are not, because 'equal treatment' is a term of art: discrimination always entails unequal treatment, but unequal

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[111] Mayer at 168.
[112] FAR 2.101.
[113] Senate Comm on Governmental Affairs, CICA of 1983, S Rep No 50, 98th Cong, 1st Sess 2 (1983).
[114] Congress ordered sealed bidding in 1809 for 'the benefit of competition'. 2 Op Att'y Gen 257, 259 (1829).
[115] Schooner, 'Desiderata' (2002) at 104; Barnes at 536, describing the US's emphasis on the 'fire of competition'.
[116] Morris Duvall at 703.
[117] Yukins (2013) at 2-5. See also Weigel at 645, arguing protection of the public fisc is paramount in America.
[118] Dekel at 248. The FAR establishes instead that contractors 'shall be treated fairly and impartially' but 'need not be treated the same.' FAR 1.102-2. Cf Yukins, 'Response' (2008) at 269.
[119] FAR 1.102(a). See also Harutyunyan at 454; Craven (2014) at NA71; Steinicke (2001) at 338.
[120] COM(2011) 896 final at 3. See also Neumayr at 218, 232–34; Steinicke (2001) at 338.
[121] Arrowsmith (2012) at 46–47, 172–75, quoting Advocate General Fennelly in *Germany v Parliament and Council*, C-376/98 (2000), 'the internal market is not value-free synonym for general economic governance'.
[122] Arrowsmith (2014) at 177; Gordon and Racca at 118.
[123] Bovis at 107–109; Didier at 125–126.
[124] Dekel 246–56; Yukins, 'Response' (2008) at 269.

treatment does not always entail discrimination.[125] *Storebaelt* introduced the equal treatment principle,[126] holding that, although this principle was not expressly included,[127] it lay at the 'very heart of the directive.'[128] This principle requires that 'comparable situations must not be treated differently and that different situations must not be treated in the same way' without objective justification.[129] Non-discrimination forbids unfair treatment along national lines, but equal treatment prohibits unfair treatment even between domestic firms.[130] This distinction matters: counterintuitively, non-discrimination rules can be discriminatory *in effect* and thus prohibited under the equal treatment principle.[131] Such subtleties are often too complicated even for EU suppliers to master and thus may elude foreign suppliers lacking the assistance of local counsel.

A. Qualification and Award Procedures

The foremost goals in the US are wise stewardship of tax revenues and best value,[132] for which America entrusts the market.[133] For qualification, this means maximum participation.[134] Indeed, although participation is an instrumental goal,[135] it is so important that some suggest that it vies with best value as the primary goal.[136] Qualification can be upstream or downstream.[137] Because the US prizes best value, officials consider it first and qualification comes later.[138] Since

[125] Trepte (2007) at 14–15. Trepte illustrates this point with *Commission v Denmark*, C-234/89 (1993), where there were two breaches. First was a clause requiring local purchases. This was discriminatory as it favoured local contractors, which was unequal treatment. Second was that the officials letting a tenderer amend its offer, which was unequal but not discriminatory.
[126] *Commission v Denmark*, C-243/89 (1993).
[127] This principle has since been added. Directive 2004/18/EC, Article 2.
[128] C-243/89, ¶33.
[129] *Fabricom v Belgium*, Joined Cases C-21/03 and C-34-03 (2005), ¶27.
[130] Arrowsmith (2014) at 614–15.
[131] Trepte (2007) at 15. See also Arrowsmith (2014) at 620.
[132] Harutyunyan 454; Yukins (2013) at 2-5. See also Schoeni and Yukins (2022) at 114–17.
[133] Schooner, 'Desiderata' (2002) at 104. See also Kendall at 6, saying that no better cost saving mechanism exists.
[134] CICA mandated 'full and open competition' so that all responsible parties could bid. 41 USC 107.
[135] Steinicke (2001) at 336; Barnes at 542.
[136] Perlman and Perry at 52; Edwards, 'Wartime' (2011), at ¶49; Edwards (2007) at ¶36.
[137] Folliot-Lalliot (2009) at 156
[138] Gordon and Racca at 126.

no one knows from whom the best tender may come, the net is cast wide.[139] A large pool is thought to ensure value,[140] a smaller one to contravene the public interest.[141] Responsibility is an afterthought.[142] Its purpose is to protect the government from incompetent and unscrupulous contractors.[143] To include more competitors, much discretion is left to officials; that is, to further participation they may consider bids from potentially irresponsible firms.[144] Non-responsibility determinations are rare, since truly dangerous are debarred governmentwide.[145] Further, officials are loath to derail awards at that late hour except in dire cases. Postponing this key decision until the end risks that contracting officers will often treat this determination as a mere formality.[146]

In contrast, non-discrimination is the basic premise of the procurement directives[147] and lies among the EU's core goals.[148] This is unsurprising since, as noted, international procurement organisations tend to concentrate on ensuring access.[149] This also explains the separation between qualification and award procedures and the reason for qualification coming first. The EU fears that authorities will manipulate qualification to favour domestic suppliers because that is exactly what contracting authorities did in the 1970s and 80s.[150] It has tightened down qualifications to eliminate such chicanery.[151] So much does the EU hew to its principles that a supplier who has been eliminated is not allowed a second chance even if its tender is the most advantageous.[152] If non-discrimination is secured, then best value is dispensable (or so the thinking goes).

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[139] Gordon (2015) at 3; Folliot-Lalliot (2009) at 155–56.
[140] Schooner, 'Desiderata' (2002) at 104.
[141] FAR 9.402(b). See also Weigel at 645, 649; Morris Duvall at 703.
[142] Harutyunyan at 473; Folliot-Lalliot (2009) at 155–56.
[143] Willard at 113; Weigel at 644–45; Schooner (2004) at 215.
[144] FAR 9.402(b); FAR 9.406-1. See also Youngman at 417.
[145] Manuel (2013) at 3–4; Cibinic, Nash, and Yukins at 409.
[146] Feldman (2016) at 69–70. See also Guensberg at 85–88; Manuel (2013) at 3; Nash (2008) at ¶70.
[147] Trepte (2007) at 319–20. See also Green Paper (2011) at 10.
[148] *Frilli v Belgium*, C-1/72fC- (1972), ¶19; *Sotgiu v Deutsche, Bundespost*, C-152/73 (1974), ¶11.
[149] Trepte (2004) at 317.
[150] Winter at 782; Gordon and Racca at 124–25.
[151] Harutyunyan at 457–58.
[152] Braun at NA118.

When EU firms compete in America, they may be too concerned with proving themselves qualified and not enough with convincing contracting officers that their tender is the best. Others may fail to appreciate the significance of the timing: all tenders are evaluated, and only at the final stage do officials consider if the winner is responsible.[153] Ignorance of this sequence may dispirit firms whose qualifications are marginal, at least by EU standards. US suppliers may have the opposite problem in Europe. Firms with a competitive advantage may be complacent, not appreciating that authorities will never reach the question of value if a firm is found unqualified. Unaware of the importance of qualification, US suppliers may thus skimp on proving themselves eligible and forfeit the opportunity to tender. On both sides, ignorance of and misunderstandings about the transatlantic system may undermine the effectiveness of foreign suppliers' participation.

B. Competitive Procedures

The distinction between domestic and international systems may also explain why the two systems' competitive procedures differ. The US functions as a single entity whose executive agencies are subject to a common set of laws, regulations, and procedures. The EU, by contrast, disseminates a framework for Member States to transpose into national legislation. In order to reach a consensus, this framework only extends to a common denominator: trade liberalisation. Its directives are not intended to substitute for domestic procurement laws,[154] at least not yet.[155]

For Americans, this divide is in one sense trivial and in another daunting. It is trivial in that only novices would be taken aback that one is usually not selling to the EU but to individual Member States, either at the national or subcentral level. Although it should be unsurprising that the EU's directives are supplemented locally, it is also daunting given Member States' numerous

[153] FAR 9.103(b). See also Guensberg at 74–75; Gordon and Racca at 126; Schwartz (2010) at 631.
[154] Wittig at NA33–NA34.
[155] Schebesta at 3; Trepte, 'Foreword' in Sanchez-Graells (2015) at viii; Arrowsmith (2014) at 177–78.

peculiarities.[156] Understanding of such matters thus requires intimate familiarity with the rules in each of the 27 systems. For Europeans, by contrast, the US's domestic orientation is a boon: suppliers will need to familiarise themselves with the workings of only one procurement system.[157]

IV. End-user or Supplier Oriented

A third feature that separates the two systems is that the US system is end-user oriented, the EU's is supplier oriented.[158] This is distinct from their purposes discussed in the last section. There it was noted that national systems seek value and international systems non-discrimination or *what end* they serve. This section concerns *whom* they serve. Safeguarding tax revenues[159] and seeking best value[160] in terms of price, quality, or conditions[161] benefit *citizens*,[162] but non-discrimination accrues to the benefit of *contractors*.[163] As discussed, the EU concentrates on non-discrimination. This is to promote the completion of the single market[164] and to further integration.[165] To this end, it protects the rights of contractors.[166] This has been the purpose of the directives since their introduction in 1970.[167] Protecting non-domestic contractors fosters integration.[168] Competitive procurement thus serves different ends *and* different beneficiaries.

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[156] Woolcock and Grier at 320.
[157] Subcentral procurement is a different story. It often bears little resemblance to the federal level. vom Baur (1996) at 159. The American Bar Association introduced a model code in 1979, but only 13 states have adopted it. Copeland at 18, 35, 42, 62, 137, 182, 205, 224, 254, 427, 436, 483, 565. Another 10 have partially done so. Ibid at 123, 146, 154, 241, 248, 323, 342, 349, 469, 546. That leaves 27 that have not, and there is much variety among them. vom Baur (1996) at 161. At the local and municipal level, there are about 400,000 government entities. So at that level, European suppliers would face challenges similar to what Americans would face in Europe. Cf above Chapter 1, notes 133–136.
[158] This divergence mirrors the tension between equal treatment and efficiency. Dekel at 238–39.
[159] FAR 1.102(a). See also *Info Scis Corp v US*, 80 Fed Cl 759, 799–800 (2008), holding that best value outweighed even the 'overriding public interest in preserving the integrity of the federal procurement system.'
[160] Harutyunyan 454; Tillipman at 1; Steinicke (2001) at 337.
[161] FAR 2.101. See also Schooner, 'Desiderata' (2002) at 104–05.
[162] Yukins (2013) at 2-5. Cf Weigel at 645; Nash and Cibinic, 'Competition' (2004) at 130.
[163] Harutyunyan 454; Yukins (2013) at 2-5.
[164] Craven (2014) at NA70–71. See also Arrowsmith (2014) at 167.
[165] Yukins and Cora at 1–2, citing Arrowsmith (2012) at 46–47; Arrowsmith (2006) at 383.
[166] Yukins (2013) at 2-4–2-5.
[167] Arrowsmith and Treumer at 8.
[168] COM(2011) 15 final at 4.

In the US, that end is best value and the beneficiary is the end-user; in the EU the ends are non-discrimination and furtherance of the single market, whose beneficiary is the supplier.[169]

A. Qualification Procedures

In the US, procedures are arranged so that best value is considered first. Even suppliers whose responsibility is dubious still receive initial consideration. Qualification comes last since, in terms of priority, responsibility is a distant second. The aim is to find the best offer, even if that comes at the expense of suppliers, who may feel that it is unfair to compete with firms they may consider unfit or irresponsible. Above all, the system serves the end user. In contrast, since non-discrimination is the premise of the directives, EU procedures are organised such that qualification come first and there is a sharp demarcation separating qualification from award.[170]

What was said in Section III.A about the effect on participation will not be repeated. Yet there are further consequences for participation associated with the distinct ends and masters. The US supplier will perhaps miss opportunities for viable protests, failing to appreciate the extent to which the directives exist to protect contractors. Conversely, EU suppliers competing for US contracts will perhaps make the opposite mistake, bringing protests too often because they fail to appreciate that the same level of contractor-oriented protection is absent. America's qualification rules exist not to succour contractors but to protect end-users. Differences between the two systems may over- and under-incentivise protests and thus hinder effective participation.

B. Competitive Procedures

Another divide between domestic and international procurement systems is that the former's goals are, in general, much broader.[171] So it is also for their utilisation of competitive

[169] Arrowsmith (2014) at 167.
[170] See below Chapter 3, Section II.F.
[171] Trepte (2004) at 6–7. Cf Bruneau and Feehily at 76–77, contrasting US and EU objectives for procurement.

procedures. It was suggested above that best value is the US's sole objective, but that was an oversimplification. Perhaps more accurately 'best value' is better described as a hypernym that encompasses a number of competing objectives. The US's aims are thus plural and diverse, with multiple, often conflicting, objectives.[172] The EU's purpose, however, is singular.[173]

While competition in procurement has been a constant theme since the early republic, the meaning of 'competition' has varied and its priority with incompatible objectives has risen and fallen. Competition requirements have been relaxed in wartime, tightened in peacetime.[174] But this is not the only axis around which conflicting desiderata turn.[175] Such various and sundry objectives encompass more than just best value or efficiency.[176] Some examples of these include openness, fairness, participation, consistency, rationality, and impartiality.[177] And these goals are implemented in a variety of policies and regulations.[178] Agreement about their priority is rare.[179] That is what one would expect when the overriding criterion is not enduring abstract principles enshrined in law but rather the ephemeral priorities of private citizens.[180]

With two caveats, the EU's objectives can be distilled into a single desideratum: completing the single market. The first caveat is that diverse horizontal policies exist at the national level. The EU's objective is unitary, but its constituent Member States pursue their own priorities. The observations made here thus hold true only to the extent that the US system is compared with a (mostly non-existent) unified EU standard. The second is that to an increasing degree, the EU

[172] Craven (2015) at 63, noting that the US system has a range of objectives, 'none of which concern free trade.'
[173] Ibid at 62–63, observing that the EU procurement system exists first and foremost to overcome trade barriers.
[174] Manuel at 3-5.
[175] Snider Smith at 96; Coy at 80–81.
[176] Hansen at 2469.
[177] Freeman (1999) at 335.
[178] Cibinic, Nash, and Yukins discuss collateral policies on small businesses, at 1573–13; green procurement, at 1632–38; discrimination, at 1638–45; labour standards, at 1645–65; and a requirement for a drug-free workplace, at 1669–71. Such goals are partly attributable to the fact that US procurement is a domestic system, but even so their volume and heft are disproportionate compared with other domestic systems. Davies (2008) at 60–61.
[179] Wilson at 317.
[180] Schoeni and Yukins (2022) at 117–18.

itself is imposing horizontal policies.[181] Even bearing in mind those two caveats, the US's goals are still more varied and the EU's, comparatively at least, monolithic.

From a US seller's perspective, selling to Member States operating under a procurement regime with a monolithic objective will seem more straightforward than selling in one regime with a plethora of competing objectives. Yet on closer examination, there are two challenges. First, because the EU's objective is to promote trade within the single market rather than free trade generally, one wonders how this objective would be realised under TTIP. Perhaps the single market's walls would be enlarged so that transatlantic partners would be treated on equal terms. More likely, lingering barriers would persist. Second, even in the best case scenario and EU-level domestic discrimination disappeared, this would do little for US suppliers. Challenges associated with a single *European* objective would fade, but those associated with the diverse objectives of 27 domestic regimes would remain.[182] However, such diversity would obstruct only to the extent that the American supplier seeks to compete in multiple Member States' markets.

From a European seller's perspective, America's diversity of objectives presents a challenge and a good example of the NTBs that this work considers. The US's objectives are kaleidoscopic: complex, numerous, evolutionary.[183] Even local vendors struggle to ascertain the priority among them.[184] TTIP would put Europeans on equal footing, but barriers would remain because US suppliers would presumably have a better understanding of their government's multifarious goals. It seems unlikely that TTIP would entirely eliminate such disadvantages. This imbalance would undermine participation and the extent to which European suppliers can participate effectively.

[181] The 2004 directive already contained collateral objectives. Arrowsmith (2006) at 350. In the 2014 directive, the pace accelerated. Arrowsmith (2014) at 177–78; Trepte, 'Foreword' in Sanchez-Graells (2015) at x.
[182] Woolcock and Grier at 320.
[183] Bialos, Fisher, and Koehl at 8–9, 55.
[184] Schooner, 'Desiderata' (2002) at 104–06.

C. Challenge Procedures

Something similar to the supplier versus end-user theme arises for challenge procedures, but this is perhaps better phrased as a compliance-complainants binary. Each system has enacted a process for disappointed bidders to seek redress but has done so for different reasons: the one to ensure that rules are enforced, the other to satisfy aggrieved suppliers. These purposes are not mutually exclusive. For most systems, remedies serve both purposes and these often complement one another.[185] Yet generally one or the other predominates.[186] So it is here. The EU's aim is compliance; the main objective in US procurement is a just outcome for the complainant.

The US government's protest system is *complainant* oriented.[187] Such a system maintains that an essential purpose of contract law, public or private, is compensation for breach of the contract.[188] In private contracts, the wrongdoing in question always concerns disputes after the contract has been consummated because there is no legal relationship beforehand.[189] However, in public contracts, the law regulates contract *formation* to a much greater degree.[190] Competing for public business is premised on compliance with procedures that ensure fairness. The violation of this premise merits a remedy. Suppliers value most, not damages, but another chance to

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[185] Pachnou (2000) at 63–64.

[186] Nash and Cibinic (1987) at ¶25; 4 Report of the Commission on Government Procurement, Part G at 36–37.

[187] If one unfamiliar with the US system read its laws, she might conclude that adjudication of complaints is preeminent. Kovacic (1995) at 462. Two decades later, one such observer did, and she reached that conclusion. Simovart at 299. But see 3 Section 809 Panel Report at 341–45, 'Currently none of the statutes governing the protest process, nor those waiving sovereign immunity and allowing protests, discuss a purpose for protests as part of the procurement process.' The panel quotes the following passage, which still holds true:

> . . . it must be determined what purpose is to be served by an award protest system: Should its purpose be to grant monetary and injunctive relief to disappointed parties as a matter of right, or should it be primarily a technique for review of agency compliance with statutes and regulations?

Ibid at 341, citing Nash and Cibinic (1987) at ¶25. Congress has yet to make a clear statement as to the purposes of protests, but Kovacic and Simovart reached the same conclusion: the US system is *complainant* oriented.

[188] 1 Report of the Commission on Government Procurement, Part A at 1, faulting the US protest system for too much emphasis on individual abuses and too little on systemic problems.

[189] Cornell at 1164, concluding that the remedies for private contracts are purely retrospective.

[190] Keyes at 732–33.

compete for the procurement. This is the captivating prize the US protest system promises.[191] One in five successful litigants later wins the disputed contract.[192]

In addition to the absence of the *pacta sunt servanda* doctrine and the attendant opportunity to recompete contracts after finalisation, America is complainant-friendly in two further respects. First, the automatic stay at the GAO constitutes a major advantage. In fact, some argue that suspension of awards and of performance pending adjudication of the complaint is too generous to protesters, since less than a third of such complaints are sustained.[193] Second, much to the chagrin of US Department of Defense (DoD) officials, disappointed offerors can make serial protests, so that a complaint can be brought at each of the three forums in turn.[194] The chance to 'appeal' GAO decisions at COFC is a significant gift to protesters.

Emphasis on protecting the protester is not only a matter of corrective justice. America's secondary motive is to foster a competitive environment.[195] With a system that is responsive to participants' complaints, protests increase confidence in the process, leading more firms to participate and increasing competition.[196] Historically, America has tolerated the inconvenience, expense, and inefficiencies of robust litigation because vendors are thought to be more apt to participate if recourse to an impartial forum is assured.[197] Tolerating litigation will attract new entrants, and more competitors ensures transparency, accountability, and best value.[198] Fairness

[191] Fairgrieve and Lichère at 186; Gordon and Golden at 208.
[192] Gordon, 'Dissecting' (2014) at 5.
[193] Metzger and Lyons at 1238–41.
[194] 3 Section 809 Panel Report at 345–55. Edwards, 'Pathologies' (2011) at 1032, saying that allowing serial protests is 'pathological'.
[195] James Nelson at 610. See also Zhang (2007) at 334, criticising the EU's compliance-oriented system and observing that suppliers protest not to win an argument with the procuring authority but to obtain redress.
[196] Schooner (2018) at 4; Gordon (2013) at 508; Kovacic (1995) at 467–68.
[197] Schooner (1999) at 248–49.
[198] Because Kelman reaches the opposite conclusion about the merits of protests, he would argue that the US system is complainant oriented to a fault. Federal Acquisition Reform Act: Hearings on HR 1670 Before the Comm on National Security, 104th Cong (Aug 2, 1995), saying protests 'inhibit innovation, discourage independent decision-making, and put an intolerable strain on the efficient functioning of the procurement system.'

to the complainant is a means to an end: to eliminate corruption and to secure best value.[199] Fairness to complainants predominates, but complementary goals are sometimes compatible.[200]

If the US is ambivalent, the EU's review procedures are unequivocally *compliance* oriented. This is clear from the Remedies Directive itself.[201] In the 1989 version, the preamble explains that the purpose of issuing this directive was that the substantive directives were 'not always adequate to ensure *compliance* with the relevant Community provisions'.[202] Individual rights go unmentioned.[203] Commentators uniformly agree that the Remedies Directive exists mostly to ensure compliance and that compensation for individuals is secondary.[204]

This complainant-compliance divide could have a major effect on protests. Coming from a complainant-centric system, US suppliers may protest too often; coming from a compliance-centric system, EU suppliers may have the opposite bias. Further, each side may emphasise the wrong aspects of its case: Americans on the harm caused, when the emphasis should be on technical infractions; Europeans on the esoteric details of the infringement, not enough on the harm suffered. Such misunderstandings may substantially undermine their effective participation.

V. Civil or Defence Composition of Purchases

What a procurement system regulates, its composition of purchases, affects its organisation. To some degree, form follows function.[205] A distinction can be made between fungible

[199] Gordon and Golden at 203, citing GAO B-401197 (2009) at 3–4.
[200] See above notes 185–186 and accompanying text.
[201] The Commission's litigation also serves to police compliance. COM(2001) 309 at 7, saying its purpose is 'to cause the offending Member State to come into line with Community law,' not to compensate complainants. See also Craig and De Búrca at 432, saying the Commission's views on providing a forum for redress are 'ambivalent'.
[202] 89/665/EEC, Preamble (emphasis added).
[203] Pachnou (2000) at 63.
[204] Simovart at 299–300; Priess and Friton at 515–16, 529–31; Leffler at 152–53. Further, two recent studies on the effectiveness of the Remedies Directive take for granted that its purpose is mainly to ensure compliance. MARKT/2013/072/C, Final Study at 140–141; SWD(2012) 342 final at 39.
[205] Arrowsmith (2018) at 142.

commodities at one end of the continuum and highly specialised items at the other.[206] For the former, cost is the sole criterion; for the latter, other criteria come to the fore, such as evidence of past performance or technical considerations.[207] The extent to which a procurement system purchases from one end or the other will inform its procedural arrangements and its legal culture.

Consistent with this distinction, there is a clear divide between what is purchased in the US federal government and in the Member States. Since 1789, the US government's foremost purpose has been to 'provide for the common Defence'.[208] Its composition of purchases corresponds with this orientation.[209] Because a common security and defence policy is still a long way off, EU defence is fragmented along national lines and coverage by the directives remains the exception.[210] The former's composition of covered purchases is primarily defence, the latter's mostly civil. This has big ramifications. Defence purchases tend to be differentiated and, relative to defence, civil purchases tend to be less specialised or even homogenous. Before addressing the significance of this dichotomy, the reasons for and the breadth of the divide are considered first.

Three institutional differences explain the gap in the composition of purchases. First, unlike the EU, where the directives apply to national and subcentral procurements alike, the FAR

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[206] Rose-Ackerman identifies four categories ranging from simple to complex: (1) 'standard products sold in private markets, such as motor vehicles or medical supplies'; (2) 'customized versions of products sold privately, such as special purpose computer systems or fleets of police cars'; (3) 'purchases of complex, special purpose projects, such as dams or port facilities, that do not involve advances in technology but require managerial and organizational skills'; and (4) 'purchases that require specialized [R&D], such as newly designed military aircraft'. Ibid at 60–63.
[207] For example, FAR 15.101.
[208] US Constitution, Preamble. For an historical account explaining the US constitution's emphasis on defence, see Schoeni (2019) at 428–31, recounting America's experience in the decade after the revolution, when the US lacked a navy and was thus unable to defend its merchants on the high seas. See also Sapolsky, Gholz and Talmadge at 1, observing 'everyone agrees that providing for the common defense is [the U.S government's] first obligation.'
[209] Guensberg at 73, noting that Americans consider procurement synonymous with defence. The chasm between bespoke defence purchases and more fungible civil purchases arises in part from America's post-war defence strategy, which has been to buy technically superior arms in small numbers. Gansler, Lucyshyn, and Arendt at 3. Further, there has been a shift from industrial-age arms toward information-age technologies. Peck and Scherer at 16. This has caused rapid cost rises dubbed 'techflation'. Adelman and Augustine at 99.
[210] Heuninckx (2015) at 336. See also Schoeni (2019) at 442–44.

does not cover state or local procurements.[211] This is remarkable both because half or more of American procurement occurs at the subcentral level and because of the nature of spending at that level.[212] Procurement there concentrates on civil goods and services.[213] At the federal level, defence accounts for 70–80% of procurement.[214] The point is not that the US spends more on defence but that the composition of purchases varies with the level of government.[215] Sub-central levels devote less to the military because national governments are generally the locus for defence spending. The comparison is between the US federal government and a common EU standard, whose directives govern not only at the national level but also extend to regional and local levels. One would *expect* the directives, then, to be written as much for the subcentral as for the national level and thus to be more civil oriented. Conversely, it would be surprising if the FAR's coverage *were not* defence oriented. For both, one would anticipate that the composition of purchases would affect the design of their procurement systems. That is precisely how each is arranged: the directives' procedures concentrate on civil purchases and the FAR's on defence.[216]

The second institutional difference concerns the US's narrow definition of 'procurement'. Apart from transfer payments to individuals or third parties for welfare and medical care, most federal spending is passed to the states through grants,[217] mostly for state-funded medical care.[218]

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[211] Schooner (2013) at 1–2. But see above Chapter 1 notes 134–138.
[212] Dawar at 10; Keating Report.
[213] Urban Institute, reporting that most of US state and local procurement spending is divided among education (31%), social welfare (22%), healthcare (10%), law enforcement (6%), and roads (6%).
[214] CRS R40516 at 1; Manuel (2011) at 2; Peterson at 244.
[215] Although the emphasis in this work is US federal procurement, greater similarity in the composition of purchases between the US and the EU would be expected if America's subcentral procurements were included.
[216] See below notes 221–225 and accompanying text for a discussion of the coverage of and interaction between the FAR and Defense Federal Acquisition Supplement.
[217] In fiscal year 2021, Congress spent 74.5% on grants/fixed charges and 13.5% on contractual services/supplies and asset acquisition, or $7.5 trillion and $1.31 trillion, respectively. USAspending.gov, Spending Explorer.
[218] Sheffler at 210–11, explaining that that grants to states and agencies funding medical care comprise the largest share of grants. Healthcare constituted 28% of grants in fiscal year 2021. USAspending.gov, Spending Explorer.

Yet because grants are not *procurements*, the FAR does not control.[219] This affects coverage. Since the FAR's definition of procurement excludes grants, its coverage is less civil oriented than one would expect based on the share of total spending going to defence (11.2%).[220] As a result, what counts as a 'procurement' under the FAR is heavily skewed toward defence (70–80%). America spends far more on its civil budget items than on defence, but the majority of the former are not 'procurements' as that term is defined in the US federal acquisition system.

The third feature that affects the composition of purchases concerns the coverage of the procurement regulations. The US is a unitary regime: both civil and defence procurements are covered under the same FAR.[221] For the uninitiated, it is sometimes confusing that the DoD also uses the Defense Federal Acquisition Supplement (DFARS),[222] but like other agency supplements the DFARS cannot amend the FAR.[223] These supplements are limited to additions needed either to implement the FAR or to satisfy agency specific needs.[224] The Office of Public Procurement Policy may strike down or amend any supplement that exceeds these limitations.[225] By contrast, the EU is bifurcated: there is a separate Defence Directive. Of the 2.4 € trillion spent on EU procurement, 80 € billion goes to defence.[226] Yet the directives cover only a small share. Baudouin Heuninckx estimates that only 9-16% of such contracts are awarded under *any* of the directives.[227] The Commission's estimate is 7.6-8.5% for procurements under the Defence

[219] Cf FAR 1.101 and FAR 2.101. See also Nash, O'Brien-Debakey, Schooner, and Edwards at 246. Because procurement contracts are distinct from grants, the grant rules are inapplicable to procurements. 2 CFR § 200.101.
[220] In fiscal year 2021, Congress spent $1.1 trillion (or 11.1%) on defence USAspending.gov, Spending Explorer.
[221] FAR 1.1.04.
[222] Trepte (2004) at 32.
[223] FAR Subpart 1.3. For more on the DFARS, see below Chapter 3, notes 119–123 and the accompanying text.
[224] Nash, O'Brien-Debakey, Schooner, and Edwards at 210.
[225] 41 USC 1121(e)
[226] COM(2016) 762 at 2.
[227] Correspondence with Baudouin Heuninckx (Jun 30, 2018). He estimates that 13–15% of defence contracts are awarded uncompetitively and that 71–76% use some form of competition but are unpublished in the Official Journal. He also deduces that 31% were awarded without any form of competition.

Directive, rising to 9.5% if the other directives are included.[228] Further, because the Article 346 secrecy exemption also allows for unreported purchases,[229] these estimates may be too high.[230] Thus, although the express purpose of the Defence Directive was to limit derogations from the directives, coverage remains quite low.[231]

Low coverage results in part from features of the Defence Directive and continued use of TFEU Article 346,[232] despite the CJEU's growing scrutiny as to overuse of this exemption.[233] The motive is more important than the mechanics: Member States have been loath to relinquish control over defence in part because of security concerns,[234] in part because it is the last vestige of sovereignty.[235] Historically, they retained autonomy because they demanded it as a condition of membership.[236] This will change only if Member States come to hold sovereignty less dear.[237]

Having reviewed reasons for the vast divide in the composition of purchases, the breadth of this divide should be considered. Of Member States' 2.4 € trillion in procurement spending, only 3.3% goes to defence (80 € billion). Of that, only a fraction is covered by one of the directives. At a little under 10%, defence covered by the directives constitutes just under 8 € billion, or just over .3% of the EU's overall procurement spending. Contrast the US figures,

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[228] SWD(2016) 407 at 53. Compare European Defense Agency (2005) at 1, reporting that a recent study affirmed that the majority of Member States' defence procurement was done outside the framework of the common market.
[229] TFEU, Article 346(1)(a). See also Butler at 87, observing that it remains uncertain when Member States can validly invoke Article 346; Trybus (2014) at 128–29, explaining that the secrecy exemption has not been tested.
[230] Heuninckx Correspondence, above note 227, acknowledging that data on the extent to which Member States invoke either exemption under Article 346 are unavailable.
[231] Trybus, 'Defence Procurement' (2013) at 249, 259.
[232] Arrowsmith (2018) at 157–22; Butler at 121–55; Trybus (2014) at 85–134, 245–08.
[233] Heuninckx (2014) at 39, citing a series of CJEU judgements holding that Article 346 is for 'exceptional and clearly defined cases' and 'an inherent general exception . . . cannot be inferred' and is to be 'interpreted strictly'; that such exceptions are available 'only if there is a genuine and sufficiently serious threat to a fundamental interest of society' and economic aims are insufficient; that Member States' security needs must be specifically expressed; and that state must prove its security interest could not have been addressed with a less restrictive measure.
[234] Arrowsmith (2018) at 143, 147–149; Butler at 79–81; Trybus (2014) at 41–44.
[235] Krieger at 178. See also Bialos, Fisher and Koehl at 30.
[236] TFEU, Article 346; Directive 2009/81/EC, recital 16. See also Georgopoulos (2007) at 212–13; Butler at 48–51, 116–17.
[237] Mawdsley at 4–5. But see Trybus (2014) at 40–41.

which as noted above ranges from 70 to 80%.[238] Further, there is no question about coverage: the FAR covers 100% of executive agency purchases.[239] As a share of procurement, US defence is thus 210 to 240 times larger than the EU's covered defence purchases. This may be the single best explanation for the two procurement regimes' dissimilarities: whereas the former revolves around defence, defence items compose but a small share of the latter's covered purchases.[240]

Consider last the consequences of this divide. A 2017 European Commission study illustrates the significance of the composition of purchases in another context, but it has an important application here. The study reports that private cross-border penetration in the EU is double that of the public sector.[241] It attributes this disparity largely to the composition of purchases. For some products, public sector cross-border trade is higher than the private sector (e.g., petroleum, chemicals, drugs, rubber, plastic, air transport). But such commodities are only a small share of Member States' purchases. Differentiated goods and services such as health, welfare, education, administration, and defence constitute 58% of their procurement spending, and these sectors naturally afford advantages to domestic suppliers.[242] Such lessons about the composition of purchases applies to more than trade; the proportion spent on complex or simple goods and services may also affect how a procurement system is set up. That is, *what* is bought affects not only the level of cross-border trade but also how transactions work. The distinction

[238] See above note 214.
[239] See above notes 221–225. See also Forman, Cliffe, Choi, and Curran at 189. But see Castellano at 486–90.
[240] In subsequent correspondence with Heuninckx (Dec 31, 2020), he commented on my article, Schoeni (2021), where I note the disparity in the composition of purchases. He challenged comparisons between the FAR and the Defence Directives are 'fundamentally different': the former has direct effect, while the latter must be transposed into domestic law. His objection is astute. In fact, this disanalogy extends beyond this chapter's subject-matter. It concerns a broader problem with the level of comparison undertaken, and no easy solution is forthcoming. See above Chapter 1, Section VI. Because the two systems are incongruous, comparisons between them are imperfect.
[241] B-1049 (2017) at 17.
[242] Ibid at 17–22. For such goods and services, proximity is key. Cernat and Kutlina-Dimitrova (2020) at 6.

between commodities and heterogenous items explains this: if price is the sole criterion, products are easily compared; if not, then the evaluation process is opaque and making comparisons harder.

Consider another distinction between defence and civil purchases. Defence encompasses both 'standard' commercial products and weapon systems,[243] but the latter are the 'core' of defence. Such systems involve complex technology; these are specialised, one-off products.[244] The extent to which defence procurement concentrates on such specialised products is key.[245] Although there are parallels with non-defense procurement, defence is unique.[246] Its 'defining characteristic' is the continuous pursuit of improved capabilities through technological advance.[247] Unlike civil products, whose value in general remains constant, a weapon's value is fleeting and relational, its utility depending on performance relative to adversaries' arsenals.[248] Although still serviceable, modern arms can be rendered obsolete in a manner almost unheard of for consumer goods.[249] Technological rivalry permeates defence, as equipment can determine success or failure on the battlefield.[250] This creates a 'technology imperative'.[251] Ministries of defense are purchasing *innovation* as much as the tangible products,[252] and a large share of their

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[243] Uttley at 72.
[244] Georgopoulos (2015) at 119; Smith at 124.
[245] Markowski, Hall, and Wylie at 47.
[246] Arrowsmith and Hartley at ix, observing that all procurement involves similar choices about 'the nature of what is to be acquired; the identity of the suppliers; the legal mechanism to be used to effect the acquisition; and . . . wider economic and social effects that might accompany the purchase'; Uttley at 74.
[247] Rogerson (1994) at 66.
[248] Kirkpatrick (2004) at 265, explaining that the 'military effectiveness provided by a weapon system is determined not only by its own performance but also by the performance of contemporary enemy systems it encounters'.
[249] Ibid. Relentless growth in the cost arms is often contrasted with the falling prices of consumer goods. However,

> The difference arises because the benefit a consumer derives from, for example, a television set is dependent only on its own performance and not by the performance of any other set in the neighbourhood. . . . If the laws of physics happened to dictate that only half of the television sets in a particular neighbourhood . . . could satisfactorily receive a picture, and if reception was as important to the viewer as victory or death is important to the soldier, the unit costs of television sets would be increasing about as fast as those of weapon systems.

Ibid.
[250] Markowski, Hall, and Wylie at 52; Parker and Hartley at 105–06; Trybus (2014) at 50.
[251] Markowski, Hall, and Wylie at 52–53. See also Uttley at 75.
[252] Rogerson (1995) at 312.

budgets is spent directly on high-end research and development (R&D) or products derived from private-sector R&D.[253]

Purchasing innovation is fraught with uncertainties.[254] This is one manifestation of problems associated with purchasing complex items.[255] Contracting for innovation presents challenges as much for the private sector as it does for the public: innovation cannot be fully specified, making such contracts incomplete.[256] Indeed, procurement failure is not uncommon in the private sector for complex products in fields such as infrastructure, information technology (IT), or pharmaceuticals.[257] For contracts involving extensive R&D, large sums of money, or extended timeframes, traditional forms of 'competitive' procurement are a poor fit – regardless of whether the product is military or civil or whether the purchasing agent is public or private.[258] Indeed, when private industry attempts a rapid advance in the state of the art, they will certainly encounter 'weapons-like' procurement problems.[259]

Such problems are more acute for defence. R&D already consumes a larger share of defence spending than in the private sector,[260] and that ratio is steadily increasing as weapons become more sophisticated.[261] Further, in terms of uncertainty, defence is sui generis.[262] It demands an

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[253] Markowski, Hall, and Wylie at 53.

[254] Rosenberg at 92–93, arguing an 'essential feature' of innovation is that it is 'fraught with many uncertainties' and 'cannot be planned.' See also Peck and Scherer at 29, 'The essence of innovation is great unpredictability.'

[255] Bajari and Tadelis at 121, 123, explaining that in engineering and construction, the central problem for complex contracts is that buyers and sellers 'share uncertainty about many important design changes that occur after the contract is signed and production begins'. Such contracts entail surprises as to the final configuration. Ibid at 124.

[256] Lyon at 223. Cf Crocker and Reynolds; Markowski, Hall, and Wylie at 51.

[257] Smith at 124.

[258] Taylor at 33. Tendering is often impractical unless the products in question are commodities, routine in nature, or commercially available. Ibid at 23. When bespoke items are needed or if concerns about quality predominate, negotiated procedures are preferable. Manelli and Vincent at 591–92, 614. Cf Bajari, McMillian, and Tadelis at 372–73; Schooner, 'Commercial Purchasing' (2003) at 148. Transaction costs explain why competitive tendering is unsuited to complex items where quality is more important than price. Yvrande-Billon at 466–73.

[259] Peck and Scherer at 9, 584,

[260] Ibid at 25–27, saying that US defence R&D was then 10 times greater than in the private sector.

[261] Keith Hartley at 11; Kirkpatrick (2004) at 267–68. Cf Markowski, Hall, and Wylie at 50–51.

[262] Scherer at 1; Peck and Scherer at 8–9, 25–27, 17, 44–45. This uncertainty arises in part because weapons, in the parlance of information economics, are 'experience' goods not 'search' goods: one cannot be sure of their effectiveness until they are tested. Ergas and Menezes at 248–49; Phillip Nelson at 312. Further, defence shares

'endless quest for the technological frontier.'[263] A 'technical arms race' exists between foes,[264] and states thus seek to push the state of the art.[265] Such intense competition makes defence different.

Relative to the US, a greater share of Member States' procurements is for simple products. That is not to say that they buy mere commodities.[266] To the contrary, in 1996 the Commission held that more flexibility was needed for complex purchases,[267] especially IT,[268] and the competitive dialogue was thus introduced in 2004.[269] However, there is still a gap between purchasing IT, which is often available off the shelf, and purchasing sophisticated weapons.[270] Defence is a monopsony, with the government as the sole buyer; no parallel private market exists.[271] Relative to complicated arms purchases, civil purchases are much simpler transactions.[272]

Since so much turns on whether the nature of what is being bought is simple or complex, the aforementioned dichotomy – i.e., that the US government's defence procurement constitutes 70–80% of its procurement, whereas covered defence procurements are only .3% of EU Member States' procurements – affects the two systems' arrangements. Profound differences have thus

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not only 'internal' uncertainties common to innovation but entails 'external' uncertainties. These include the technical environment, foreign intelligence, and strategic requirements. Peck and Scherer at 24, 45–54.

[263] Bellais and Droff at 209.

[264] Hartley (2000) at 7. See also Kirkpatrick (1995) at 264; Mahnken at 271.

[265] Peck and Scherer at 9.

[266] Conversely, it is not the case that the US government never purchases simple or low-tech goods and services. Even in the DoD, a large share of its purchases is for basic commodities. Besselman, Arora, and Larkey at 422.

[267] COM(96) 583 final.

[268] Arrowsmith and Treumer at 16; Steinicke (2001) at 333.

[269] Arrowsmith (2014) at 859–61, 976–77.

[270] Rose-Ackerman at 60–63.

[271] Defence procurement tends to be complex, heterogenous, and unavailable for purchase off the shelf. Bialos, Fisher and Koehl at 50, 52; Gansler, Lucyshyn, and Arendt at 7; Roan at 61. Competition, as usually conceived, requires multiple vendors selling close substitutes. 1 Report of the Commission on Government Procurement, Part A at 19. Yet price competition is rarely available for defence because substitutes are a low threat. Taylor at 33; Gansler, Lucyshyn, and Arendt at 12. Indeed, where the items in question are highly complex, the application of competitive tendering methods can result in the mere 'semblance of competition'. Yvrande-Billon at 469.

[272] Perhaps the best explanation for the differences in public and private purchasing are the government's unique needs. Checchi at 377. This is more pronounced for defence. Peterson at 4. More complex civil purchases are, like defence, differentiated products and choosing suppliers cannot be reduced to a question of lowest price. Engel, Fischer, and Galetovic at 142–43. Where civil purchases are so complex that uncertainty approaches that of defence, defence-like issues emerge. Peck and Scherer at 9, 584. More often, though, civil procurement concerns existing technologies and can be efficiently done using standard competitive procedures. Ibid at 11; Scherer at 1.

emerged.[273] These can be 'unofficial invisible obstacles' to foreign competition, which are most acute in sectors where the government is the sole buyer.[274]

A. Qualification and Award Procedures

One feature of the America's system is a tendency to overuse competitive negotiation, especially the trade-off award process.[275] That process is available whenever awarding on the basis of price or technical rating alone would be unsuitable.[276] It requires the comparative analysis of cost and non-price factors to determine the optimal balance.[277] Trade-offs are a sensible choice if the government is buying bespoke goods and its requirements are hard to define, the technology is developmental, or the risks are high. Such conditions often apply to defence. In the midst of the Cold War arms race, America abandoned sealed bidding and embraced procedures that enabled officials to consider more than just price. With the benefit of trade-off procedures, officials can now choose to pay a premium when, in their judgement, there is enough value added. Nevertheless, what makes sense for sophisticated technology is a more dubious strategy for more prosaic purchases. Rarely should the government pay more than market price for commodities, items whose distinguishing characteristic is price. Yet the US government often does so. Because defence is such a large share of purchases, it has developed an expensive habit of treating simple products as if they were complex, paying a premium based on the mistaken premise that qualitative considerations matter as much for janitorial services as for missile defence.[278]

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[273] Because high-tech defence items are often in the R&D phase, selection based on lowest price alone is unwise. vom Baur (1958) at 21. For such one-of-a-kind items, conventional procedures are inadequate. Checchi at 360; Peck and Scherer at 11. More sophisticated tools are needed. Marshall, Meurer, and Richard at 21.
[274] Reich at 14–15.
[275] Others have noted a predilection for negotiation as a distinguishing feature of US procurement, Hoekman at 575, but it is an original contribution of this work to connect this tendency to the US's defence-orientated system..
[276] FAR 15.101-1(a).
[277] FAR 15.309.
[278] *ProMaintenance Services, LLC*, Comp Gen Dec B-412958 (2016), janitorial services; *Advance Business Solutions*, Comp Gen Dec B-412937.2 (2016), landscaping. Cf Edwards (2016) at ¶47; Edwards (2010) at ¶19.

Since a smaller share of covered EU procurement goes to defence, it seems probable that there would be a corresponding tendency to treat all acquisitions more like commodities, at least relative to America. Certainly, the directives allow for the consideration of non-price criteria. Unlike US sealed bidding, where only price and price-related factors can be considered,[279] the open procedure makes available the same array of criteria that are used in all of the other award procedures.[280] On the other hand, the existence of the Article 346 derogation and of a separate directive for defence means that, relative to America, purchases under the other procurement directives will perhaps be more prosaic in nature and thus more price oriented. However, empirical evidence is lacking to confirm this conjecture.

To the extent there is truth to the claim that the US, to a fault, treats all procurements like heterogenous weapons purchases and the EU treats all procurements more like commodities, this would have ramifications for the nature and effectiveness of their transatlantic participation. From their domestic experience, US suppliers would concentrate too much on non-price features when selling their wares in the EU. Conversely, EU suppliers would concentrate too much on price and neglect other important factors. For both, the suppliers would bring to the competition in the foreign system expectations from their domestic system that would probably be frustrated. This will make them less-effective competitors.

B. Competitive Procedures

Chapter 4, Sections II.A.1 and B.1 will juxtapose sealed bidding and open procedures and argue that, historically, the use of negotiation has been a key difference between the two systems. The relative composition of purchases is perhaps the best explanation. As discussed, the EU's

[279] FAR 14.408-1(a).
[280] Directive 2014/24/EU, Article 67.

procurements focus on products that are simple, homogenous, and commercially available. The US government concentrates on the opposite composition of purchases.

Open procedures work best for simple items.[281] Some defence procurements fit the bill.[282] Herein lies a key distinction between American and European attitudes toward negotiation: complexity. In term of value, most US contracts are for military items, and a preponderance of these are complex. For such contracts, negotiation is a necessity. Few covered EU procurements are for defence, so contracts are generally less complex and negotiation is less common. The US's defence-oriented composition of purchases has begotten a tolerance for negotiation because, often, that is the only sort of competition that is to be had in this realm. The EU has historically disfavoured negotiations, but that has changed with the Defence Directive.[283] Yet the point still holds since defence constitutes such a small share of covered procurements (.3%).

This oversimplifies matters in one respect. In Europe, whether negotiation is available turns on complexity; in America, that turns on whether there are non-price award factors. In the EU, the open procedure can still be used for contracts that involve non-price factors since these non-price factors can be included as award criteria. The US, however, affirms that the use of non-price factors necessitates negotiation, given that sealed bids must be awarded *only* based on price-related factors. It seems that America has adopted this rule because substantial overlap exists between complexity and non-price factors. The reason is surely its distinctive composition of purchases. Given defence contracts' dominant share of US procurement, contracts whose award criteria cannot be reduced to price are, in general, also complex. Given its composition of

[281] See below Chapter 4, especially Section III.B.
[282] William Washington at 183.
[283] SWD(2016) 407 final at 40. In the private correspondence with Heuninckx cited above, above note 240, he also noted that since the Defence Directive was introduced, there has been a dramatic shift toward the negotiated procedures, with about 80% of covered defence contracts being awarded with some form of this procedure.

purchases, the distinction between complexity and non-price factors is probably quite often a distinction without a difference. Hence America's insistence on negotiated procedures.

One illustration of the differences between the two systems in the treatment of negotiations concerns the use of non-price factors in sealed bidding and open procedures. Both procedures forbid negotiations, but US sealed bidding also prohibits consideration of non-price factors while the EU's open procedure authorizes the use of non-price factors. US firms may be unaware that they are forbidden to discuss non-price factors for contracts that they would normally expect to involve extensive negotiations. If so, they may be more apt to submit incomplete bids, assuming they can make adjustments in order to improve or refine their offers during negotiations. Conversely, EU firms may fail to appreciate how important discussions are because US federal contracts with non-price factors necessarily involve negotiations. For these reasons, both sides may compete poorly and thus lose on bids that by all rights should have been won.[284]

C. Challenge Procedures

In America, ambivalence about protests is longstanding. The Section 809 Panel reported that protests are burdensome despite their role as the primary means for ensuring accountability.[285] The volume of protests is criticised because America's adversaries are not subject to the same level of oversight and can buy or develop weapons faster.[286] The Section 809 Panel recommends major reforms[287] to 'get inside the turn' of competitors.[288] It concedes that a 2018 RAND study proved that frivolous protests are rare,[289] but the gravamen of its complaint stands: protests are burdensome and delay time-sensitive defence acquisitions.[290]

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[284] See below Chapter 4, Section III.B.
[285] 3 Section 809 Panel Report Ex-6, 340.
[286] 1 Section 809 Panel Report at 10.
[287] 3 Section 809 Panel Report 340–360.
[288] Section 809 Panel Report Road Map at 21.
[289] Ibid at 352, citing RAND Study (2018) at 27–30, 35, 37. See also GAO, B-401197 (2009) at 11–12.
[290] 1 Section 809 Panel Report at 10.

The Section 809 Panel's complaints are familiar. Five decades earlier, Congress conducted a comprehensive study of federal procurement and reached an ambivalent conclusion about protests: 'Although award protests serve a necessary and useful function in Government procurement, the annual number of protests is rising to a level that potentially could have an adverse effect on the acquisitions process.'[291] Concern about their effect on defence has been especially marked.[292] Certain safeguards, thus, have been established to minimise protests' interference with defence acquisitions.

Among the most prominent of such safeguards are the statutes imposing decision deadlines. The Tucker Act mentions defence and requires that COFC give 'due regard' to national security and a need for 'expeditious resolution' of protests.[293] Similarly, CICA mandates that the GAO resolve protests within 100 days,[294] and, to make this enforceable, requires a report to Congress whenever a decision is not rendered within that timeframe.[295] Although CICA does not mention defence specifically, its reforms were defence-oriented because in America, procurement is virtually synonymous with defence procurement.[296] Frequent demands from Congress's armed services committees on the effect of protests on defence suggest that the rationale for CICA's expedited timeline was acute concern for the DoD's time-sensitive purchases – in part because delays are associated with higher costs.[297]

[291] 4 Report of the Commission on Government Procurement, Part G at 48.
[292] That protests slow down defence such that the DoD cannot move fast enough to keep pace with its peers was the chief concern that the Section 809 Panel was charged to evaluate. Section 809 Panel Roadmap at I, 21–22, 29–30.
[293] 28 USC 1491(b)(3).
[294] 31 USC 3554(a)(1).
[295] 31 USC 3554(e)(2). See also GAO-20-220SP (2019) at 3.
[296] Guensberg at 73.
[297] For example, GAO, B-401197 (2009).

Case law has erected additional safeguards. As Chapter 5, Section II.F details, courts already review protests under a deferential standard. Yet deference for defence is even greater.[298] Under *M Steinthal & Co v Seamans*, special deference was to be given to the Air Force given the technical nature of the procurement, the complexity of this area of the law, and the expertise of the agency and GAO officials.[299] This was adopted in later cases,[300] and it was eventually codified in the aforementioned statute as COFC's standard of review: 'due regard' is to be given when national security interests are concerned.[301]

Such deference is quantifiable. DoD contracts are less likely to be protested. The Federal Procurement Data System indicates that from 2008–14, the DoD accounted for 70% of spending on procurement but only 55% of protests.[302] There is also an even more notable difference in the 'sustain rate', referring to the share of cases where a protester is granted some form of relief, either the award being overturned or corrective action being taken. The DoD's sustain rate is half that of civilian agencies: 2.5% versus 5%.[303]

This deference may be an obstacle to participation in two respects – depending on European suppliers' level of awareness. Well-informed suppliers will be less inclined to protest lost awards for defence contracts because their chances of winning are slimmer. This will not only inhibit protests but perhaps also their willingness to compete for US defence contracts in the first place. And ill-informed European suppliers may be inclined to protest even when it would not be in their interest to do so.

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[298] Schwartz (2004) at 37.
[299] 455 F2d 1289, 1298–99, 1301 (DC Cir 1971).
[300] *Shoals American Industries, Inc v US*, 877 F2d 883, 888–89 (11th Cir 1989).
[301] 28 USC 1491(b)(3).
[302] Manuel and Schwartz at 17.
[303] RAND (2018) at 13; Manuel and Schwartz at 17. The difference in outcomes between defence and civilian agency procurements may also be due to the DoD's sophisticated debriefing systems and engagement with vendors.

Special deference for defence does not exist in the EU. There are, however, several challenges that may be obstacles to Americans suppliers. Three of these are discussed below. Each of these is taken in turn.

US suppliers may be discouraged to learn that only a small number of Member States' defence contracts are covered under any of the directives. In fact, only 20% of such contracts are awarded to non-domestic firms.[304] Because 70–80% of US federal procurement expenditures go to defence and, thus, US suppliers are often defence contractors, the fact that Member States are mostly closed to foreign competition, especially for defence, may be disappointing.[305] The US contractors who are perhaps most adept at navigating the procurement process will be defence contractors whose wares will be harder to sell to 27 States regularly asserting exemptions from EU procurement rules. This is a substantial obstacle to participation and thus also to protests.

Americans may also be discouraged that when defence is covered, usually it is the Defence Directive that controls, but that is not always so. Depending on the nature of the procurement, one of the other directives may apply: procurement, utilities, or concessions. This may confuse Americans familiar with US government regulations. No separate regime exists in America: federal procurement *is* defence procurement.[306] That suppliers must either learn a separate set of rules or else hire local counsel may dissuade those least able to afford such assistance. A separate defence regime may thus pose an obstacle to US suppliers accustomed to a unitary system.

Third, not only will the American supplier find it vexing that European defence is mostly exempted from the standard procurement directives and that a separate Defence Directive applies to tendering, but it may also be frustrated that the standard Remedies Directive does not apply.[307]

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[304] COM(2013) 542 final at 3.
[305] See above note 214.
[306] Schoeni (2019) at 432, quoting correspondence between Christopher Yukins and Martin Trybus.
[307] Trybus at 135, noting that Directive 2009/81/EC establishes a 'hidden' remedies regime for defence protests.

As a result, contractors will be less skilful in how they bring protests under this unfamiliar regime. Because familiarising oneself with this separate remedies regime imposes transaction costs, this would either reduce participation or perhaps make foreign contractors less-effective competitors.

Given these three obstacles, it is less likely that American suppliers will compete for EU defence contracts, much less file protests in the rare cases where they compete. They may prefer to seek business elsewhere. This is consistent with what we know about American penetration of EU procurement markets generally and of defence in particular: competition for awards is uncommon, awards to US firms rare,[308] and bid protests almost non-existent.[309] An inhospitable remedies regime specially tailored for defence contributes to this state of affairs.

VI. Conclusion

This chapter has outlined four of the fundamental differences of the embedded legal cultures of the US and the EU procurement systems. The first of these involved the age of the two systems. The next two concerned their status as domestic or international procurement systems. The last that the two systems have distinct compositions of purchases in terms of defence versus civil spending. These themes underlie the substance of the next three chapters and this entire work. Comprehension of these themes is critical to an appreciation of what divides the two systems, and the improvement of such understanding is necessary to increasing participation in the transatlantic procurement trade.

[308] GAO-19-414 at 12–13, 21–22. See also COM(2013) 542 final at 3, reporting that 80% of defence contracts are awarded to domestic suppliers.
[309] See below Chapter 5, Section I, note 21.

Chapter 3: Qualification and Award Procedures

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I. Introduction

Governments must choose with whom to do business. In the EU, this process is called qualification;[1] in the US, a responsibility determination.[2] These terms of art are similar but not equivalent, their meanings differing subtly. Gaps thus arise in how the two function,[3] creating NTBs and deterring foreign participation.[4] The first substantive chapter commences with qualification and award procedures because '[i]t takes little imagination to appreciate the importance of the front end of the procurement cycle.'[5] These procedures decide who participates and whose bid is chosen.[6] If these rules insufficiently curtail discretion, this may have a 'dramatically anti-competitive effect.'[7] Without the proper precautions, such qualification and award criteria can easily be abused.[8] Establishing safeguards is essential both for basic fairness and for a system that is welcoming to foreign competition.[9] This subject is of particular interest because some argue that the EU's sometimes onerous qualification procedures are a high barrier to entry for American suppliers.[10]

Some may question the decision to discuss qualifications and awards in the same chapter. Each is a substantial topic in its own right, and the two are often treated separately.[11] Yet comparing them side by side is valuable because, although the procedures in the two systems

[1] Arrowsmith (2014) at 1183.
[2] Cibinic, Nash, and Yukins at 409.
[3] Trepte (2004) at 4, 6–7.
[4] Harutyunyan at 476.
[5] Davies (2008) at 137.
[6] Franch and Grau (2013) at 311.
[7] Simchak at 553. See also Sanchez-Graells and De Koninck at 28.
[8] Verdeaux at 731; James at 24.
[9] Harutyunyan at 476.
[10] Woolcock and Grier at 320.
[11] Compare Cibinic, Nash, and Yukins at Chapter 4 and Chapters 5–8 with Arrowsmith (2014) at Chapter 12 and Chapters 7–11 and with Trepte (2006) at Chapters 6–7.

operate in a manner that is often functionally similar, there are still some important differences – especially as to timing and separability.[12]

II. Juxtaposing Qualification and Award Procedures

A. Definition

1. US

A common misunderstanding is that federal contracts work just like private contracts. In fact, they are so dissimilar as to resist comparison.[13] Three concepts set them apart. Chief among these three is the qualification of contactors.[14] More often, the US uses the terms 'responsible' and 'responsibility determination', which are analogues to the EU's 'qualified' or 'qualification process'.[15] As mentioned, qualification is considered 'downstream' in America,[16] but this is still a core requirement. Indeed, responsibility is notable in the 'maze of requirements' because it is global and applies regardless of the contract's value, the agency making the award, or the acquisition procedure used.[17]

Responsibility is not as straightforward as it may seem.[18] It encompasses three categories of procedures: responsibility determinations, suspensions and debarments, and conflicts of interest.[19] Only the first will be considered at length, but brief introductions as to the latter two are also provided for context.

Suspensions and debarments are closely related to responsibility.[20] The distinction is that these exclusions apply across the federal government, whereas non-responsibility determinations

[12] See below Section II.F.
[13] Schooner (2001) at 715–16; Cuneo and Crowell at 548; Miller at 56.
[14] Mayer at 165–68.
[15] Cibinic, Nash, and Yukins at 409; Butler at 277.
[16] Folliot-Lalliot (2009) at 156. See also above Chapter 2, Section III.A and below Section II.F.
[17] Bodenheimer at 1.
[18] Whelan (1993) at 42; Gray at 46.
[19] Cibinic, Nash, and Yukins at 409.
[20] FAR Subpart 9.4.

entail ineligibility only as to a particular contract.[21] A bidder may be deemed non-responsible as to one contract but this would not preclude another agency or even another official within the same agency from finding the same bidder responsible as to a separate contract.

Organisational conflicts of interest (OCIs) determinations comprise the third qualification procedure.[22] These arise when a contractor either would have an actual or a potential bias during performance or an unfair advantage when competing for future contracts.[23] Whereas this is an important area in America, with extensive elaboration in case law,[24] prohibiting OCIs is still novel in Europe.[25] Although the CJEU considered OCIs as early as 2005,[26] such conflicts were entirely unmentioned in the directives until 2014.[27] This limits the potential for comparative analysis.[28]

Returning to responsibility determinations,[29] by statute contracts are awarded only to 'responsible' suppliers.[30] Officials have an affirmative duty to make this determination before awarding a contract.[31] A negative finding requires a written explanation, referred to as a non-responsibility finding.[32] An affirmative finding does not; simply signing the contract suffices.[33] When protested, courts scrutinize affirmative findings only if there are 'serious questions' as to rationality.[34] The GAO grants only limited review of such protests.[35] For a system that relies

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[21] Manuel (2013) at 3–4.
[22] FAR subpart 9.5.
[23] FAR 9.505 (a) and (b).
[24] Gordon (2005) at 25–26, 50–51. See also Hayken 146–49, discussing *Science Applications Int'l Corp*, Comp Gen Dec B-293601 (2004); ABA Section of Public Contract Law at 7–10, 28, 32, 34.
[25] Auby, Breen, and Perroud at xvii. Cf Hayken at 146–49.
[26] *Fabricom v Belgium*, C-21/03 and C-34/03 [2005], ¶¶ 26, 29–34 Cf Treumer (2005) at 101–03; Priess (2002) at 166.
[27] Compare Directive 2004/18/EC with Directive 2014/24/EU, Article 25.
[28] Cf Jurich at 248–53.
[29] FAR Subpart 9.1.
[30] 10 USC 3303(c) and 41 USC 3702(c), implemented by FAR 9.103(b).
[31] Schwartz (2010) at 631, n 44.
[32] FAR 9.105-2(a)(1). See also Nash, O'Brien-Debakey, Schooner, and Edwards at 415; Feldman at 68.
[33] FAR 9.105-2(a)(1).
[34] *Impresa Costruzioni Geom Domenico Garufi v US*, 238 F3d 1324, 1340–41 (Fed. Cir. 2001). See also Nash (2001) at ¶12.
[35] 4 CFR § 21.5(c).

heavily on protests for its oversight function, protests of affirmative responsibility determinations protests are quite rare, perhaps because the burden of proof in such cases is high.[36]

Responsibility pertains not to the bid itself,[37] but rather it concerns to the *bidder's* integrity and capacity to perform the work.[38] It encompasses how a bidder would conform with the terms of the contract,[39] and it addresses 'performance capability', which includes resources, experience, management, past performance, and integrity.[40] Although the FAR lists additional standards,[41] it provides little guidance on the procedures for making responsibility determinations.[42] Officials are given broad guidelines and are otherwise left to their own devices.[43]

For the European supplier, three features about responsibility determinations may stand out. First, these procedures are oriented not to the protection of suppliers from discrimination but to the protection of the government itself.[44] Second, officials have considerable discretion.[45] Third, once a competitor is deemed responsible and the contract awarded, disappointed bidders have limited recourse. For Europeans suppliers, whose entire system is designed to constrain the discretion of contracting authorities so that domestic firms are not unfairly favoured over foreign competitors, these three features may seem worrisome. America, from their perspective, may seem insufficiently attentive to constraining the potential for favouritism. Although such concerns are arguably based on misapprehensions about the use of responsibility determinations in the US federal system, these features may still discourage participation.

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[36] Nash (2008) at ¶70.
[37] Manuel (2013) at 3, citing FAR 9.104-1.
[38] Cibinic, Nash, and Yukins at 412; Nash, O'Brien-Debakey, Schooner, and Edwards at 415.
[39] *Blount, Inc v US*, 22 Cl Ct 221, 227 (1990)
[40] *Bean Dredging Corp v US*, 22 Cl Ct 519, 522 (1991).
[41] FAR 9.104-1; FAR 9.104-2. See below Section II.C.
[42] Guensberg at 70.
[43] *Impresa Costruzioni*, 238 F3d at 1334–35, holding contracting officers are 'generally given wide discretion'.
[44] Cf Chapter 2, Section III.A.
[45] See below Section III.B.1.

2. EU

The EU's qualification procedures are not so well defined in the procurement directives as responsibility determinations are defined in the FAR. Qualification is the process of deciding which firms may compete.[46] But under this broader heading, three separate sub-procedures can be distinguished: eligibility, exclusion, and selection. Eligibility concerns who is permitted to compete.[47] Exclusion concerns who may not compete based on certain misconduct.[48] And selection concerns who is qualified to compete in terms of resources, experience, and so forth.[49] These distinctions are subtle and certainly will be unfamiliar to many American contractors.

Although qualification (in the broad sense) and award procedures both fall under the same general heading in the directive,[50] a distinction is established between the two.[51] This is central to the definition of the procedures for choosing participants and awarding contracts. Section II.F discusses this demarcation and notes that the CJEU has drawn this distinction for three decades. This marks a significant divide between the two systems' approaches: the EU's approach is the reverse of US in that review of qualification criteria precedes evaluation of award criteria – albeit in processes often occurring within a single procedure.[52]

US and EU qualification procedures have distinct emphases. If the US concentrates on protecting the government from incompetent and unscrupulous firms,[53] the EU concentrates on curtailing domestic favouritism.[54] Both systems seek to eliminate unsuitable contractors,[55] but

[46] Arrowsmith (2014) at 1183.
[47] Trepte (2007) at 321–22.
[48] Directive 2014/24/EU, Article 57. See also Trepte (2007) at 337–48.
[49] Directive 2014/24/EU, Article 58. See also Trepte (2007) at 320–21.
[50] Directive 2014/24/EU, Section 3, Choice of Participants and Award of Contracts.
[51] Ibid, Article 56(1). Specifically, this section distinguishes Articles 67–69 (Subsection 3, Award of the Contract) from Articles 57–58 (Subsection 1, Criteria for Qualitative Selection).
[52] Franchi, Turco and Bosio at 26.
[53] Schooner (2004) at 216.
[54] Trepte (2006) at 319–21.
[55] Trepte (2004) at 194..

the EU takes greater care in constraining the bases on which firms can be excluded or de-selected. The Court has held that the directive's grounds for exclusion are generally exhaustive,[56] though Member States may supplement this list subject to the principle of proportionality.[57] Additions to the selection criteria are also carefully delimited.[58] These strict restraints on disqualifications result from the single market imperative.[59]

The 2014 Directive also incorporates a process for reducing the pool to a manageable size for certain procedures.[60] This is available for restricted procedures,[61] competitive procedures with negotiation,[62] competitive dialogue procedures,[63] and innovation partnerships,[64] but not for open procedures or negotiated procedures without prior publication.[65] For the latter, this reduction is unavailable unless no suitable tenders exist; there is only one firm that can provide a certain work, good, or service; or for extreme urgency.[66] For the four procedures, suppliers who satisfy the qualification criteria are invited to compete. But for the open procedure, all the suppliers who tender will be evaluated at both award and qualification phases.[67]

Award procedures also require separate treatment. Once qualified bidders are identified, authorities make award on the basis of the 'most economically advantageous tender' (MEAT),[68] which is defined either in terms of price or the best price-quality ratio based on qualities

[56] Steinicke (2014) at 110; Arrowsmith (2006) at 353.
[57] *Fabricom*, ¶¶ 28-36; *Michaniki v Ethnico Simvoulio Raidotileorasis*, Joined Cases C-213/07 (2008), ¶¶ 41–44. See also SIGMA at 23; Arrowsmith (2014) at 1184–85; Steinicke (2014) at 110–11.
[58] Directive 2014/24/EU, Article 58(1).
[59] *Domenico Politano*, C-324/14 (2014), ¶¶ 36–40.
[60] Directive 2014/24/EU, Subsection 2.
[61] Ibid, Article 28(2).
[62] Ibid, Article 29(2).
[63] Ibid, Article 30(1).
[64] Ibid, Article 31(1).
[65] Ibid, Article 65(1).
[66] Ibid, Article 32(2)(a)–(c).
[67] Trepte (2006) at 376.
[68] Directive 2014/24/EU, Article 67(1).

connected to the contract's subject-matter.[69] Permissible criteria include quality, such as technical merit, aesthetic characteristics, and social or environmental aspects; organisation, qualification, and experience of the assigned staff; and after-sales services and technical support.[70] The nexus with the subject-matter need not pertain to the physical composition of the contract's subject-matter, but can have a more abstract relationship.[71] For example, such an abstract relationship may involve the process of production, provision, or trading of the work, supplies, or services in question, or even a process at another stage in the life cycle.[72]

The previous paragraph lists the award criteria, but it does not define them. These were undefined in the 2004 Directive[73] and remained undefined in the 2014 Directive, even though the recitals claim '[t]he notion of award criteria is central to this Directive.'[74] Yet apart from flagging the centrality of award criteria, the recitals also provide some clues. First, awards are to be conducted on the basis of *objective* criteria.[75] When the criteria are properly employed, this process is technical, formulaic, and even dry.[76] Second, award procedures ensure compliance with transparency, non-discrimination, and equal treatment 'with a view to ensuring objective comparison of the relative value of the tenders.'[77] To ensure equal treatment, authorities must indicate in the contract notice the criteria used and weight given to each one.[78] Third, the new directive was amended 'to encourage a greater quality orientation'.[79]

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[69] Ibid, Article 67(2).
[70] Ibid, Ibid, Article 67(2)(a)–(c)
[71] Ibid, Article 67(3).
[72] Ibid, Article 67(3)(a) and (b)
[73] Lichère at 237 (2013).
[74] Directive 2014/24/EU, Recital 89.
[75] Ibid, Recital 90.
[76] Lichère at 237 (2013). See also below Section III.B.2.
[77] Directive 2014/24/EU, Recital 90. See also Lichère (2013) at 238–41.
[78] Directive 2014/24/EU, Recital 90. Cf ibid, Article 67(5). See also below Sections III.A.1 and II.A.2.
[79] Directive 2014/24/EU, Recital 90.

For the American supplier, what will be conspicuous is the single market imperative, which may suggest the exclusion of third parties. To what extent protections intended for Member States would extend to cosignatories of the GPA is unclear, but under the national treatment principle the EU must provide remedies that are at least as favourable as those afforded to domestic firms.[80] Regardless, this work supposes that with TTIP in effect, such de jure barriers are removed. US firms would be treated as if they came from the 'twenty-eighth' Member State.

B. Exclusion Grounds

1. US

A well-documented difference between the US and the EU is that in America the emphasis is on discretionary, not mandatory, grounds for exclusion.[81] In US federal procurement, whether a debarment official is considering an exclusion or a contracting officer is making a responsibility determination, the decision is often discretionary.[82] Although there are some mandatory *statutory* causes for debarment,[83] the *administrative* debarment the grounds for are 'always discretionary'.[84] Perhaps because the latter debarments are more common, they are emphasized in the literature – especially when making comparisons with the EU debarment system, which is often mandatory.[85]

For the European supplier considering whether to compete in America, the emphasis on discretionary debarment in the U.S. system could both encourage and discourage participation. For one who is excluded from EU procurements, the possibility of greater leniency would of

[80] Arrowsmith (2018) at 855–56, 859; Davies (1997) at 124.
[81] Youngman at 415–17; Harutyunyan at 472–73.
[82] FAR 9.103(b); FAR 9.406-1 (a).
[83] Manuel (2010) at 11, explaining that statutory grounds are 'often mandatory, and occasionally discretionary'. Manual's Congressional Research Service report provides a useful summary distinguishing statutes that do not provide for a waiver (e.g., Buy American Act, Davis-Bacon Act) and those that can be waived by the President (Clean Air Act and Clean Water Acts) or the Secretary of Labor (Service Contract Acts and Walsh Healey Acts). Ibid at 3–4.
[84] Ibid at 11. Under the FAR's suspension and debarment regime, causes for debarment are determined based on whether debarment would be in the government best interest. FAR 9.406-1.
[85] See Youngman at 415–17; Harutyunyan at 472–73.

course be welcome. Yet such enthusiasm should be tempered because US exclusion grounds overlap considerably with EU exclusion grounds.[86] In addition, EU suppliers with clean hands may be discouraged from participating in America, knowing that rivals who would be excluded in the EU would not necessarily be excluded in the US. Such uncertainties and misgivings could overly *discourage* European participation in the US.

2. EU

Mandatory exclusions afford more certainty. However, the picture is more complicated than it may seem. First, not all exclusions are mandatory.[87] Contracting authorities are to exclude suppliers for certain offenses: organized crime, corruption, fraud, terrorism, money laundering, child labour or other human trafficking, and tax evasion.[88] For these, mere evidence of misconduct is insufficient; the supplier must be convicted by final judgement.[89] Authorities must also exclude suppliers when a judicial decision has found that they are in breach of obligations to pay taxes or social security contributions. Other grounds are discretionary: violations of environmental, social, or labour law; bankruptcy; professional misconduct; collusion; conflicts of interest; subpar past performance; serious misrepresentations; efforts to influence authorities or to obtain confidential information that could confer advantage; and providing misleading information affecting exclusion, selection, or award.[90] Arguably, this list is not exhaustive.[91] Local legislation may supplement these exclusions, and the *Michaniki* decision also implied that Member States can add exclusions unrelated to professional qualities.[92] But such discretionary

[86] Compare FAR 9.406 with Directive 2014/24/EU, Article 57.
[87] Directive 2014/24/EU, Article 57(4). See also de Mars at 253; Priess at 113; Trepte (2006) at 342–51.
[88] Directive 2014/24/EU, Article 57(1) and (2). See also Graells, 'Exclusion' (2014) at 105.
[89] Directive 2014/24/EU, Article 57(1).
[90] Ibid, Article 57(2)–(4).
[91] *Fabricom v Belgium*, C-21/03 and C-34/03 [2005]; *Michaniki AE v Ethniko Simvoulio Raidotileorasis and Ypougos Epikrateias*, C-213/07 [2010].
[92] Arrowsmith (2014) at 1297–98.

exclusions must be stated in the contract notice.[93] Depending on whether it is Article 57(1), (2), or (4), some exclusions are obligatory and others discretionary.[94]

Another feature that complicates the picture is that, even for mandatory exclusions, Member States specify implementation procedures. For example, they can choose the maximum period of exclusion, although this is capped at the greater of five years or the period set in the judgement.[95] Because imposing a short duration would render compulsory exclusions impotent, Member States still wield substantial discretion.[96]

Complications also ensue from derogations. Even if mandatory exclusions under Article 57(1) or (2) apply, on an 'exceptional basis, for overriding reasons relating to the public interest,' Member States can grant exemptions.[97] The 2014 Directive confirmed that derogations apply only in truly exceptional cases, about which the 2004 Directive was unclear.[98] Further complicating their use is the application of the principle of proportionality, discussed below.[99]

Last, suppliers that are subject to exclusions under Article 57(1) or (2) can be exempted and allowed to participate if they show sufficient 'self-cleaning' efforts.[100] Although this exception is unavailable for defaulted tax payments,[101] it is another significant departure from a seemingly unforgiving regime. Authorities are to exercise discretion in their evaluation of the corrective measures and the 'gravity and particular circumstances'. If suppliers show sufficient

[93] *Pizzo*, C-27/15 [2016], ¶50. See also Sanchez-Graells and De Koninck at 13–14.
[94] de Mars at 268, 272.
[95] Directive 2014/24/EU, Article 57(7). See also Arrowsmith (2014) at 1283.
[96] Arrowsmith (2014) at 1276.
[97] Directive 2014/24/EU, Article 57(3).
[98] Arrowsmith (2014) at 1281–82.
[99] See below Section III.A.1.
[100] Directive 2014/24/EU, Article 57(6).
[101] Ibid. See also Arrowsmith (2014) at 1389.

evidence of reliability, authorities can include them a nominally 'mandatory' exclusion notwithstanding.[102]

Some US scholarship says EU exclusions are mandatory and unforgiving in contrast with the US's discretionary procedures.[103] This is misleading. Exclusions are few, narrowly tailored, and uncertain in their application.[104] Further, the terms of their implementation are discretionary, Member States can grant derogations, and authorities can make exemptions for self-cleaning.[105] These features suggest the distance between the two systems is not as wide as some have thought.

To the extent that US suppliers are under the misapprehension that the EU's exclusions are inflexible, firms with even a minor history of misconduct would, perhaps, be dissuaded from competing. If so, they would err. Contracting authorities have significant discretion – depending on the national legislation, perhaps even discretion that is on par with that which is afforded to US contracting officers – in terms of implementation, derogations, and self-cleaning exemptions. 'Mandatory' exclusions are indeed an ominous threat, but considerable flexibility is available.[106]

C. Selection Criteria

I. US

Under the FAR's taxonomy, responsibility may be assessed based on two standards: general or special.[107] The former is the closest analogue to the directive's selection criteria and is reviewed here. The latter is considered in the next section, II.D. These two standards overlap, and their underlying criteria generally fall into two categories: capacity and integrity.[108]

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[102] Directive 2014/24/EU, Article 57(6).
[103] Youngman at 415–17; Harutyunyan at 472–73.
[104] Arrowsmith (2014) at 1276.
[105] Contrary to some American commentary on mandatory exclusions, above note 103, from an EU perspective, *too much* discretion is left with authorities. de Mars at 269, 272, holding this discretion 'is in direct opposition to the fundamental principles underpinning all EU law, such as equal treatment, transparency, and proportionality.'
[106] Priess at 112.
[107] FAR 9.104-1; FAR 9.104-2.
[108] Cibinic, Nash, and Yukins at 412. Cf Nash, O'Brien-Debakey, Schooner, and Edwards at 415.

General standards form the basis of most responsibility determinations.[109] These are 'general' in the sense that they apply to all procurements and thus need not be specified separately in the solicitation to be considered. Such criteria are adequate financial resources, the capacity to perform on schedule, satisfactory past performance, a satisfactory record of integrity or business ethics, appropriate accounting and other operational controls, necessary equipment, and a seemingly innocuous stipulation that suppliers must be 'otherwise qualified'.[110]

For the EU supplier bidding for US contracts, the latter may be the most daunting. 'Otherwise qualified' introduces a host of collateral requirements, which are not performance standards but strictures that further socioeconomic goals.[111] In other words, FAR 9.104-1(g) makes all such collateral requirements matters of responsibility.[112] These include the following:

- Equal Opportunity Employment.[113] Contractors are ineligible unless, among other things, they 'take affirmative action to ensure applicants are employed, and that employees are treated during their employment, without regard to their race, color, religion, sex, or national origin.' They cannot receive an award above $10 million without a letter from the Department of Labor stating they are in compliance.[114]
- Small Business Subcontracting Plans. For contracts exceeding $650,000, firms must have plans to incorporate to maximum extent practicable various classes of small businesses, including veteran-owned, historically underutilised business zones, businesses at least 51% owned by historically disadvantaged groups, and women-owned small businesses.[115]
- Government Employees. Agencies cannot award contracts to government employees or to business entities owned or substantially controlled by government employees.[116]
- Quasi-military Armed Forces. Agencies cannot contract with the Pinkerton Detective agency or with similar organisations that provide armed forces for hire.[117]

[109] *Vador Ventures, Inc*, Comp Gen Dec B-296394 (2005).
[110] FAR 9.104-1 (a)–(g).
[111] Manuel (2013) at 5.
[112] Cibinic, Nash, and Yukins at 434.
[113] 48 CFR § 22.802(b)
[114] Exec Order 11246, 30 Fed Reg 12319 (Sept 24, 1965).
[115] 15 USC 637(d)(4)(C); 15 USC 637(d)(5)(B).
[116] 48 CFR §§ 3.601–602.
[117] 5 USC 3108; 48 CFR § 37.109.

Under the guise of proving themselves otherwise qualified, firms must prove an encyclopaedic knowledge of a system that is 'extraordinarily spacious' to satisfy all its myriad requirements.[118]

Another challenge will be that the agencies publish supplements to the FAR, each with its idiosyncrasies. For example, the DFARS quadruples the column space devoted to the general standards in the FAR.[119] Additional criteria include requirements as to accounting systems for cost-reimbursement and incentive contracts,[120] limitations on purchases from 'terrorist' countries,[121] and limits on firms owned by foreign governments.[122] The DFARS is further supplemented by each military service.[123]

For the European suppliers, what may be most difficult is to figure out what 'otherwise qualified' means. It is not enough to adhere to FAR 9.104-1. Instead, 'otherwise qualified' requires familiarity with *all* applicable statutes and regulations, no mean feat given this 'constantly changing patchwork'.[124] This uncertainty may discourage participation in the first place or it may lead European suppliers to compete ineffectively, wasting their precious time and resources.

2. EU

The directives distinguish exclusions (or 'eligibility criteria') from selection criteria, and here lies the difference: exclusions do not depend on a supplier's capacity to perform, whereas selection criteria are 'to identify the capable suppliers and weed out those who are incompetent.' Further, whereas exclusions apply across the board, contracting authorities may choose different selection criteria depending on the nature of the contract. To be effective, these criteria should

[118] Whelan (1993) at 16.
[119] Compare DFARS 209.104-1 with FAR 9.104-1.
[120] DFARS 209.104-1(e).
[121] DFARS 209.104-1(g)(i).
[122] DFARS 209.104-1(g)(ii).
[123] For example, AFFARS Subpart 5309.1, which provides the Air Force's supplemental guidance on responsibility.
[124] Schooner (2001) at 675. See also Forman, Cliffe, Choi, and Curran at 189.

be tailored appropriately.[125] There are no mandatory selection criteria for rejecting suppliers,[126] but minimum requirements must be included in the contract notice.[127]

In the past, authorities could choose selection criteria depending on the subject-matter.[128] Yet the 2014 Directive suggests the listed criteria are exhaustive.[129] Despite the inartful drafting, case law indicates that authorities do retain some discretion to supplement the criteria so long as these fit into one of three categories:[130] professional suitability, financial standing, or technical ability.[131] Before each is considered, Article 58(1) merits attention: requirements must be 'related and proportionate' to the subject-matter in question. This language was added to curtail the abuse of suitability requirements that may favour local suppliers and thus impair competition.[132]

Professional suitability is the most straightforward criterion, only requiring proof that the supplier is appropriately registered with professional or trade organisations. This ensures that the supplier has the legal capacity to carry out the work in question.[133] Purchasers may not require that such registration be acquired in the host's Member State; home-state registration suffices.[134]

Financial standing is undefined, but Article 58(3) provides an illustrative list: minimum annual turnover, minimum turnover in the contract's subject-matter, liability and asset ratios, and indemnity insurance. These ensure that suppliers have adequate resources. The 2014 Directive designates turnover as a key indicator but caps the required minimum at two times the contract's estimated value in order to ensure greater SME participation.[135]

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[125] Trepte (2007) at 320–21, 352–53.
[126] Arrowsmith (2014) at 1189, 1206, 1235.
[127] Directive 2014/24/EU, Article 58(5).
[128] Trepte (2004) at 99.
[129] Directive 2014/24/EU, Article 58(1). See also Sanchez-Graells (2014) at 115.
[130] Sanchez-Graells (2014) at 115; Franchi, Turco, and Bosio at 28, citing *Swm Costruzioni 2 SpA v Provincia Luigino* (C-94/12) [2013] ECR I-7849. cf Arrowsmith (2014) at 1191, 1210–11.
[131] Directive 2014/24/EU, Article 58(1).
[132] Graells, 'Exclusion' (2014) at 117. See also Sanchez-Graells and De Koninck at 28.
[133] Directive 2014/24/EU, Article 58(1) and (2). See also Graells, 'Exclusion' (2014) at 116.
[134] Directive 2014/24/EU, Article 58(2). See also Trepte (2007) at 350–51.
[135] Directive 2014/24/EU, Article 58(3). See also Graells, 'Exclusion' (2014) at 117.

Like financial standing, technical and professional ability remains undefined. Yet the gist is clear from the criteria that may be imposed: 'human and technical resources and experience' sufficient for performance 'to an appropriate quality standard.' In evaluating professional ability, authorities evaluate suppliers' 'skills, efficiency, experience and reliability.'[136] Such qualities may be considered only insofar as they are 'appropriate' to effectuating performance and 'related and proportionate to the subject-matter of the contract'.[137]

What 'sufficient' resources entails is a thorny question. First, this includes not only capacity to satisfy the solicitation's minimum requirements but also sufficient capacity to deliver on what the tenderer promises. Second, this may include not only the intrinsic qualities of what is being delivered but the manner in which the work is carried out, such as conformity with social or environmental requirements. *Beentjes* first addressed the latter issue, finding that requiring tenders to address unemployment was improperly characterized as a 'technical ability' but that such a requirements are permissible if they are otherwise compatible with the Treaties.[138]

For the American supplier competing for European procurements, the parallels between the US's general standards and the EU's selection criteria will be striking:

- 'suitability to pursue the professional activity'[139] seems to correspond with 'otherwise qualified and eligible';[140]
- 'economic and financial standing'[141] with 'adequate financial resources';[142] and
- 'technical and professional ability'[143] with a 'satisfactory performance record', 'necessary organization, experience, accounting and operational controls, and technical skills', and 'necessary production, construction, and technical equipment'[144]

[136] Directive 2014/24/EU, Article 58(4).
[137] Directive 2014/24/EU, Article 58(1). See also Arrowsmith (2014) at 1206.
[138] Arrowsmith (2014) at 1208–10, citing *Beentjes* (C-31/87) at ¶30.
[139] Directive 2014/24/EU, Article 58(1)(a).
[140] FAR 9.104-1(g).
[141] Directive 2014/24/EU, Article 58(1)(b).
[142] FAR 9.104-1(a)
[143] Directive 2014/24/EU, Article 58(1)(c).
[144] FAR 9.104-1(c), (e), and (f).

Yet these parallels are superficial. Beneath the surface lie differences that may baffle the novice foreign supplier. For one thing, much of the jurisprudence turns on the principle of equality.[145] For another, the EU fears discretion during the qualification phase to a greater degree than in the US.[146] To understand selection criteria, the US supplier must be familiar with not only the directives and implementing legislation but also with the treaties and the CJEU's jurisprudence. Unless the firm hires local counsel, it may take the superficial similarities between the systems' selection criteria at face value. This could encourage them to participate, when they would not have done so if they had been better informed; it may also cause them to participate ineffectively.

D. Special Standards

1. US

As mentioned, the FAR distinguishes between general and special standards.[147] The latter are sometimes called definitive responsibility criteria.[148] Depending on the nature of the acquisition, general standards may need to be supplemented with special standards, which are necessary if suitable performance requires 'unusual expertise or specialized facilities'.[149] They cannot unduly restrict competition,[150] and they must be applied equally to all suppliers.[151] Such standards cannot be waived.[152] Yet contracting officers have wide discretion in determining whether the standards are met,[153] and contractors may rely on affiliates, subcontractors, or joint

[145] Verdeaux at 730. See below Section III.A.2.
[146] de Mars at 269. See below Section III.B.1.
[147] FAR 9.104-1; FAR 9.104-2.
[148] Nash and Cibinic, 'Definitive' (1992) at ¶66, writing that the GAO invented this term and that 'definitive standards' refers to the 'special standards' in FAR 9.104-2.
[149] FAR 9.104-2.
[150] *Keeson, Inc; Ingram Demolition, Inc*, Comp Gen Dec B-245625 (1992).
[151] FAR 9.104-2(a).
[152] *Mary Kathleen Collins Trust*, Comp Gen Dec B-261019.2 (1996).
[153] *Reliance Elec Co*, Comp Gen Dec B-184865 (1976).

ventures to satisfy their terms.[154] Notably, although special standards must be stated in the solicitation, officials often fail to do so.[155] This frequently gives occasion to successful protests.[156]

Defining a special standard is challenging. Being objective does not make it special; it must also be specific and mandatory.[157] Requiring proof of comparable work experience was found to be neither.[158] In another case, the GAO held that a provision that the facilities must generally conform with all applicable Federal Communication Commission's regulation was not specific.[159] Special standards are also confused with specification requirements.[160] The former is a condition precedent that must be satisfied pre-award;[161] the latter establishes how the work in question is to be performed post-award.[162] Such difficulties make use of special standards perilous, and two prominent commentators have thus discouraged their use.[163]

Well-informed suppliers will be inclined to protest when special standards are used because officials are given less deference when using such standards.[164] This would make such protests more enticing to EU suppliers, at least for those clever enough to figure out that theirs odds are better. Others may forgo viable protests based on a partial knowledge of American protests: they may know that successful protests of affirmative responsibility determinations are rare and yet not appreciate the significance of this exception, at least not without the help of local counsel.[165]

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[154] *Tutor Saliba Corp*, Comp Gen Dec B-255756 (1994).
[155] FAR 9.104-2(a).
[156] Nash and Cibinic, 'Definitive' (1992) at ¶66.
[157] *John C Grimberg Co v US*, 185 F3d 1297, 1302 (Fed Cir 1999).
[158] *Weldtest, Inc*, Comp Gen Dec B-216747.2 (1984).
[159] *AT&T Corp*, Comp Gen Dec B-260447.4 (1996).
[160] Cibinic, Nash, and Yukins at 431–32.
[161] *General Sales Agency*, Comp Gen Dec B-247529.2 (1980).
[162] *Thames Towboat Co*, Comp Gen Dec B-282982 (1999).
[163] Nash and Cibinic, 'Definitive' (1992) at ¶66.
[164] *United Materials, Inc*, Comp Gen Dec B-243669 (1991).
[165] 4 CFR § 21.5(c), making an exception for protests that allege the use of definitive responsibility criteria.

2. EU

There is no separate category of selection criteria akin to US special standards, but if certain expertise or specialised resources is needed, authorities may use criteria that ensure contractors have the resources or experience to perform to an appropriate level.[166] This seems to be a subset of the 'technical and professional ability' criterion rather than a distinct criterion.[167] Any such conditions must be advertised in the notice.[168] Contractors prove their qualifications using the single procurement document[169] and other specified evidence.[170] This performs much the same function as special standards in the US, but there seem to be fewer intricacies than in America.

There is no separate list of special selection criteria, but authorities do have another mechanism for reducing the field of candidates.[171] This is the procedure described in Article 65, which is unchanged from that first set forth in the 2004 Directive.[172] Some debate exists as to the purpose of this procedure.[173] It can be used to winnow the field and to choose those firms whose expertise, experience, and resources are superior.[174] Yet, unlike the US's special standards, that is not its express purpose. Rather, it exists mainly to reduce the transaction costs associated with too many offers.[175] This can be done using methods unrelated to qualifications or expected quality of a supplier's bid. Some commentators even maintain that drawing lots and rotations would be acceptable methods,[176] though not all would agree on that point.[177]

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[166] Directive 2014/24/EU, Article 58(4).
[167] Compare ibid Article (1)(c) with ibid Article 58(4).
[168] Ibid, Article 58(5). See also Steinicke (2013) at 281,
[169] Directive 2014/24/EU, Article 59.
[170] Ibid, Article 58(4); ibid, Article 60(4), referencing Annex XII, Part II. See also Arrowsmith (2014) at 1217.
[171] Directive 2014/24/EU, Article 65(1). See also Franchi, Turco, and Bosio at 26.
[172] Compare Directive 2004/18/EC Article 44 (3) and Directive 2014/24/EU, Article 65. See also Steinicke and Vesterdorf at 697; Arrowsmith (2014) at 697.
[173] Compare Steinicke and Vesterdorf at 699–09 with Arrowsmith (2014) at 686–90; Trepte (2006) at 382–84.
[174] Steinicke and Vesterdorf at 701–02.
[175] Ibid at 698. Cf Telles at 7, n 25; Graells, 'Exclusion' (2014) at 99; Fjeldet Lunde and Nybø-Sørensen at 137.
[176] Steinicke and Vesterdorf at 699–01, 708.
[177] Arrowsmith (2014) at 689–91, arguing that, although it is likely that rotations or drawing lots would be prohibited, the question turns one's reading of *Commission v Italy*, C-360/89 (1992).

US suppliers may find reductions under Article 65 disconcerting. No such mechanism exists in the US, at least not before offers are made. Contractors are accustomed to candidates being restricted to those within the 'competitive range' when submitting proposals under FAR part 15.[178] But the fact that otherwise qualified candidates can be summarily eliminated merely to reduce the administrative burden may discourage US participation for European contracts.[179] Why make the effort if one can be stricken from list on a whim?

E. Award Criteria

1. US

Guidance on evaluating proposals is sparse. Agencies may choose any procedure that ensures a fair evaluation.[180] Officials may review the proposal as a whole, but it is more common to assess price, technique, and capacity separately.[181] Award decisions are not overturned unless they are arbitrary, capricious, or in violation of law.[182] Even if an award was improperly evaluated, protests will be denied unless a 'reasonable possibility' exists that the error affected the result.[183]

Guidance on permissible award criteria is likewise sparse.[184] Such criteria must encompass key areas of importance and support the differentiation between proposals.[185] Consistent with the distinction between sealed bidding and other methods that are sometimes grouped under the heading of 'negotiated procedures', the discussion of award criteria is also divided in this way.[186]

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[178] FAR 15.306(c).
[179] Cf Cibinic, Nash, and O'Brien-Debakey at 221–36.
[180] FAR.102-2(c)(3)
[181] Cibinic, Nash, and O'Brien-Debakey at 541, citing FAR 15.204-5(b).
[182] *Pacific Consultants*, Comp Gen Dec B-198706 (1980).
[183] *CDA Investment Techs, Inc*, Comp Gen Dec B-272093.3 (1997).
[184] Doke (2007) at 145. Cf Nash and Cibinic, 'Selecting' (1996) at ¶32, saying the FAR's treatment is incoherent.
[185] FAR 15.304(b). See also Cibinic, Nash, and Yukins at 687.
[186] FAR 15.000. See also Cibinic, Nash, and Yukins at 673.

a. Sealed Bidding

For sealed bidding, CICA amended the two basic procurement statutes, the Armed Services Procurement Act and the Federal Property and Administration Services Act[187] so that contracts would be awarded to the firm whose bid is 'most advantageous'.[188] This is decided 'considering only price and other price-related factors included in the solicitation.'[189] Previously, the statutes had said the government was to consider not 'other *price-related* factors' but 'other factors'. CICA made the procurement statutes conform with the case law so that sealed-bid contracts are awarded on the basis of the aggregate cost.[190] Such 'price-related' factors thus may also include transportation,[191] life-cycle,[192] and other miscellaneous costs.[193]

Chapter 4 will suggest that sealed bidding and open procedure are quite similar. For the EU supplier contemplating whether to compete for a sealed-bid procurement, this similarity could be misleading. As noted, price and price-related factors are the only permissible criteria.[194] The criteria under Article 67 are much broader.[195] Also, case law suggests Member States cannot mandate price as the sole criterion.[196] This could be a stumbling block. The EU supplier may assume that the US would consider a wider range of factors – as it does for negotiated procedures

[187] Pub L 98-369 (Jul 18, 1984), 98 Stat 1180, §§ 303B, 2723. CICA amended the two basic procurement statutes, the Armed Forces Procurement Act of 1947 and Federal Property and Administration Services Act of 1949. Nash, O'Brien-Debakey, Schooner, and Edwards at 91. See also Forman, Cliffe, Choi, and Curran at 189.
[188] 10 USC 3303(c); 41 USC 3702(b).
[189] FAR 14.408-1(a).
[190] 45 Comp Gen 59, B-155725 (1958), at 68; *To Allis-Chalmers Mfg Co*, 47 Comp Gen 658, B-163890 (1968).
[191] FAR 14.201-8(a).
[192] FAR 7-105(a)(3)(i).
[193] Other costs include storage costs, *Borg Warner Corp*, Comp Gen Dec B-189275 (1977); the cost of potential delays and changes in the course of contract performance, *ACS Constr Co*, Comp Gen Dec B-250372.2 (1993); and the costs that result from variable performance locations, *Cascade Gen, Inc*, Comp Gen Dec B-272271 (1996).
[194] FAR 14.408-1(a).
[195] Such diverse criteria include social criteria, Directive 2014/24/EU, Recital 97; workforce criteria, ibid, Recital 99; production criteria, ibid, Article 67(3); and various externalities, ibid, Recital 96. See also Arrowsmith 2014 at 246–48; Faustino at 127–28.
[196] *Sintesi Spa v Autorità per la Vigilanza sui Lavori Pubblici*, C-247/02 (2002), ¶¶39–42. See also Arrowsmith (2014) at 764; Faustino at 126.

– and so fail to grasp is how important price is and thus fail to concentrate single-mindedly on offering a lower price.[197] This is another example of how differences between the two systems may lead firms to participate in a manner that is misaligned with rules governing the local system.

b. Negotiated Procedures

Award procedures are more complicated for negotiated procedures. The purpose is to select the proposal that constitutes 'best value',[198] which is defined in a somewhat circular fashion as the outcome that 'provides the greatest overall benefit in response to the requirement'.[199] The first step is to decide what 'decisional rule' to use.[200] That is, the solicitation must state whether, compared to price, other criteria are more important, equal in importance, or less important. Where the requirement falls on this 'best value continuum' determines the better approach,[201] the most common of these being lowest price technically acceptable (LPTA) and trade-offs.[202] LPTA is almost self-explanatory,[203] but trade-offs require further description. In short, trade-offs require subjective judgements about the assessment of non-price, qualitative factors and how

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[197] Arrowsmith (2014) at 780–81, 788–89, explaining that awareness of the relative importance of award criteria is essential so that contractors can tailor their bids to contracting authority's priorities.
[198] FAR 15.302.
[199] FAR 2.101. 'Best value' is a term of art, whose meaning is inconsistent with what plain language would suggest:

> In the peculiar world of federal procurement . . . 'best value' all too often has come to mean something quite different from the government getting a bargain. Typically, it means a procurement in which price is a negligible or even zero-weight source selection factor and the evaluation criteria are so flexible that award is left up to the total discretion of the agency.

House Committee on Government Operations, Federal Property Administrative Services Authorization Act of 1991, HR Rep No 102-364, 102d Cong, 1st Sess 20 (1991).
[200] Cibinic, Nash, and Yukins at 676.
[201] FAR 15.101.
[202] FAR 15.101-1, trade-off process; FAR 15.101-2, LPTA process. Only these two are enumerated in the FAR, but others are authorised if they conform with the statutes. FAR 15.100; FAR 15.101. Three have been approved. First, FAR 15.101 references a 'combination' of listed approaches and, since there are only two, this would have to combine trade-off and LPTA approaches, which the GAO has approved. *Integrated Concepts & Research Co*, Comp Gen Dec B-309803 (2008). Second, although the FAR no longer cites it, a procedure exists that allows for negotiation after source selection. *Veteran Tech, LLC*, Comp Gen Dec B-310303.2 (2008). Third, several agencies make the lowest priced proposal the presumptive winner but allow post-award discussions to ensure the specifications are understood. *JT Constr Co*, Comp Gen Dec B-244404.2 (1992).
[203] FAR 15.101-2. See also Nash, O'Brien-Debakey, Schooner, and Edwards at 298–99.

those non-price factors should be valued against price to determine the best overall value.[204] When deciding between LPTA and trade-offs, if non-price criteria are unimportant, then LPTA is favoured; if differences in non-cost criteria are in fact material, trade-off is the better choice.[205]

Whichever approach is chosen, common procedures apply. The solicitation must define the award criteria, and if the trade-off approach is used, their relative importance must be described.[206] While officials have broad discretion,[207] criteria must be reasonably related to the requirements.[208] Further, the award must be consistent with the solicitation criteria.[209] Unless they are unreasonable or inconsistent with the solicitation's terms or statutes or regulations, awards are generally upheld.[210]

Four criteria are prescribed, regardless of the approach. Price and quality are considered in all cases.[211] Past performance is also required, unless the official documents a reason for which this criterion would be unsuited.[212] If unbundling would create opportunities for small businesses, then subcontracting plans must be evaluated. Last, absent a written determination, discriminating on the basis of a firm's teleworking arrangements is forbidden.[213]

Two distinctions between LPTAs and trade-offs are especially important to this work: the timing and manner of evaluations. For LPTA, the solicitation states what constitutes 'best value'; this determination is made *ex ante*. For trade-offs, the best-value determination is made *ex post* – not until after the receipt and evaluation of proposals.[214] LPTA compels a pass-or-fail choice.[215]

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[204] FAR 15.101-1(a). Cf Nash, O'Brien-Debakey, Schooner, and Edwards at 489; Gordon and Racca 127–28.
[205] Compare FAR 15.101-2(a) with FAR 15.101-1(a).
[206] 10 USC 3206; 41 USC 3306(c)(1), implemented in FAR 15.101.1(b)(1) and (2).
[207] *Augmentation, Inc*, Comp Gen Dec B-186614 (1976).
[208] *Olympus Building Services, Inc.* Com Gen Dec B-282887 (1999).
[209] FAR 15.304(b).
[210] *Lakeside Escrow & Title Agency, Inc.* Com Gen Dec B-272388.2 (1997).
[211] 10 USC 3206; 41 USC 3306(c)(1). FAR 15.304(c) implements these statutes.
[212] FAR 15.304(c)(3).
[213] FAR 15.304(c)(4) and (5). See also Cibinic, Nash, and O'Brien-Debakey at 209.
[214] Cibinic, Nash, and O'Brien-Debakey at 206, 209.
[215] FAR 15.10102(b)(3).

Trade-offs allow officials to make judgements about whether the value-added with each criterion would justify a higher price. This flexibility makes it a more popular approach.[216]

As a general matter, evaluations should be based only on factors stated in the solicitation.[217] It is usually inappropriate to add criteria after the submission of proposals.[218] Case law, however, has created some exceptions. Agencies can evaluate matters 'logically encompassed by or related to the stated criteria',[219] and they have wide discretion to determine if unstated criteria fall within the scope of or are related to the listed criteria.[220] The same rule applies to subfactors and is applied liberally.[221] Despite this flexibility, in both cases there must be a 'clear nexus' between the stated and unstated criteria.'[222] If the agency determines that different criteria would be better, it must amend the solicitation, thus providing suppliers the opportunity to amend their offers.[223]

Not only must the solicitation state the evaluation factors and significant sub-factors,[224] it must also disclose their relative importance.[225] COFC has said that making the 'rules of the game' known is essential to fairness.[226] Disclosure of relative importance entails, at a minimum, stating whether the combination of non-price factors is more important than, equal to, or less important than price.[227] If the solicitation is silent on this point, a protest will often be sustained.[228]

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[216] Cibinic, Nash, and O'Brien-Debakey at v, 206–07.
[217] 10 USC 3301; 41 USC 3701(a). See also Nash (2012) at ¶53.
[218] *Grey Advertising, Inc*, Comp Gen Dec B-184825 (1976).
[219] *Bank Street College of Educ*, Comp Gen Dec B-213209 (1984).
[220] *Forestry Surveys and Data v US*, 44 Fed Cl 493, 499 (1999); Cibinic, Nash, and Yukins at 819–21; Cibinic, Nash, and O'Brien-Debakey at 561–63. See also Peckinpaugh and Goldstein at 336.
[221] *Bendix Field Eng'g Corp*, Com Gen Dec 5-241156 (1991). But if a sub-factor has an inordinate impact, it is considered a 'significant' sub-factor and hence must be identified. *Devres, Inc*, Comp Gen Dec, B-224017 (1986).
[222] *Global Analytic Info Tech Servs, Inc*, Comp Gen Dec B-298840.2 (2007).
[223] FAR 15.206.
[224] 10 USC 3206(b)(1)(A) 2305; 41 USC 253a(b)(1)(A). FAR 15.304(d) implements these statutes.
[225] 10 USC 3206(b)(1)(B); 41 USC 253a(c)(1)(A).
[226] *Dubinsky v US*, 43 Fed Cl 243, 259 (1999).
[227] 10 USC 3206(c)(1)(C); 41 USC 3306(c)(1)(C). These statutes are implemented in FAR 15.304(e).
[228] *Bio-Rad Laboratories, Inc*, Com Gen Dec B-297553 (2007).

Significantly, although relative importance must be disclosed, the exact rating method need not be.[229] 'Rating method' refers to the elaborate standards that agencies create in order to ensure consistent evaluations.[230] Any method or combination thereof can be used, including 'colour' or adjectival ratings, numerical weights, and ordinal rankings.[231] Such scores alone will not support a source selection.[232] No law mandates disclosure,[233] but the GAO has criticised failure to do so when the method has a substantial influence on the award.[234] Further, disclosure is a best practice because it enables understanding of the acquisition strategy and stimulates competition.[235]

In striking contrast with the EU, the US does not require that the evaluation be objective.[236] This subjectivity is evident in two respects. First, permissible criteria include factors that are inherently subjective,[237] sometimes to a fault.[238] Past performance is perhaps the best example: despite having become the most salient criterion, it is often hard to define in a way that does not devolve to a subjective preferences that favour incumbents.[239] Second, trade-offs also involve subjective judgements about the relative value of criteria.[240] This has been a general practice since at least 1976[241] and was formalised in 1984.[242] Although binding scores are used,[243] authorities

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[229] FAR 15.304(d).
[230] Cibinic, Nash, and O'Brien-Debakey at 353.
[231] FAR 15.305(a).
[232] *JW Assocs, Inc*, Comp Gen Dec B-275209 (1997). See also Cibinic, Nash, and Yukins at 835.
[233] WILLCOR, Inc, Comp Gen Dec B-413390.4 (2016).
[234] *Post Procurement: Eagle Air Hub Selection Not in Accordance with Solicitation*, Comp Gen Rep GCD-92-127 (1992). See also Cibinic, Nash, and O'Brien-Debakey at 353.
[235] *Computervision Corp*, GSBCA No 8601-P, 86-3 BCA ¶19,266; Cibinic, Nash, and O'Brien-Debakey at 346.
[236] FAR 15.304(b)(2).
[237] Gordon (2014) at 42–43; Gordon and Racca (2014) at 127–28.
[238] Doke (2007) at 136, criticising use of subjective factors such as user friendliness, aesthetics, planning, employee appearance, innovation, intrinsic value, level of confidence, reputation, and vision.
[239] FAR 15.304(c)(3). Cf Feldman at 203; Guerrero and Kirkpatrick at 243.
[240] FAR 15.101-1(c).
[241] *Grey Advertising, Inc*, 55 Comp Gen 1111 (1976). The Army Air Corps Act of 1926, Pub L No 69-446, 44 Stat 780, Section 10, was perhaps the first authorization for trade-off type evaluations. This enabled officials to consider non-price, qualitative factors. See also Gordon and Racca (2014) at 127–28; Wittie at 12–13.
[242] PL 98-369, 98 Stat 1187, §§ 2721, 2723. See also Wittie at 20, 28.
[243] FAR 15.305(a).

still exercise *subjective* judgement.[244] This entails deciding the premium to be paid for non-price factors.[245] Two officials making trade-offs in the same case could reach opposite conclusions, yet both could be permissible judgements.[246] Even so, this discretion is not unlimited.[247]

That US procurement allows the use of unstated sub-criteria may confuse EU suppliers. In Europe, suppliers must be made aware of all sub-criteria. The fact that US statutes establish a similar rule but the case law creates an exception for 'logically encompassed' sub-criteria may further the potential for confusion. As a result, European suppliers may compete and lose based on unstated sub-criteria. Worse, because such unstated criteria are clearly forbidden in Europe, these firms may protest and then also lose the protest because the unstated sub-criteria are 'logically encompassed' in the stated criteria. In this manner, reasonable misunderstandings about the US system based on expectations imported from the EU system could lead European firms to first compete poorly and then to protest poorly, exacerbating the waste of time and resources. A third possibility, of course, is that better-informed firms will be aware that unstated sub-criteria may exist and thus may choose not to participate in the first place. This too would be suboptimal.

2. EU

Unlike US procurement, where award criteria depend on what contract method is used,[248] in the EU the criteria enumerated in Article 67 remain constant.[249] Under the 2004 Directive, there were two permissible criteria: most economically advantageous tender and lowest price.[250]

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[244] FAR 15.308. See also 1 Report of the Commission on Government Procurement at 19.
[245] FAR 15.101-1(c). See also Nash (2001) at ¶13.
[246] Gordon, 'Protecting' (2014) at 42–43.
[247] *DynCorp Int'l LLC*, Comp Gen Dec B-289863 (2002), holding that discretionary decisions must be 'reasonable, consistent with the evaluation scheme, and adequately documented.'
[248] Compare FAR 14.408-1(a) with FAR 15.302.
[249] Directive 2014/24/EU, Article 67.
[250] Directive 2004/18/EC, Article 53(1)(a) and (b). See also ibid, Recital 46, saying these criteria ensured objectivity, competition, and compliance with principles of transparency, non-discrimination, and equal treatment.

The 2014 Directive collapsed these two into one,[251] but it still preserved the previous directive's price-only and price-and-quality binary categories.[252] The remaining criterion is the MEAT.[253] This term was redefined and now means either (a) lowest price or cost or (b) best price-quality ratio.[254] Although the previous lowest price option has been removed, a binary choice remains because lowest price is one of the two forms of 'most advantageous' tender.[255]

The 2014 Directive introduced cost alongside price.[256] Economic advantage is therefore calculated using 'price or cost, using a cost-effectiveness approach, such as life-cycle costing.'[257] 'Price' entails only the initial purchase expense; 'cost' captures subsequent expenses for delivery, resource consumption, maintenance, and disposal.[258] For environmental factors, 'externalities' that are attenuated from the contract's subject-matter may also be considered.[259] The EU's introduction of 'cost' parallels the use of price-related factors in the US.[260]

Article 67 provides an illustrative list of the qualitative aspects of a tender which comprise the second half of the MEAT's price-quality assessment:[261]

> (a) quality, including technical merit, aesthetic, and functional characteristics, accessibility, design for all users, social, environmental, and innovative characteristics, and trading and its conditions;
> (b) organisation, qualification, and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

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[251] Directive 2014/24/EU, Recital 89, saying that 'most economically advantageous' is now the 'overriding concept'. Cf Steinicke and Vesterdorf at 716, calling this the greatest change to award criteria in the new directive.
[252] Directive 2014/24/EU, Article 67(2).
[253] Ibid, Recital 90, explaining that 'most economically advantageous tender' was made the default award criterion 'to encourage a greater quality orientation of public procurement'.
[254] Ibid. See ibid, Recital 89, stating that to avoid confusion it redefined 'most economically advantageous' from the 2004 Directive to mean instead 'best price-quality ratio'. See also Faustino at 128–29.
[255] Steinicke and Vesterdorf at 716–17; Faustino at 125; Arrowsmith (2014) at 737.
[256] Directive 2014/24/EU, Article 67(2).
[257] Ibid, citing ibid, Article 68.
[258] Ibid, Article 68(1)(a)(i), (ii), (iii), and (iv). See also Arrowsmith (2014) at 737.
[259] Ibid, Recital 96. See also Faustino at 127–28.
[260] Compare FAR 14.201-8. See also Cibinic, Nash, and Yukins at 591–97.
[261] Directive 2014/24/EU, Article 67(2). See also Steinicke and Vesterdorf at 718–19, observing that issuing a comprehensive list is impossible because legitimate criteria will depend on the subject-matter.

> (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.[262]

The 2014 Directive made three changes. First, social and innovative features were added.[263] Second, following *Commission v Netherlands*,[264] so was fair trade.[265] Third, qualifications and experience of the staff, which were thought impermissible under a strict reading of *Lianakis*, were also included, at least to the extent such factors would be relevant to the award determination.[266]

Like the 2004 Directive, the 2014 Directive requires a nexus between criteria and the subject-matter.[267] Before, even if a criterion was 'economic' in that it could be monetised or if it conferred a benefit, broadly construed, authorities still had to prove such a nexus existed.[268] *Commission v Netherlands* eased this requirement, holding that in cases where a criterion is related to the intrinsic nature of a product, a 'constructive' nexus may exist.[269] Yet the new directive creates the first legislative presumption of such a nexus. Under this standard, a more attenuated link suffices, such as a mere connection to the costs over a contract's entire life-cycle.[270]

In addition to having a clear connection to the contract's subject-matter, award criteria must also be objective or quantifiable.[271] 'Contracts should be awarded on the basis of objective criteria' because so doing ensures compliance with the treaty principles of transparency, non-discrimination, and equal treatment.[272] Not only are the criteria themselves to be objective, but

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[262] Directive 2014/24/EU, Article 67(2).
[263] Ibid, Article 67(2)(a); Recital 97; Recital 99. See also Arrowsmith (2014) at 746–48; Faustino at 130.
[264] C-368 [2012]. See also Faustino at 130.
[265] Directive 2014/24/EU, Article 67(2)(a).
[266] *Lianakis v Dimos Alaxandroupolis*, C-532/06 [2008]. See also Arrowsmith (2014) at 757.
[267] Directive 2014/24/EU, Article 67(2).
[268] *Concord Bus Finland*, C-513/99 [2002], ¶55; Steinicke and Vesterdorf at 719, 726.
[269] Op cit, ¶91. See also Faustino at 130–31.
[270] Directive 2014/24/EU, Article 67(3). This presumption extends to factors that involve production processes, resale of such products, and processing at later stages of the life cycle, even if these factors do not constitute part of the products' material substance. Cf Steinicke and Vesterdorf at 727; Arrowsmith (2014) at 745, 795–97.
[271] Directive 2014/24/EU, Article 67(4) and (5).
[272] Ibid, Recital 90. See also Steinicke and Vesterdorf at 718.

their comparison is also to be conducted objectively.[273] Where price is the sole criterion, this is straightforward; this exercise is harder for unquantifiable criteria,[274] such as technical, aesthetic, functional, social, or environmental features.[275] Some States have resorted to pseudo-scientific formulas[276] – creating a semblance of impartiality for what is an inherently subjective process.[277]

Contracting authorities must disclose the award criteria,[278] including any sub-criteria[279] and their relative weighting.[280] There is some confusion about the timing of these requirements, but doubtless firms must be provided this information soon enough so that they can tailor their proposals to the evaluation standards.[281] In addition to requiring disclosure of the weighting, the directive further restricts authorities' freedom of action.[282] To this end, the criteria must include specifications that are amenable to verification and weighting for each criterion.[283] If weightings are impossible,[284] the solicitation must at least list criteria in the order of importance.[285] So the 2014 Directive seems to require the disclosure both of the award criteria and also of what US procurement calls the 'rating method'. The significance of this distinction is explored below.

Several features of the EU's award criteria may discourage transatlantic participation. First, as has been mentioned, Chapter 4 will argue that US sealed bidding and EU open procedures are similar and may even be considered equivalents.[286] Yet as also discussed, for sealed bidding price controls: all evaluation factors must either directly involve price or at least be price related. Article

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[273] Directive 2014/24/EU, Recital 90.
[274] Gordon and Racca at 129.
[275] Directive 2014/24/EU, Article 67(2)(a).
[276] Stilger, Siderius, and Van Raaij at 114–17; Dini, Pacini, and Valletti at 309–10.
[277] Gordon and Racca at 129–30; Trepte (2004) at 326. See also below Section III.B.2.
[278] Directive 2014/24/EU, Article 67(5).
[279] *Lianakis*, op cit, ¶38, stating that authorities cannot apply sub-criteria that were not announced beforehand.
[280] Directive 2014/24/EU, Article 67(5). See also Steinicke and Vesterdorf at 730–35.
[281] Arrowsmith (2015) at 738, 780–81, 788–89.
[282] Directive 2014/24/EU, Article 67(4).
[283] Ibid, Article 67(4) and (5). See also Steinicke and Vesterdorf at 730–31.
[284] Arrowsmith (2014) at 769, 773; Trepte (2006) at 471–72.
[285] *Strabag Benelux NV v Council*, ECR II-00135 (2003), ¶61.
[286] See below Chapter 4, Section II.A.

67's remit is much wider. Thus, US firms may suffer under the misapprehension that for open procedures, like sealed bidding, price is the definitive criterion, and they should concentrate their efforts mainly on delivering the best price. This would worsen the quality of their participation.

A second feature of EU award criteria that may discourage participation is the emphasis on objectivity. As noted, US procurement is more comfortable with discretion and subjective evaluation of factors irreducible to numerical values. The European supplier – accustomed to a system that curtails discretion and subjective judgements to eliminate domestic favouritism – may find this arrangement unappealing and may assume that discrimination will ensue. Such fears may deflate European contractors' interest in competing for American contracts.

A third feature of EU award criteria that may be disruptive is that disclosure requirements for rating methods differ. Both systems mandate that the solicitation state the criteria,[287] strive for objectivity,[288] and favour disclosure of their relative importance,[289] and when the latter is not feasible, accept a simple form of ranking.[290] Yet there is a difference. The US clearly establishes that the solicitation need not state the rating method. The 2014 Directive is not explicit on this point; however, Article 67(4) and (5) suggest that States must enact legislation that would require disclosure not only of the criteria and their relative importance but also of the rating method.[291] If so, that could have serious implications. US suppliers would certainly appreciate that the EU

[287] Compare FAR 15.304(d) with Directive 2014/24/EU, Article 67(4).
[288] Compare FAR 15.304(b)(2) with Directive 2014/24/EU, Article 67(4).
[289] Compare FAR 15.304(d) with Directive 2014/24/EU, Article 67(5).
[290] Compare FAR 15.304(e) with Directive 2014/24/EU, Article 67(5).
[291] A rating method is the tool that officials use to evaluate award criteria. These can be colour-coded, adjectival, numerical, or ordinal. FAR 15.305(a). This term is not used in EU procurement, but it seems Article 67 imposes duties akin to disclosing rating methods: criteria 'shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.' Article 67(4). To ensure competition, the solicitation must include objective specifications. Ibid. Tenders are assessed on the basis of how well they meet those criteria. Taken together, this demands greater transparency than does the US. Cf FAR 15.304(d), 'The rating method need not be disclosed in the solicitation.' Further, both recognise that sometimes rating methods cannot be provided. In such cases, the US only requires that officials state whether the combined non-price factors are more important, equal to, or less important than price. FAR 15.304(e). The EU sets a more exacting standard: 'Where weighting is not possible for objective reasons,' authorities must 'indicate the criteria in decreasing order of importance.' Article 67(5).

requires that rating methods be disclosed, which would foster participation. However, this could give rise to misplaced hopes, since 'objective' ratings often prove illusory because such methods produce results that seem not so much neutral and detached as they seem random or irrational.[292] If so, this may lead US suppliers to lose confidence and lessen participation over the long-term.

F. Separateness and Sequence of Qualification and Award Criteria

Governments must choose at what stage qualification will occur.[293] This is one of the basic distinctions between the two systems: that US qualification procedures are 'downstream' and that EU procedures are 'upstream'.[294] Reasons for this divide are explored elsewhere.[295]

I. US

The hallmark of the US procurement is that the determination of what constitutes the most advantageous offer is made '*after the receipt of proposals*.'[296] Conducting qualification earlier runs counter to US practice, the objective of which is not transactional efficiency but securing best value.[297] For sealed bidding, the lowest bidder is the tentative awardee;[298] for negotiated contracts, the proposal of best value assumes this position.[299] Systems that put qualification first are viewed with suspicion as that sequence limits competition.[300] US procurement is, instead, designed to foster the widest possible participation from competitors and to secure business rivalry and thereby best value.[301] Qualification procedures protect the government from suppliers whose services would present a 'false economy' and who would thereby undermine best value.[302]

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[292] Gordon and Racca 129–30.
[293] Arrowsmith, Linarelli, and Wallace at 596.
[294] Folliot-Lalliot (2009) at 156.
[295] See above Chapter 2, Section IV.A and below Section III.B.1.
[296] Cibinic, Nash, and Yukins at 677 (emphasis original).
[297] *Mercury Consol, Inc*, Comp Gen Dec B-212077.2 (1984).
[298] FAR 14.408(a). See also Schwartz (2010) at 631.
[299] FAR 15.302.
[300] Folliot-Lalliot (2009) at 156.
[301] See above Chapter 2, Section III.A.
[302] FAR 9.103(c).

Systems putting evaluation of qualification criteria before evaluation of award criteria come in two varieties. First, there are true pre-qualification systems like the World Bank, where these are two separate procedures and only those who pass the qualification stage are later invited to tender. Second, there are systems like the EU, where qualification and tender occur in the same procedure but where qualification and award criteria are considered sequentially. The US is, of course, a post-qualification system,[303] at least for the most part.[304] Although pre-qualification procedures do exist in America, their use is considered suspect.[305]

The next section explains that EU makes a clear demarcation between qualification and award criteria. Such a delineation does not exist in the US. Responsibility standards include financial resources, schedule, past performance, experience, management or technical skill, and facilities and equipment.[306] Award factors include financial capability,[307] schedule,[308] past performance,[309] experience,[310] key personnel,[311] understanding of the work,[312] and facilities.[313] The extent to which these lists parallel one another suggests that little difference exists. The GAO has said as much: 'It is not always possible to draw a distinct line between the two concepts'.[314] Responsibility criteria can be used as award criteria so long as they are evaluated *comparatively*.[315]

One issue with these criteria being interchangeable has been recognised: this could lead officials to award the contract not to the supplier whose proposal represents best value (US) or

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[303] Folliot-Lalliot (2009) at 156.
[304] Generally, pre-qualification is considered an unlawful restriction on competition. *Rotair Indus, Inc*, Comp Gen Dec B-276435.2 (1978). However, such a restriction is permissible if it serves a bona fide need. Ibid.
[305] Nash and Cibinic, 'Prequalification' (1996) at ¶16, saying pre-qualification is a 'dirty word' in US procurement.
[306] FAR 9.104-1(a)–(f).
[307] *Delta Data Sys Corp v Webster*, 744 F2d (DC Cir 1984). Cf Cibinic, Nash, and Yukins at 713.
[308] *Rotair Indus, Inc*, op cit.
[309] 41 USC 3306(c)(1)(A); 41 USC 1126. FAR 15.304(c)(3) implements these statutes.
[310] FAR 15.304(c)(2). See also Cibinic, Nash, and O'Brien-Debakey at 632–36.
[311] *PAI Corp*, Comp Gen Dec B-298349 (2006); *Base Techs, Inc*, Comp Gen Dec B-293061.2 (2004).
[312] *Government Acquisitions, Inc*, Comp Gen Dec B-401048 (2009).
[313] *Conrex, Inc*, Comp Gen Dec B-266060.2 (1996).
[314] *Continental Maritime of San Diego, Inc*, Comp Gen Dec B-249858.2 (1993).
[315] *PHE/Maser, Inc*, Com Gen Dec B-238367.5 (1991). Cf Doke (2007) at 146.

to the MEAT (EU) but to the supplier that fulfils the criteria in the most convincing way.[316] This is precisely what we see in the US.[317] As the saying goes, 'Nobody ever got fired for hiring IBM.'[318] Officials will often prefer the incumbent, whose capacity exceeds the qualification criteria, to the unknown upstart, whose qualifications just barely meets such criteria. Failure to appreciate that qualification and award criteria are interchangeable in the US system could put European competitors at a disadvantage. A modest EU firm may provide only what it deems necessary to prove that it is qualified for a particular contract, not appreciating that in America evaluations often devolve into a 'battle of résumés' – thereby withholding additional information that could have won the contract. Thus, ignorance may lead such firms to compete ineffectively. And for European suppliers who are aware of this, it may discourage the participation in the US.

The European supplier may also be disheartened that gamesmanship with award criteria is well documented in the US. For example, in the 1980s contracting officers used responsibility-type criteria to circumvent the Small Business Administration's authority to override nonresponsibility determinations, thus using subterfuge to avoid delays.[319] While this practice has been recognised for what it is, it nonetheless continues.[320] This too may inhibit participation.

2. EU

While the strict separation of selection and award criteria is unfamiliar in US procurement, this is a subject of general interest in the EU. This is a 'highly relevant theme' in part because it has been litigated extensively before the CJEU and in part because the settled rules underwent a

[316] Treumer (2009) at 111.
[317] Doke (1995) at 21–22, observing that responsibility-type award factors erode competition because resources are evaluated not on the basis of what is adequate but in comparison with one's largest competitors.
[318] Cf Hansen at 2471; Estrin Gilman at 599-600; Cohen at 21–22.
[319] *B&W Service Industries*, Comp Gen Dec B-224392 (1986).
[320] Nash and Cibinic (2001) at 613.

fundamental change in the 2014 Directive.[321] As noted, qualification consists of three parts.[322] First is eligibility.[323] Second are exclusions, mandatory and discretionary.[324] The 2014 Directive clarifies that suppliers can be excluded at any time, even after the evaluation of award criteria.[325] Third are the selection criteria.[326] After this, tenders are evaluated using distinct award criteria.[327]

Qualification and award stages are sometimes thought to be separated chronologically.[328] That is not required.[329] Officials may evaluate both qualifications and tenders in the same sitting. These evaluations may occur simultaneously or sequentially but must be treated as separate exercises governed by different rules.[330] Although not a legal requirement,[331] qualification criteria are often used to filter out suppliers before award criteria are applied and tenders evaluated.[332]

After Member States flouted non-discrimination rules for decades, the CJEU reached a landmark holding in *Beentjes*.[333] This case stressed two principles. First, it articulated a sharp distinction between qualification and award criteria.[334] The former, it said, 'concern the qualities of contractor as such'; the latter 'relate to the qualities of the service which he offers' or 'the work which he proposes to carry out.'[335] These are distinct.[336] Second, in order to eliminate disguised discrimination it forbade use of qualification criteria during the award stage.[337]

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[321] Piga and Treumer at 1, 3.
[322] Sanchez-Graells (2014) at 105; Franchi, Turco, and Bosio at 27; Trepte (2007) at 337.
[323] Trepte (2007) at 321–22.
[324] Directive 2014/24/EU, Article 57.
[325] Directive 2014/24/EU, Article 57(5). See also Graells, 'Exclusion' (2014) at 99–100.
[326] Directive 2014/24/EU, Article 58.
[327] Ibid, Subsection 3.
[328] Folliot-Lalliot (2009) at 156.
[329] *Beentjes* (C-31/87) at ¶37, holding that authorities may disqualify suppliers 'up to the last moment' provided this 'is not a disguised refusal to allow criteria for awarding the contract to operate in the normal away.'
[330] Trepte (2007) at 337, 376, n 70.
[331] Directive 2014/24/EU, Article 56(2).
[332] Folliot-Lalliot (2009) at 156. Indeed, in Europe doing qualification first is often considered the 'logical sequence'. Sanchez-Graells (2014) at 99. See also Telles and Butler at 136; Lunde and Nybø-Sørensen at 137.
[333] *Gebroeders Beentjes BV v State of the Netherlands* (C-31/87) [1988] ECR 4635.
[334] Franch and Grau (2014) at 131–35.
[335] *Beentjes* at ¶36.
[336] Arrowsmith (2014) at 749; Folliot-Lalliot (2009) at 156; Braun at NA118.
[337] *Beentjes*, C-31/87 at ¶37. See also Graells, 'Exclusion' (2014) at 100; Trepte (2007) at 467.

In one sense, *Beentjes* prioritized qualification.[338] Yet the Court declined to adopt a rigid sequential separation. If an official finds that a supplier is unsuitable 'up to the last moment' before award, disqualification is permissible even at that late stage provided so long as it is not a disguised form of discrimination.[339] *Beentjes* even allowed that award and qualification could be simultaneous.[340] Their separateness is, therefore, not so much *temporal* so much as *categorial*.[341]

In 2008, the Court issued a second landmark opinion.[342] *Lianakis* held that 'experience, qualifications, and means of ensuring proper performance of the contract' concern suitability and are thus invalid award criteria.[343] This reinforced the divide between qualification and award. It also questioned whether past performance is a valid award criterion.[344] Unfortunately, *Lianakis* has also sown confusion, not least as to its central tenet concerning the separation of award and qualification criteria.[345] Its meaning is still being debated.[346]

Setting aside whether *Lianakis* should be rejected, Member States have widely ignored it. They apply a flexible interpretation so that suppliers' experience is evaluated when it is considered relevant to the procurement in question. That is inconsistent with *Lianakis*. Perhaps the Court was mistaken, but its holding undoubtably forbade treating experience as an award criterion.[347] Nevertheless, national courts have rejected this reading in favour of a narrower interpretation.[348]

The 2014 Directive modified the rules consistent with Member States' narrower interpretation, superseding *Lianakis* in part by allowing experience as an award criterion under

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[338] Folliot-Lalliot (2009) at 156. See also COM(2011) 15 at 16–17.
[339] *Beentjes*, C-31/87 at ¶37. Cf Graells, 'Exclusion' (2014) at 100, citing Directive 2014/24/EU, Article 57(5).
[340] *Beentjes*, C-31/87 at ¶16.
[341] Ibid, explaining that 'the two procedures are governed by different rules'. See also Arrowsmith (2014) at 749.
[342] *Lianakis*, op cit.
[343] Ibid at ¶¶ 31 and 32. See also Lunde and Nybø-Sørensen at 133.
[344] Folliot-Lalliot (2009) at 163–64.
[345] Arrowsmith (2014) at 749; Lee (2010) at 55.
[346] Treumer (2014) at 15–17.
[347] Lee (2013) at 82–83, 90–91, 95, citing COM(2011) 15
[348] Treumer (2009) at 109; Treumer (2014) at 15–16.

some conditions.[349] Specifically, Article 67(2)(b) provides that contracting authorities may consider 'organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance,' such as in the selection of a consultancy contract.[350] Thus, while the new directive rejects a strict reading of *Lianakis* that would forbid any consideration of experience at the award stage, it also raises new questions. It is unclear if experience may be considered only in exceptional cases where it has a 'significant impact'. This language also fails to reconcile the overlap of selection and award criteria. And to what extent the directive supersedes *Lianakis* remains unsettled.[351] So this area remains a 'lawyer's paradise'.[352] Such legal uncertainties make hiring local counsel a necessity, which will discourage some foreign firms from competing. Others may be unaware of these difficulties, will not seek legal counsel, and thus their participation will be less effective and the likelihood of winning a contract lower. Either result would be suboptimal.

From *Beentjes* down through *Lianakis*, for three decades the CJEU has drawn a distinction between qualification and award evaluations.[353] How this division will affect American suppliers is uncertain. No such rule exists in the US. In fact, the order of evaluation is exactly reversed and responsibility is assessed only for the tentative winner.[354] Conceivably, however, Americans may recognise that this distinction reduces the potential for misusing award criteria and renders the firms that have minimally adequate resources competitive with the incumbents who will often win if awards devolve into a mere comparison of size, resources, or curricula vitae.[355] If so, this

[349] Treumer (2014) at 16; Piga and Treumer at 4. cf *Ambisig v Nersant* (C-601/13), [2015], ¶¶ 22–23, 35, holding that it was permissible for an authority to consider experience under the 2004 Directive despite *Lianakis*.
[350] Directive 2014/24/EU, Article 67(2)(b). See also Treumer (2014) at 16; Lee (2013) at 95.
[351] Arrowsmith (2014) at 757–60.
[352] Treumer (2014) at 25.
[353] Petersen at NA248.
[354] Gordon and Racca at 126; Schwartz (2010) at 631, n 44.
[355] Treumer (2009) at 111.

would perhaps encourage participation, at least among smaller and perhaps more efficient firms that otherwise would have little chance of winning against the hyper resourced IBMs of the world.

There is another possibility. With a sharp demarcation between qualification and award, the EU's position is unique. In addition to America, most other regimes allow the two to overlap, including the GPA, the UNCITRAL model procurement code,[356] and the World Bank.[357] Nor is there a private sector analogue.[358] Thus, given the novelty of this issue, US suppliers may be unaware of the considerable advantage it would afford. Ignorance, therefore, would perhaps undermine the potential stimulus to greater participation.

III. Comparing Foundations

A. Constitutional Character

1. The Principle of Proportionality

This section returns to the exclusions considered in Section II.B. As explained there, some exclusions are mandatory, others discretionary, and still others may be added to supplement those found in the directives.[359] For the latter, the CJEU holds Member States may add exclusions so long as they are non-discriminatory.[360] The principle of proportionality applies to all of them.[361]

The general application of this principle is not set forth as clearly as it could be, but it can be derived from the text. It is expressly mentioned in Article 57(3) as to overdue tax payments.[362] A recital clarifies that the principle of proportionality also applies to discretionary grounds.[363] Although it is not specifically mentioned as to mandatory grounds, it can be inferred. First, that

[356] Lee (2013) at 85–86, citing UNCITRAL Model Law on Procurement, Article 39.
[357] Folliot-Lalliot (2009) at 156.
[358] Lee (2013) at 86.
[359] Directive 2014/24/EU, Article 57(1), (2), and (4).
[360] SIGMA at 23.
[361] Directive 2014/24/EU, Article 57(3) and (6). Cf Arrowsmith (2014) at 1243–44; Priess at 113; Steinicke (2013) at 122.
[362] Directive 2014/24/EU, Article 57(3).
[363] Ibid, Recital 101.

is because self-cleaning, which is premised on this principle, applies to most exclusion grounds.[364] Second, the 2014 Directive clearly establishes that this principle is an overarching standard that applies to the entirety of the directive.[365] This principle thus applies to all grounds for exclusion.

Apart from its application to exclusions, proportionality applies to the selection process. In fact, most of the case law concerns this phase. The reason is that selection is designed not to identify the best supplier but to eliminate those who do not meet the minimum standards. Such judgements are more art than science and are thus difficult to enforce.[366]

The proportionality principle has a long history. The 2014 Directive first referenced it in an article,[367] but the 2004 Directive's preamble also mentioned it.[368] The CJEU created it,[369] borrowing it from the German *Verhältnismässigkeit*.[370] It was enshrined as a general principle of EU law with the 2009 Lisbon Treaty.[371] The Maastricht Treaty had introduced it in 1992 alongside subsidiarity,[372] but the distinction between these two was unclear.[373] The distinction is that subsidiarity circumscribes the EU's *competence* whereas proportionality delimits the *form* and *content* of particular legislative measures.[374]

Although proportionality can be used both to challenge EU and Member State actions, it is the latter that is of more concern to procurement matters. The Court uses a three-part test when examining the proportionality of a legislative measure: (1) whether it was suitable to achieve the desired end, (2) whether it was necessary to that end, and (3) whether it imposed a burden

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[364] Directive 2014/24/EU, Article 57(6).
[365] Directive 2014/24/EU, Article 18. See also Steinicke and Vesterdorf at 326; Priess at 113.
[366] Steinicke and Vesterdorf at 326–27.
[367] Directive 2014/24/EU, Article 18(1).
[368] Directive 2004/18/EC, Recital 2.
[369] *Internationale Handelsgesellschaft*, C-11/70 (1970). See also Hartley (2014) at 148, 167–68.
[370] Hartley (2014) at 167. Cf Craig and De Búrca at 551, saying that this principle originated in the criminal law.
[371] Treaty of Lisbon, Article 1(6), codified in TEU, Article 5(4). See also TFEU, Protocol 2, Article 1, stating there should be 'constant respect' for this principle.
[372] Maastricht Treaty, Article G (B)(5), amending TEU, Article 3(b).
[373] Craig and De Búrca at 172–73.
[374] Hartley (2014) at 124.

that was excessive in relation to the objective.[375] Authorities can impose obligations only to the extent to which they are deemed strictly necessary.

'The most striking point about' this doctrine one commentator observes, 'is that it leaves a great deal to the judgement of the Court' and opinions 'frequently differ.'[376] For US suppliers, this another case where legal uncertainty arises. European will have a better sense of when abuses violate the principle of proportionality. Because no similar principle exists in America, US suppliers are at a disadvantage. This makes the decision about whether to protest harder, which may lead firms to bring frivolous protests – and over the long run may discourage participation.

2. The Principle of Equal Treatment

In 1957, six countries signed the Treaty of Rome creating the European Community.[377] After two ruinous wars, their aim was to fashion a customs union to stabilise the region. Because cross-border procurement remained limited, in the 1970s the Commission issued the directives to stimulate trade.[378] Consistent with the single-market project,[379] their purpose through various iterations was non-discrimination.[380] Unlike proportionality, which was not included in a substantive article until 2014, equal treatment was first recognised in the 2004 Directive: 'Contracting authorities shall treat economic operators equally and non-discriminatorily'.[381]

Not only do the directives prohibit unfair trade restrictions, so do the treaties.[382] Core among such prohibitions are equal treatment and non-discrimination.[383] As their names imply,

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[375] Craig and De Búrca at 551, 556–58
[376] Hartley (2014) at 168. Cf Steinicke and Vesterdorf at 326–27.
[377] Fox at 5–6.
[378] Piga and Treumer at 1.
[379] *Domenico Politanò*, C-225/15 (2016), ¶¶36–40; *Partner Apelski Dariusz v Zarzad Oczyszczania Miasta*, C-324/14 (2015), ¶¶33–34.
[380] COM(2011) 15 at 4. See also Trepte (2007) at 319–20; Hayken at 143, 149; Verdeaux at 723–24, 730.
[381] Directive 2004/18/EC, Article 2.
[382] TFEU, Article 18. See also Steinicke and Vesterdorf at 292.
[383] *Fabricom v Belgium*, C-21/03 and C-34/03 (2005), ¶¶25, 35–36. See also Steinicke and Vesterdorf at 292.

these principles ensure that suppliers compete on a level playing field.[384] They apply to all intra-EU commerce – and under this work's hypothetical, also to transatlantic procurement – and are particularly important for procurement because governments often use various forms of NTBs to favour local suppliers.[385] Such discrimination was especially common in 1970s and 80s, and qualification procedures were considered the main culprit.[386]

Not only are equal treatment and non-discrimination especially important in the context of qualifications procedures, but the CJEU has said that these principles entail obligations that exceed the directives' requirements.[387] Non-discrimination is an application of equal treatment in that it prohibits biased treatment on the basis of nationality.[388] What follows thus concentrates on the Court's treatment of the more general principle.

The CJEU first recognised the equal treatment principle in 1993, predating its inclusion in the procurement directives.[389] Its definition derived from decisions in other areas of law,[390] but the Court also provided a more specific definition in the context of procurement.[391] It is not enough for authorities to treat domestic and non-domestic firms the same but *all* firms must be treated equally, including domestic vis-à-vis domestic.[392] This principle's function is to ensure that procedures are conducted in a competitive fashion.[393] It applies throughout all stages of the procurement process, not only when firms are submitting tenders.[394]

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[384] Hayken at 143.
[385] Procurement is unmentioned in the treaties; however, the CJEU applied equal treatment to this field, and it has found several previsions especially important, including TFEU Articles 18, 28, 49, and 56. Neumayr at 220–28.
[386] Jan Winter at 782.
[387] Arrowsmith (2014) at 613, 618.
[388] Ibid at 621. Cf TFEU, Article 18, also prohibiting national discrimination; Steinicke and Vesterdorf at 294.
[389] *Commission v Denmark* (*Storebaelt*), C-243/89 (1993). See also Steinicke and Vesterdorf at 294–95.
[390] Arrowsmith (2014) at 614.
[391] Joined Cases C-21/03 and C-34/03, *Fabricom v Belgium* (2005), ¶27, equal treatment 'requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified.'
[392] *Walloon Buses*, C-87/94 (1996). See also Arrowsmith (2014) at 614–15.
[393] *Storebaelt*, op cit, ¶33. See also Steinicke and Vesterdorf at 295.
[394] *Commission v France*, C-16/98 (2000), ¶¶103–09. See also Arrowsmith (2014) at 619.

The CJEU frequently struggles with the balance between equal treatment and competing policy objectives.[395] Indeed, one commentator maintains that equal treatment accounts for most of the Court's procurement decisions.[396] This principle and its scope give rise to much uncertainty in that the Court has substantial power to restrict contracting authorities.[397]

For the US supplier, equal treatment, like the principle of proportionality, creates uncertainty. Businesses abhor uncertainty, and this may discourage American participation. But this assumes that US suppliers are aware of these roiling waters. Many will not be, and thus may miss opportunities for viable protests when equal treatment is violated. On the other hand, this may have the opposite effect because assurances of equal treatment could encourage participation among American suppliers. What is not to like about assurances of (legally enforceable) equal treatment with one's competitors? Inexperience, though, may result in ineffective protest actions.

From the perspective of the EU supplier, the absence of an unpredictable 'constitutional' rule could be seen as a boon and could encourage participation. Alternatively, the absence of an overarching principle of non-discrimination could discourage participation as it could lead European suppliers to question whether they would be treated fairly. The effect of the systems' asymmetry is unpredictable but on balance it would seem more likely discourage participation. Worse, EU firms could inadvertently lodge frivolous protests because they fail to realise that in America there is no equivalent to the quasi-constitutional principles derived from the EU treaties.

[395] Arrowsmith (2014) at 620.
[396] Verdeaux at 730.
[397] Arrowsmith (2014) at 620.

B. Legal Culture

1. Discretion

The EU and the US share a fundamental fear of discretion, but their fears differ. Such fear 'constitutes a defining element of [US] political and legal cultures',[398] and this extends to procurement. Indeed, apprehension about discretion lies at the heart of US procurement. Such reservations arise from a cynical view of government with deep roots in American history, in that the nation 'was born in an armed struggle against tyranny.'[399]

For procurement, such fears may have to do in part with a commitment to the separation of powers. 'Reverence' for this is an American tradition, derived from sources ancient, medieval, and modern.[400] Montesquieu's formulation is said to have influenced American founders most: 'the legislative power is united with executive power in a single person or a single body of the magistracy, there is no liberty'.[401] James Madison famously advocated for the separation of powers in *The Federalist*, number 47.[402] This doctrine retains an 'enduring hold'. Administrative agencies are an affront to such sensibilities in that they were deliberately given 'blended powers'.[403] Thus, contracting officers, as agents of the administrative state with broad authority, raise the hackles of a people wary of power that is too concentrated.

In the realm of procurement, Americans' fears about contracting officers having too much discretion and offending the separation of powers manifest in several ways. First, they fear that officials will use their discretion for self-enrichment. They also fear that bureaucrats are lazy and careless about how they spend others' money. Last, they fear that officials are easily swayed by

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[398] Schuck at 176
[399] Kelman (1990) at 1, 9–10, 13, 27–28.
[400] Freedman at 15, citing Plato, Aristotle, Cicero, Machiavelli, Blackstone, and Locke.
[401] Montesquieu at 157.
[402] Hamilton, Madison, and Jay at 235, 'The accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny.'
[403] West at 17.

pressures to reward constituencies.[404] These fears are manifested in concerns about what is called the principal-agent problem, where the interests of the sovereign and its agents diverge.[405]

The 'brilliant solution' to these problems was to concentrate on price.[406] The purpose of statutes requiring that contracts be awarded to the lowest bidder

> is to give all persons *equal right to compete* for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to *compete on a common basis*.[407]

In addition to lowest price, the US later embraced best value,[408] but the idea remained the same: Americans feared a particular kind of discretion and the solution lay not in narrowing the field of competition but in opening it even wider. Concentrating on the best offer answers American concerns about discretion because contracting officers' decisions are subjected to closer scrutiny if they cannot be justified in terms of lowest price or best value.[409]

Despite the considerable discretion granted, such discretion is bounded.[410] At bottom, fear of discretion is a defining feature of US political and legal culture.[411] Americans' 'profound reservations' arises as wide bureaucratic discretion conflicts with basic beliefs about institutional limitations.[412] This is deeply ingrained and curtails bureaucratic discretion.[413] Responsibility is important; however, value has always been paramount and so acts as a constraint on discretion.[414]

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[404] Kelman (1990) at 13–14.
[405] Trepte (2004) 70–83.
[406] Kelman (1990) at 15.
[407] *US v Brookridge Farm, Inc*, 111 F2d 461, 463 (10th Cir 1940) (emphasis added).
[408] Gordon and Racca at 126–27.
[409] Ibid at 153; Folliot-Lalliot (2009) at 156; Schooner, 'Desiderata' (2002) at 104; James at 23; Turpin at 18.
[410] James at 24; Rogerson (1994) at 86.
[411] Schuck at 176.
[412] West at 340–41; Freedman at 262–63.
[413] Freedman at 262–63.
[414] James at 23.

Still, contracting officers' business judgement is given considerable deference.[415] This extends not only to the responsibility determination but also to the information required to reach that decision. If challenged, the agency is entitled to a presumption of regularity and need only show that a rational basis for its decision existed.[416] To rebut this, a protester must prove the official acted arbitrarily or capriciously.[417] Agencies have such broad discretion because, the argument goes, they often suffer the consequences if a contract goes to an unscrupulous or incompetent supplier and thus have an incentive to render a determination in good faith.[418]

For the European supplier, the fact that US contracting officers have so much discretion throughout the qualification and award process may be disheartening. That is because Europeans fear that too much discretion will let authorities favour domestic suppliers. As a domestic system, the US system is not designed to eliminate this sort of discrimination and so is not well equipped to calm their fears. That may discourage participation.

Europe's fear of discretion is rooted in different concerns. This fear arises not from abstract worries that some tyranny or abuse of discretion would offend a political theory but from concrete fears about contracting authorities' unfairly steering business to local favourites. Such abuses were prevalent in the recent past and undermined the common market project. If officials routinely discriminate against non-domestic suppliers, the entire project is imperilled.[419] Not only does this violate basic treaty principles, but fundamental to the union to which the EU aspires to is the notion that its members will trade freely with one another and in good faith.

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[415] *Bender Shipbuilding & Repair Co, Inc, v US*, 297 F3d 1358, 1362 (Fed Cir 2002).
[416] *Southern Foods, Inc v US*, 76 Fed Cl 769, 782 (2007); *Impresa Costruzioni*, 238 F3d at 1332–33, 1339.
[417] *Southern Foods*, 76 Fed Cl at 782.
[418] *News Printing Co v US*, 46 Fed Cl 740, 746 (2000).
[419] Jan Winter at 741, 782.

The CJEU is wary of disguised discrimination.[420] As discussed, the qualification process was supposed to take place mainly upstream and a sharp distinction was to be made between qualification and award criteria.[421] These measures are supposed to remove discretion and ensure Member States treat each other's suppliers fairly. From the perspective of an American supplier considering whether to compete in Europe, the strictures designed to eliminate discrimination among Member States would surely be welcome because, under this work's TTIP hypothetical, those same protections would extend to US suppliers. Insofar as US suppliers are aware of this, that would encourage American participation.

2. Objectivity

Another distinction between the two systems is the use of objective criteria and formula in the award process. In US procurement, scores are often used to help officials assess the merits of proposals in an unbiased manner.[422] The ultimate decision, though, is generally not based solely on scores or formulas.[423] Officials still must exercise judgement,[424] or else the agency risks a sustained protest.[425] Numerical scores are non-binding.[426] Americans commentators are often sceptical about subjectively assigned numbers creating the false sense of objectivity.[427] When such scoring systems are utilized, more protests are induced; however, these are usually denied.[428]

The EU favours awarding contracts on the basis of objective criteria.[429] These are often expressed as numbers and compared using formulas.[430] As noted, this procedure is generally

[420] Trepte (2007) at 467.
[421] Folliot-Lalliot (2009) at 156; Arrowsmith (2014) at 749; Trepte (2007) at 376.
[422] FAR 15.305(a). Cf Edwards (2006) at ¶7, noting that scoring and rating are optional.
[423] Cibinic, Nash, and O'Brien-Debakey at 766. Cf *Stone & Webster Eng'g Corp*, Com Gen Dec B-255286.2 (1994).
[424] *C&B Constr, Inc*, Comp Gen Dec B-401988.2 (2010).
[425] Nash and Cibinic, 'Evaluating' (1992) at ¶17.
[426] *Trajen, Inc; Maytag Aircraft Corporation*, Comp Gen Dec B-296334 (2005). See also Feldman at 185.
[427] Gordon and Racca at 129.
[428] Nash (2012) at ¶53.
[429] Directive 2014/24/EU, Recital 90.
[430] Gordon and Racca at 125.

regarded as formulaic – as simple as scoring offers and then tallying scores.[431] From an American perspective, calling this scoring process 'objective' is farcical. Americans would argue that defining the formulas for award is inherently subjective, and because those formulas for award may not accurately reflect the market conditions encountered by the government agency through the competitive process, the subjectivity or inaccuracy of the formulaic selection criteria is only amplified. Worse, in such a system small differences in scoring can force an official to choose one contractor over another based on meaningless differences in their tenders and as noted the results may seem random or irrational.[432]

US suppliers may be unaware that scores matter in the EU to a greater degree. Such ignorance may have two consequences: it may both reduce viable protests and inflate the number of unavailing protests. Conversely, some EU suppliers may misunderstand trade-offs and fail to appreciate that the scores are non-binding. The volume of protests on this basis could be confusing,[433] leading them to believe protesting scores that do not add up is a viable ground for a protest. That may lead them to litigate unwinnable protests. Both scenarios are suboptimal.

3. Past Performance

Although it was not required or standardized until the 1990s,[434] the US has formally considered past performance since at least the 1960s.[435] The Office of Federal Procurement Policy first issued guidance requiring the consideration of past performance in 1993.[436] Congress

[431] Lichère (2013) at 237–38.
[432] Gordon and Racca at 130. See also Folliot-Lalliot (2009) at 155.
[433] Nash (2012) at ¶53.
[434] Manuel (2015) at 10. See also Nagle (2003) at 929.
[435] *Educ Servs*, Com Gen Dec B-156860 (1965). See also Manuel (2015) at 9; James at 24. Informally, use of past performance had been in effect for another four decades. See below notes 451–453 and accompanying text.
[436] 58 Federal Register 3573.

passed the Federal Acquisition Streamlining Act the following year, giving this guidance the force of law.[437] This was in turn codified and made effective with FAR Subpart 15.3 in 1999.[438]

Increased emphasis on past performance was considered a triumph among commentators, who considered the old system an ineffective 'writing contest' that was a poor measure of whether a contractor could deliver on its promises.[439] Past performance was considered the alternative to selection based on complex but often meaningless proposals and a better indicator of reliability.[440] As noted, it was made a mandatory evaluation factor under the 1990s reforms,[441] and it remains the preeminent award criterion in US procurement.[442] What is most significant to the European supplier competing for US contracts, however, is that the subjective evaluation of this singularly important criterion is almost unchallengeable.[443]

Since the FAR was first promulgated in 1984 officials have also considered past performance for purposes of responsibility determinations.[444] Firms that recently have been 'seriously deficient' are presumed non-responsible.[445] Until 2008, past performance was the only standard that officials were required to consider.[446] That year, Congress mandated that the information in the Federal Awardee Performance and Integrity Information System be considered,[447] including civil, criminal, and administrative proceedings resulting in convictions,

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[437] Pub L 108-355, §1091(b), 108 Stat 3272 (Oct 13, 1994), codified at 41 USC §1126.
[438] Manuel (2015) at 10, explaining that the requirement was phased in so that it applied first to contracts valued above $1 million, then $500,000, and last to the current level of $100,000.
[439] Nash and Cibinic, 'Evaluation' (1991) at ¶22; Kelman (1990) at 40, quoting a procurement official: 'We deal with written lies.' Despite reforms, this remains a problem. Edwards (2016) at ¶47; Edwards (2010) at ¶19.
[440] Causey at 640; Kelman and Blum at ¶463; Kelman (1990) at 40.
[441] FAR 15.304(c)(3).
[442] Manuel (2015) at 11–16; Causey at 638–39; Guerrero and Kirkpatrick at 243; Kelman (1990) at 93. But see FAR 15.305(a)(2)(i), establishing that past performance is but one indicators of capacity to perform successfully.
[443] 4 CFR § 21.5. Cf *American Indian Ctr, Inc*, Comp Gen Dec B-278678 (1998), holding that the responsibility determinations are subjective judgements and thus not susceptible to review; Guerrero and Kirkpatrick at 258–59.
[444] 48 Federal Register 42102 (Sep 19, 1983), establishing the FAR. See also Manuel (2015) at 17.
[445] FAR 9.104-3(b).
[446] FAR 9.105-1(c) (2008). See also Manuel (2015) at 18.
[447] 75 Fed Reg 14,059 (Mar 23, 2010), codified at 48 CFR parts 2, 9, 12, 42, and 52.

terminations, and nonresponsibility determinations within the previous five years for contracts worth $500,000 or more.[448] This new expanded mandate made past performance even more important.[449] Mere pro forma consideration of past performance would no longer suffice.[450]

Considering past performance was in practice long before the FAR existed.[451] In 1919, one of the earliest treatises reported that the War Department had a developed an index card list of 50,000 contractors recording 'how well or inefficiently bidders on this list . . . carried out their agreements' and noted that most agencies had developed similar lists.[452] Use of such records to ascertain responsibility based on the type or degree of experience has been deemed permissible; however, agencies cannot establish requirements that would exceed what is absolutely necessary.[453]

The EU's use of past performance is far more limited than in the US. For qualification, it is hardly mentioned, either as an exclusion[454] or as selection criterion.[455] Although 'the necessary human and technical resources and experience' and 'sufficient level of experience demonstrated by suitable references from contracts' are akin to past performance, these are applied on a pass/fail basis.[456] Once a 'sufficient' level has been reached, evidence of exceptional experience confers no advantage and qualified suppliers will compete on equal footing at the award stage.

As for the award procedures, until the 2014 Directive, case law prohibited use of past performance unless there was a close nexus to the requirements specific to a given procurement.[457]

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[448] PL 110-417, §872(b)(1) and (c), 122 Stat 4356 (Oct 14, 2008).
[449] Manuel (2015) at 18.
[450] Nash (2014) at § 65.
[451] James at 24.
[452] Shealey at 209.
[453] 39 Comp Gen 173, B-140481 (1959). See also Cibinic, Nash, and Yukins at 417.
[454] Directive 2014/24/EU, Article 57. Article 57 does not list exclusions for past performance except in extreme cases where the contractor 'has shown significant or persistent deficiencies' under a prior public contract.' Ibid, Article 58(4)(g). See also Sanchez-Graells (2014) at 110; de Mars at 268.
[455] Directive 2014/24/EU, Article 58.
[456] Ibid, Article 58(4).
[457] *Commission v Greece*, C-199/07 (2009); *Evropaiki Dynamiki v Commission*, T-345/03 (2008); *Lianakis*, op cit. See also Petersen at NA248–49; Lee (2010) at 55–56.

Previously, case law allowed consideration of the incumbent's advantages arising from previous public contracts (in terms of cost, knowledge, or expertise) but not of its past performance for the same contracting authority.[458] This deprived them from considering one of the most useful award criteria.[459] The 2014 Directive, however, rejected a strict interpretation of *Lianakis* that would preclude consideration of past performance during the award stage and allowed for the consideration of experience,[460] at least as to the specific staff assigned to performing the contract.[461] This has been characterised either as a mere clarification[462] or a rejection of the line of precedent running from *Beentjes* to *Lianakis*.[463] Whichever it was, the 2014 Directive made experience a permissible criterion in some cases.[464] This muddies the waters, making the contrast between US and EU less stark than it previously had been.

For European suppliers competing in America, it may be disappointing to learn that skilled incumbents have such a decisive advantage because past performance is the preeminent criterion. What may further discourage participation is that affirmative responsibility determinations – of which past performance forms a large part – are practically unchallengeable. On the other hand, not all suppliers will be aware of these difficulties. On this basis, they may choose to compete and later to protest, not grasping that their chances of winning the award or the protest are slim. In either case, the result would be suboptimal.

For the US supplier competing in Europe, especially one with a marginal record who would struggle to win US federal contracts on that basis, it may be alluring that their odds are better because past performance is less important. So long as its performance is not so poor that it rises

[458] *Evropaiki Dynamiki v Commission*, op cit, ¶¶ 68–70. See also Arrowsmith (2014) at 617–18, 747–48.
[459] Gordon and Racca at 125; Folliot-Lalliot (2009) at 163–64; Jan Winter at 771.
[460] Arrowsmith at 757.
[461] Directive 2014/24/EU, Article 67.
[462] Faustino at 129; Steinicke and Vesterdorf at 722.
[463] Treumer (2016) at 34; Arrowsmith (2014) at 757–58.
[464] Faustino at 129.

to the level of 'significant or persistent deficiencies', such firms had a fighting chance to win the award, at least until the 2014 Directive made experience a permissible criterion. At the award phase, the ground has shifted and the EU now allows authorities to make assessments based on experience with previous procurements. It seems that past performance is still a more important award criterion in the US than in the EU, but the gap has narrowed. Thus, given this shifting and uncertain ground, it may be harder for US contractors with a less than stellar performance record to know what their chances are in the EU, at least without the assistance of local counsel.

IV. Conclusion

As noted in the introduction, it requires little imagination to appreciate that abuses on the front end of the procurement cycle have the potential for a dramatic anti-competitive effect.[465] For a procurement system to function in a fair or competitive fashion, therefore, these procedures must be carefully monitored. This chapter compared such monitoring in each of the two systems. To recap, this section will consider the recurring themes from Chapter 2 and others presented in this chapter that are specific to this subject-matter.

Three recurring themes from Chapter 2 are conspicuous in this chapter:

- in terms of their relative ages, that the subject-matter in this area is much more unsettled in the EU and that the law is less easily identified in the US;
- concerning the domestic-international divide, Europeans may be too concerned with proving themselves qualified and Americans insufficiently concerned with that effort; and
- as for the civil-defence split over the composition of purchases, European suppliers may concentrate too much on price and American suppliers too much on other factors.

With each of these, there were examples of suppliers that may err by not tendering when they should have done, by tendering for unwinnable procurements, and by tendering or protesting ineffectively either due to disparities in the two systems or differences of embedded legal cultures.

[465] Davies (1997) at 137.

Not all obstacles are common to all three procedures discussed in this work. This chapter also identified some impediments unique to qualification and award procedures. One such is the divide as to the discretion allowed during qualification, about which the EU is more cautious. To prevent abuses, qualification and award are separated and qualification comes first in the EU. US federal procurement is not immune from such abuses. One notorious example of mislabelling criteria to circumvent procedures was mentioned.[466] This will discourage European participation. American suppliers, however, will appreciate that the EU limits the potential for the abuse of discretion in this manner and will have a greater incentive to participate.

Also discussed in this chapter were two principles that leave much discretion to the CJEU about which opinions often differ: proportionality and equal treatment. American suppliers lack experience with such 'constitutional' doctrines in federal procurement and so may find themselves ill equipped for identifying the violation of these principles and in turn filing a timely protest. Conversely, European suppliers operating in America may search in vain for like principles and thus may waste their time and efforts on grounds for protest that do not exist.

Another impediment unique to qualification and award procedures is scoring methods. Whereas such methods are mere non-binding heuristics in America, the EU emphasises objective scoring to a fault. This will affect what causes of action suppliers bring when protesting abroad. American firms may miss opportunities to protest based on scoring since such grounds are generally losing arguments in the US. European firms may protest too often since US numerical scoring creates an illusory sense of objectivity and credibility even though, again, such scoring is not dispositive and is rarely the basis for a winnable protest. Taken together, these differences will perhaps make European participation less effective if not frustrate it entirely.

[466] See above notes 319–320.

This chapter also explained that there was until recently a wide gap as to past performance. That changed when the 2014 Directive made experience a permissible award criterion. It is thus harder for American suppliers to know where the boundaries lie without hiring local counsel. When the procurement rules are superficially similar, important differences may lurk beneath the surface. Such false similarity may have a perverse effect, causing more confusion and discouraging participation. However, to the extent past performance is a more decisive criterion in America, that may boost participation in Europe by US suppliers whose performance has been marginal and have the opposite effect on participation in America by EU suppliers with a spotty history.

On balance, it is hard to say what the collective effect of the differences in the two systems' qualification and award procedures will be. Yet the picture that is already emerging is that the gap between the two systems – in terms of divergent procedures and incompatible legal cultures – is wide enough that liberalisation of transatlantic procurement will prove a major undertaking.

Chapter 4: Competitive Procedures

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I. Introduction

Competition is a common desideratum for many procurement systems.[1] It is also a word about which there is little agreement.[2] It has been called 'one of the most ambiguous concepts in law and economy,' the meaning of which varies depending on the context.[3] In procurement, no consensus exists,[4] but its definition parallels use of the term in law and economics,[5] where it may signify the absence of restraint, the notion of 'perfect' competition, mere contestability, or the preservation of a fragmented field of suppliers to curtail abuses of market power.[6] Both the US and the EU ostensibly favour competition,[7] are GPA signatories,[8] and share certain basic commitments.[9] Even so, discussions of this subject may founder on differing understandings of 'competition'. Sometimes such differences are semantic.[10] Often, however, they run deeper.

At first US and EU definitions of 'competition' may seem identical. On closer inspection, this word functions somewhat like what linguists call *faux amis*, words borrowed from a foreign tongue whose original denotation has been altered.[11] When such words are encountered in the foreign tongue, they create a false sense of familiarity. Closer examination reveals that this kinship is misleading. The barrier here, of course, is not between languages but between legal systems. But similar problems can arise. Ronald Dworkin has distinguished between *concepts* and *conceptions*, the former being ideas that are essentially contested because they contain a

[1] Schooner, 'Desiderata' (2002) at 103.
[2] Hayek at 92.
[3] Kosinski at 217.
[4] Trepte, 'Foreword' in Sanchez-Graells (2015) at x.
[5] Nash, O'Brien-Debakey, Schooner, and Edwards at 90; Trepte (2004) at 3, 66–68, 86, 112–18.
[6] Stiglitz at 192–97; Bork at 58–60; Hayek (1948) at 92–96.
[7] Taylor at 23.
[8] 1867 UNTS 154, Annex 4(b), amended by GPA/113.
[9] Anderson, Kovacic, and Müller at 696–97; Francois, Nelson, and Palmeter at 106; Didier at 125–27; Snider Smith at 112–13. However, while the WTO GPA establishes certain baselines, this agreement leaves room for disagreement. Anderson, Kovacic and Müller at 695.
[10] Trepte (2004) at 270–7, suggesting 'infelicitous terminology' is often the source of misunderstandings.
[11] Koessler and Derocquigny. Cf Walter at 102.

normative dimension and the latter representing particular interpretations of concepts within different cultures.[12] 'Competition' is no doubt both.[13] But this chapter is not about normative questions. Rather, it is concerned with a descriptive matter: the differing transatlantic conceptions of competition. It seeks to elucidate what those differences are and to uncover what effect they may have on transatlantic suppliers.[14]

A. Competitive Procedures in the US

Understanding the meaning of 'competition' is essential to comprehending the enumerated competitive procedures in the US system. This is a term of art that may confuse the uninitiated. Indeed, its meaning has been called the 'primary semantic hurdle' to understanding the federal procurement system.[15] With the passage of the CICA in 1984, this word was defined by statute. It was to be 'full and open',[16] which was defined as a system wherein all qualified bidders would be allowed to compete.[17] CICA in turn enumerated five procedures that it deemed 'competitive':

(1) sealed bids
(2) competitive proposals
(3) architect-engineer statutory procedures
(4) broad agency announcements basic research proposals
(5) General Services Administration (GSA) Multiple Award Schedule (MAS) program[18]

The Federal Acquisition Regulation (FAR) supplements this list with two additional procedures that are deemed competitive under the Small Business Act:

(6) Small-business set asides
(7) Research proposals under the Small Business Act[19]

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[12] Dworkin at 103, borrowing these terms from Gallie.
[13] 'Competition' is a disputed term, not only in law but also in other fields. Birch at 5–6.
[14] Trepte (2004) at 135,.
[15] Rich at 6, quoting a 1976 RAND study.
[16] 10 USC 3201(a); 41 USC 253(a)(2). See also Manuel (2011) at 11.
[17] Pub L 98-369, §2711, 98 Stat 1180. See also HR Rep No 98-1157 (Oct. 10, 1984).
[18] P Law 98-369 (Jul 18, 1984), 98 Stat 1179–80, 1186–87. See also Manuel (2011) at 8–9.
[19] FAR 6.102. See also Nash, O'Brien-Debakey, Schooner, and Edwards at 92.

It has been observed that there is something Orwellian about Congress declaring some procedures per se 'competitive' by legislative fiat,[20] but it did precisely that.[21]

The US's competition debate has centred on the first two: sealed bidding and competitive negotiation. CICA changed their names in 1984. Until then, they were known as 'formal advertising' and 'negotiation'. Congress renamed them to eliminate the lingering connotation that formal advertising was competitive and negotiation was not.[22] Although it is anachronistic to use 'sealed bidding' and 'competitive negotiation' prior to the passage of CICA, for simplicity these terms are also used in reference to historical procedures before 1984. In addition, this chapter discusses two less competitive procedures: indefinite delivery/indefinite quantity (IDIQ) and sole-source contracts. The first two, however, will receive the most attention.

B. Competitive Procedures in the EU

The directives are less 'Orwellian' about competition than the US as they have not defined their procedures as 'competitive' by fiat. Instead, they have established a hierarchy of procedures, which can be grouped into standard, special, and exceptional categories.[23] 'Standard' are the open and restricted procedures.[24] 'Special' denotes the competitive dialogue and competitive procedure with negotiation. And 'exceptional' refers to the negotiated procedure without prior notice.[25] All of these are considered in turn, but for the sake of comparison the open procedure and the competitive procedure with negotiation will receive the most attention because these two are the most are similar to America's sealed bidding and competitive negotiation procedures.

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[20] Schwartz (2010) at 636.
[21] Deeming certain procedures 'competitive' is a 'legal fiction', a process often employed by the common law. Such fictions can be useful, conferring a certain legitimacy without the necessity of explanations. However, when these legal fictions are used without 'complete consciousness of [their] falsity,' dangers may ensue. Fuller at 6–19.
[22] Cohen at 2, 38; Todd Washington at 4.
[23] Telles and Butler at 132–33.
[24] Directive 2014/24/EU, Article 26(2). See also ibid Recitals 42, 44, and 50.
[25] Ibid, Recitals 42 and 50.

II. Juxtaposing Procedures

This section considers the two systems' competitive procedures. Before proceeding, three organizational points should be made: the first concerning the types of procedures that are grouped under the heading of 'competitive'; the second about some potential confusion regarding an alternative meaning of 'competitive procedures' that is not considered here; and the third relating to the reason for dilating on the roles of negotiations in each system.

While this chapter's title features the word ''competitive', that is something of a misnomer. Not every procedure discussed is *competitive*. 'Competitive procedures' is a general category that embodies assorted less- and non-competitive procedures in addition to the standard competitive procedures. Discussing the range of competition frames this discussion.

In addition to being vague, 'competitive procedures' is also ambiguous. It may refer either to a menu of methods that are to varying degrees competitive or to certain ground rules required for a competitive environment. Such ground rules would govern advertising opportunities, providing a statement of requirements, evaluating qualifications, and issuing awards.[26] These are unquestionably important and have been called the 'heart' of the procurement process.[27] But Chapters 3 and 5 cover this ground. Further, this material is not considered further as there is a consensus about what the basic elements are.[28] This chapter, then, is about the menu of competitive procedures, not the ground rules for a competitive environment.

Finally, one of the fundamental differences between the two systems' procedures is the role that negotiation plays and whether it is considered a friend or foe of competition. This section

[26] Arrowsmith (2014) at 157, 164; Trepte (2004) at 296–25.
[27] 1 Report of the Commission on Government Procurement (1972) at 18.
[28] Snider Smith (2008) at 115–16, summarising the 2003 SARA panel.

devotes special attention to the extent to which negotiations are permitted under each procedure. This lays the groundwork for the discussion in Section III.B.

A. Open Tendering Procedures

1. Sealed Bidding (US)

CICA mandated full and open competition, mainly using two procedures.[29] Sealed bidding is the first.[30] If four conditions are met, it must be used: sufficient time, the award can be based on price or price-related criteria, no need for discussions, and an expectation of multiple bidders.[31] If one or more is not satisfied, the negotiated procedure is the default.[32] This may create the impression this procedure is still in regular use.[33] In fact, fewer than 2% of procurements are awarded using sealed bidding.[34]

Formality is the hallmark of sealed bidding.[35] Contracts are advertised to encourage broad participation,[36] and it entails a choreographed procedure for publicly opening bids.[37] Unlike the EU's open procedure, which can include various non-price factors, sealed bids are made using only price or price-related criteria.[38] For reasons discussed below, this is a crucial distinction.

Two terms are important for sealed bidding procedures. One is new, and the other was already introduced in Chapter 3. First, bids are 'unresponsive' if the bid itself fails to conform to the invitation in some material respect and thus cannot be considered for award.[39] Such strict compliance requirements ensure the integrity of the process and that bidders are on equal

[29] 10 USC 3201(b)(1); 41 USC 253(a)(2).
[30] 10 USC 3201(b)(2); 41 USC 253(a)(2)(A).
[31] FAR 6.401(a) and 14.103-1(a), implementing 10 USC 3201(b)(1) and 41 USC 253(a)(2)(A).
[32] FAR 6.401(b). See also Feldman at 44.
[33] Schwartz (2010) at 631.
[34] Chaudhry at 9.
[35] Feldman at 123; Nash, O'Brien-Debakey, Schooner, and Edwards at 428.
[36] FAR 14.201; FAR 14.202; FAR 14.203.
[37] FAR 14.401, et seq.
[38] FAR 14.101(e). See also Cibinic, Nash, and Yukins at 574, citing 47 Comp Gen Dec 658, B-163890 (1968).
[39] 10 U.S.C. § 2305(b)(3); 41 U.S.C. § 3701(b).

footing.[40] Second, contracts can be awarded only to 'responsible' bidders, meaning tenderers must have the capacity to perform.[41] *Unresponsive* bids are rejected, and contracts then go to the lowest priced *responsible* bidder.[42] Responsiveness is specific to sealed bidding, whereas responsibility is common to the whole U.S. procurement system.[43]

Sealed bids are evaluated without discussions.[44] The FAR is silent as to this matter, but there is an exception for 'corrections'. Case law recognises may allow bidders the opportunity to correct obvious mistakes.[45] Similarly, for the EU's open procedures, case law says that authorities have a duty to allow corrections in certain cases. Negotiations encompass more than correcting obvious mistakes.[46] Both sealed bidding and open procedures prohibit negotiations.[47]

The fact that negotiations are prohibited under both sealed bidding and open procedures could confuse US suppliers selling in the EU. That is because for Americans this sort of competition must be *only* about price. Americans could miss a crucial difference. Namely, that open procedures allow the consideration of non-price criteria. In the most open and competitive procedure within in each system, there is a distinct notion about what 'competition' signifies. This is an example of the problem discussed in Chapter 2, Section V.A: Americans may fail to appreciate that in the EU, choosing a procedure that does not utilizes negotiations does not necessarily entail a prohibition on the consideration of non-price award factors. Failure to recognise this distinction could lead US suppliers astray, for example, so that they concentrate

[40] FAR 14.301. See also Nash, O'Brien-Debakey, Schooner, and Edwards at 416.
[41] 10 U.S.C. § 2305(b); 41 U.S.C. § 3701(c).
[42] FAR 14.101(e).
[43] See above Chapter 3, Section II.A.1.
[44] FAR 14.101(d).
[45] Cibinic, Nash, and Yukins 626–30.
[46] Arrowsmith (2014) at 729–30, 816–34, 919–32.
[47] FAR 14.101(d); COM(2000)275 at 3.1 and 3.2. See also Arrowsmith (2014) at 715.

too much on price and not enough on other factors. This is another misunderstanding that could undermine effective participation.

2. Open and Restricted Procedures (EU)

As a rule, contracts must be awarded using either open or restricted procedures.[48] Other procedures are permissible only in defined circumstances.[49] Like sealed bidding, the open procedure involves a formal process: advertising, letting all interested parties tender, etc.[50] Such formalities curtail discretion. These limit making and concealing discriminatory decisions, serve as guarantees of competition, objectivity and transparency, and reduce potential for collusion.[51] This procedure leaves little room for post-tender discussions.[52]

Unlike sealed bidding, open procedures may utilise non-price factors. Americans would counter that use of non-price factors necessitates negotiation. Here, Americans and Europeans disagree on a question of first principle: whether non-price factors can be evaluated properly without negotiations. On this minor disagreement turns major differences in the two regimes. The gap is narrowing, but negotiation remains the rule in America and the exception in Europe.[53]

Restricted procedures are like open procedures in almost every respect except that the contracting authority issues invitations after reviewing requests to participate and only the invitees can tender.[54] Limitations on discussions are about the same as for open procedures.[55] That is, the scope for post-tender dialogue is narrow and is limited to exceptional circumstances. As with the open procedure, authorities can seek clarifications when presented with obvious

[48] Directive 2004/18/EC, Article 28. See also Arrowsmith (2014) at 611–12.
[49] Arrowsmith (2014) at 608.
[50] Directive 2014/24/EU, Article 27(1).
[51] Arrowsmith (2014) at 608–09, 959, 961.
[52] Trepte (2007) at 377.
[53] Hoekman at 575.
[54] Directive 2014/24/EU, Article 28(1) and (2).
[55] Trepte (2007) at 377; Arrowsmith (2014) at 715.

errors, but their communications must be impartial and must not favour one tenderer over another.[56] As a word of caution, this EU procedure should not be confused with the procedure sharing this name under the UNCITRAL model procurement code, which is entirely different.[57]

American suppliers will perhaps misunderstand these procedures in two respects. First, based on assumption of a false equivalence with sealed bidding, US firms may not appreciate the significance of non-price criteria for open and restricted procedures. Americans may assume, mistakenly, that the lowest price should win and so will be insufficiently attuned to other, non-price criteria. Compounding this confusion is the strict limit on negotiations. Because US procurement equates use of negotiations with the consideration of non-price criteria, Americans will perhaps conflate the prohibition on negotiations with a prohibition on the use of non-price criteria, once again making a false analogy to the system they are familiar with. This also may lead them to focus too much on price and too little other criteria. Such subtle differences, along with a tendency to draw false lessons from domestic experience, may lead American firms to participate ineffectively.

B. Procedures Involving Negotiation

1. Competitive Negotiation (US)

Competitive negotiation is the second of two competitive procedures under CICA.[58] When all four conditions for sealed bidding are not met, contracting officers are supposed to use this method.[59] The US merges several procedures under this general heading. By definition, this category encompasses any contract awarded 'using other than the sealed bidding procedures'.[60]

[56] Arrowsmith (2014) at 715, 816–19, 832.
[57] Trepte (2007) at 378–79; Trepte (2004) at 122.
[58] 10 USC 3201(b)(1); 41 USC 253(a)(2).
[59] 10 USC 3201(b)(2); 41 USC 253(a)(2)(B). These four conditions are list above in section II.A.
[60] FAR 15.000, citing FAR 14.101.

As its name implies, the crucial feature of competitive negotiation is the availability of discussions with industry until proposals are received.[61] But that is not all.[62] Competitive negotiation also permits the consideration of non-price factors and subjective trade-offs among such factors.[63] When price is not dispositive, it allows officials to consider quality, past performance, technical expertise, management skills, personnel qualifications, and experience.[64] Subjective evaluations and trade-offs empower officials to make choices more like commercial buyers and, it is thought, to do so without sacrificing competition.[65]

Generally, both systems approve of pre-launch discussions. In America, this is called market research, and it is encouraged across the spectrum of procedures.[66] Similarly, in Europe pre-tender discussions with potential suppliers are generally permissible.[67] In both systems, depending on the procedure, discussions may be restricted once the process commences – that is, discussions that are post-launch, -tender, or -award, depending on the procedure. In the US, the negotiated procedure permits such discussions but sealed bidding does not.[68] In the EU, four procedures permit discussions to varying degrees, and three of these are reviewed in this section.[69] Both systems forbid post-award discussions that would either entail 'cardinal' changes or substantial modifications.[70] The former signify changes beyond the scope of the contract,[71] and the latter refer to changes rendering a contract 'materially different'.[72]

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[61] FAR 15.201(a).
[62] Cohen at 2–4.
[63] FAR 15.304(c)(2); Cibinic, Nash, and Yukins at 395.
[64] FAR 15.304(c)(2). See also Cohen at 2.
[65] Feldman 158–59.
[66] FAR Part 10. See also Cibinic, Nash, and Yukins at 341–45.
[67] Arrowsmith (2014) at 650–54, 884–85, 1000–01.
[68] Compare FAR Part 15 with FAR Part 14.
[69] Directive 2014/24/EU, Articles 29–32.
[70] Compare Cibinic, Nash, and Nagle (2006) at 382–85 with Arrowsmith (2014) at 933–44,
[71] *Air-A-Plane Corp v US*, 408 F2d (Ct Cl 1969).
[72] Directive 2014/24/EU, Article 72(4).

Europeans have long been suspicious of competitive negotiation because it sounds like the competitive procedure without prior publication or a sole-source procurement. Both the US and the EU disfavour sole-sourcing and have enacted safeguards. Competitive negotiation is not a sole-source procedure. Yet a negative connotation lingers in Europe. This is a classic example of how terminology can sow confusion. This is unfortunate because negotiation is often a sound method, and the US is a prime example of a system using this procedure competitively.[73] The FAR describes it as a procedure that permits bargaining and revisions following 'persuasion, alteration of initial assumptions and positions, and give and take'.[74] America's use of negotiations is not only competitive but some have even hailed this innovation as a major achievement.[75]

For the European supplier, lingering bias against competitive procedures could diminish participation since some may suppose that negotiation necessarily entails unfair discrimination. That is unfortunate not only because this procedure is genuinely competitive and but also because for better or worse it is the dominant procedure in US procurement. The aversion to negotiation could lead some European suppliers to miss viable opportunities to compete for US contracts.[76]

2. Competitive Procedure with Negotiation (EU)

Like the restricted procedure, under the competitive procedure with negotiation, only suppliers who are invited may submit bids. As its name implies, what distinguishes this procedure is that dialogue with the tenderers is the default and is even required in subsequent tenders unless the contracting authority specifically reserves the right to make the award after the initial tender without dialogue in the contract notice or invitation.[77] The preamble to the 2014 Directive

[73] Trepte (2004) at 270–71, 276–78; Arrowsmith (2014) at 959–60.
[74] FAR 15.306(d).
[75] Schwartz (2010) at 631. See also Section III.B below.
[76] Hoekman at 575.
[77] Directive 2004/18/EC, Article 29(1)–(4).

recognises a 'great need' for the additional flexibility this procedure affords. It even suggests that its use will result in greater cross-border trade.[78] This marks a significant departure from the EU's traditional opposition to negotiation.[79]

This procedure was renamed in the 2014 Procurement Directive. Until then it was called the 'negotiated procedure with prior publication of a contract notice'.[80] Its old name was easily confused with the negotiated procedure *without* prior publication of a contract notice, the EU equivalent of a sole-source procurement. That was unfortunate because the two have little in common. Indeed, there is nothing inherently uncompetitive about procurement procedures with discussions.[81] Perhaps the new nomenclature will alleviate any lingering concerns about the competitiveness of this procedure.[82]

Use of the competitive procedure with negotiation is limited to enumerated circumstances:

(1) the requirements cannot be met without adaptation of standard solutions;
(2) the procurement will include design or innovative solutions;
(3) 'specific circumstances' related to the nature, complexity, or legal and financial make-up of the procurement or associated risks;
(4) the technical specifications cannot be established with sufficient precision; or
(5) where in response to an open or restricted procedure, unacceptable tenders were submitted.[83]

The Court interprets these exceptions strictly, placing the burden on the authority. The scope for negotiation is wider than for open or restricted procedures.[84] If the previous directives were equivocal about whether post-tender negotiations are available, the 2014 Directive leaves no doubt clearly states that contracting authorities 'shall negotiate' after the initial tender is issued.[85]

[78] Ibid, Recital 42.
[79] Hoekman at 575.
[80] Ibid, Article 30.
[81] Trepte (2007) at 384–85.
[82] Trepte (2004) at 275–76.
[83] Directive 2014/24/EU, Article 26(4)(a) and (b).
[84] Arrowsmith (2014) at 607–08, 961–63.
[85] Directive 2014/24/EU, Article 29(3). cf Trepte (2007) at 312.

American suppliers familiar with the EU's longstanding suspicions about negotiation may not appreciate that the 2014 Directive significantly narrows the gap. On paper at least, the EU is now as accepting of negotiation as in the US. Failure to appreciate this sea change could reduce participation. The remaining small differences could present another obstacle. In the past, the gap between the two systems might have made them more understandable to one another. Paradoxically, as that gap narrows it actually may be harder for non-domestic suppliers to recognise lingering differences without the assistance of local counsel. So not understanding the import of this change, US suppliers may not take full advantage of the opportunity to negotiate with EU contracting authorities and thus may compete less effectively than they could have done.

3. Competitive Dialogue (EU)

Competitive dialogue was at first a variation on the competitive procedure with negotiation, which has been a source of confusion since it was introduced in 2004.[86] Its close relation to this procedure remains confusing. Grounds for using competitive dialogue are also unclear. In terms of the scope for negotiation, it lies somewhere between open and restricted procedures (none) and competitive procedure with negotiation (extensive).[87]

It is perhaps obvious to note that, insofar as the difference between the competitive dialogue and competitive procedure without negotiation remains a source of confusion for EU suppliers and is still debated among procurement scholars, it will be even more confusing to US suppliers. This may have adverse effects on both the quality and quantity of their participation.

[86] Trepte (2007) at 404.
[87] Arrowsmith (2014) at 606–07, 861–62, 871–77; Telles and Butler at 181.

4. Innovation Partnerships (EU)

The 2014 Directive introduced yet another form of negotiated procedure, the innovation partnership.[88] This was in response to stakeholders' demands for procedures that would promote and stimulate innovation.[89] Its combined the procurement of R&D with a follow-on contract under the a single award procedure.[90] Although it has been called the 2014 Directive's 'most important novelty', this 'new' procedure does not seem to confer additional flexibility on contracting authorities.[91] Arguably, it only provides guidance about what was already permissible under the 2004 Directive. Indeed, when Article 31 is compared with Article 29, their procedures seem to be almost identical.[92] Recital 49 supports this view in that innovation partnerships 'should be based on the procedural rules that apply to competitive procedure with negotiation'.[93] Some ambiguity remains about whether this procedure confers new authority, regulates an existing authority, or some combination thereof.[94]

Use of innovation partnerships may discourage some US suppliers from participating for the same reason as for the competitive dialogue: it is new, its application is still debated in the EU, and so its workings may bewilder the uninitiated. But there is more. Arrowsmith has argued that these partnerships are problematic in two further respects. First, combining development and supply contracts may undermine competition because not all suppliers interested in one phase will be interested in the other. Second, this procedure may increase the risk of discrimination.[95] If her concerns are valid regarding the anticompetitive effects of this procedure within the EU,

[88] Directive 2014/24/EU, Article 1.
[89] SEC(2011) 1585 final at 65. See also Apostol at 214–15.
[90] Directive 2014/24/EU, Recital 49. See also Arrowsmith (2014) at 1046–47.
[91] Apostol at 221; Gomes (2014) at 211.
[92] Telles and Butler at 176; Gomes at 212. Cf Telles and Butler at 176–77.
[93] Directive 2014/24/EU, Recital 49.
[94] Arrowsmith (2014) at 1047–50.
[95] Ibid at 1047–48.

it stands to reason that it will discourage US participation to an even greater degree. These two problems will perhaps affect not only foreign participation but the quality of such participation.

C. Aggregated Contracts

1. IDIQ Contracts (US)

In a strict sense, FAR 16.503 defines IDIQs as contracts that are indefinite both as to the date of delivery and the quantity to be delivered.[96] For convenience, 'IDIQ' is sometimes used as a catchall for several forms of aggregated contracts.[97] This incorporates the other two types in FAR Subpart 16.5[98] but also GSA federal supply schedule (FSS),[99] multiagency (MAC),[100] and government-wide acquisition (GWAC) contracts.[101] For convenience, that usage is adopted here. IDIQS are administered in two steps: an 'umbrella' contract is awarded, whereupon suppliers are added to a list of sources for broadly defined requirements;[102] when a need arises, officials choose from that list.[103] When suppliers are awarded a contract, they incur an obligation to perform upon issuance of a task (services) or delivery (goods) order.[104]

Combining these procedures under the rubric of 'IDIQs' is consistent with the literature and convenient for a one-to-one comparison with frameworks, but this is an oversimplification. There are important distinctions. This work treats FSS (FAR Part 8) and FAR Subpart 16.5 contracts as fungible 'IDIQs', but the failure to distinguish between them in a non-academic context would be tantamount to malpractice: the former are subject to CICA's 'full and open

[96] FAR 16.501-2(a); FAR 16.504(a).
[97] Nash, O'Brien-Debakey, Schooner, and Edwards at 263; Yukins, 'Introduction' (2017) at 85; Manuel (2011) at 23; Gordon and Kang at 226; Cibinic, Nash, and Yukins at 1121; Schwartz (2010) at 635.
[98] FAR 16.502 (definite quantity contracts); FAR 16.503 (requirements contracts).
[99] 40 USC 501; 41 USC 153(3). (MAS). Feldman at 110.
[100] 31 USC 1535.
[101] 40 USC 11302(e).
[102] 10 USC 3403; 41 USC 4103(b).
[103] FAR 16.505(a)(2).
[104] Federal Acquisition Streamlining Act of 1994, codified in 10 USC 3401, 3403, and 3405–06 and 41 USC 4101–410, and implemented by FAR Subpart 16.5.

competition'[105] and are always protestable,[106] whereas the latter requires only a 'fair opportunity' competition for orders[107] and are not always protestable.[108] This is a comparative work, not a practitioner's guide.[109] IDIQs are complicated. An interesting thesis could be written comparing them with frameworks in excruciating detail. However, that would have been a work unto itself.

Whether IDIQs are competitive has long been debated. These procedures have existed since the 1950s.[110] In the late 1970s, the GAO worried that IDIQs violated the 'spirit' of competition.[111] In 1984, however, Congress exempted some IDIQs from CICA's competition requirements.[112] A decade later, the Federal Acquisition Streamlining Act of 1994 (FASA) made IDIQs mainstream.[113] FASA also exempted task and delivery orders from CICA's 'full and open competition' because proponents envisioned that, during the second phase, robust competition would occur naturally.[114] And FASA instituted a preference for awarding umbrella contract to multiple suppliers,[115] which the GAO in turn interpreted to mean that IDIQs must be kept open to new entrants.[116] However, this is a double-edged sword: if *everyone* is included on the umbrella contract, then competition in the second phase is non-existent because authorities can effectively

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[105] 10 USC 3403(c); 41 USC 253h(c). See also Manuel (2011) at 20.
[106] The GAO held that FASA's prohibition on protests did not apply to FSS contracts. *Severn Cos, Inc*, Comp Gen Dec B-275717 (1997). COFC has agreed. *Labat-Anderson, Inc*, 50 Fed Cl 99, 104–05 (2001); *Idea, Inc v US*, 74 Fed Cl 129 (2006). See also Gordon and Kang at 227; Sherry, Koehl, and Armstrong at 484–85.
[107] 10 USC 3406(c); 41 USC 253j(e). See also Manuel (2011) at 21; Cibinic, Nash, and Yukins at 1171.
[108] The National Defense Authorization Act for Fiscal Year 2008 and authorised protests of IDIQs valued above $10 million for a limited period. PL 110-181, § 843, 122 Stat 236-39 (Oct 14, 2008); Manuel (2011) at 21–22. It was thought this authority would expire in 2011, but the GAO held that it retains jurisdiction. *Technatomy Corp*, Comp Gen Dec B-405130 (2011). Protests are allowed in two cases: orders that exceed the scope of the contract; orders above $25 million in the DoD, NASA, and the Coast Guard and above $10 million in other agencies. FAR 16.505(a)(10)(i)(A) and (B). Protests can be brought only to the GAO. FAR 16.505(a)(10)(ii).
[109] I am indebted to Nathan Castellano for alerting me about the dangers of combining various forms of IDIQ-type contracts under one single heading. I added this paragraph in response to his comments on a previous draft.
[110] Gordon and Kang at 228. See also Thornton at 384–85.
[111] GAO Rep No PSAD-80-35 at 18–19; 54 Comp Gen 392 (1975). See also Thornton at 390.
[112] Gordon and Kang at 231; Manuel (2011) at 9, 20–21.
[113] Yukins, 'Introduction' (2017) at 85; Nash (2005) at ¢55.
[114] Kelman (1998) at 256, citing Pub L 103-355, §§ 1004 and 1005. See also Smith (2008) at 99.
[115] 10 USC 3403(d)(4)(A) and 41 USC 4103(d)(3), implemented by FAR 16.500(a)
[116] *REFA Int'l, Inc*, Comp Gen Dec B-274849 (1997), at 13. See also Yukins, 'IDIQs' (2008) at 558.

enter sole-source contracts with *anyone*.[117] Reports suggest that in the 1990s, 72% of IDIQs were awarded in such an uncompetitive manner.[118] Legitimate competition, therefore, never happened either on the front end or back end.[119] When a consensus emerged that IDIQs were being used to circumvent competition,[120] lawmakers introduced competition requirements.[121] Despite reforms, competition has remained limited.[122] Their nominal competition is a fiction.[123] But this may not be apparent at first to foreign suppliers.

Two familiar problems may beset European suppliers. First, there is the 'huge black hole' in awards:[124] vendors are often unaware of orders and so lack a 'fair' opportunity in the second-phase.[125] If awareness of opportunities is a problem even for American suppliers, it will likely prove an even greater challenge for Europeans. Second, restrictions on some forms of IDIQs limit standing and forums for protests.[126] Coupled with the limited awareness of opportunities, such limits on challenge procedures may further discourage European participation.

As the next section will show, EU frameworks are similar to IDIQs. This could create an impression of false equivalence. But some forms of IDIQs elide competition by including all interested parties on the umbrella contract, even those who come along later. Analogous first-phase competition is more robust in Europe. Winning the first phase of is a lesser prize than winning a framework at that stage. This may deceive Europeans in two ways. It could lead them rest on their laurels because they have 'won' the first stage (when most competitors 'win' at this

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[117] Schooner (2005) at 564–65; Nash and Cibinic (2000) at ¶32.
[118] DoD IG (2001) at iii, 4. See also NASA IG (2001) at 2–3; DoD IG (1999) at 15. Every study in the 1990s and early 2000s reached the same conclusions. Nash (2005) at ¶55. See also Thornton (2002) at 427.
[119] Schwartz (2010) at 635–36; Schooner (2005) at 564–65.
[120] Nash (2005) at ¶55; Thornton (2002) at 427; Schooner (2001) at 558–60.
[121] FAR 8.405; FAR 16.505.
[122] FAR 8.405-1(d); FAR 16.505.
[123] Gordon and Kang at 243–49.
[124] Yukins (2006) at ¶318. See also Yukins, 'IDIQs' (2008) at 547, contrasting the first and second phase and calling the latter 'a much darker, uncompetitive world'.
[125] Gordon and Kang at 246.
[126] See above note 108.

stage in America). Or it could lead them to overinvest in the first stage and underinvest at the second. Such misunderstandings could prove substantial obstacles to winning US procurements.

2. Framework Agreements (EU)

Frameworks were introduced in 2004,[127] and they resemble IDIQs in several respects.[128] Like IDIQs, they are agreements whereby contracting authorities and suppliers establish terms governing contracts over a period of time[129] – the rationale being that having terms laid down in advance reduces the administrative costs for subsequent transactions.[130] Like IDIQs, frameworks unfold in two steps: during the first phase, suppliers are selected to participate; during the second, authorities award orders to one or more firms chosen for the framework agreement.[131]

But frameworks differ from IDIQs in important ways. First, although America specifically discourages single-source IDIQs, no such rule exists for frameworks.[132] Second, their definitions overlap, but their coverage is not coextensive. For example, US requirement contracts resemble EU dynamic purchasing systems,[133] but whereas the former are 'IDIQs' in a broad sense, the latter are not frameworks.[134] Third, while IDIQs are often open to buyers across the US government,[135] frameworks are limited to the EU contracting authority in question.[136] Further, unlike IDIQs, which are sometimes exempt from competition, frameworks are not a separate procedures, are usually awarded under open or restricted procedures, and are therefore subject to competition.[137]

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[127] Directive 2004/18/EC, Article 33.
[128] Arrowsmith (2014) at 1101, n 1; Yukins, 'IDIQs' (2008) at 546.
[129] Directive 2014/24/EU, Article 33(1).
[130] Arrowsmith (2014) at 1101.
[131] Directive 2014/24/EU, Article 33(1), (3), and (4).
[132] Cf Directive 2014/24/EU, Article 33(3) and (4).
[133] Compare FAR § 16.503 with Directive 2014/24/EU, Article 34.
[134] Compare Directive 2014/24/EU, Articles 33 and 34. See also Arrowsmith (2014) at Chapter 11; Arrowsmith (2018) at Chapter 19.
[135] Cibinic, Nash, and Yukins at 1121. When authority for interagency acquisition is lacking, authorities can use the Economy Act to purchase from other agencies' IDIQs. Ibid at 1135.
[136] Directive 2014/24/EU, recital 60. See also Arrowsmith (2014) at 1125, 1169–70, 1179.
[137] Directive 2014/24/EU, Article 33(1). See also Arrowsmith (2014) at 1117–18; Trepte (2007) at 436–37.

Some common obstacles for US vendors parallel challenges for EU vendors selling in America: new entrants will be excluded from frameworks,[138] eliminating the competition for four years.[139] IDIQs are not so much 'central' purchasing but rather a form of decentralisation, which transfers the procurement function from professional buyers to end users.[140] Likewise, having novices place orders on frameworks creates special dangers to good business decisions, compliance, and oversight. A temptation also exists to use frameworks outside their scope for administrative convenience.[141] Just as overusing IDIQs in US procurement may discourage EU suppliers so also would overuse of frameworks discourage US suppliers' participation in Europe. In both cases, excessive use of such contract vehicles would undermine trust in the foreign system since such procedures would award contracts to insiders rather advertise them for all to compete.

In addition to these common barriers, US suppliers, based on their familiarity with IDIQs, may sometimes underestimate the level of competition required for inclusion in the framework. Unlike IDIQs, the directives envision most of the competition happening up front.[142] Admission to an IDIQ umbrella contract is sometimes called a 'hunting license', because it affords suppliers the opportunity to compete for task and delivery orders across the whole federal government.[143] Further, whereas Congress favours multi-supplier awards, the directives establish no such preference.[144] Inattentive American tenderers may fail to notice a detail in the advertisement that the framework will choose only one provider,[145] leading it to put forth less than its best tender. In addition, whereas IDIQs are often open to new entrants, frameworks are closed for the

[138] Arrowsmith (2014) at 1102.
[139] Directive 2014/24/EU, Article 33(1).
[140] Gordon and Kang at 243–44.
[141] Arrowsmith (2014) at 1102, 1104.
[142] Ibid at 1104, 1115.
[143] Gordon and Kang at 226, 241.
[144] Directive 2014/24/EU, Article 33(3) and (4). See also Arrowsmith (2014) at 1106; Trepte (2007) at 438.
[145] Directive 2014/24/EU, Annex V, Part C, 10(a). See also Arrowsmith (2014) at 1120, 1129.

duration of the agreement, which may continue four years.[146] Compounding these obstacles is the extent to which terms are open for negotiation after the first phase. Unlike IDIQs, the directives prohibit 'substantial modifications' to frameworks during the second phase. Careless American firms may unwittingly enter frameworks with a mistaken understanding about what can be renegotiated later. This could be an obstacle to winning at the second phase if the order is placed on the basis of the original tender alone.[147] This may undermine effective participation.

Another potential barrier to US firms lies in the opposite direction: they may sometimes expend too much effort. That is because of a difference in the availability of frameworks for other authorities' use. As noted, an IDIQ with one agency is often available across the whole of government, but the same is not true for frameworks. The uninitiated US firm may waste time and resources competing for a framework with a single authority, vastly overestimating its value.

D. Non-competitive Procedures

I. Sole Source (US)

Since its founding, America has limited sole-source contracts.[148] CICA, its preeminent procurement statute, was passed in 1984 in large part to curtail the burgeoning use of sole-sourcing in the Reagan defence build-up when it was estimated that two-thirds of DoD contracts were uncompetitive.[149] The rule is now 'full and open competition', wherein all qualified bidders can participate.[150] Yet CICA also established seven cases when sole-sourcing is permissible:

(1) only one responsible source,
(2) unusual and compelling urgency,
(3) maintain a sole source for national emergency,
(4) treaty or international agreement requires,
(5) authorised or required by statute,

[146] Directive 2014/24/EU, Article 33(1), 33(3), and (4) and Recital 60.
[147] Ibid, Article (4)(b) and (4)(c), Article 33(3)(a), (4)(b) and (4)(c). cf Arrowsmith (2014) at 1127, 1141–53.
[148] Act of Feb 20, 1792, ch 7, § 6. Coy at 22, noting that Congress's first contracting statute forbade sole-sourcing.
[149] Nash and Cibinic (2003) at ¢40, citing; FAR 6.3. cf Coy at 7–8; Barnes at 538.
[150] 10 USC 3201(a); 41 USC 253(a)(2). See also Manuel (2011) at 11.

(6) national security, and
(7) necessary in the public interest[151]

Even when uncompetitive procedures would be allowed under one of these conditions, the sole-source method is further restricted in that officials must utilise as many sources as 'practicable'.[152] Only the first of these seven conditions is exempt from this additional requirement because, were there only one viable source, attempts to purchase from multiple vendors would be futile.[153]

These safeguards are supposed to ensure that use of sole-sourcing remains exceptional.[154] They do not. Although sole-source procurements have been halved since their peak in the 80s, they still constitute 29% of procurement.[155] Studies attribute this to defence's disproportionate share of the composition of purchases, especially to the non-competitive follow-on contracts the DoD is forced into when it lacks data rights to the technologies that underpin its systems.[156] Consistent with this explanation, 'only one responsible source' is the most common exception.[157]

The prevalence of sole-source contracts may discourage European suppliers, who will be justly suspicious that such procedures will be used to favour domestic firms. Two factors mitigate the apparent overuse of this procedures. First, sole-sourcing is less common for non-defence contracts. Second, because sophisticated weapons are so expensive, they constitute a lop-sided share of the *value* of procurements, inflating the share of sole-source procurements; however, in terms of *volume*, sole-sourcing is less common. Whatever the explanation, the fact that 29% of US procurement spending is awarded sole-source may discourage EU participation. There is another possibility. If an EU firm believes that they can win a sole-source contract –

[151] 10 USC 3204(a); 41 USC 3304(a). See also Manuel (2011) at 26–28.
[152] 10 USC 3204(d) and 41 USC 3304(d), mandating that officials solicit from as many sources as practicable for exceptions (2) and (6). FAR 6.301(d) extends this mandate to exceptions (3), (4), (5), and (7).
[153] Cibinic, Nash, and Yukins at 299
[154] Yukins, 'Introduction' (2017) at 80.
[155] Chaudhry at 9, using 2014 figures.
[156] GAO-14-395 at 18–21; GAO-10-833 at 19–24. See also Hanson at 2472.
[157] GAO-10-833 at 1, 14; GAO-14-395 at 16; GAO-17-270SP at 8–9.

say a defence contract for a major weapon system that will be in service for decades – with the possibility of a steady revenue stream in perpetuity, then perhaps the prevalence of sole-source contracts could actually incentivise greater European competition.[158]

2. Negotiated Procedure without Prior Publication (EU)

Like sole-source procurements in the US, the EU strictly limits use of this procedure.[159] Since this procedure is uncompetitive, it poses several risks.[160] Its use is generally discouraged, but there are nine exceptions, which are available depending on whether the contract is for works, supplies, or services and in some cases whether a reasonable substitute exists:

(1) no other suitable tenders,
(2) only a particular supplier (artistic reasons, technical reasons, or intellectual property),
(3) extreme urgency,
(4) R&D,
(5) additional deliveries from original supplier,
(6) purchases from the commodities market,
(7) advantageous terms from going-out-of-business sale,
(8) design contest, and
(9) repetition of similar work[161]

The CJEU interprets these exceptions strictly. Further, it has held the contracting authority bears the burden of proof and must be able to explain why it used a particular procedure.[162] The Directive make clear that this procedure is a last resort, to be used only when all else has failed. Because there is little formal guidance on the use of this procedure, authorities are left to their own devices.[163] On average, Member States use this procedures in only 6.3% of procurements, but in Hungary, Romania, Czechia, and Slovakia its use ranges from 15% to nearly 20%.[164]

[158] I am indebted to Nathan Castellano for suggesting this entertaining scenario.
[159] Directive 2014/24/EU, Article 32. See also Arrowsmith and Treumer at 11.
[160] Arrowsmith (2014) at 961.
[161] Ibid, Article 32(2)(b), (2)(c), (3)(a), (3)(b), (3)(c), (3)(d), (4), and (5)
[162] Trepte (2007) at 387–95; Arrowsmith (2014) at 961–62, 1061, 1063.
[163] Telles and Butler at 132–33.
[164] Chong, Klien, and Saussier at 15, 21.

For American suppliers, the narrow conditions for this procedure often corresponds with those in which the sole-source method can be used. For example, 'only one responsible source'[165] is comparable contracts that 'can be supplied only by a particular economic operator';[166] and 'unusual and compelling urgency'[167] with 'extreme urgency'.[168] When coupled with the EU's infrequent use of this procedure (6.3%) compared with US sole-sourcing (29%), this may encourage participation. Yet suppliers sell not to the 'average' Member State but to particular nations. Use clusters at the extremes, with half the Member States using it rarely and about one-third using it in 10% or more of cases.[169] Depending on the sophistication of the supplier, such variability may (a) encourage or discourage participation depending on the level of use or (b) inhibit participation due to the costs associated with mastering the nuances of 27 local varieties.[170]

III. Comparing Foundations

A. Constitutional Character

Both systems invoke competition as a fundamental priority, but the two are to some extent speaking very different languages.[171] Their constitutional character is essential to 'deciphering' these two languages. In particular, although both praise the merits of competition, competition answers distinct fears. Americans distrust government and avarice that can lead to fraud, waste, and abuse. Europeans worry about tribalism and the prospect that, if unchecked, local officials would discriminate against non-domestic suppliers. The former is concerned with integrity and efficiency, the latter with the EU's *raison d'être*: establishing the single market. These distinct rationales shape how the two function.

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[165] 10 USC 3204(a)(1); 41 USC 3304(a)(1).
[166] Directive 2014/24/EU, Article 32(2)(a) and (2)(b).
[167] 10 USC 3204(a)(2); 41 USC 3304(a)(2).
[168] Directive 2004/18/EC, Article 32(c)
[169] Chong, Klien, and Saussier at 21.
[170] Woolcock and Grier at 320.
[171] Bruneau and Feehily at 76–77.

Americans have a long tradition of distrusting government. As noted, the US government was 'invented against government': its founders separated power among three branches due to a deep-seated fear of corruption.[172] Fear of an overweening state came partly from theory and history but also from recent experience.[173] During the Revolution, procurement earned a reputation for 'sharp practices, profiteering, and kickbacks.'[174] Further, at least in the founding mythology, safeguards protected citizens from public graft and distinguished the US from the 'corrupt, servile, dependent, and contemptible' British Parliament,[175] wherein the MPs would participate a government of 'loaves and fishes'.[176] Fear of corruption thus lay at the heart of the founding.[177]

Such fears animate its procurement system. Because Americans have a nearly unshakeable faith in free enterprise,[178] competition is thought to be the remedy.[179] These diseases take several forms. One is collusion among buyers and sellers.[180] Another is one-sided overpricing, where vendors take advantage of gullible buyers.[181] A third is incompetence, which is not exactly corruption but is similarly loathed and results from negligence.[182] Because these three overlap,

[172] Peters at xx–xxi.
[173] Teachout at 34–35, 39.
[174] Doke at S-5.
[175] Annals of Congress, vol 18 (1808) at 1618.
[176] Ibid at 1688. While Americans thought that the Britain had the right form of government, they believed that it had become irredeemably corrupt and thus provided a cautionary tale as American established their own constitution. Teachout at 36–39. In 1792, Congress passed laws prohibiting officials from using their offices for private gain, and this was 'far more advanced than British legislation at the time.' Kelman (1990) at 13.
[177] Teachout at 38, citing three historians of the founders' ideology saying that corruption was a pervasive concern. Indeed, 'the Constitutional Convention defined the republic as a nation preoccupied with corruption.' Ibid at 82.
[178] Besselman, Arora, and Larkey at 422–23; Schooner, 'Desiderata' (2002) at 104.
[179] Harp at 43, saying, 'our forefathers bestowed the competitive bidding' to curb corruption. See also Snider Smith at 88–89, 108–14; Schooner, 'Desiderata' (2002) at 104–05.
[180] Perlman at 3187, 3197, 3209; Tiefer and Shook at 57.
[181] Tiefer and Shook at 57.
[182] Kelman (1990) at 13.

they are sometimes spoken of collectively.[183] Americans fear corruption and incompetency both as inherent evils and because of their burden on the end-user and the taxpayer.[184]

Regulation is often tightened in response to scandals.[185] As mentioned, more competition is frequently the preferred solution.[186] This has been true since the early republic.[187] From 1809 to 1861 Congress passed several competition statutes to curb fraud,[188] the latter of which served as the mainstay of federal procurement through the Second World War.[189] Starting in the 1930s, the Comptroller General likewise mandated 'full and free'[190] and 'full and open' competition.[191] Following exemptions instituted due to the exigencies of war, the Armed Services Procurement Act of 1947 reinstituted 'full and free competition'.[192] CICA, which has been the statutory bedrock of US procurement since 1984, was passed in the wake of procurement scandals.[193] Following scandals in Iraq and Afghanistan, Congress again prescribed more competition.[194] As the Tenth Circuit Court of Appeals has explained, 'The purpose of these statutes and regulations' has always been 'to prevent unjust favoritism, or collusion or fraud'.[195] Three decades earlier, Justice Oliver Wendall Holmes wrote that to prevent fraud in government procurement, the 'protection of publicity' is needed.[196] This is the dragon that preoccupies the American mind.[197]

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[183] These three are grouped together as the 'dreaded trio': fraud, waste, and abuse. Perlman at 3188–89, 3195–96.
[184] Tiefer and Shook at 57.
[185] Kelman (1990) at 14; Turpin and Whelan at II-16.
[186] Gordon and Racca at 145; Peterson at 48.
[187] 1 Report of the Commission on Government Procurement (1972), Appendix G, 163–84.
[188] Doke at S-5.
[189] Ibid, citing Revised Statutes of the United States § 3709 (1873–74). See also Wittie at 6–7.
[190] 10 Com Gen 294, 301 (1931).
[191] 17 Com Gen 789 (1938).
[192] 62 Stat 21 (Feb 19, 1948).
[193] Perlman at 3193–96; Todd Washington 19–20; Peterson at 8, 48.
[194] Manuel (2011) at 1, 23–25.
[195] *US v Brookridge Farms, Inc*, 111 F2d 461, 463 (10th Cir 1940). Cf Opinion Attorney General 257 (1829), saying the statute was designed to prevent favouritism and other 'notorious mischief'; vom Baur (1958) at 19–20.
[196] *US v New York & Porto Rico SS Co*, 239 US 88, 93 (1915).
[197] Harutyunyan at 454.

Europeans seek to slay another dragon.[198] The EU came about first as a customs union. These were the aims of its predecessors, the European Coal and Steel Community and the EEC, and these remain its core object.[199] Competition is required not so much to increase efficiency, lower costs, or curb fraud but to ensure equality of opportunity.[200] This emphasis on equality arises from distrust of public authorities, whose motives are thought to be protectionist if left unchecked.[201] The EU's dragon, then, is a distrust officials' tendency to favour domestic firms.[202]

EU-wide competition remains the core objective because of ongoing concerns of tribalism along national lines.[203] In 1985 white paper, the Commission found procurement was 'marked by the tendency of the authorities concerned to keep their purchases within their own country.' This partitioning is 'one of the most evident barriers to the achievement of a real internal market.' It called for policies to remove 'psychological barriers' and to widen cross-border competition.[204]

Whether one looks at the 2004 report on cross-border procurement or the 2011 version that took into account local subsidiaries, EU procurement remains mostly national.[205] Estimates on the level of cross-border competition vary depending on whether volume or value is measured: in terms of volume, 1-2% of public contracts are direct cross-border awards; in terms of value, cross-border transactions account for about 4%.[206] When subsidiaries are included, which is a better measure,[207] indirect cross-border transactions are considerably higher: in terms of volume

[198] Ibid at 454–55, saying the EU procurement system's goals are monolithic: 'attaining a single European market.'
[199] Arrowsmith (2014) at 149; Trepte (2007) at 40.
[200] Trepte (2007) at 40, quoting Commission Decision 92/204/EEC in Cases IV/31.572 and 32.571-*Building and Construction Industry in the Netherlands.*
[201] Steinicke (2001) at 337.
[202] Gordon and Racca at 144.c
[203] Arrowsmith (2002) at 3; Bovis at 112.
[204] COM(85) 310 at 23–24.
[205] Weishaar at 65.
[206] Kutlina-Dimitrova and Lakatos at 505–06, basing their estimates on a dataset drawn from 2008 to 2012.
[207] B-1049(2017) at 1–2, 27–28, 153–54.

21.9%, in terms of value 20.4%.[208] Still, intra-EU cross-border competition remains uncommon relative to the private sector, with public imports standing at half the private level.[209]

For European vendors, the US may seem surprisingly cavalier about replacing traditional procedures with seemingly less competitive methods. America's rhetoric about 'competition' could confuse European suppliers, who might assume that 'competition' has the same meaning as in the EU, where competition usually implies transparency and some sort of public advertising. However, not all contracts that Americans would consider 'competitive' fit this mould.

Americans may be taken aback that, despite the emphasis on non-discrimination, Member States' markets remain relatively closed off to foreign competition relative to private markets. Recent studies show that setting up local subsidiaries increases vendors' chances, but favouritism persists.[210] Unwritten, tacit preferences serve as NTBs. The EU has been unable to remove them over four decades, so their eradication with the passage of TTIP seems improbable.

B. Legal Culture: For or Against Negotiation

This section considers the precedent and customs that have accrued around negotiation. Both systems have come to accept and even formally recognise negotiation as a legitimate competitive procedure. Terminology varies, but in terms of black-letter laws and regulations, the two systems are not so far apart. Historically, the US favoured open tendering and considered negotiated procedures suspect.[211] More recently, it placed negotiations on equal footing. The EU has followed a similar trajectory, but it continues to disfavour negotiation in some measure. Despite the EU's recent reforms, this remains is a crucial difference between the two systems.[212]

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[208] Ibid at xii, 27–28.
[209] Ibid at xi, 16–17, reporting that the private sector's share of imports is 10 percentage points higher than is the public sector's, at 18.8% versus 7.9%.
[210] Cost of Non-Europe, Part A at 79. Construction is an especially problematic. Woolcock and Grier at 320.
[211] Cohen at 5–6.
[212] Hoekman at 575.

Understanding the tension between the two basic procedures in US procurement requires a history lesson. 'Since the early days of the Republic,' writes James Nagle, the foremost chronicler of federal contracting, 'Congress has clearly preferred a competitive bidding system,'[213] especially one based on sealed bidding.[214] This has been called the 'brilliant solution' to what the framers feared most: fraud, waste, and abuse.[215] Congress mandated sealed bidding in 1809[216] and again in 1861.[217] From 1809 until World War II, it was the rule except for wartime exigencies,[218] when it was thought too slow and inefficient.[219] Although the 1861 statute remained in force for nearly a century, during the Second World War a measure was enacted rendering sealed bidding *unlawful* without special permission; the exception swallowed the rule.[220] These were 'major cracks in the monolithic legislation' that mandated sealed bidding.[221]

Immediately after the war, exemptions were lifted and the rule reverted to the status quo ante: for a brief time, sealed bidding became the norm once again.[222] Recent experience, however, had taught the value of flexible procedures for defence contracts,[223] and so competitive negotiation was incorporated soon after in the Armed Services Procurement Act of 1947 (ASPA).[224] Yet ASPA maintained a preference for sealed bidding.[225] Negotiation was a necessary evil to keep pace with complex procurements and rapid technological growth.[226] Mere tolerance

[213] Nagle (1999) at 7. See also Gordon and Racca at 139, noting that sealed bids have been used since the 1700s.
[214] Rich 6–7; Keyes at 351; Davies at 59; Peterson at 14–16; Todd Washington 20.
[215] Kelman (1990) at 15, quoting *US v. Brookridge Farm, Inc*, 111 F2d 461, 463 (10th Cir 1940),
[216] Act of Mar 3, 1809, ch 28, § 5. See also Cohen at 2.
[217] Revised Statutes of the United States § 3709 (1873–74).
[218] Shealey at 162–63; Laurent at 90, 99.
[219] Nagel at 7; Tiefer and Shook at 57; Wittie at 10.
[220] Todd Washington at 13–14, citing the War Powers Act of 1941, Title 2, 55 Statute 838 (1941).
[221] vom Baur (1958) at 20.
[222] Gordon and Kang at 226.
[223] Cohen at 6–7; vom Baur (1958) at 21; Peterson at 15; Barnes at 536.
[224] Barnes at 536; Todd Washington at 14.
[225] vom Baur (1958) at 22; Wittie at 23–24; Cohen at 13.
[226] Wittie at 16.

gradually yielded to a need for more flexible procedures.[227] Eventually, negotiation became the rule.[228]

Military contracts using negotiation reached 85% of all procurements in the 1960s.[229] Despite several attempts to return to sealed bidding,[230] the share of procurements awarded under competitive negotiation peaked at 90% in 1982. Competitive negotiation had become the norm, which was recognised with the passage of CICA in 1984.[231] CICA put negotiation on equal footing with sealed bidding, a step that many considered overdue.[232]

More important than the historical development of this policy are the reasons that Congress felt compelled to recognise negotiation as a legitimate procedure, given the countervailing pull of a longstanding preference for sealed bidding.[233] Even though the role of sealed bidding has diminished, it has been suggested that this procedure still 'deserves study because . . . its concepts and procedures serve as foundations for all acquisition methods' in America.[234] Why would the American abandon sealed bidding when it so perfectly answered their fear of corruption?[235] How, then, did the US come to view competitive negotiation as an acceptable procedure?[236] The answer lies in the composition of purchases considered in Chapter 2 and the methods thought best suited to the purchase of high-tech, complex, and bespoke defence kit.

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[227] 1 Report of the Commission on Government Procurement (1972), Appendix G, at 177–78; Coy at 25.
[228] Cohen at 8.
[229] Ibid; Todd Washington at 16; Coy at 25.
[230] 1 Report of the Commission on Government Procurement (1972), at 20–21. Cf Cohen at 8; Gordon and Kang at 230; Wittie at 19–20; Todd Washington at 18–21.
[231] Cohen at 8, 13; Gordon and Racca at 122–23.
[232] Wittie at 20, 28; Todd Washington at 22; Coy at 35, 38.
[233] Wittie at 1–5, listing statutory mandates in 1775, 1777, 1792, 1809, 1815, 1842, and 1852. Cf Tiefer and Shook at 57–59; Barnes 536–37; Todd Washington 13–14; Coy 14, 22.
[234] Tiefer and Shook at 57.
[235] Kelman (1990) at 15.
[236] Schwartz (2010) at 631.

The decision to recognise competitive negotiation was premised on findings made by the Commission on Government Procurement in 1972,[237] which held that justifiable restrictions on sole-source procurements had the unintended consequence of limiting competitive negotiation:

> The point is not that there should be more negotiation and less advertising, but that competitive negotiation should be recognized in law for what it is: namely, a *normal, sound buying method which the Government should prefer when market conditions are not appropriate for the use of formal advertising*. . . . When competitive negotiations are the appropriate procurement technique, the statute should not require Government officials to indulge in expensive, wasteful, and time-consuming procedures . . .[238]

This report memorialised a long-held belief that negotiation was legitimately competitive when market conditions were inappropriate for sealed bidding – especially for R&D procurements.[239]

Despite a fixation with sealed bidding, America made a radical break and recognised that sealed bidding was sometimes unsuited to conditions. It is best for technologically stable products, when the government buyer knows exactly what she wants and can write detailed specifications.[240] Conversely, when offers cannot be compared based on the 'common dominator of price,'[241] 'shot-in-the dark' price competition is absurd.[242] Immature, technically sophisticated products are not amenable to a simple price comparisons.[243] Such products require an iterative process, where officials can compare the merits of various solutions and have ongoing discussions to refine their requirements.[244] As the composition of purchases shifted away from commodities,

[237] Todd Washington at 18; Peterson at 18–19; Cohen at 8–10.
[238] 1 Report of the Commission on Government Procurement (1972) at 21 (emphasis added).
[239] vom Baur (1958) at 21.
[240] Nash and Cibinic, 'Some Additional Thoughts' (1992) at ¶9.
[241] 1 Report of the Commission on Government Procurement (1972) at 18–19.
[242] Edwards (2008) at ¶42.
[243] Gordon and Racca at 123; Tiefer and Shook at 57; vom Baur (1958) at 21.
[244] Peckinpaugh and Goldstein at 281– 82; Gordon and Racca at 125, 127–28; Cibinic, Nash, and Yukins at 674.

America embraced competitive negotiation.[245] Even some outsiders agree that this procedure is truly competitive.[246] Competitive negotiation is even hailed as the system's 'signal achievement'.[247]

How does the EU view negotiation's effect on competition? Whereas America considers it an enabler, Europe has long considered negotiation an obstacle.[248] It has long disfavoured negotiated procedures because of the potential for abuse to pursue national preferences.[249] However, under the 2004 and 2014 Directives such procedures are increasingly available. The 2014 Directive recognises the 'great need for . . . additional flexibility to choose a procurement procedure [that] provides for negotiations.'[250] The publication of a 1996 green paper initiated a debate,[251] and the introduction of the competitive dialogue in 2004 resulted.[252] This new procedure was added because the existing methods were considered inadequate to the nature of procurements, including the increased use of IT and public-private partnerships,[253] and because discussions under the competitive procedure with negotiation had been interpreted in a restrictive fashion.[254] Existing options were thought insufficiently flexible for complex contracts.[255] That is because for complex contracts, officials may know what their needs are but not know what the best commercial solutions may be.[256] The 2014 Directive made flexible procedures more broadly

[245] Barnes at 536; Gordon and Kang at 222; Tiefer and Shook at 80.
[246] Trepte (2004) at 276–80; Steinicke 331–32.
[247] Schwartz (2010) at 631.
[248] Hoekman at 575.
[249] Schwartz (2010) at 631.
[250] Directive 2014/24/EU, recital 42.
[251] Arrowsmith and Treumer at 25–29, citing Commission, Green Paper, *Public Procurement in the European Union: Exploring the Way Forward,* COM (96) 583 final.
[252] Arrowsmith (2014) at 859–61; Bovis at 86.
[253] Arrowsmith and Treumer at 16; Steinicke (2001) at 333.
[254] Bovis at 86–88, citing Council Directives 93/37/EC, Article 7(2)(C) and 92/50/EEC, Article 11(2)(b)-(c).
[255] Arrowsmith (2014) at 959; Arrowsmith and Treumer at 3.
[256] Arrowsmith and Treumer at 26–27, citing Commission, Communication, Public Procurement in the European Union, COM (98) 143, section 2.1.2.2.

available.[257] It introduced the current version of competitive procedures with negotiation, which is arguably closer to the sort of discussions under the US's competitive negotiation procedure.[258]

Competitive dialogue was introduced for purchasing differentiated products. This made at least some form of competition possible.[259] This should sound familiar. America's parallel debate started in the 1950s, when Cold War planners to reconsidered how to buy state-of-the-art arms. In the US, negotiation was long tolerated and finally approved in 1984;[260] in the EU, negotiation came of age with the 2004 directive.[261] The US and the EU also share a common rationale for this development: that open procedures are unsuited for purchasing complex items.

Despite the parallel views on the use of negotiation, the US and the EU still diverge in how frequently they are used. Negotiation remains the exception in the EU: data suggest that less than 10% of contracts are negotiated.[262] Although on paper use of negotiation appears similar, that is not the case: the US extols negotiations, whereas the EU tolerates them.[263] Legal culture may explain Europe's infrequent utilisation of negotiated procedures. They still view them with some suspicion, considering discussions a potential *restraint* on competition. Indeed, from their perspective, the distinguishing feature of competitive procurement is that it is selects a winner without need for discussions.[264] Negotiation is not only unnecessary but to the European mind can actually undermine the proper functioning of the competitive procedures.[265] Although there

[257] Arrowsmith (2014) at 976–77.
[258] Yukins (2013) at 2-6.
[259] Steinicke (2001) at 333.
[260] Cibinic, Nash, and Yukins at 331, citing FAR 6.401.
[261] Arrowsmith and Treumer at 3.
[262] Chaudhry at 18.
[263] Hoekman at 575; Trepte (2007) at 311; Steinicke (2001) at 336.
[264] Arrowsmith (2014) at 275.
[265] Trepte (2007) at 385.

is a growing recognition the practice is sometimes sound and the authority for such procedures was greatly expanded in 2004 and 2014, a negative connotation lingers.[266]

US vendors will perhaps find that it is in one sense easier to compete given that the EU favours open procedures to a greater degree. Because open procedures afford the highest level of transparency, competition, and inclusion, vendors may delight in the use of this procedure. Yet, in another sense, Americans may find it harder to compete. Sellers may be surprised to learn that the existence of non-price factors alone is not enough for authorities to initiate discussions. Except for sealed bids, American suppliers are more accustomed to discussions with the purchaser following their initial offer and having the opportunity to clarify, refine, and amend their offers. Further, competition for sealed bids never involves non-price factors. Americans may be unprepared for a single opportunity to tender without receiving further guidance from the purchasers through the sort of ongoing discussions they are accustomed to in US procurement.

European vendors in America may be taken aback that the preponderance of contracts is awarded using negotiation and that sealed bidding is a rarity.[267] Two results may ensue. First, because European vendors are more accustomed to devoting their best efforts to the initial tender, they may underappreciate how important subsequent communications are to winning and may find themselves outcompeted by competitors who do understand how important discussions are. Second, the failure to appreciate the importance of discussions could also lead disappointed vendors to file frivolous protests, thereby wasting time and resources. This is because sellers may be surprised at how extensively competitive negotiation is used, even for the purchase of simple products. Unlike in the EU, negotiation is the rule, and this is bound to confuse European

[266] Arrowsmith (2014) at 275–77; Trepte (2007) at 309.
[267] Chaudhry at 9.

vendors tendering in America. Inexperience with similar procedures will not only affect the level but also the quality of European participation in the US.

C. Policy Objectives

The repetition of a common procurement vocabulary around the world can be deceptive because priorities differ and the objectives for adopting such common principles vary widely.[268] 'Competition' is one such word whose polysemous meaning is appealing for different reasons. This section considers two policy objectives associated with 'competition' in the US and the EU.

1. The Competition Mandate

One fundamental difference between competition in the US and the EU is the relative emphasis this desideratum receives. In the US, it is mandated. What that means exactly and the efficacy of this mandate are open questions, but there can be no doubt that the US system endorses competition. Indeed, competition is the general rule.[269] Just what that word means has, of course, evolved. As noted, for the republic's first two centuries, it generally meant use of sealed bidding.[270] During the Cold War, America became less enthralled with sealed bidding and came to believe that competition should include negotiated procurements.[271] A competition requirement existed the statutory institution in 1984,[272] but CICA marked a renewed emphasis.[273] More to the point, it mandated 'competition' and defined this term as a public procurement system where all qualified bidders could participate. The meaning of this mandate is somewhat

[268] Trepte (2004) at 3–5, 7.
[269] Perlman at 3187.
[270] Wittie 20–21, 28; Cohen at 13; Peterson at 36–37, 86–87; Archibald and others at 5, 7–8; Rich at 6–8. See also Tiefer and Shook at 57; Cibinic, Nash, and Yukins at 331; Keyes at 351; Todd Washington at 13; Barnes at 537; Kelman (1990) at 15; Shealey at 162–63.
[271] Chapter 2, Section V.A.
[272] *Aero Corp v Department of the Navy*, 549 F Supp 39, 46 (DDC 1982).
[273] Burnett and Kovacic at 252–53.

unclear, but the US has at least made an explicit statement that competition is one of its procurement system's objectives.

If the competition mandate in America is a clarion call, to the extent that such a mandate exists in the EU it speaks with a fainter voice – despite advocacy for its recognition in some quarters.[274] Assuming *arguendo* that some form of competition objective exists, the directives are not so explicit as in America. For now, the aim is not competition but non-discrimination and equal treatment.[275] As a by-product, these principles also create a competitive environment.[276] Yet Europe has not unequivocally established competition as one of its objectives.

For US vendors, the lack of a competition mandate may be vexing and the emphasis on non-discrimination and equal treatment may be confusing. These two principles certainly share overlapping purposes, but they are not the same. It is not hard to imagine cases that are non-discriminatory yet 'uncompetitive' in the American sense. This may engender mistrust and thus discourage US suppliers' participation in Europe.

For EU vendors, the competition mandate may be a frustrating because it is unclear what it means. Does competition entail non-discrimination, equal treatment, both, or something else? Further, vendors may struggle to know if they have a viable protest when officials choose to employ less competitive procedures. This will decrease their willingness to participate and, if ultimately they choose to compete, the quality of their participation.

[274] Trepte, 'Foreword' in Sanchez-Graells (2015) at x. Also compare Arrowsmith (2014) 169–70, 173 with Kosinski at 220, 225; de Quesada 229, 236; Verdeaux at 726.
[275] See above Chapter 2, Section III.
[276] Arrowsmith (2014) at 273; Hayken at 143.

2. Optimal versus Maximum Level of Competition

A frequent refrain in US procurement is that competition is not so much a procedure as an *objective* that the procedures are designed to obtain.[277] That objective is, arguably, business rivalry.[278] When policies and procedures encourage such rivalry, firms have as much an incentive to compete for public contracts as for private sector business opportunities.[279] Such competition is thought to yield higher quality, lower prices, and greater integrity, which are America's ultimate goals.[280] Securing these aims depends on sharp dealing among determined rivals. Competition, therefore, aspires to be cutthroat so that the government can best achieve its true objectives.

Competition in the EU means something different. If US procurement is competitive but not open, perhaps EU procurement is best described as open but not competitive. Procurement in the EU is first and foremost *open*. That is not the same as competitive.[281] European policies strive to foster the single market, wherein Member States may be afforded free access to their neighbours' business. Such access is the end in itself,[282] not a means to an end.[283] Insofar as 'competition' is used at all, the term is synonymous with the greater single market project.[284] Competition, then, is not so much about business rivalry but access within the single market.

Some scholars take this observation about competition a step further and maintain that the sort of competition that would replicate private markets was never an objective in the EU. They would concede that Member States are free to adopt competition as a local objective, but they

[277] Cohen at 2.
[278] Anderson and Kovacic at 69.
[279] 1 Report of the Commission on Government Procurement (1972) at 19.
[280] FAR 1.102(a); Report on the Commission on Government Affairs accompanying Senate 2127, S Report 97-665 (1982) at 3. See also Steinicke (2001) at 336.
[281] Bialos, Fisher and Koehl at 3, 69–70, 84–87.
[282] America is less concerned with strictly equal treatment. Yukins (2007) at 269, citing FAR 1.102-2.
[283] Steinicke (2001) at 336.
[284] COM(2011) 896 final at 3.

doubt that the directives require this. They maintain that the efficient allocation of resources through competition is neither a prerequisite for the single market nor the other way around.[285]

Because the US views competition as an instrument of policy to achieve other aims whereas the EU views it as a valuable end state, their preferred levels of competition differ. American rhetoric can wax poetic and obscure the true state of affairs. In practice, America favours competition only insofar as it serves the system's secondary ends. That is, the US is comfortable with restricting competition to what is considered optimal in terms of administrative efficiency. The premise is that while competition is useful, at some point there is diminishing marginal utility because of increased administrative costs.[286] In 1972, the Commission on Government Procurement considered the matter ultimately opposed maximum competition for that reason.[287] A decade later, CICA incorporated that recommendation,[288] seeking to find an appropriate balance between competition and pragmatism,[289] which some competition advocates criticised.[290]

In 1996, the Clinger-Cohen Act sought to restrict competition further, replacing CICA's 'full and open' with *efficient* competition.[291] That did not succeed, but the FAR was worded so that competition would be sought only insofar as it was 'consistent with the need to *efficiently* fulfil the Government's requirements.'[292] Efficiency was addressed later in the statute by allowing contracting officers to restrict the 'competitive range' by reducing the suppliers who would be evaluated at the next stage, insofar as doing would not impair 'efficient competition'.[293]

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[285] Arrowsmith (2014) at 167; Trepte (2006) at 3.
[286] Mayer at 175. See also Nash (2005) at ¶55,.
[287] 1 Report of the Commission on Government Procurement (1972) at 22–23.
[288] PL 93-369 § 2711(a)(1) (Jul 18, 1984), codified in 10 USC 2304(a)(1)(A) and 41 USC 253(a)(1)(A).
[289] Perlman and Perry at 50.
[290] Oliver.
[291] Cibinic, Nash, and Yukins at 294–95.
[292] Clinger-Cohen Act § 4101, codified in 10 USC 230(j) and 41 USC 3301(c) (emphasis added).
[293] Ibid at § 4103, codified in 10 USC 2305(b)(4)(B) and 41 USC 3703(b).

Not only did CICA and subsequent legislation restrict competition, the GAO has also long required that agencies pursue only *adequate* competition.[294] Ostensibly, competition is to be 'full and open' and that means that all responsible parties may submit bids.[295] In practice, however, such competition may be limited to what is adequate,[296] efficient,[297] or practicable.[298] Thus, CICA's 'full and open competition', which was a term the GAO coined in 1928,[299] means something less robust than what the plain language would suggest. The last section showed that a mandate exists, but that mandate is not unqualified and the aim is not maximalist competition.

The EU, however, takes a different view. Because competition is not so much a policy tool but instead signifies a non-discriminatory commercial environment, the EU cannot abide restrictions on competition. To curb competition for efficiency's sake would undermine the primary objective: the single market. Europe, thus, seeks not optimal but *maximum* competition in the sense of ensuring a non-discriminatory single market to the greatest extent possible. Limits on competitive procedures that would restrict participation are therefore tighter than in America.

The EU's reticence about restrictions on participation is straightforward. Member States have a history of restricting trade, especially in the area of public procurement.[300] As mentioned, the Cecchini Report observed that in 1988 that a divide existed between political appearances and economic reality in the EU. Until then, the EU proved no match for the Member States' bureaucracies, whose purchases remained almost hermetically sealed within national borders.[301] Rarely did this result from explicit policies, but more often from 'psychological, administrative,

[294] Cibinic, Nash, and Yukins at 295–98.
[295] 10 USC 403(6). See also Doke (1995) at S-7.
[296] Doke (1995) at S-10, citing *Uniform Rental Services*, Comp Gen Dec B-228293 (1987).
[297] Cibinic, Nash, and Yukins at 295–98. See also Petrillo (1997).
[298] Doke (1995) at S27–28; Manuel (2011) at 3, n 12.
[299] Todd Washington at 23–24, citing 8 Comp Gen 252 1928, A-24906.
[300] Cost of Non-Europe, Part A at 86.
[301] Cecchini Report at 18.

and practical pressures' that have proven harder to eradicate.[302] The EU, therefore, is ever watchful for policies that would let Member States furtively undermine non-discrimination. As *The Cost of Non-Europe* report said, the EU uses imposes 'formalised procedures' to ensure 'administrative impartiality'.[303] The EU cannot tolerate exceptions to rigid formalities because impartiality through fair procedures is the whole point. Competition cannot be moderated for efficiency's sake lest the system cease to be non-discriminatory.[304] Maximum competition is the goal because this is synonymous with the procedural impartiality, which is the absolute objective.

For American vendors in Europe, the absence of a limiting principle that would restrict competition to what is useful could discourage participation. This need not be the result of a mere misunderstanding about how the other system works but from a clear-eyed assessment that transactions costs outweigh the benefits. Firms care about bottom lines, not abstract theories. But suppliers may also fear that free-for-all competition would preclude profitable transactions.

For European vendors, America's limits on competition may be puzzling. Ample opportunities may exist, but EU vendors may choose not to participate because, they suppose, a system that limits the field of competition for the sake of efficiency is insufficiently dedicated to non-discrimination and therefore cannot be trusted. Because this is a problem not of misunderstanding but of mistrust, it would perhaps prove harder to dispel.

IV. Conclusion

Like the previous chapter, this section both reviews what has been uniquely covered in this chapter and returns to the recurring themes introduced in Chapter 2. This chapter wrestled with

[302] Cost of Non-Europe, Part A at 79, 81.
[303] Ibid at 144.
[304] Some tension exists between this description of EU's objectives as a maximalist form of competition and the reduction procedures under Directive 2014/24/EU, Article 65(1) discussed above in Chapter 3, Section II.D.2.

the definition of 'competition', about which there is little agreement.[305] Suppliers seeking to sell to transatlantic markets must also grapple with the meaning of competition under each system.

Consider first the recurring themes from Chapter 2. First, because of its antiquity relative to EU procurement, the meaning of competition in America has evolved over two centuries' time and is thus difficult to pinpoint. This uncertainty may inhibit European participation in the US. Second, European suppliers may appreciate the US's domestic orientation, with its monistic conception of competition, and American suppliers may find local variations in the application of EU 'competition' requirements an impediment. Third, given the end-user- versus supplier-orientation divide, the objectives of the two systems differ widely. American suppliers may find it easier to participate in procurement market that has a single overriding objective, whereas European suppliers may find competition's multiple and sometimes conflicting purposes in the US daunting. Each of these three difficulties may affect the quantity and quality of participation.

In the conclusion of the last chapter, it was noted that the narrowing of the gap between the two systems as the use of past performance could actually sow greater confusion for suppliers. Until recently, the permissibility of negotiations was a fundamental distinction between the two systems. With the introduction of the competitive dialogue in 2004 and the 2014 Directive's emphasis on the flexibility that negotiation affords, that distinction has faded. This fading contrast may bewilder transatlantic suppliers. For American suppliers, the EU's increasing acceptance of negotiation could make selling to Member States seem harder: paradoxically, as the divide between them narrows, understanding the small remaining differences may prove elusive.

A second theme discussed only in this chapter is each system's basic purpose, phrased metaphorically as the 'dragon' that preoccupies them. In the US, the fear is that the government

[305] Trepte, 'Foreword' in Sanchez-Graells (2015) at x.

itself can be an obstacle to sound procurement. In the EU, the fear is that the single market will founder based on Member States' unwillingness to forego favouritism ('tribalism'). Differences as to the basic purposes for a procurement system may affect the choice of procedures and suppliers' understanding of and willingness to compete for transatlantic procurements.

Another theme raised in this chapter is that the competition mandate in US procurement. It was noted that this creates confusion in two respects. First, the meaning of 'competition' in US procurement is not clearly defined. This is a much repeated refrain whose meaning is unclear. Second, although comparable objectives – non-discrimination, equal treatment – are better defined in Europe, it is doubtful that these objectives, even collectively, can be construed as a competition objective comparable to America's competition mandate. But this is an unsettled question, and the absence of a clear requirement may inhibit US suppliers' trust and participation.

A final theme was the contrasting views on the limits of competition. The US allows limits on the use of competitive procedures based on what is useful, whereas the EU abhors restrictions and finds them contrary to its fundamental purposes. Rather than simple misunderstandings, these are matters of first principle and as such cannot be easily reconciled. Further, because these run deeper than idiosyncrasies that local counsel can explain, concerns about transaction costs on one side and discrimination on the other may discourage US and EU contractors' participation.

As noted in Chapter 2, some features of each system may favour participation while others may have the opposite effect. What is most striking in this chapter is not so much the misunderstandings about esoteric details that may escape notice but differences of basic purposes that are obvious and easily understood and yet may nonetheless substantially reduce participation. Illuminating such differences can explain the obstacles but may not be sufficient remove them; so long as such differences remain, doubts about the foreign procurement system may also persist.

Chapter 5: Challenge Procedures

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I. Introduction

It is axiomatic that rules without sanctions are impotent. This is also true for procurement.[1] Chapter 2 summarised the EU's first two decades of public procurement regulation in which enforcement mechanisms were lacking and provided a textbook example of an ineffectual system.[2] Establishing a procurement system with adequate enforcement methods is therefore crucial. There are, broadly speaking, four categories of enforcement procedures in procurement:

(1) review or challenge procedures, which the US calls 'bid protests';
(2) criminal, administrative, and disciplinary sanctions;
(3) review by external enforcement authorities; and
(4) intergovernmental dispute-settlement procedures.[3]

Both the US and the EU use all four. This chapter concentrates on the first.[4] That is because protests are critical to a sound system,[5] not only in these two systems but more generally,[6] and because a shared belief in protests is one of the more interesting points of comparison available.[7]

The 1972 Commission on Government Procurement Report issued a classic definition of a protest in the US: 'complaints lodged by an interested party against any part of the contract award process.'[8] This formed the basis for the definition in the FAR with the added requirement that the complaints lodged must also be in writing.[9]

The EU uses a similar definition. Review procedures are available 'to any person having or having had an interest in obtaining a particular contract and who has been or risks being

[1] Trybus, 'Hidden' (2013) at 137.
[2] Priess and Friton at 513, suggesting that common procedures will be 'ineffectual' without a means of enforcement.
[3] Arrowsmith, Linarelli, and Wallace at 750.
[4] 'Bid protests' and 'challenge procedures' or 'review procedures' are used interchangeably: the former term is a specific to the US; EU and various international forums use the latter two. Ibid. For example, the GPA uses challenge procedures, which is unsurprising as it was modelled on the Remedies Directives. Zhang (2011) at 485.
[5] Trepte at 530.
[6] Knauth.
[7] Gordon (2006) at 445.
[8] 4 Report of the Commission on Government Procurement, Part G at 5.
[9] FAR 33.101.

harmed by an alleged infringement.'[10] Like the US definition, much turns on what a 'with an interest' means. This is considered in Section II.E.

Apart from suppliers' protests before national forums, the Commission can bring a challenge against a Member State before the CJEU for failure to implement its obligations under the EU treaties.[11] This is the third of the four procedures listed above. It is mentioned below in Section III.B.2, but it is not considered at length because there is no correlate in America. Further, private challenges in domestic forums are far more common in Europe and are emphasised here.

From a practical perspective, this chapter stands out. Whether to protest is a hard choice.[12] Suppliers are loath to sue customers, fearing to damage relationships,[13] are alive to the fact that 'success' seldom means being awarded the contract,[14] and suspect that, given the litigation costs, only the lawyers win.[15] Yet they are also disinclined to give up too easily on must-win contracts,[16] and are less worried about relationships when their customers span various agencies or Member States.[17] With pros and cons thus equipoised, ignorance of or misunderstanding about a foreign protest regime may have disproportionate effects, perhaps tipping the balance against a challenge that should have been brought or vice versa. If so, insights that could make these two systems less inscrutable for foreign suppliers could have immense practical value.

Transatlantic protests are uncommon. On the US side, a 2012 study of decisions before the GAO and the Court of Federal Claims (COFC) between 2001–09 claimed there was not a

[10] Amended Remedies Directive (2007), Article 1(3).
[11] TFEU Article 258, implemented in Directive 89/665/EEC, Article 3 and Directive 92/13/EEC, Article 8.
[12] For a review of some of the strategic considerations involved, see Rector and Cook 280–82.
[13] Gordon, 'Dissecting' (2014) 'Dissecting' at 7. When polled on their reasons for not protesting, nearly half (46%) cited their fear of retaliation. MARKT/2013/072/C, Appendices at 28.
[14] Rector at 1. Cf MARKT/2013/072/C, Appendices at 28, saying 53% of suppliers reported that they did not protest since they had 'no chance' of winning and another 34% because they lacked confidence in the remedies.
[15] Roemerman at 12. See also MARKT/2013/072/C, Appendices at 28, finding that 24% of suppliers decided not to protest because the process was 'not worth it' and 34% because the costs were too high.
[16] Bowsher and Moser at 196.
[17] Rector at 6–7.

single protest from a firm headquartered abroad.[18] But that is untrue, and a cursory search proves several foreign protests were made at the GAO[19] and COFC[20] in this timeframe.[21] Foreign protests are still uncommon, but there seems to have been an increasing number in the last decade.[22] On the EU side, no one has studied the volume of US challenges in Member States forums, but one would suspect that the number would be low, given that only a small fraction of the EU's €2 trillion in annual procurement expenditures budgets are awarded to US suppliers.[23] Given the dearth of information, I contacted the chief procurement officials from all 27 Member States. This inquiry (described below) confirmed that such protests are indeed rare.[24] Whatever the exact figures, broadening understanding of the other side's protest regime would be conducive

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[18] Maser, Subbotin, and Thompson at 147–48.

[19] *C&H Service Srl*, Comp Gen Dec B-310790 (2008); *CSI GmbH*, Comp Gen Dec B-400434 (2008); *Simont SpA*, Comp Gen Dec B-400481 (2008); *Joint Venture Penauillie Italia SpA v US*, Comp Gen Dec B-298865 (2007); *Team BOS/Naples-Gemmo SpA/DelJen*, Comp Gen Dec B-298865.3 (2007); *Antmarin Inc*, Com Gen Dec B-296317 (2005); *AIA-Todini-Lotos*, Comp Gen Dec B-294337 (2004); *Consortium HSG Technischer Service GmbH*, Comp Gen Dec B-292699.4 (2004); *Impregilo Edilizia SpA*, Comp Gen Dec B-292468.4 (2003); *3K Office Furniture Distribution GmbH*, Comp Gen Dec B-292911 (2003); *MCI WorldCom Deutschland GmbH*, Comp Gen Dec B-291418 (2003); *Gemmo Impianti SpA*, Comp Gen Dec B-290427.2 (2003); *GROH GmbH*, Comp Gen Dec B-291980 (2003); *Servizi Aeroportuali Srl*, Comp Gen Dec B-290863 (2002); *HSG Philipp Holzmann Technischer Service GmbH*, Comp Gen Dec B-289607 (2002).

[20] *Erinys Iraq Ltd v US*, 78 Fed Cl 518 (2007); *R&W Flamman GmbH v US*, 53 Fed Cl 647 (2002). In addition, a British consultancy intervened in a protest of a procurement for which it was the original awardee. *Infrastructure Def Techs, LLC v US*, 81 Fed Cl 375 (2008). And a Swiss food supplier likewise intervened in a protest for a contact in which it was the original awardee. *Autofrigo Europe SRL v US*, 2005 WL 6124814 (Fed Cl 2005).

[21] My search was not comprehensive. I found the aforementioned examples searching for the abbreviations for 'limited liability companies' in Germany (GmbH), France (SARL), the UK (Ltd), Italy (SpA), and Spain (SRL).

[22] Using the same search terms described in the previous footnote, I found that since 2010 there have been 38 foreign protests before COFC and 72 foreign protests before the GAO.

[23] My initial assumption that the level of protests was based on the GAO's 2019 report discussed above in Chapter 1. Using a dataset from 2015, it claims that Member States collectively awarded only $300 million contracts to US suppliers, or about .015% of their annual €2 trillion in procurement outlays. GAO-19-414 at 21–22. This suggests that US suppliers' interest in European contracts is negligible and their protests few. Yet a 2020 study by two economists from the European Commission, also discussed above in Chapter 1, notes 12–14, challenges the GAO's findings and claims that EU purchases from US firms dwarfs US purchase from EU firms when indirect purchases are included. Cernat and Kutlina-Dimitrova (2020) at 3–5. When I discovered this report, it left me in a quandary about the volume of bid protests that one should expect to see in Europe.

[24] Starting in April 2021, I contacted the national portals for all 27 Member States, using 'Public Procurement in EU Countries' and also networked with researchers from several Member States. Active correspondence continued for three months. Six countries have yet to respond. Four do not track protesters' country of origin. For the remaining 17, we have at least some data on the number of protests by US suppliers or their subsidiaries. So far, the data suggest that US suppliers bring about 1.7 per year in each Member State. But this is only a rough estimate. Sweden's *Upphandlingsrättslig Tidskrift* will be publishing an article with a full report of my findings.

to increased transparency, competition, and trust from suppliers who are deciding whether to participate in foreign procurement markets and, when they lose a competition, whether to protest.

If suppliers are to succeed across the Atlantic, they must have some familiarity with the host market.[25] This includes the 'nooks and crannies' of review procedures.[26] This will be easier for EU suppliers as they need familiarise themselves with one new system; Americans must contend with 27. Like EU procurement law generally, EU remedies law lies hidden behind a veil of national laws,[27] which this chapter cannot hope to remove. Consistent with this work's general approach, this chapter presents a 'unified European outlook.'[28] Yet as practical guidance that is insufficient because suppliers sell not to the EU but to Member States. The counsel of the 1997 *Practical Guide on Remedies* remains valid: 'complainants . . . need to take legal advice'.[29] In the US, a study found that small firms are less likely to win protests but if they hire specialised counsel, such differences vanish.[30] Because such counsel are expensive, those who need it most are, oftentimes, least able to afford it.[31] That is, larger and better-resourced firms will often have local subsidiaries or greater familiarity with working in foreign markets. Smaller firms with fewer resources will lack local subsidiaries and have less experience in foreign markets. Hence the greater need for counsel and the affordability problem.

Before proceeding, some comments about third-country standing seem necessary. Although foreign protests are uncommon in America, the two main forums regularly hear some European protests, as noted above. Americans' standing in Europe is less clear.[32] As GPA signatories, both

[25] Knauth.
[26] Nash and Cibinic (1987) at ¶25.
[27] Schebesta at 3. See also Woolcock and Grier at 320, describing diverse national practices among Member States as a barrier to market access in the EU.
[28] Schebesta at 4.
[29] *Practical Guide* at 5.
[30] RAND Study (2018) at xvi, 51, 60, 67–68.
[31] Reich at 15.
[32] Trepte (2007) at 551–52.

must afford suppliers not only 'timely, effective, transparent, and non-discriminatory review procedures' but remedies at least as favourable as those that are available to domestic suppliers.[33] Yet providing forums 'at least as favourable' does not necessarily require providing access to the exact same forums. This raises questions that cannot be answered here, except to offer a reminder about the premise upon which this work rests: that is, that TTIP is in effect and de jure trade barriers have been removed. Consistent with that hypothetical, this chapter supposes that US and EU firms have access to each other's forums. The point of doing the analysis in this way is to show that even if access were unquestioned, other problems would persist. As noted above, the emphasis here will not be the effect on foreign *participation*, as in the previous two chapters, but rather the effect on the quantity and quality of foreign *protests*.

As noted in above,[34] this chapter will take a different approach to the thought experiment. Rather than asking how each divergence of law or differing artefact of embedded legal culture would affect participation, this chapter considers a narrower question about how such divergences and differences would affect the likelihood or character of a firm lodging a foreign bid protest. Of course, a firm's willingness to file such a protest would in turn also bear on its participation.

II. Juxtaposing Challenge Procedures

A. Forums

Every procurement remedies system must decide where this function is to be located.[35] The US offers three forums: the purchasing agency, an administrative forum, and one traditional court. The EU leaves the institutional composition to local discretion. Within the framework

[33] Revised WTO GPA, Article XVIII(1). See also Arrowsmith (2018) at 855–56, 859; Davies at 124.
[34] See above Chapter 1, Section IV.
[35] Gordon (2006) at 433–34.

of the same three basic forum choices as in America – contracting authorities, administrative forums, courts – Member States have established a variety of bid protest forum arrangements.

I. US

Since 2001, there have been three forums for protests: the agency in question, the GAO, and COFC. That year the Administrative Dispute Resolution Act (ADRA) removed jurisdiction from 94 federal district courts.[36] Before 2001, the system was considered too complex and the various forums to have unjustifiable differences.[37] Subtle differences between the remaining three forums still cause needless confusion even for experienced *American* suppliers.[38]

The first is the agency. Both the FAR and GAO encourage seeking resolution there first, but a protest there is not required for protests at the other two forums.[39] This forum has long existed,[40] but consistent procedures were lacking until the 1990s.[41] These are now found in FAR Part 33.[42] Protesters may request an independent review at one level above the decisionmaker.[43] Contracting officers must consider all protests and seek legal advice.[44] During the protest, procurements are suspended.[45] Decisions must provide explanations.[46] If agencies find an infringement, they may (a) take any remedial action available to the GAO, (b) pay the protester's costs, or (c) require that the awardee repay certain costs.[47] Despite these safeguards, a concern

[36] 5 USC 571–84. See also Chapter 2, Section II.C.
[37] Nash and Cibinic (1993) at ¶12.
[38] Edwards, 'Pathologies' (2011) at ¶32; Carpenter and Schwartz at 2, 10–11.
[39] FAR 33.102(e); 4 CFR, Part 21. See also Nagle and Lasky at 5.
[40] 4 Report of the Commission on Government Procurement, Part G at 36–38.
[41] Exec Order No 12979, 60 Fed Reg 55,171 (Oct 27, 1995). See also Cibinic, Nash, and Yukins at 1681; Gordon and Golden at 206; Schaengold, Guiffré and Gill at 261–62.
[42] FAR 33.102 and 33.103. Some gaps remain. For example, deadlines for agency decisions, burdens of proof, and standards of review are undefined. Cibinic, Nash, and Yukins at 1674.
[43] FAR 33.103(d)(4).
[44] FAR 33.102(a).
[45] FAR 33.103(f).
[46] FAR 33.103(h).
[47] FAR 33.103(b)(1), (2) and (3)

remains that officials may succumb to institutional pressures even for valid protests.[48] Anecdotal evidence would suggest that suppliers rarely use this forum due to the low probability of success.[49]

Next along a continuum of formality lies the GAO.[50] If economy and speed matter, this forum has much to recommend it.[51] Protests must be in writing, but counsel are not required.[52] Until 2018, there was no filing fee.[53] Its decisions are rendered within 100 days,[54] are often delivered sooner,[55] and it even offers a 65-day express option.[56] The GAO has well-developed precedents upon which Congress, courts, and agencies rely.[57] While the attorneys who adjudicate protests are not judges, they are true subject-matter experts.[58] Give these advantages, it is no wonder that the GAO has long been the forum of choice.[59] More than 95% of protests against the DoD are filed there.[60]

COFC is the third forum. A predecessor court for claims against the federal government has existed since 1855, and that court has heard protests as a subset of such claims since 1956.[61] COFC has been the only judicial forum since 2001.[62] Its main appeal is its judicial status.[63] Unlike the GAO, its decisions are formal, legally binding, and subject to appellate review.[64]

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[48] Kovacic at 470 (1995). See also Howard and Miller at 8, observing that agency-level protests are often decided by the very person whose actions, decisions, or conduct are in question.
[49] Yukins (2021) at 242; Carpenter and Schwartz at 2; Schaengold, Guiffré and Gill at 254–55.
[50] Howard and Miller at 8–9; Nagle and Lasky at 5.
[51] 31 USC 3554(a)(1), mandating an 'expeditious and inexpensive' resolution of protests.
[52] 4 CFR § 21.1.
[53] Gansler at 191. See also Manuel and Schwartz at 6–7, explaining that the GAO is inexpensive because hiring counsel is not required; nor are formal briefs, pleadings, or motions; nor travel to Washington.
[54] 4 CFR § 21.9(a).
[55] GAO, B-401197 (2009) at 10, reporting that over half of DoD GAO protests were resolved within 30 days.
[56] 4 CFR § 21.9(b).
[57] Tiefer and Shook at 602.
[58] Schaengold, Guiffré and Gill at 246; Samuelson at 5.
[59] Forman, Cliffe, Choi, and Curran at 196; Carpenter and Schwartz at 2.
[60] RAND Study (2018) at 31–32.
[61] Heyer, 140 F Supp 409.
[62] Carpenter and Schwartz at 8.
[63] Although COFC is bound by Supreme Court and Federal Circuit precedent, Cibinic, Nash, and Yukins at 1808, its judges are not bound by COFC holdings. *Casa de Cambio Comdiv SA v US*, 291 F3d 1356 (Fed Cir 2002).
[64] 28 USC 1295(a)(3). See also James Nelson at 614.

Although technically GAO opinions are not 'appealed' to COFC,[65] nothing precludes 'serial' protests:[66] first to the agency, then the GAO, and last COFC.[67] Several factors lessen COFC's allure: it does not grant an automatic stay,[68] it is slower,[69] legal counsel is required, making it a much more expensive forum,[70] and its review standard is the least friendly.[71] This forum is seldom used. It is also criticised for lacking specialised procurement expertise,[72] given that its remit includes tax, patent, and vaccine litigation, among myriad other subjects.[73]

For an EU supplier deciding whether to compete in the US, the nature of the forums is an important consideration. The fact that the GAO, by far the most popular forum, is non-judicial and somewhat informal may undermine confidence since many (though not all) EU review bodies are judicial forums. This may discourage participation. Yet such mistrust would be misguided. The GAO has much more in common with the EU's judicial bodies than it would seem at first.

2. EU

The Remedies Directive leaves the choice of forum to local discretion.[74] Rather than presenting a cumbersome summary of the EU's 27 separate systems, this section is limited to what the directive requires, or to a 'unified European perspective'.[75] Yet this perspective is not

[65] McKeen at 329.
[66] 28 USC 1491(b). See also Schaengold, Guiffré and Gill at 318.
[67] James Nelson at 618.
[68] Below Section III.G.1.
[69] Unlike the GAO, COFC lacks a statutory mandate that its decisions should be 'expeditious'. 31 USC 3554(a)(1). Nor is there a 100-day time limits on its decisions. Cibinic, Nash, and Yukins at 1674.
[70] Rules of the US Court of Federal Claims (Jul 1, 2019), Rule 81.3.
[71] Below Section III.F.
[72] Schooner (2003) at 720, 751–53.
[73] U.S. Court of Federal Claims, 'Judicial Business 2020', <https://www.uscourts.gov/statistics-reports/us-courtfeder al-claims-judicial-business-2020> accessed Feb 26, 2022.
[74] Arrowsmith, Linarelli, and Wallace at 756.
[75] Schebesta at 4.

inaccurate given that Member States' autonomy has been eroded[76] and given that there is less room for local variation than in the past.[77] Indeed, this area is now 'substantially harmonised'.[78]

Protests are to be available for public contracts, framework agreements, works concessions, and dynamic purchasing.[79] Member States must ensure that procedures are no less enforceable than under domestic law.[80] Standing is considered below,[81] but review procedures are required to be available only to those who both (1) have or have had an interest in the contract in question and (2) have been harmed or at least risked being harmed by an infringement of the substantive rules.[82] Remedies include interim measures, set asides, and damages under the old directives,[83] to which the 2007 Remedies Directive added standstill, ineffectiveness, and alternative penalties.[84] Each of these is discussed below.

Initial review bodies need not be judicial in character, and as in the US, independence from the contracting authority is not required.[85] Unlike the US, however, the EU also allows procedures that *require* that protesters first seek review with that original authority.[86] For suppliers from Member States competing in the US, this may sow confusion. Protesters in the US system are *encouraged* to bring protests to the procuring agency but are not required to do so.[87] Further, an agency protest does not always stay the GAO deadline. Misunderstanding the

[76] Arrowsmith (2018) at 928; Arrowsmith, Linarelli, and Wallace at 756.
[77] Priess and Friton at 511. While the general rule is that the EU leaves remedies to national legislation, procurement deviates from the norm. Treumer, *Enforcement* (2011) at 17, 49. Remedies were so important in this field that legislative intervention was considered necessary. Pachnou (2000) at 55.
[78] *Consorci Sanitari del Maresme v Coporació de Salut del Maresme*, C-203/14 (2015), Advocate Jääskinen.
[79] Directive 2007/66/EC, Article 1(1).
[80] Ibid, Article 1(2).
[81] Section II.E.2.
[82] Directive 2007/66/EC, Article 3.
[83] Directive 89/665/EEC, Article 2; Directive 92/13/EEC, Article 2. Cf Directive 2007/66/EC, Article 2(1).
[84] Directive 2007/66/EC, Articles 2a, 2d, and Article 2e.
[85] Directive 2007/66/EC, Article 2(9). See also Arrowsmith (2018) at 945.
[86] Directive 2007/66/EC, Article 1(5).
[87] FAR 33.102(e).

process could thus cause an unwary European firm to miss the GAO filing deadline based on the mistaken belief that protests must first commence with the agency.

Insofar as initial review is concerned, the EU is agnostic as to judicial or non-judicial forums.[88] Despite some scholars' preference for the latter,[89] where dockets are said to move faster given narrower jurisdiction and subject-matter expertise,[90] the Remedies Directive is silent. Yet if a non-judicial venue is chosen, two safeguards are required:[91] first, that it provide written reasons; second, that its decisions be reviewable by a body that is a court or tribunal under TFEU, Article 267.[92] Properly designed, these bodies can, like courts, request rulings on issues of EU law that are ambiguous, equivocal, or unclear,[93] collapsing the distinction between these forums.[94]

The EU's principle of effectiveness serves as a constraint on forum choice and favours the establishment of specialised tribunals. The Remedies Directive exceeds the EU treaties' standards for effectiveness. Several scholars argue that specialised bodies are often more effective forums.[95] If a judicial forum yields 'slow, cumbersome, and/or costly proceedings,' the CJEU may find that such a review process is ineffective.[96] In 2015, 10 Member States had already established specialised tribunals.[97] Given the Commission's preference for such bodies and their alleged merit

[88] Directive 2007/66/EC, Article 2(8) and (9); Directive 92/13/EEC, Article 2(8) and (9); Directive 89/665/EEC, Article 2(8) and (9).
[89] Cerqueira Gomes (2017) at 251–52. See also below note 95.
[90] COM(2017) 28 final at 9.
[91] Directive 2007/66/EC, Article 2(8). Cf Arrowsmith (2018) at 946, writing that safeguards are imposed to ensure an adequate review and that the legislator assumed that such safeguards exist inherently in judicial bodies.
[92] Directive 2007/66/EC, Article 2(9). Cf *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin*, C-54/96 (1997), at ¶23, establishing six criteria for whether a review body is a court under TFEU, Article 267.
[93] Arrowsmith (2018) at 946–47; Trepte (2007) at 566.
[94] SWD(2012) 342 final at 22.
[95] Arrowsmith (2018) at 936–37, 946, citing Advocate General Bot's opinion in *Wal AG v Stadt Frankfurt am Main*, C-91/08 (2010) at ¶65, arguing that the principle of effectiveness under the Remedies Directive and the TFEU and are not coextensive and the former's protections exceed the latter's; Caranta, 'Paths' (2011) at 55–57.
[96] Arrowsmith at 936–37, 946.
[97] MARKT/2013/072/C, Final Study at 58–59. Only 10 Member States *exclusively* use such specialised bodies, another 11 used theses bodies for certain phases of procedures – such as interim measures or set asides. Ibid at 59.

in terms of speed, efficiency, and cost, institutional pressure may in future mandate the use of such forums and restrict the use of traditional, non-specialised venues.

For American suppliers, it may seem unusual that the Directive does not require the creation of multiple initial review bodies. In the US, forum choice is a tactical decision. Firms unfamiliar with the EU procedures who do not hire local counsel may search in vain for alternative forums. Nothing prevents Member States from providing multiple forums,[98] but none seem to have done so.[99] This could be a stumbling block for EU suppliers in America also: not having to make a forum choice in Europe, they may not grasp the tactical significance in the US. This could lead to disappointing results and, in the long term, dissuade EU firms from bringing viable protests.

Compounding such potential confusion, suppliers can also complain to the Commission under Article 258,[100] which in turn can investigate and, if it chooses, refer the case to the CJEU. This provides another avenue,[101] especially for those reluctant to protest,[102] but it is not a separate forum. In the first decades of procurement regulation, the Commission forwarded many of these cases as this was the only way to challenge the actions of the procuring authority.[103] Scarce resources necessitated that the Commission narrow its focus to major breaches, important legal issues, and cases of general application.[104] This mechanism is thus unsuited for complaints that are minor, particular, or local.[105] US suppliers may also be disappointed that, after lodging their

[98] Arrowsmith (2018) at 249.
[99] SWD(2017) 13 final, Annex 6.
[100] Directive 89/665/EEC, Article 3, Directive 92/13/EEC, Article 8, and Directive 2007/66/EC, Article 3 implement the corrective mechanism established in TFEU, Article 258.
[101] Arrowsmith (2018) at 898, 901–02, 908–18; Trepte (2007) at 567–69, 579.
[102] Matei at 358; Trepte (2007) at 580.
[103] Arrowsmith (2018) at 900–03; Trepte (2007) at 531. In 1996, the EC sought to augment use of this forum. COM(96)583 final. Member States resisted. Arrowsmith (2018) at 903; Fernández Martín (1993) at 49–53. In 1998, the Commission re-prioritised on 'particularly serious infringements'. COM(1998) 143 final at 12–13.
[104] Arrowsmith (2018) at 903–04; Treumer, *Enforcement* (2011) at 20–21; Arrowsmith, Linarelli, and Wallace at 850–53.
[105] COM(2001) 309 final at 51, 67–68. Less reliance on supranational measures is consistent with broader trends. Arrowsmith (2018) at 903. Directive 2007/66/EC, recital 28, 'refocused on serious infringements'.

complaint, they have no influence over the process.[106] Absent settlement, this a lengthy process that can last over two years.[107] And it is unavailable for concluded contracts.[108]

Inexperienced US suppliers could mistake Article 258 for a protest forum.[109] But this mechanism exists not to redress private interests but as a monitoring device.[110] Further, it is not even clear if complaints can be brought by suppliers from non-EU countries because, arguably, an infringement is not legally cognisable unless it affects a Member State or an EU citizen. And EU suppliers may be disappointed that the US lacks an anonymous complaint mechanism. Such mechanisms provide an alternative for the risk averse or those who fear losing public contracts.[111] Misunderstandings about this forum could make US suppliers protests less effective or could even dissuade them from protesting in the first place.

B. Filing Fees and Cost of Litigation

Protest costs differ widely. High costs can discourage litigation. But *uncertainty* about such costs is even more important. For Europeans selling to the US, the primary concern is the legal costs; for Americans, the primary concern is the significant variations among Member States.

1. US

Filing fees for federal protests are low. Agencies do not charge at all.[112] Further, they are to provide a forum that is informal, procedurally simple, and *inexpensive*, not only in terms of filing fees (zero) but in terms of legal costs (pro se).[113] Until recently, the GAO did not charge

[106] COM(2002) 141 final at 1.
[107] Trepte (2007) at 584, 579–80, calling this procedure lengthy and cumbersome.
[108] Directive 2007/66/EC, Article 3(1).
[109] Treumer (2007) at 382.
[110] OJ C303/8 (1996) at 8; COM(2001) 309 final at 7.
[111] Trepte (2007) at 531. See also Verdeaux at 735; Pachnou, 'Factors' (2005) at 99, 101–02. The EC reports that on average nearly half of suppliers (46%) attributed the decision not to protest contract awards to fear of retaliation. MARKT/2013/072/C, Appendices at 28.
[112] FAR 33.103. See also McKeen at 332.
[113] FAR 33.103(c).

a fee either, consistent with its statutory mandate that it should provide a bid protest forum that is inexpensive.[114] In 2018, it added a $350 filing fee, just below COFC's $400 fee.[115]

While filing fees remain nominal, what is far more expensive is hiring local counsel. Suppliers may bring pro se protests at the agency level.[116] Given this forum's informality,[117] it is probable that they often choose to do so. Suppliers can also represent themselves at the GAO,[118] and this is not uncommon,[119] despite the greater procedural complexity and voluminous precedent.[120] If protesters do hire counsel, such fees are inexpensive relative to COFC[121] as the GAO procedures are informal and its deadlines tight, which imposes some limits on the extent to which legal theories can be identified and developed.[122] Self-representation before COFC is possible in some cases,[123] but that course is ill advised and, relative to GAO protests, rare.[124]

US protests undoubtedly impose heavy litigation costs, but data are lacking.[125] The GAO may recommend that winning protesters receive attorneys' fees of up to $150 per hour,[126] which may be increased under some circumstances.[127] Based on the Equal Access to Justice Act, under some conditions COFC may award small businesses attorneys' fees of up to $125 per hour,[128]

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[114] 31 USC 3554(a)(1).
[115] Compare GAO, Press Release (2018) with Court of Federal Claims Schedule of Fees, effective Oct 1, 2019, http://www.uscfc.uscourts.gov/sites/defaul t/files/19.10 .01%20UPDATED%20Fee%20Schedule.pdf.
[116] McKeen at 332.
[117] FAR 33.103(c).
[118] GAO-18-510SP at 4. See also Manuel and Schwartz at 6–7.
[119] GAO, B-401197 at 13. See also RAND Study (2018) at 40, 51, 68.
[120] 3 Section 809 Panel at 348.
[121] Metzger and Lyons at 1237–38.
[122] 4 CFR § 21.1(f).
[123] Rules of Court US Court of Federal Claims 83.1(a)(3) (Jul 1, 2019).
[124] 3 Section 809 Panel at 348; Manuel and Schwartz at 7.
[125] Gordon (2013) at 501.
[126] 31 USC 3554(c)(2)(b).
[127] Cost of living increases or limited availability of qualified attorneys may justify higher fees. Ibid. The GAO routinely recommends payments above the $150 cap. Cibinic, Nash, and Yukins at 1756–57. Attorneys' fees often far exceed that statutory limit. *6K Systems, Inc*, Comp Gen Dec B-408123.5 (2014), approving $225 per hour; *Public Communications Services, Inc*, Comp Gen Dec B-40058.4 (2009), approving $705 per hour.
[128] 5 USC § 504; 28 USC § 2412. See also Herzfeld at 8; Schaengold at 329.

with some allowances for increases based on the cost of living.[129] Also, doing proper cost-benefit analysis is impossible without knowing the expense side of the ledger. Insofar as legal fees are not generally available but are subject to various thorny conditions and limitations, EU vendors may be discouraged from filing protests.

2. EU

A vast divide separates the Member States' costs, both in terms of fees and legal costs. That the Remedies Directives do not attempt to regulate such costs explains the degree of variation.[130] Costs can undermine the value of remedies – if costs are too high, disappointed firms may remain silent.[131] Thus, in *Orizzonte Salute* the CJEU held that costs must not render a supplier's exercise of its rights excessively difficult or otherwise compromise effectiveness. It also held that to participate, bidders must have 'an appropriate economic and financial capacity.'[132] While the Court specified that fees for less than 2% of the contract value are permissible,[133] several questions remain. For example, it is unclear whether *Orizzonte Salute*'s holding also covered legal fees.[134]

Application fees among Member States diverge widely.[135] Some charge none.[136] For those who do charge a fee, the differences are driven by the fee structure. Where there is a flat fee, the cost as a share of contract value starts high but decreases; where the fee is percentage of contract size, the fee remains steady. As examples of the former, Italy, the Netherlands, and Slovenia rank among the highest costs for contracts €250,000 and below but fall to the lower end for contracts

[129] *Geo-Seis Helicopters, Inc v US*, 79 Fed Cl 74 (2007). See also Cibinic, Nash, and Yukins at 1800–01.
[130] Arrowsmith (2018) at 950.
[131] Caranta, 'Paths' (2011) at 81–82.
[132] *Orizzonte Salute v Azienda Pubblica di Servizi*, C-61/14 (2015) at ¶¶46–47, 64.
[133] Ibid at ¶¶58–65. Italy's is the most expensive. MARKT/2013/072/C, Final Study at 122.
[134] Arrowsmith (2018) at 951; Arrowsmith and Craven at 232; Caranta, 'Paths' (2011) 81–82.
[135] SWD(2014) 262 final at 22, reporting a range of €200 to €86,500.
[136] MARKT/2013/072/C, Final Study at 67, Estonia, Latvia Luxembourg, and Sweden.

€10 million and above; of the latter, Czechia, Malta, and Hungary all have low costs for contracts €250,000 and above but are among the highest for contracts €10 million and above.[137]

Legal fees also diverge widely. Often, forum choice and litigation costs are not separable questions. Forum choice drives costs. Take for example the UK, where procurement cases in England, Wales, and Northern Ireland go to the High Court.[138] Fees there are nominal,[139] but legal fees make overall costs twice the median of the next highest State.[140] Designating this forum entails higher costs, both because procedures at this tribunal are complex and because plaintiffs are obliged to hire both solicitors and barristers.[141] So expensive forums may constitute a barrier, especially for foreign suppliers in particular need of local counsel.[142]

Despina Pachnou has argued that disparities between Britons' and Greeks' willingness to sue results from the level of costs.[143] She has also written that legal costs, in particular, 'are the foremost consideration when a firm contemplates litigation.'[144] Such comparisons are not limited to Greece. Similar conclusions could be drawn from low-cost Sweden, which decided 237 times more cases than did the UK from 2009–12.[145]

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[137] Ibid at 66, 68–70. Figure 5.14 provides a helpful summary of this dispersion. Ibid at 69.
[138] UK Public Contracts Regulation (2015), regulation 91(2). In Scotland, the Court of Session and Sheriff Court share jurisdiction, and the latter was intended to make it easier and less expensive to protest. Boch at 413, 416.
[139] Arrowsmith and Craven note that during their study (2008–12), the maximum fee in English courts stayed at £2,000. Fees were raised in 2015 to £10,000 for claims above £200,000, 5% of the value for £10,000– £200,000 claims, and £480 for non-damage claims. Ibid at 231. Those remain unchanged. HM Courts & Tribunals at 5-6.
[140] MARKT/2013/072/C, Final Study at 124; ibid, Appendices at 13–19. See also Arrowsmith and Craven at 231, finding that costs at the High Court are much higher than reported in the 2015 Commission Remedies Report, ranging £350,000–2 million for cases reaching final judgement rather than the EC's €130,000 estimate.
[141] Arrowsmith and Craven at 231, complexity; Pachnou, 'Bidder Remedies' (2003) at 62, barristers and solicitors.
[142] Pachnou, 'Mechanisms' (2005) at 97, reporting that UK suppliers, authorities, and lawyers claimed the most important cause of litigation avoidance in the is legal costs. See also Arrowsmith and Craven at 231, 242–43.
[143] Pachnou, 'Mechanisms' (2005) at 260.
[144] Pachnou, Thesis (2003) at 284–85.
[145] MARKT/2013/072/C, Final Study at 83, Table 6.2, reporting that Sweden issued 11,144 decisions from 2009 to 2012 compared with the UK's 47.

Costs can deter litigation,[146] but their role can also be overstated. A recent Commission report surveying suppliers showed that cost is not decisive.[147] The commonly stated reasons for not suing suggest that cost is not always the best explanation. Challenges are least common in the UK,[148] where costs are among the highest, but suppliers actually attribute their reluctance to sue to high costs at a lower rate (31%) than the EU aggregate (34%). UK suppliers blame retaliation (66%) and low success rate (63%) at more than double that rate, trailed by 'no confidence' (50%).[149] Another study compared suppliers who protested with those who did not, and found that both groups cited the same two main reasons: cost and fear of reprisals.[150] Other considerations also impinged on litigation rates.[151] Hence, cost does not seem to be dispositive.

How particular Member States' fees would affect a US supplier lies beyond this work's scope, which is limited to a general EU perspective. Also, because the costs of bringing protests differ widely, it is hard to generalise about how suppliers would respond. This much is clear: American suppliers must evaluate the costs in each Member State separately. This is especially challenging as to legal costs since the EU has provided little guidance.[152] While local counsel could be consulted, such discussions would be costly, time intensive, and perhaps misleading. On balance, this dearth of information may discourage US suppliers from protesting and also cause them to make poor tactical choices and to protest ineffectively.

[146] Caranta, 'Paths' (2011) at 81–82, Trybus (2011) at 232; Dragos, Neamtu, and Veliscu at 175–79.
[147] COM(2017) 28 final at 6.
[148] Arrowsmith and Craven at 227–28.
[149] MARKT/2013/072/C, Appendices at 13, 28.
[150] Arrowsmith and Craven at 249, 251.
[151] In the UK, other that factors that inhibit litigation include generalised trust in the public sector, Pachnou, 'Mechanisms' (2005) at 261, and a non-adversarial legal culture. Arrowsmith and Craven at 245–46, 250.
[152] In general, procurement data about foreign bidders are scarce for non-EU firms. Woolcock and Grier at 320.

C. Filing Deadlines

Determining the right filing deadline is another question every protest system must make.[153] There is a tension between a rapid review that allows for closure and on that still allows enough time for legitimate challenges.[154] America opts for two forums with tight deadlines and a third that is more generous, whereas the EU Member States generally adopt tighter deadlines.

1. US

Timing requirements fall into two categories: one based on improprieties in the solicitation, one for post-award complaints. In the former, the same deadline applies whether protests are lodged before the agencies,[155] GAO,[156] or COFC:[157] they must be filed before the bid opening or the time limit for proposals submissions. For the latter, there are significant distinctions between forums. This causes needless confusion at home,[158] perhaps even more for the uninitiated abroad.

In 1995, the President mandated the creation of agency-level procedures.[159] Before, some agencies had instituted procedures, but no procedures covered all executive agencies.[160] With that new mandate came a standardized deadline for post-award protests. Like the GAO, it is no later than 10 days after the basis is known or should have been known, whichever is sooner. Although agencies may consider protests that are untimely when there is 'good cause shown,'[161] this discretion is rarely exercised.[162] While a protest is pending, contracts cannot be awarded without a written justification. Notably, an agency protest does not necessarily extend the time

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[153] Gordon (2006) at 437–38.
[154] Arrowsmith (2018) at 964–65. Among suppliers polled about relevant provisions of the Remedies Directive, 30% held time limits were relevant. MARKT/2013/072/C, Appendices at 22.
[155] FAR 33.103(e).
[156] 4 CFR § 21.2(a)(1). See also *Cadell Constr Co*, Comp Gen Dec B-401281 (2001) at ¶130.
[157] *Gold Fleet, LP v US*, 492 F3d 1308, 1313–15 (Fed Cir 2007).
[158] Edwards, 'Pathologies' (2011) at ¶32.
[159] Exec Order No 12979, 60 Fed Reg 55,171 (Oct 27, 1995).
[160] Schaengold, Guiffré and Gill at 262.
[161] FAR 33.103(e).
[162] *Orbit Advanced Techs, Inc,* Comp Gen Dec B-275046 (1996) at ¶228.

for obtaining a GAO stay, although agencies may allow a suspension if the agency protest is denied and a protest is later filed at the GAO.[163]

GAO deadlines are short and unforgiving.[164] Strict post-award timeliness requirements are its hallmark.[165] It imposes three deadlines. First, if a protest was previously filed with the agency, the GAO considers subsequent protests untimely if the original protest was untimely.[166] Second, solicitation impropriety protests must be filed before the receipt deadline. Third, for post-award protests, suppliers have 10 days upon learning of a protest.[167] These deadlines impose constraints on identifying, developing, and submitting allegations.[168] If a protest is timely, additional grounds are discovered and supplemental issues raised, the latter are dismissed if brought after the original deadline.[169] So strict are timeliness rules that protests are sometimes even denied for being early.[170]

While such strict time limits do not exist at COFC, two pitfalls exist. First, like all federal claims, protests must be brought within the six-year statute of limitations.[171] Second, the delay must not be unreasonable or unexcused.[172] COFC has found that 14 months is permissible, but suppliers cannot delay their protests indefinitely lest such stalling be considered unreasonable.[173]

For European suppliers, the GAO's tight filing window may be an obstacle. Just identifying viable grounds may exceed 10 days. The disparity with COFC's deadline may also be confusing. Such short and unforgiving filing deadlines may discourage disappointed firms from protesting. What is more, EU suppliers will be at a particular disadvantage with the GAO's short deadline

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[163] FAR 33.103(f).
[164] *Labat-Anderson*, Comp Gen Dec, B-246071, B-246071.5 (1992). See also Feldman at 224.
[165] James Nelson at 599.
[166] 4 CFR §21.2(a)(3)
[167] 4 CFR § 21.2(a)(1) and (2).
[168] Boland and others at 4.
[169] GAO-18-510SP at 12.
[170] Conant Hoang and Bakies, citing *360 IT Integrated Solutions*, Comp Gen Dec B-414650.19 (2018).
[171] 28 USC 2501. See also *L-3 Comm's Integrated Sys v US*, 79 Fed Cl 453, 455 (Fed Cl 2007).
[172] *Software Testing Solutions, Inc v US*, 58 Fed Cl 533, 535-536 (2003).
[173] *CW Gov't Travel, Inc v US*, 61 Fed Cl 559, 569 (2004).

because their inexperience will make it harder to identify protestable issues and to articulate them. Being forced to work in this short time window will diminish the effectiveness of their protests.

2. EU

As suggested, EU deadlines are more diverse than in America. Member States' deadlines rules are caught on the horns of two dilemmas: first, tension between local procedural autonomy and the Directive's purview;[174] second, countervailing public interests in granting enough time to lodge protests while also ensuring expeditious resolution.[175] The Remedies Directives provide some guidance, but Member States have wide discretion, making the overall EU picture a muddle.

The original directive required an expeditious process.[176] Yet it failed to define 'rapid'.[177] *Universale-Bau v EBS* partly filled the gap: holding that a deadline as short as two weeks was not unreasonable.[178] *Santex v Unità Socio Sanitaria* held that deadlines run from the notification or when the tenderer became aware of the infringement and that if strict enforcement would make protests impossible or excessively difficult, deadlines are extended.[179] And *Uniplex v NHS*, held that a requirement that protests must be brought promptly would be too uncertain.[180]

The 2007 Remedies Directive also introduced floors on deadlines. Member States set their own, but these cannot be less than 10 days from the award.[181] This establishes a minimum. But it remains unclear whether there is a maximum that Member States may set.[182] Protests based on

[174] Caranta, 'Paths' (2011) at 81–83.
[175] Arrowsmith (2018) at 964–65.
[176] Directive 89/665/EEC, Article 1(1); Directive 92/13/EEC, Article 1.
[177] Trepte (2007) at 549; Arrowsmith (2018) at 965; COM(2006) 195 final/2 at 2.
[178] *Universale-Bau AG v Entsorgungsbetriebe Simmering GmbH*, C-470/99 (2002).
[179] *Santex SpA v Unità Socio Sanitaria Locale n 42 di Pavia*, C-327/00 (2003).
[180] *Uniplex (UK) v NHS Business Services Authority*, C-406/08 (2010) at ¶¶69–70.
[181] Directive 2007/66/EC, Article 2c. See also Arrowsmith (2018) at 965.
[182] Arrowsmith (2018) at 944, 971.

the principle of effectiveness have a separate deadline and this cannot be later than six months from contract finalisation,[183] which arguably establishes the latest permissible deadline.[184]

Despite the introduction of time limits, variety persists. Most have laid down limits that mirror the Directive,[185] making 10–15 days the default.[186] Denmark, Ireland, Italy, and the UK allow 30 days. Slovenia allows just eight,[187] which violates the minimum.[188] The Netherlands has no limit.[189] Issues remain: some use calendar days, others work days, and most are unspecified.[190] Member States also differ on whether to count from the award date or from when the infringement was learned about.[191] Another issue arises about States whose deadlines slightly exceed the minimum.[192] In the majority standstill and review are concurrent, but in some States standstill runs from when the award decision is sent, cutting the standstill by one day.[193] States also differ as to the principle of effectiveness, which each implements in its own way.[194]

For US suppliers, such idiosyncratic deadlines may bewilder.[195] Not only will the variety be intimidating but so also will short filing windows. Such strict time limits discourage even those experienced with Europe's filing deadlines.[196] Like the GAO, where short deadlines make

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[183] Directive 2007/66/EC, Article 2f(1)(b). And Member States may shorten the period for ineffectiveness claims to 30 days if their authorities provide appropriate notice of the award. Directive 2007/66/EC, Article 2f(1)(a).
[184] Arrowsmith (2018) at 967–68.
[185] SWD(2017) 13 final at 29.
[186] Compare Directive 2007/66/EC, Article 2c and SWD(2017) 13 final, Annex 9.
[187] SWD(2017) 13 final at 108–09.
[188] Directive 2007/66/EC, Article 2c.
[189] SWD(2017) 13 final at 109. Having no upper limit contravenes the Directive. Arrowsmith (2018) at 971.
[190] Ireland and Luxembourg use calendar days. SWD(2017) 13 final at 108. Spain, Latvia, Portugal, and Slovenia use work days. Ibid at 108–09.
[191] In 23 Member States, the deadline runs from the date of the award notice. In Germany, Hungary, and Ireland, the deadline runs from when the protest knew or ought to have known of the infringement. Ibid.
[192] Ibid, listing deadline of 14 days in Finland, 15 in Latvia, and 16 in France and Slovakia.
[193] MARKT/2013/072/C at 54,. Further complicating the interplay between deadlines and standstill, over half of the Member States have not used the default standstill. Compare ibid at 55–57 with 2007/66/EC, Article 2b.
[194] Compare Directive 2007/66/EC, Article 2c and Article 2f; SWD(2017) 13 final at 108–10.
[195] Woolcock and Grier at 320; Gordon (2006) at 437–38.
[196] When UK lawyers were polled about reasons that suppliers choose not to pursue challenges, strict time limits were the most important reason. Arrowsmith and Craven at 243. Cf Pachnou, Thesis (2003) at 288–89, 347–48, observing that time limits make it difficult to bring challenges in the UK and Greece. Some 57% of EU lawyers held that time limits were relevant. MARKT/2013/072/C, Appendices at 22. About half as many EU

it hard to identify, develop, and submit protests within the prescribed timeframe, mastering the EU filing deadlines may be challenging for American suppliers. This will discourage them from filing protests, and those who do may struggle in order to articulate viable grounds in short order. Their bid protests may be less effective than they would have been if more time had been allotted.

D. Decision Timelines

Every system must also choose how much time the forum has to render its decision: more time allows a more thorough investigation; fixing a shorter time limit affords greater certainty.[197] America's forums have three distinct timelines, whereas the EU has none.

I. US

These are the timelines: Agency protests are decided within 35 days.[198] Next speediest are GAO protests, in which GAO attorneys are given 100 days to render an opinion.[199] There is no timeline for COFC,[200] but protests are prioritised ahead of other litigation and its schedule is comparable to that of the GAO.[201] Proposals to expedite the process are under review. In 2019, one of the Section 809 Panel's recommendations was to impose the same GAO timeline for decisions at COFC,[202] and a recent bill also proposed reducing the GAO timeline to 65 days.[203] Neither has been enacted.[204] Congress did pass another of the Panel's proposals,[205] requiring that DoD contracts under $100,000 be expedited, possibly reducing decisions to only 10 days.[206]

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suppliers thought so. Ibid. This disparity may have to do with the difference between suppliers who had sought counsel and thus understood the filing deadlines and those who had not and did not. Arrowsmith and Craven at 243.

[197] Gordon (2006) at 438.

[198] FAR 33.103(g).

[199] 4 CFR § 21.9. 50% are decided within 30 days and 70% within 60 days. RAND Study (2018) at 38–39.

[200] Federal Courts Administration Act of 1982, Pub L No 102-572, § 906, amending 28 USC 798.

[201] Gordon and Golden at 206.

[202] 3 Section 809 Panel Report at 345.

[203] Ramish 65–68. See also Schooner (2018) at 30.

[204] Turner and Castellano; Ramish at 74–75.

[205] 3 Section 809 Report at 355–58.

[206] National Defense Authorization Act of 2019 § 822, amending 10 USC 2302.

The next section explains that, although there are no EU provisions to harmonise timelines, Member States have established such timelines and these cluster around 30 days. For many EU suppliers, US timelines may seem lax: 35 days for agency protests, 100 days for GAO protests, and 100-plus days for COFC. Awareness of more generous decision timelines may discourage EU suppliers deciding whether to protest, who are familiar with and so likelier favour a swifter outcome. (Yet from a survey discussed below, this does not seem to have been the main driver.[207])

2. EU

Although the Remedies Directives have long required that review procedures be 'rapid', they do not set decision timelines.[208] Some have independently done so. So there is a considerable diversity of waiting periods,[209] even though the Commission has cautioned that the duration of adjudication is a major factor in a remedies programme's effectiveness.[210]

At one extreme, 11 Member States have not set a time limit.[211] The UK is one example, and the reviews average 300 days, perhaps more because of the forum than the absence of a time limit.[212] At the other extreme, France and Romania allow just 20 days and Poland and Slovenia 15. Eight Member States' limits cluster at 30 days.[213] The remaining four Members States have established limits that exceed 30 days, with Germany (35 days) and Lithuania (60 days) at the extremes and Austria (42 days) and Cyprus (45 days) in between.[214]

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[207] See below Section II.D.2, citing MARKT/2013/072/C, Appendices at 27.
[208] Directive 89/665/EEC, Article 1(1); Arrowsmith (2018) at 944.
[209] MARKT/2013/072/C, Final Study at 65–66,137.
[210] SWD(2017) 13 final at 36.
[211] MARKT/2013/072/C, Final Study at 65. In Denmark, there is no time limit, but the Complaints Board usually decides within eight months. Ibid, Country Fiches at 33. In Ireland, decisions usually come within four months but can take two years. Ibid at 60. Reports about Portugal are inconsistent. Compare Final Study at 66, Figure 5.13, saying Ireland lacks a limit with Country Fiches at 83–84, saying its courts have 10 days for review.
[212] Ibid, Final Study at Figure 6.7, listing five other States with judicial forums having even longer review periods.
[213] Ibid at 65–66. See also ibid, Country Fiches at 13.
[214] Ibid, Final Study.

When polled about what discourages protests, suppliers say slow decisions are a not major factor.[215] But the questionnaires do not compare States having a deadline with those not having one. Presumably, such comparisons would reveal a disparity consistent with the variety of decision timelines, with firms feeling particular frustration with States lacking timelines, because businessmen would probably prefer closure and deplore the uncertainty of unresolved litigation.

For Americans, shorter timelines may encourage protests. For Europeans making a similar calculation about whether to protest in America, longer waits may have the opposite effect. Because the EU has not established a timeline, the Commission has not polled suppliers on this point, and so how much timelines affect their propensity to protest is unknown. The Directive mandates a rapid decision but gives no other guidance.[216] Not establishing a firm timeline for rendering decisions affects interim measures: review bodies may be less amenable to granting suspensions if there is a long wait for the protest decision.[217] That is what the evidence shows: 11 Member State have not imposed limits and a half dozen have procedures lasting more than a year.[218] Interim measures are granted only reluctantly. For Americans accustomed to interim measures in the form of automatic stays,[219] the fact that interim measures are not more readily available for bid protests will be unsatisfying and so may discourage them from lodging protests.

E. Standing

Another choice every system must make concerns the extent to which standing is limited.[220] As discussed below, standing rules are more restrictive in America than in Europe.

[215] Ibid, Appendices at 27, reporting that only 10% of non-protesters said the process was too slow.
[216] Directive 2007/66/EC, Article 1; Directive 92/13/EEC, Article 1(1); Directive 89/665/EEC, Article 1(1).
[217] Arrowsmith (2018) at 988.
[218] MARKT/2013/072/C, Final Study at Figure 6.7.
[219] For further discussion of GAO or CICA stays, see below in this chapter, Section II.G.1.
[220] Gordon (2006) at 436–37.

I. US

In all three forums, the test is whether the protester is an 'interested party'. This is a term of art whose definition varies somewhat with each forum.[221] The GAO and COFC agree, however, that subcontractors,[222] taxpayers,[223] and other third parties[224] do not qualify. Standing before agencies and the GAO is nearly the same. For agencies, an interested party is 'an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.'[225] The GAO uses roughly the same definition.[226] What primarily distinguishes them is that agencies *may* consider protests from interested parties and the GAO *must* do so.[227]

For parties to have standing at the GAO,[228] they must meet two criteria:[229] they must be actual or prospective bidders and the award must affect their 'direct economic interest'.[230] Actual bidders are those who have submitted bids. Defining prospective bidders is harder.[231] The term encompasses *potential* competitors,[232] but suppliers lacking the capacity to participate do not qualify.[233] Defining 'direct economic interest' is also much discussed in the case law.[234] A supplier has such an interest if it is next in line for award or if it could compete if its protest were upheld.[235] So standing is narrow under GAO jurisdiction rules.[236]

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[221] Carpenter and Schwartz at 2, 5.
[222] *US Polycon Corp*, B-254655.3 (1994). See also Claybrook at 544–46; Keyes at 733.
[223] *Winstar Communs v US*, 41 Fed Cl 748 (1998).
[224] *American Federation of Government Employees*, Comp Gen Dec B-282904.2 (2000).
[225] FAR 33.101.
[226] 4 CFR §21.0(a)(1).
[227] 31 USC 3553(a). See also Cibinic, Nash, and Yukins at 1682.
[228] 4 CFR §21.0(a)(1).
[229] *A Moe & Co*, Comp Gen Dec B-219762 (1987).
[230] 4 CFR §21.0(a)(1).
[231] Cibinic, Nash, and Yukins at 1694–97.
[232] *Tumpane Servs Corp*, Comp Gen Dec B-220465 (1986).
[233] *Polycon Corp*, Comp Gen Dec B-218304.2 (1985).
[234] Cibinic, Nash, and Yukins at 1696–1700.
[235] *Sparton Def Elecs*, Comp Gen Dec B-237396 (1989).
[236] Maser, Subbotin, and Thompson at 142.

Standing rules at COFC are similar to the GAO but differ in significant ways. It has adopted a broader definition of 'interested party'.[237] Until 2001, the GAO used the CICA definition, whereas COFC applied the APA's wider definition.[238] The gap narrowed when the Federal Circuit mandated that COFC also use the CICA definition.[239] Like the GAO, the two-part 'interested party' test must be satisfied.[240] Yet differences remain. First, to prove itself a prospective bidder, a firm need not show it would have been awarded the contract had it submitted an offer, only that it would have been qualified to do so.[241] Unlike the GAO, bidders need not prove their capacity in the market.[242] Third, a 'direct' interest requires not that the bidder be next in line,[243] but only 'allegational prejudice'.[244] Last, for pre-award cases, a protester need not show a substantial chance of winning, only that it suffered a nontrivial competitive injury that is correctible through judicial relief.[245] The Federal Circuit has not established a binding definition,[246] but in *National Air Cargo Group* one judge held that the mere prospect of increased competition for tasks orders on an IDIQ contract would constitute such an injury.[247]

More recently, the Federal Circuit issued an opinion that may signal a considerable expansion standing in the US.[248] In *Acetris Health LLC v US*, the court held that for COFC protests bidders and potential bidders will no longer be required to show that they had a substantial chance of winning the award in order to be granted standing. Acetris had complained that it could not compete on equal footing because of an agency interpretation that excluded

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[237] Keyes at §33.6.
[238] *CHE Consulting, Inc v US*, 47 Fed Cl 331 (2000).
[239] *AFGE Local 1482 v US*, 258 F3d 1294, 1300–02 (Fed Cir 2001).
[240] *Infrastructure Defense Technologies, LCC v US*, 81 Fed Cl 375 (2008).
[241] *Myers Investigative & Sec Servs, Inc v US*, 275 F3d 1366 (Fed Cir 2002).
[242] *Polycon Corp*, op cit.
[243] Cibinic, Nash, and Yukins at 1696–97.
[244] *Linc Gov't Servs, LLC v US*, 96 Fed Cl 672, 695–700 (2010).
[245] *Weeks Marine, Inc v US*, 575 F3d 1352, 1363 (Fed Cir 2009).
[246] Ralston and Murry at 14.
[247] *Nat'l Air Cargo Group, Inc v US*, 127 Fed Cl 707, 716 (2016).
[248] Hargreaves at 231.

Acetris's products. Under the old rules, Acetris would not have been considered an 'interested party' because it was not the next-highest bidder after the awardee, but the Federal Circuit held that Acetris should be granted standing since it was 'virtually certain' that the same issues would arise again.[249] It is unclear how broadly *Acetris Health* will be interpreted, but this opinion may signal a shift that would make standing at COFC much broader and more aligned with the EU.[250]

From the perspective of the European supplier, American standing rules may be baffling in two respects. First, all three forums circumscribe standing more than the EU does. Indeed, one recent survey of 98 countries found that the rules for standing in US federal procurement are not only more restrictive than most EU countries but arguably the most restrictive standing rules the world.[251] Considered alone, this may substantially discourage participation. And Europeans may also find nuances between GAO and COFC standing rules hard to discern. Depending on how *Acetris Health* is interpreted, the gap between the two may diverge such that COFC rules may become much more permissive than the GAO rules and, thus, more like the EU's standing rules.[252] In the long run, this convergence between COFC and baseline EU standing rules may encourage European protests. Meanwhile, however, the uncertainty about the existing nuances separating the COFC and GAO standing rules added to the churning waters as to the application of *Acetris Health* may discourage EU suppliers. This is another area where uninitiated contractors would be at a disadvantage. Simply ascertaining whether they would be granted standing is not an easy question, especially with standing rules before COFC being in a state of flux. Sometimes, bold firms may lodge a protest only to have it denied weeks or months later because they lack standing.

[249] 949 F3d 719, 726–27 (Fed Cir 2020).
[250] Hargreaves at 251.
[251] Ibid at 231, 238, comparing standing rules in terms of parties and circumstances. When the two are combined, he concludes that US standing rules are 'somewhat restrictive' and the narrowest of the countries considered in this study. Ibid at 243, 245.
[252] Ibid at 251, 253–54. See also Yukins (2021) at 208; Hurst and others at 3.

This is another example of how the numerous divergences between the two procurement systems may lead firms to make mistakes and file protests in an ineffective manner.

2. EU

Superficially, the Directive's two criteria for standing are similar to America's. They also share similar rules for including and excluding parties that choose not to compete. On closer inspection, however, the Directive affords much more generous standing rules.[253] Together the distinctions discussed below comprise an obstacle because transatlantic suppliers will often over- or under-estimate whether they have standing based on experiences with their domestic standing rules as explained below.

The Directive uses a two-tiered test that is similar to the US, test wherein the tenderer must show both an interest in the contract and that it risked harm from the infringement.[254] Also like the US, the failure to challenge a solicitation prior to award prevents a subsequent protest.[255] Further, the principle of effectiveness declares that exercising legal rights under the Remedies Directive must not be practically impossible or excessively difficult,[256] which applies as much to Member States' systems as a whole as to particular remedies prescribed under the Directive.[257] And in both systems, standing will be denied if the challenger has no chance of a success.[258] Yet despite their superficial similarities, it may be difficult to bridge the gap between the two systems.

One crucial difference is that the US requires that there be a 'direct economic interest', but the EU requires not actual harm, merely 'risk' of harm. The CJEU has held that complainants do not have the burden of proof and cannot be required to prove actual or imminent harm.

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[253] Hargreaves at 238, 240, 243, 245, 251, 253–54.
[254] Directive 2007/66/EC, Article 1(3).
[255] *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH. KG v Republik Österreich*, C-230/02 (2004).
[256] *Rewe-Zentralfinanz v Landwirtschaftskamme*, C-33/76 (1976).
[257] Arrowsmith (2018) at 935–37, 943–45.
[258] *US v IBM Corp*, 892 F2d 1006 (Fed Cir 1989); *pressetext Nachrichtenagentur*, op cit, at ¶143.

Unless 'manifestly excluded,' harm is assumed.[259] Compared with US standing rules, that is quite generous: it shifts the burden and grants standing even if the risk is low. The contrast is sharper between the GAO and the EU than between (especially the pre-*Acetris Health*) COFC and the EU: first, because the GAO requires that protesters be next in line or least competitive if the protest were to succeed, while COFC requires a mere showing of 'allegational' prejudice; and second, because for pre-award protests COFC requires only a nontrivial competitive injury, not that the protest show that it had a substantial chance of winning. Either way, this is still a substantial divide. Past experience with their domestic system may lead US suppliers to *underestimate* when they have standing in the EU, and their own past experience may lead EU suppliers to *overestimate* when they have standing in the US, which would result in their protests being dismissed. On both sides, domestic experience may lead foreign contractors to miss some opportunities for viable protests or to protest when the grounds for doing so are lacking.

The US and the EU also differ as to subcontractors. In America, whatever the forum, subcontractors lack standing.[260] This again stems from the *direct* economic interest test.[261] When a prime loses due to an error, subcontractors can only allege second-tier damage,[262] and thus generally lack standing. The Remedies Directive is muddier on this question but leaves the door open to granting standing.[263] On the one hand, it refers not to primes, candidates, or tenderers but to 'persons',[264] which would support the argument that subcontractors were meant to be included.[265] On the other, it limits protesters to those who seek to 'obtain a particular contract,'[266]

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[259] *pressetext Nachrichtenagentur*, op cit, at ¶¶147–49.
[260] Claybrook at 544.
[261] 31 USC 3551(2).
[262] *N Carolina Div of Servs for the Blind v US*, 53 Fed Cl 147 (2002), aff'd, 60 Fed Appx 826 (Fed Cir 2003).
[263] Arrowsmith (2018) at 955.
[264] Directive 2007/66/EC, Article 1(3).
[265] Arrowsmith (2018) at 955.
[266] Directive 2007/66/EC, Article 1(3).

which seems to limit protests to prime contractors. Yet if subcontractors lack standing to participate in pre-award protests, they can sue under the principle of effectiveness.[267] This is a considerable distinction and may affect transatlantic suppliers: American subcontractors who are inexperienced in the EU may miss chances to protest; European subcontractors unfamiliar with the US's absolute exclusion of non-primes may sometimes bring protests in vain.

Last, while America establishes a bright-line rule for improprieties in solicitation documents, the EU's rule is murkier. In America, such protests must be filed before the closing date for receipt of bids or else the protest would be dismissed as untimely.[268] In the EU, Member States may establish a rule that to be eligible protesters must first tender.[269] When a firm fails to protest an unlawful specification before award, it forfeits the right to a later challenge.[270] There are exceptions: if the procedure was so defective that participating would have harmed the protester or if competing would be an exercise in futility, then the right to protest is preserved.[271]

In addition to these distinctions with the EU's baseline requirements, the procurement directive also establishes grounds on which Member States may grant broader rights to 'citizens, concerned stakeholders . . . and other persons or bodies' who lacked 'an interest in obtaining [the] contract' For these, it specifically suggests recourse to auditing authorities, oversight bodies, or ombudsman,[272] but some Member States have gone further and granted such persons and groups access to the same review procedures that would be afforded to interested parties who risk being harmed. For example, France has thus conferred standing to trade unions.[273] Because standing rules in some Member States far exceed the EU's baseline requirements, this is one area

[267] Arrowsmith (2018) at 955.
[268] 4 CFR § 21.2(a)(1).
[269] Dischendorfer at NA101.
[270] *Grossmann Air Service Bedarfsluftfahrunternehmen GmbH & Co KG v Austria*, C-230/02 (2004).
[271] Trepte (2007) at 551.
[272] Directive 2004/18/EC, Recital 122.
[273] Amblard and Gillet, citing *Département du Tarn-et-Garonnne*, Conseil d'Etat, April 4, 2014, no 358994.

where it is difficult to compare US and EU procurement rules without delving into the details of each Member State. In sum, the EU's standing rules are already more open than America's, and some Member States are even more generous than what the EU baseline rules require.[274]

Standing rules for pre-award improprieties may be especially confusing for US suppliers, perhaps more so than comparisons of challenge procedures in other areas. EU suppliers who are aware of the differences may relish that US rules are simpler for improprieties in solicitations. US suppliers who contemplate challenging an illegal solicitation in the EU may be confounded about the deadline and whether they must tender in order to have standing. Compounding this, there is considerable variety among the Member States about whether third parties will be given standing. Such dissimilarities may discourage American protests or else make them less effective.

F. Standard of Review

Every system must also decide how hard it should be for protesters to win. That requires deciding to how much to stall procurements and second-guess authorities' choices.[275]

1. US

The FAR establishes agency procedures, but it does not state a standard of review. Protests must be reviewed and decisions must be well-reasoned and explain the agency's views.[276] Agencies use the GAO's standard: clear and convincing evidence. Agencies may establish a more generous standard but not standards that are more parsimonious than what the FAR requires.[277]

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[274] A recent article compiles a useful summary of standing rules in 21 Member States. Most grant standing only to 'economic operators' but not to third parties. Hargreaves at 271. In addition to France, States that provide some form of broader access include Belgium, Finland, Malta, and Portugal. Ibid at 260–61, 283–84, 287. Croatia affords standing that is broader in one sense but narrower in another: it grants standing to any person but requires a showing of actual harm rather than the mere possibility. Ibid at 267–68. Denmark's rule is similar. Ibid at 269.
[275] Gordon (2006) at 442–44.
[276] FAR 33.103(a) and (h).
[277] Cibinic, Nash, and Yukins at 1674, 1686.

The GAO's duty is to review whether procurements comply with law and regulation.[278] This means a protester must prove that the agency (a) prejudicially violated a statute or regulation[279] or (b) made a discretionary decision without a rational basis.[280] Discretion is limited only by the test of rationality and consistency with evaluation factors.[281] The presumption of correctness is gone,[282] but protesters now bear a burden to prove their case to a preponderance.[283]

COFC and GAO standards are sometimes conflated, but meaningful distinctions exist. COFC reviews protests under the APA,[284] which authorises setting aside decisions that are arbitrary, capricious, an abuse of discretion, or otherwise violate the law.[285] The Federal Circuit has held that under the ADRA, Congress intended that COFC apply the APA in the same manner as set out in the *Scanwell Labs* line of cases,[286] wherein awards may be set aside if (a) the official's decision lacked a rational basis, meaning it was arbitrary or capricious, or (b) there was a violation of statute or regulation.[287] The former criterion is deferential to the agency.[288] Mere negligence is insufficient to show a decision was arbitrary or capricious. Lack of a rational basis can be proven in four ways,[289] but the most common is to allege bad faith.[290] This requires proof that the agency acted with specific intent to injure the protester. Such proof must be 'irrefragable'.[291] Otherwise, clear and convincing evidence must establish that the decision lacked

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[278] 31 USC 3554(b)(1).
[279] *Tri-Ark Indus, Inc*, Comp Gen Dec B-274450.2 (1997).
[280] *Joanell Laboratories, Inc*, Comp Gen Dec B-187547 (1977).
[281] *Bank Street College of Educ.*, Com Gen Dec B-213209 (1984).
[282] *Medical Coaches, Inc*, Comp Gen Dec B-171578 (1971).
[283] *Cardion Electronics*, Comp Gen Dec B-218566 (1985). See also Shnitzer at 12.
[284] Shepherd at 1559.
[285] 5 USC 706(2)(A).
[286] 424 F2d at 873–74.
[287] *Impresa Construzioni*, 238 F3d at 1332.
[288] *Advanced Data Concepts, Inc v US*, 216 F3d 1054, 1057–58 (Fed Cir 2000).
[289] *Keco Indus, Inc v US*, 492 F2d 1200, 1203–04, 1206–07 (1974).
[290] Cibinic, Nash, and Yukins at 1784–85.
[291] *Galen Med Assocs, Inc v US*, 369 F3d 1324, 1330 (Fed Cir 2004).

any rational basis or violated applicable statutes or regulations,[292] which is a heavy burden.[293] The standard is even higher for negotiated procurement.[294] Indeed, one court called this standard 'near draconian' from the protester's perspective.[295]

Returning to the comparison of review standards, because COFC affords 'extreme deference' to agency decisions under the APA, this forum is the least friendly to protesters.[296] One study suggested that in four of the five GAO opinions that COFC overturned in 2008, it actually held agencies decisions to a higher standard.[297] The Federal Circuit reversed that trend in 2018, requiring that COFC give more deference to the agencies.[298] While some contend that COFC and GAO differences are merely semantic,[299] the two forums often disagree about the extent of the agencies' discretion. If the exact contours of their disagreement remain uncertain, it is certainly clear that their standards of review are not identical.[300]

For European suppliers, differences between GAO and COFC standards may seem daunting. Indeed, so close are their review standards that distinctions between them are often lost on *American* suppliers. Further, for suppliers hailing from Member States with more robust scrutiny, all three forums' considerable deference to agencies may seem permissive. These two difficulties may diminish the number and quality of protests that EU suppliers bring in the US.

[292] *Northern Telecom, Inc v US*, 8 Cl Ct 376, 379 (1985).
[293] *Centech Group, Inc v US*, 554 F3d 1029, 1037 (Fed Cir 2009).
[294] *Logicon, Inc v US*, 2 Cl Ct 776, 782 (1991).
[295] *Overstreet Elec Co v US*, 59 Fed Cl 99, 102 (2003).
[296] Howard and Miller at 9; Ralston and Murry at 11; McKeen at 339; Schaengold at 298; Keyes at § 33.6.
[297] Webber at 14.
[298] *Dell Federal Systems*, 906 F3d 982 (Fed Cir 2018).
[299] Nash (2011) at ¶12; Webber at 13–14.
[300] Metzer and Lyons at 1251–52.

2. EU

If conflicting review standards in the US are sometimes confusing, this pales in comparison with the EU's 'gaping black hole'.[301] The Remedies Directive is silent as to the standard of review. Each Member State devises its own standard.[302] *Croce Amici* held that such standards are determined by national rules, subject only to the treaty principles of equivalence and effectiveness.[303] The Court has not said whether the scrutiny under the Remedies Directives' principle of effectiveness exceeds the treaties' general requirements.[304] One Advocate General maintained that the level of scrutiny would exceed the requirements under general EU law, even outlining what that would entail.[305] Another held the standard of review should be deferential for discretionary assessments, such as an engineer's professional estimates of costs when the exact nature or quantity of works is unknown.[306] Further confusing matters, Member States can grant more extensive powers, such as asking review bodies to consider whether decisions are *expedient*, not just whether they are legal.[307]

Given that that Member States are left to their own devices, standards are perhaps more deferential than they ought to be. Data from the Commission Remedies Report are indicative. When suppliers were queried about why they did not protest, 53% in aggregate answered that they had 'no chance'. Such pessimism reaches 75% in Hungary and Sweden, 77% in Germany, 80% in Austria, and even 100% in Lithuania and Malta.[308] While other factors surely contribute

[301] Caranta, 'Paths' (2011) at 84.
[302] Arrowsmith (2018) at 982.
[303] *Croce Amica One Italia Srl v Azienda Regionale Emergenza Urgenza*, C-440/13 (2014).
[304] Arrowsmith (2018) at 982.
[305] Opinion of Advocate General Campos Sánchez-Bordona, *Connexxion Taxi Services BV v Staat der Nederlanden*, C-171/15 (2015), ¶¶70–73.
[306] *SIAC Construction Ltd v County Council of Mayo*, C-19/00 (2000), ¶55 (Advocate General Jacobs).
[307] Arrowsmith (2018) at 986, citing *Croce Amici*, op cit, at ¶45. Cf Caranta, 'Paths' (2011) at 86.
[308] MARKT/2013/072/C, Appendices at 28, Table 4.14.

to such doubts, among them must be a standard of review that is overly deferential.[309] Until the EU sets a common standard that is less deferential, some Member States may continue to favour closure and expeditious procurements rather than closer scrutiny.

If more than half of European suppliers decline to bring protest because they believe they have no chance of success (in part because of a standard that is highly deferential to authorities), what would American suppliers do? That depends on both the familiar circumstances at home and the extent to which suppliers appreciate their host's highly deferential standard of review. In America, few contracts are protested,[310] but on average 40% of protests that are filed are sustained or validated by agencies undertaking corrective action.[311] One study says that a fifth of successful protesters go on to win the contract.[312] Small businesses are especially sanguine: they constitute just 15% of DoD spending, but they filed 53% of GAO protests in 2008-2016.[313] American suppliers come from an environment where protests are often won and confidence runs high. Poorer prospects could affect them in two ways. Suppliers unaware of the disparity and accustomed to successful protests may protest weak cases, wasting their time and effort.[314] Or American suppliers who are aware of the disparity may be deterred from protesting; compared with the US success rate, the numbers in most Member States are bound to seem discouraging.[315]

How will this disparity affect European suppliers? That depends on their awareness of the divide. Suppliers unaware of a much more favourable standard of review may miss opportunities for viable protests. Conversely, suppliers who are aware may file frivolous protests, perhaps not

[309] Ibid, Final Study at 138.
[310] RAND Study (2018) at 26, reporting that less than .3% of DoD procurements are protested; Gordon (2013) at 495–96, calculating from GAO reports that between 99.3% and 99.5% of procurements were not protested.
[311] RAND Study (2018) at 31–32. One recent practitioners' guide provides a useful summary of GAO protest reports from 2009–18, and it reports a slightly higher success rate: 43.9%. Nichols and others at 4.
[312] Gordon, 'Dissecting' (2014) at 5
[313] RAND Study (2018) at xv, 53.
[314] One complaint about the EU is the absence of statistics about foreign bidders. Woolcock and Grier at 320.
[315] Contractors succeeded in a third of EU protests. SWD(2012) 342 final at 33; SWD(2014) 262 final at 27.

appreciating that the higher success rate are the result of suppliers assisted by experienced protest litigators shrewdly identifying and contesting only the most egregious violations.

G. Interim Measures

This section considers another of the questions about choices that every system must make: Is the procurement to be suspended during the protest? This is a key comparison because the two systems often differ on this point, which may affect transatlantic suppliers' incentives.[316]

1. US

Often, the term 'automatic stay' refers to the GAO.[317] However, agencies are also required to grant a form of automatic stay,[318] although this can be overridden.[319] Upon receipt, agencies must pause the award or suspend performance. Protests can go to the contracting officer or one level up.[320] Agency protests do not necessarily preclude a GAO protest,[321] but that may happen[322] – because even a timely protest does not always toll the clock.[323]

The GAO is better known for its automatic stay,[324] often called a 'CICA stay'.[325] This is one of this forum's principal benefits.[326] Like the agency stay, during the automatic suspension, the agency must withhold award or suspend performance. Likewise, agencies can override the stay,[327] and such overrides are also subject to COFC review.[328]

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[316] Gordon (2006) at 441–42. For strategic considerations, see Rector and Cook at 266–67.
[317] Carpenter and Schwartz at 9.
[318] Howard and Miller at 8; Carpenter and Schwartz at 3.
[319] 31 USC 3553(c)(2); FAR 33.103(f)(3). Overrides are overturned if the decision was arbitrary, capricious, abused discretion, or otherwise violated the law. *Keeton Corr, Inc v US*, 59 Fed Cl 753, 755 (2004).
[320] FAR 33.103(f)(1), (d)(3), and (d)(4).
[321] 4 CFR § 21.2(a)(3).
[322] *Labat-Anderson Incorporated*, Comp Gen Dec B-246071.5 (1992). Cf Schaengold, Guiffré and Gill at 328.
[323] FAR 33.103(f)(4); 21 CFR § 21.6.
[324] Carpenter and Schwartz at 9.
[325] James Nelson at 612.
[326] Schaengold, Guiffré, and Gill at 296–97.
[327] 31 USC 3553(c) and (d). See also FAR 33.104(b) and (c).
[328] *Superior Helicopter LLC v US*, 78 Fed Cl 181, 186–87 (2007).

Unlike CICA stays, which are automatic for GAO protests, COFC requires a motion for injunctive relief.[329] Granting such relief is uncommon and has been called an 'extraordinary and drastic remedy'.[330] To be granted, it must established that (a) the protester is likely to succeed on the merits, (b) it will otherwise suffer irreparable harm, (c) an injunction will not harm the public interest, and (d) the balance of hardships favours the protester.[331] As noted in Section II.C.1, COFC does not have a specific protest deadline. However, a dilatory protest can imperil the right to injunctive relief. Thus, winning such relief is a riskier proposition than at the GAO.[332]

Two features of American interim measures may bewilder the European supplier. First, it may seem unbelievable that even spurious protests may disrupt procurements and that while the means for an override exist, the process is rarely used.[333] To the extent that this is understood, it may incentivise protests. Second, even contracts that have been finalised can be rescinded.[334] Perhaps because damages are sometimes the only available relief for finalised contracts in the EU,[335] the scope for 'interim measures' is more generous in the US: in particular, protesters can still win, even after award and finalisation. This divide is so substantial that inexperienced European suppliers may fail to fully understand and thus may file fewer protests than they otherwise would have done.

2. EU

The Remedies Directive has separate provisions on interim measures: first, a requirement that review bodies have authority to suspend contract award *procedures*;[336] and second, a

[329] 27 USC 1491(b)(2); COFC Rules of Court, op cit, Appendix C, ¶¶9–15. See also McKeen at 338.
[330] *Mazurek v Armstrong*, 520 US 968, 972 (1997).
[331] *Alion Science and Technology Corp v US*, 74 Fed Cl 372 (2006). Even if the agency was arbitrary, capricious, or violated the law, injunctions are still discretionary. *PGBA, LLC v US*, 389 F3d 1219, 1227 (Fed Cir 2004).
[332] Schaengold, Guiffré and Gill at 328, 296–97.
[333] A distinguishing feature of the US system is that protesters can stop the process 'in its tracks'. Spiedel at 69.
[334] Gordon and Racca at 143.
[335] Arrowsmith (2018) at 991, 1015–16; Trepte (2007) at 553.
[336] Directive 2007/66/EC, Article 2(1)(a).

suspension of a contested *decision* to allow time for review before finalisation.[337] Member States may establish automatic suspensions for the former, and they must do so for the latter.[338]

While review bodies must be given the power to suspend procedures, such measures need not be automatic. Were they automatic, it is thought, they would provide 'vexatious litigants' the chance to make procurements a 'hostage to fortune', which they could disrupt by lodging spurious protests.[339] Member States can curtail this measure's availability because its criteria are a matter of national discretion.[340] Such discretion is circumscribed by the effectiveness principle, which says national rules cannot make unduly difficult the exercise of rights under the Remedies Directive, including interim measures.[341] Yet there remains much room for manoeuvre and obtaining relief is rare.[342] Permissible criteria include consideration of costs,[343] prospect of success in the ultimate dispute,[344] and availability of damages.[345]

Automatic interim measures *must* be provided for contested decisions to prevent authorities from rushing contracts to conclusion to circumvent remedies.[346] When an independent review body considers a protest, the Member State must ensure that the authority cannot finalise before the body has either (a) decided on the substance of the review or (b) at least decided on the interim measures. There are no exceptions, which encourages expeditious review.[347]

What will perhaps confuse Americans most about European interim measures is that pre- and post-award remedies differ sharply. It may seem strange that Member States can tightly

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[337] Ibid, Article 2(3).
[338] Ibid, Article 2(4).
[339] Trepte (2007) at 554.
[340] *CS Communications Systems Austria v AUV*, C-424/01 (2003), ¶30.
[341] Ibid, ¶¶31–32. See also Arrowsmith (2018) at 989–90.
[342] Treumer, *Enforcement* (2011) at 30; Brown (1998).
[343] Directive 2007/66/EC, Article 2(5).
[344] *CS Communications Systems Austria*, op cit, ¶¶26, 32.
[345] Arrowsmith (2018) at 990–91.
[346] Arrowsmith (2018) at 993.
[347] Directive 2007/66/EC, Article 2(3).

control suspensions for pre-award procedures but that suspensions are automatic for post-award protests. Further, they may be taken aback that suspensions can be terminated without reaching the question of whether a protest will likely succeed on its merits; the decision on the interim measures will suffice. These several disadvantages may discourage suppliers from filing protests.

Another potential obstacle concerns a factor that is prohibited in America. Member States can give review bodies the right to consider the 'balance of convenience',[348] including the 'probable consequences of interim measures for all interests likely to be harmed . . . and may decide not to grant such measures when their negative consequences could exceed their benefits.'[349] In contrast, the GAO cannot *ever* weigh the disruption resulting from termination, re-competition, or re-award.[350] A European firm that wins an US contract that is later protested may be disappointed to learn, when presenting arguments as an intervenor, it cannot argue the 'balance of convenience'. Another concern is that an American protester could make an untimely request for interim relief. Such difficulties may make EU suppliers less effective.

H. Legal Effect

Another choice every system must make is the extent to which forums can provide meaningful relief.[351] If a forum's decision lacks legal force, 'winning' will be of little solace. In general, suppliers want to win contracts, or at a minimum to be compensated for their losses, not merely to litigate on principle. When they do protest, suing prospective customers in this manner is a perilous endeavour without a private sector parallel, this is done on the basis of cost-benefit analysis. Europeans may worry that, technically, GAO decisions are non-binding.[352]

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[348] Trepte (2007) at 554.
[349] Directive 2007/66/EC, Article 2(5).
[350] 31 USC 3554(b)(2).
[351] Gordon (2006) at 444–45.
[352] Forman, Cliffe, Choi, and Curran at 196.

I. US

Where the GAO finds no violation of statutes or regulations, it denies the protest. But where there is a violation, it *recommends* various remedies.[353] That its decisions are non-binding derives from its unique status. Unlike the executive agencies against whom protests are brought, it is a creature of the *legislature* and lacks constitutional authority to compel the executive.[354] So the GAO's role is not to override decisions, only to say whether awards comply with the law.[355]

What power the GAO lacks de jure it has de facto in that its 'non-binding' decisions are seldom ignored.[356] So much so that a 'non-binding' GAO recommendation is 'tantamount to a binding order'.[357] Two considerations account for such deference. First, while agencies are free to disregard GAO recommendations, such infractions must be reported to Congress promptly. Agencies have 60 days to adopt recommendations. After that, noncompliance must be reported within five days.[358] This alone instils compliance. What gives the GAO more teeth is the implied threat in the form of the legislature's control over the public fisc.[359] Congress's 'power of the purse' give it leverage over executive agencies, whose daily bread depends on continued funding.

But although the GAO is the preferred forum, protesters favouring a binding decision are not without recourse. For a venue with a formal process, binding decisions, and appellate review, COFC is available.[360] Yet such formality is not free. Litigation costs are considerable, and the resolution can take several months.[361] That GAO decisions are non-binding may inhibit protests. It should not. As discussed, GAO recommendations are the functional equivalent of a binding

[353] 31 USC 3554(b)(1)(A)–(H). The GAO can also award protesters' costs. 31 USC 3554(c)(1)(A) and (B).
[354] *Ameron, Inc v US Army Corps of Engineers,* 809 F2d 979, 986 (3rd Cir 1986).
[355] 31 USC 3554(b)(1).
[356] Manuel and Schwartz at 16–18.
[357] Schwartz (2010) at 648.
[358] 31 USC 3554 (e)(1).
[359] Metzger and Lyons at 1254–55; James Nelson at 598.
[360] James Nelson at 614.
[361] Howard and Miller at 9.

court order. Binding decisions in EU forums and nominally 'non-binding' decisions at the GAO are not so different as they may appear at first. Still, this could discourage protests as not all EU suppliers will grasp how this works. Or suppliers may protest at COFC only because its decisions are formal and legally binding, perhaps failing to notice other, weightier tactical considerations. This could make their protests in America less effective.

2. EU

Twenty-one Member States only have review bodies whose decisions are binding.[362] Six have a non-binding forum, but in Austria and Belgium these are regional tribunals and no such forum exists at a national or federal level.[363] Only four national bodies issue non-binding opinions: Czechia, Italy, Luxembourg, and the Netherlands.[364] Yet on closer examination, although the Czech Office for Protection of Competition can offer advice, its powers are not *only* advisory. This tribunal can also cancel awards and prohibit performance.[365] Italy's National Anti-Corruption Authority can also issue binding opinions in some cases.[366] The Netherlands's Commission of Procurement Experts is independent and is thus not even considered a 'review body' under the Directive.[367] Only in Luxembourg is there a government-sponsored tribunal whose opinions are purely advisory.[368] Hence, EU review bodies' decisions are generally binding.

US suppliers may confuse the dearth of non-binding forums with the absence of bodies that are faster and cheaper than formal judicial forums. Yet the EU lacks the former but not the latter. Ten Member States have specialised bodies, another nine use such bodies for certain

[362] European Commission, 'Data Availability' (2018), Appendix 2.
[363] Ibid at 1, 4–5 (Lower Austria) and 10, 13–14 (Flemish region). Although it is the second most populous region, Lower Austria accounted for less than 2% of Austria's protests. Ibid at 7.
[364] Ibid at 37–38, 93, 95, 112, 116, 121–22.
[365] Ibid at 38.
[366] Ibid at 94–95.
[367] Ibid at 122.
[368] Ibid at 116.

review procedures, leaving eight using exclusively judicial forums.[369] Their timelines compare favourably with the GAO, and are in some cases more streamlined:[370] France 20 days, Germany five weeks, Lithuania under 70 days.[371] Portugal is an outlier, with decisions averaging six months.[372] Several European forums will in fact deliver their verdicts faster than will the GAO, so suppliers who choose not to protest because 'faster' nonjudicial forums are lacking would err.

I. Damages

Every system must choose whether to make awards of damages available.[373] In a 'counter-cultural' contrast, their availability is limited in America, whereas the award of damages is embraced as a necessary component of the remedies system in the EU.[374] Confusion about or ignorance of these surprising contrasts could affect suppliers deciding whether to protest abroad.

I. US

None of the federal government's three forums award damages. In particular, recovery for lost profits has been universally rejected.[375] At most, bidders may recover bid preparation and protest costs.[376] The rationale derives from scepticism about whether protesters should be able to sue for damages when they have no 'right' to a contract.[377] Further, the absence of the *pacta sunt servanda* doctrine means sustained protests can afford suppliers a second chance to compete and access to a more direct remedy is viewed as obviating the need for secondary remedies.[378]

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[369] MARKT/2013/072/C, Final Study at 58–59.
[370] Finland (no deadline) and Ireland (12–18 months) are outliers. European Commission, 'Data Availability' (2018), Appendix 2 at 59, 90, 180. Greece is undergoing reforms, making its timelines uncertain. Ibid at 78.
[371] Ibid at 64, 70, 110.
[372] Ibid 138.
[373] Gordon (2006) at 444–45.
[374] Fairgrieve and Lichère at 186. See also Rector and Cook at 275–77.
[375] Gordon and Golden at 199, 207.
[376] Gordon and Golden at 199, 202, 206–07; Cibinic, Nash, and Yukins at 1794–01.
[377] *Perkins v Lukens Co*, 310 US 113, 125 (1940).
[378] Fairgrieve and Lichère at 186; Gordon and Golden at 201, 208–09; Caranta, 'Damages' (2011) at 182–83.

When a challenge is brought to agencies, they may reimburse the protester's costs.[379] These include costs associated with bid preparation and protests.[380] Lost profits are absent from this list of available remedies.[381] This is interpreted to mean that lost profits are not authorised.[382] The primary recourse is the chance to overturn the award and to compete for the contract anew.[383]

The GAO has historically rejected damages. Among CICA's most important innovations was the automatic stay, prohibiting awards or performance until protests are resolved. If finality is not sacrosanct, then disappointed suppliers can be afforded a 'second bite at the apple' and damages will be unnecessary.[384] And this is often what legitimate protesters want most.[385]

While lost profits are not available at the GAO, it is easier to recover attorneys' fees there than at COFC,[386] which is one reason that many favour the former over the latter.[387] If the agency takes corrective action before the GAO issues a decision, protesters can still recover costs. Even if a protest is *denied*, the GAO may recommend that the protester be awarded costs, but this is rare.[388] At COFC, costs are available only if a protest is successful, and recovery is limited only to bid preparation costs.[389] Qualifying small businesses may also recover 'reasonable' legal fees.[390]

EU suppliers considering whether to protest may find the US system confusing in three ways. First, the fact that lost profits are never awarded may discourage suppliers accustomed to a system where damages have a prominent role.[391] Second, for those familiar with America's

[379] FAR 33.102(b), referencing FAR 33.104(h) and granting the same remedies.
[380] 31 USC 3554(c)(1); 4 CFR § 21.8(d).
[381] FAR 33.104(h)(1).
[382] Gordon and Golden at 208.
[383] FAR 33.103(f).
[384] Gordon and Golden at 201–02, 206, 209.
[385] Not all protesters are bona fide; 'pirate firms' protest in pursuit of damages. Fernández Martín (1996) at 215.
[386] Schaengold, Guiffré and Gill at 329.
[387] Metzger and Lyons at 1238; Herzfeld at 8.
[388] 4 CFR § 21.8(e). See also *Advanced Tech Sys, Inc*, Comp Gen B-296493.6 (2006).
[389] 28 USC 1491(b)(2). See also *SKJ & Assocs, Inc v US*, 67 Fed Cl 218, 225 (2005).
[390] 28 USC 2412.
[391] Caranta, 'Damages' (2011) at 182–84.

private litigation,[392] it may be disappointing that compensation for legal costs is narrowly tailored. Last, even in forums where legal costs are sometimes recoverable, suppliers may be frustrated that assessing recoverability requires reading the case law, making it hard to know if one can recover without local counsel. These challenges may inhibit European suppliers from filing protests and, if they do protest, to do so ineffectively.

2. EU

Unlike America, where lost profits have been anathema since the 1920s,[393] damages are the chief remedy in the EU. Both systems allow recovery of bid preparation and protest costs, but the EU also authorises lost profits. This marks an important distinction.[394] The rationale is two-fold. First, under *pacta sunt servanda*, there is no alternative: after finalisation, damages are the sole remedy.[395] Second, lost profits are an incentive so that firms will support efforts to open up procurement markets.[396] France led the way, and it has been awarding lost profits since the 1970s.[397] That lost profits are recoverable is well established in the literature[398] and case law.[399]

Aside from the availability of lost profits, what may be most striking to Americans is the variety among Member States.[400] It has been a constant refrain that finding a common 'European' standard is challenging. But this is particularly the case as to damages. 'Undoubtedly,' damages are the 'most problematic' of the remedies, given that damages receive scant mention in the Directive, and are therefore driven by centuries-old local laws, the case law from the CJEU is

[392] Gordon and Golden at 207.
[393] Gordon and Golden at 200–03.
[394] Caranta, 'Damages' (2011) at 183; Gordon and Racca at 143–44.
[395] Fernández Martín (1996) at 213; Trepte (2007) at 553, 561–62; Brown (1998) at 90.
[396] Caranta, 'Damages' (2011) at 183; Treumer (2011) at 163.
[397] Gabayet at 10; Lebon at 322.
[398] Treumer (2011) at 151; Leffler at 161; Arrowsmith (2018) at 1046–53; Steinicke and Vesterdorf at 1412.
[399] French, German, Danish, Norwegian, and Swedish courts have awarded lost profits. Treumer (2011) at 151.
[400] Fairgrieve and Lichère at 4, 185–87.

practically non-existent,[401] and there has been little academic treatment.[402] Legal uncertainties include the calculation method,[403] conditions and procedures to be imposed,[404] standard of causation,[405] and whether breaches must be 'sufficiently serious'.[406] Even if these are overcome the supplier encounters practical difficulties: a protracted process, high standard of proof, and lower success rate.[407] Because the Member States have retained so much discretion here,[408] US suppliers must cope with 27 varieties of implementation to a greater degree than in other areas.[409]

Yet Member States are not left entirely to their own devices. There are *some* rules.[410] While there is leeway as to how damages are awarded,[411] *Spijker* established three preconditions: (a) the rule infringed must be intended to confer rights, (b) the breach must be sufficiently serious, and (c) there must be a causal link between the breach and the loss sustained.[412] Further, the CJEU set aside legislation that made culpability a precondition.[413] The European Free Trade Zone Court held that bad faith, lack of due diligence, or failure to detect an infringement are grounds for rejecting claims.[414] *Brasserie* also held that lost profits cannot be entirely excluded.[415] This discussion is not comprehensive, but it is offered to demonstrate that, even though the Member States have been granted considerable discretion in this area, there are still some limits.[416]

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[401] Steinicke and Vesterdorf at 1407; Caranta, 'Damages' (2011) at 174; Arrowsmith (2018) at 1046.
[402] Fairgrieve and Lichère at 1.
[403] Trepte (2007) at 558.
[404] Steinicke and Vesterdorf at 1409.
[405] Caranta, 'Damages' (2011) at 168–70, 176; Zhang (2007) at 334–35.
[406] Arrowsmith (2018) at 1047–50; Henty NA185-NA186; Treumer (2004) at 576.
[407] Annex, SEC(2006) 557 at 12.
[408] Fairgrieve and Lichère at 1–2.
[409] Arrowsmith (2018) at 1046; Steinicke and Vesterdorf at 1407. See also Woolcock and Grier at 320.
[410] Fairgrieve and Lichère at 2; Arrowsmith (2018) at 1046.
[411] *Stadt Graz v Strabag AG*, C-314/09 (2009), ¶¶33–34.
[412] *Combinatie Spijker Infrabouw-De Jonge Konstruktie*, C-568/08 (2008), ¶¶85–86.
[413] *Commission v Portugal*, C-275/03 (2004); *Commission v Portugal*, C-70/06 (2008).
[414] *Fosen-Linjen AS*, E-16/16 (2018), ¶103. In *Fosen-Linjen II*, Norway Supreme Court submitted a narrower issue, and the CJEU did not reach the question of the bad faith or due diligence. *Fosen-Linjen AS*, E-7/18 (2019).
[415] *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* Cases C-46/93 (1996), ¶87.
[416] Arrowsmith (2018) at 1046.

For American firms, damages may incentivise litigation.[417] But as noted, they are a second-best remedy.[418] What suppliers want most is a second chance at winning the contract.[419] The aforesaid uncertainties and difficulties are a hindrance and have resulted in underutilisation.[420] These may have a greater effect on undecided Americans, tantalising as the prospect of lost profits may be. Further, given the complicated and uncertain landscape, those who do seek lost profits will do so ineffectively.

III. Comparing Foundations

A. Constitutional Character

1. Separation of Powers

It has been argued that America's distinctive contribution to constitutionalism, or to the art of government generally, is the separation of powers.[421] Several state constitutions came earlier and incorporated this principle, but it is the federal Constitution's statement that exercises an 'enduring hold on the American imagination'.[422] This principle serves to delimit bureaucratic discretion and circumscribe federal power.[423] It is unsurprising that a principle so foundational the American system of government has also left its mark on federal procurement.

Over the past two centuries, Congress has established several different administrative bodies tasked with hearing pre- and post-contract procurement disputes,[424] and there has been a long debate about the status of such bodies given Congress's power over fiscal matters.[425] When it

[417] Zhang (2007) at 339; Fernández Martín (1996) at 214–15.
[418] Fernández Martín (1996) at 213. See also Trepte (2007) at 563–63.
[419] Papson and others at ¶126; Fairgrieve and Lichère at 192; Zhang (2007) at 334; Fernández Martín (1996) at 213.
[420] Steinicke and Vesterdorf at 1409; Annex, SEC(2006) 557 at 12. See also Treumer (2006) at 169–70; Brown (1998) at 93.
[421] Peabody at 87; Schlesinger at xxv. See also US Const, Articles I, II, and III.
[422] Freedman at 1046, listing New Hampshire and Massachusetts; ibid at 1047.
[423] Federalist no 47 (Madison) at 235; West at 340–41.
[424] Bennett at 1–2, 13–15. See also Swan (2014) at 106.
[425] US Const art I, § 8; ibid, art I, sec 9.

established the Court of Claims (COFC's predecessor) in 1855, debates ensued about its status and whether Congress had thereby arrogated a judicial role in an unconstitutional manner.[426] The Founders recognised the commixture of several government powers: Madison noted that nature of the comptroller's role was both executive and judicial;[427] Hamilton that the federal government lacked a venue to enforce public contracts.[428] Debates resurfaced with the creation of the GAO,[429] as in the course of reviewing protests, it arguably exercises the powers of all three branches of government.[430] This made it one of the most formidable agencies.[431] Whether the GAO's protest authority violates the Constitution's separation of powers doctrine has been called one of the foremost legal issues in bid protest law.[432]

As mentioned, the most recent litigation as to the GAO's exercise of the authorities that are divided among the three branches followed the passage of CICA in 1984. When President Reagan signed CICA into law, he issued a statement claiming that parts of the law were an unconstitutional violation of the separation of powers and provided directions on how the agencies should implement this law to make it compliant with this constitutional norm.[433] Among the nondelegable authorities to which he objected were the automatic stay and authority to award costs.[434] The GAO responded that it only declares whether awards comply with law and its remedies are only *recommendations*.[435] The Supreme Court later struck down the

[426] Swan (2014) at 107.
[427] Joseph Gales (ed), 1 Annals of Cong (1789) at 611.
[428] Federalist no 81 (Hamilton) at 397.
[429] Murray at 169–73.
[430] Abikoff at 1539–40; Schwartz (2010) at 646; Abikoff at 1539, 1546–62.
[431] Cibinic and Lasken 349–50.
[432] Nash and Cibinic (1987) at C25.
[433] President Reagan's Statement on Signing the Deficit Reduction Act of 1984, Pub Papers 1053 (Jul 18, 1984).
[434] McConnell.
[435] Comptroller General at 124.

provisions delegating executive authority to the GAO.[436] But the Third Circuit later upheld the GAO's status when its role in bid protests was challenged.[437]

This section may seem to duplicate Section II.H in parts, but it explains the reasons for the limits on the GAO's authority. Those reasons run deep. Even legislation cannot transform its decisions into binding law. When it renders decisions tantamount to orders, it operates at the outer limits of legislative power. This is not a mere convention. To expand the GAO's authority would require a constitutional amendment that would perhaps upend the constitutional order. The separation of powers has been foundational principle for two and a half centuries. The US is 'institutionally aberrant' in this respect, and such inflexibility may baffle EU vendors, whose institutions are more responsive to the popular will.[438] Such confusion about the foundations of the American constitutional order may discourage European participation.

2. Secondary Remedies Regime

Thus far, the discussion of EU remedies has mostly been limited to the Remedies Directive, but disappointed bidders can also challenge procurements under the auspices of the Treaties and the CJEU's jurisprudence.[439] These authorities fall under the two headings of the principles of equivalence and effectiveness.[440] This has been called a secondary remedies regime.[441] The details are not explored here. But the mere existence of this parallel regime marks an essential contrast and also a potential stumbling block for American vendors since nothing similar exists in the US.

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[436] *Bowsher v Synar*, 478 US 714, 726–34 (1986).
[437] *Ameron, Inc v US Army Corps of Engineers*, 809 F2d 979, 991–95 (3rd Cir 1986).
[438] Brown-Shafii at 49, 51.
[439] *Wall AG v Stadt Frankfurt am Main*, C-91/08 (2010). See also Arrowsmith (2018) at 932–33; Treumer, *Enforcement* (2011) at 44–49; Trepte (2007) at 541, 545; Arrowsmith and Treumer at 16.
[440] Arrowsmith (2018) at 933–37.
[441] Treumer, *Enforcement* (2011) 44–45.

America's founders imported the sovereign immunity doctrine from the English common law.[442] To bring claims against the government, therefore, petitioners must seek a waiver of this immunity.[443] This also applies to protests. As a constitutional matter, the government, 'enjoys the unrestricted power . . . to determine those with whom it will deal, and to fix the terms upon which it will make needed purchases' so that executive agencies have an 'adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers.'[444] Grounds for protest must be derived from specific statutory authorisation.[445] Courts look to statutes to decide if rights were conferred. If statutory authority is absent, the parties lack standing.[446] Jurisdiction, hence, is narrow and statutorily defined – not derived from broader constitutional rights or principles.[447]

EU protest grounds extend beyond what the Remedies Directives confer. This distinction creates complementary obstacles. US suppliers contemplating a protest may be unaware that challenges can be brought not only for infringements of the procurement directives but also for violations under the Treaties. It may thus overlook viable protests. Conversely, European suppliers may search in vain for the 'constitutional' grounds outside of statutes. They may protest too often. And when they do protest, they are more likely to do so in ineffective way.

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[442] Swan (2014) at 106.
[443] US Const, amend I, preserving the right 'to petition the Government for a redress of grievances'.
[444] *Perkins*, 310 US at 127.
[445] Compare ibid at 127–28 with *Heyer*, 140 F Supp at 412–14, holding that the Tucker Act conferred standing when the government failed to evaluate bids in good faith, with *Scanwell*, 424 F2d at 869, holding the Administrative Procedures Act granted standing to challenge contract awards in district court.
[446] *Perkins*, 310 US at 125–27, holding that the Public Contracts Act of 1936 conferred 'no enforceable rights upon prospective bidders' and that it 'was not intended as a bestowal of litigable rights'. See also 4 Report of the Commission on Government Procurement, Part G at 6–7; Metzger and Lyons at 1229–30.
[447] Kovacic 471–74 (1995), noting that bidders gained standing when Congress passed laws conferring standing. Similarly, district courts lost jurisdiction in 2001 with the Administrative Dispute Resolution Act of 1996.

3. The Constitutionalisation of Remedies

Continuing with the theme of the secondary remedies regime, a related trend is that national remedies are increasingly becoming subject to EU imperatives. This is a notable reversal. Before, remedies had been purely matters of national legislation.[448] Yet in a prescient article, Pachnou predicted that the principle of effectiveness would eventually be used to obtain tighter control.[449] That is precisely what has happened in the last two decades. Under the guise of ensuring effectiveness, the CJEU has struck down legislation on time limits, standing, discovery, fault requirements, and intervening causes. The Court's enforcement of this principle has been aggressive, far-reaching, and dynamic.[450]

Case law enforces three principles. Chief among these are the aforementioned principles of effectiveness, about which abundant jurisprudence exists, and of equivalence or non-discrimination. *Commission v Germany* recognized a third: legal certainty.[451] Such enforcement is said to ensure the protection of rights under the Treaties that would otherwise be neglected.[452]

It has been suggested that precise definitions are lacking because the CJEU has been vague in order to maximise the application of these principles.[453] Yet some broad outlines can still be discerned. Effectiveness requires that national remedies not render the exercise of one's rights under the treaties virtually impossible or 'excessively difficult'.[454] To this is added the *Simmenthal* requirement that 'full force and effect' be given to rights under the treaties and the

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[448] Treumer, *Enforcement* (2011) at 17, 49; Cerqueira Gomes (2017) at 251–52; Caranta, 'Paths' (2011) at 91–92; Arrowsmith, Linarelli, and Wallace at 756; Pachnou (2000) at 56–57.
[449] Pachnou (2000) at 55, 61.
[450] Schebesta at 55–56, 59–60, citing *Combinatie Spijker Infrabouw*, C-568/08; Treumer, *Enforcement* (2011) at 46-47, citing *Strabag AG*, C-314/09.
[451] *Commission v Germany*, C-131/88 (1991), ¶¶36, 50, 57, 61, 63.
[452] Fernández Martín (1996) at 181–83.
[453] Pachnou (2000) at 59.
[454] *Rewe v Landwirtschaftskammer Saarland*, C-33/76 (1976), ¶5; *Comet BV v Produktschap voor Siegerwassen*, C-45/76 (1976), ¶¶12–16; *San Giorgio*, C-188/82 at ¶14.

directives.[455] Equivalence or non-discrimination requires that remedies for enforcement of EU rules should be no less favourable than the remedies available for the enforcement of domestic rules.[456] Legal certainty requires that the local provisions for implementing remedies be specific, precise, and clear.[457] Of these, effectiveness is the most prominent in the Court's jurisprudence.[458]

The application of this principle has led to the 'constitutionalisation' of remedies so that over time the interpretation of treaty requirements has imposed more and more restrictive requirements and thus eroded national autonomy.[459] Local review procedures, therefore, must comply not only with the Remedies Directive[460] but also the evolving jurisprudence on the principle of effectiveness.[461] This creates compliance problems for Member States, whose procedures must conform with case law that is ever-changing and has been called 'incoherent'.[462]

What was true for American suppliers as to the secondary remedies regime applies with greater force to the constitutionalisation of remedies. As noted, in US procurement, remedies law is mostly found in legal codes, making grounds for protests easier to identify. For the EU, familiarity with the directives and national legislation procedures is insufficient. Since the CJEU increasingly defines remedies, Americans may struggle to identify viable grounds, or to know when grounds are nonviable, without counsel steeped in the Court's jurisprudence. This may discourage protests, especially from firms who cannot afford local counsel. And if they bring protests of their own with the assistance of counsel, they are more likely to do so ineffectively.

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[455] *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77 (1978), ¶¶7, 22.
[456] *Commission v Greece*, C-307/87 (1989). See also Arrowsmith (2018) at 370–71; Trepte (2007) at 6–7.
[457] *Commission v Germany*, C-131/88 at ¶63.
[458] Arrowsmith (2018) at 936.
[459] Arrowsmith (2018) at 1023–24; Sanchez-Graells (2018) at 496; Priess and Friton at 511; Matei at 362–63.
[460] A distinction exists between the broader principle of effectiveness and ineffectiveness under the Remedies Directive. Compare *Simmenthal*, C-106/77, ¶¶7, 22 with Directive 2007/66/EC, Article 2d(1). Cf Arrowsmith (2018) 943–45, 1017–25; Steinicke and Vesterdorf at 1423–25; Golding and Henty 150–54.
[461] Pachnou (2000) at 73–74.
[462] Schröder and Stelkens at 446, 448.

4. *Pacta Sunt Servanda*

As mentioned above, *pacta sunt servanda* is the doctrine that a contract, once signed, cannot be overturned, and this affects the possible remedies for infringements.[463] It does not exist in America, where even signed contracts can be overturned.[464] No standstill is required.[465] If the protester meets the deadline, the contract can be overturned. Whether the contract has been signed is irrelevant.[466] In this regard, US and EU remedies were, until recently, opposites.[467]

As noted in Chapter 2's historical summary,[468] until recently the EU adhered to *pacta sunt servanda* in a rigid fashion.[469] This resulted in a race to signature and illegal direct awards.[470] Once a contract was finalised, Member States could establish damages as the only remedy.[471] Not all did so, but this choice was available.[472] Advocate General Alber first laid the groundwork for overturning *pacta sunt servanda* in *Sankt Polten* in 1999, where he suggested that contracts may be set aside based on certain factors: the seriousness of the infringement, whether finalisation was expedited to avoid a challenge, and the contract's urgency.[473] Then finally in 2003, the CJEU overturned this rule in part, holding an ongoing infringement constituted a continuing breach.[474]

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[463] Treumer (2007) at 371. See also Trepte (2007) at 565; Arrowsmith, Linarelli, and Wallace at 785.
[464] Gordon and Racca at 143.
[465] McKeen at 330.
[466] FAR 33.102(a); 4 CFR § 21.2(a); 28 USC 1491(b)(1).
[467] Swan (2013) at 31, citing Arrowsmith (1993) at 751–53, 786–87, observing that until the 1960s, improperly awarded contracts were held to be void *ab initio*, citing *Schneider v US*, 19 Ct Cl 547, 551–52 (1884).
[468] Chapter 2, Section II.C.
[469] Swan (2013) at 32; Racca, Cavallo Perin, and Albano at 102; Treumer (2007) at 371.
[470] SEC(2006) 557 at 10; Matei at 352. Cf Directive 2007/66/EEC, Recitals (4).
[471] Directive 89/665/EEC, Article 2(7); Directive 92/13/EEC, Article 2(6).
[472] Racca, Cavallo Perin, and Albano at 96; Treumer (2007) at 376; Brown (1998) at 90.
[473] *Sankt Pölten Administrative Centre Case*, C-328/96 (1999), ¶¶73–79.
[474] *Commission v Germany*, joined cases C-20/01 and C-28/01 (2003). See also Arrowsmith (2018) at 919–20; Trepte (2007) at 565; Treumer (2007) at 373. The same procurement was revisited in *Commission v Germany*, C-503/04 (2007), which held that Germany violated Article 260 in that it had not complied with the previous judgment. Further, Advocate General Trstnjak held that rescission was proportionate because this was a 30-year contract. Ibid at ¶¶76–78. Cf Steinicke and Vesterdorf at 1423.

The effect of *pacta sunt servanda* was also diluted with the introduction of a standstill period in *Alcatel* and *Commission v Spain*.[475] Yet this solution was partial. With a standstill there would be fewer protests of signed contracts, but this did not resolve causes of action that went unnoticed until after the award. Strict observance of *pacta sunt servanda* would still make it impermissible to overturn finalised contracts even for serious infringements.

A third development that undercut *pacta sunt servanda* was that the 2007 Remedies Directive also codified the principle of effectiveness, making it possible to terminate what were previously inviolable finalised contracts. Where Member States choose not to fully implement this principle, fines and shortened contracts are offered as alternative remedies.[476] This was a substantial development in that it desacralized concluded contracts and helped address the problem with unlawful direct awards sometimes used to circumvent the directives.[477]

Last, the 2014 Directive introduced provisions that further limited *pacta sunt servanda* in that it afforded authorities the right to cancel concluded contracts in three cases: when there is a substantial modification,[478] the awardee is subject to a mandatory exclusion,[479] or there is a 'serious' infringement of the Treaties or Directive.[480] Several questions remain: for modifications, it is unclear if terminations end the whole contract or just the revised part, the consequences of terminations are still to be determined, and it is unclear to what extent such consequences must be compatible with rules on the termination for ineffectiveness. While 'serious' infringements include unlawful direct awards, it is unclear what else that may include.[481]

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[475] *Alcatel*, C-81/98, ¶¶48–50; *Commission v Spain*, C-444/06 (2008), ¶58.
[476] Directive 2007/66/EEC, Article 2d and Article 2e(2).
[477] Treumer (2007) at 32–33; Directive 2007/66/EEC, Recital 13. See also Cerqueira Gomes (2016) at 182; Matei at 352.
[478] Directive 2014/24/EU, Article 73(a).
[479] Ibid, Article 73(b), referencing mandatory provisions under Article 57(1).
[480] Ibid, Article 73(c). See also Arrowsmith (2018) at 1042.
[481] Arrowsmith (2018) at 1041–43

Pacta sunt servanda is nonetheless still in force.[482] Indeed, it controls in most cases.[483] Cracks have emerged in this once solid doctrine.[484] The EU has become more like the US in this respect,[485] but how the two compare is less clear-cut than when they were polar opposites. For US suppliers considering EU protests, it may be hard to know if a protest can be brought after the standstill without hiring counsel. That is a steep price, especially for contracts with tighter profit margins. For the EU suppliers considering a protest in America, the fact that *pacta sunt servanda* does not exist simplifies matters. If the deadline is met, contracts can be rescinded and complainants have a second chance to compete. That may be enticing and, presumably, will encourage more protests by European suppliers.

B. Legal Culture

1. Culture of Litigation

For two centuries, observers have noted that litigiousness one of the hallmarks of American culture.[486] In 1835, de Tocqueville wrote, 'There is hardly any political question in the United States that sooner or later does not turn into a judicial question.'[487] Foreign firms doing business with America are well aware that it is the paradigmatic litigation culture.[488] European firms have long flocked to US courts given the favourable rules of procedure and 'distinctive American penchant for litigation'.[489]

In this context, it is unsurprising that US procurement also features a robust litigation culture or that Americans consider protests a bulwark of competition in federal procurement.[490]

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[482] Directive 2007/66/EEC, Article 2(7). See also Arrowsmith (2018) at 1006–07, 1022.
[483] Arrowsmith (2018) at 1017.
[484] Directive 2007/66/EEC, Article 2(7). See also Arrowsmith (2018) at 1015.
[485] Swan (2013) at 31–32.
[486] Re at 1205, citing *Marbury v Madison* (1 Cranch) 137, 177 (1803); Rowe at 887–88.
[487] de Tocqueville at 441.
[488] Crowell & Moring at 8; Marcus at 710; Carroll at 219.
[489] Marcus at 736.
[490] Gordon and Kang at 233; Schooner (2018) at 28.

Americans believe a relationship exists between litigation and competition.[491] When authoring CICA, Congress considered a strong review mechanism necessary to underwrite the competition mandate and to guarantee that vendors, who should have won, would be afforded meaningful relief.[492] Protests ensure integrity and the appearance of fairness,[493] which are both considered essential to stimulating competition.[494]

Along with France, America is one of the few nations with a long tradition of protests.[495] Protests are only brought in a minority of cases,[496] but the probability of a protest approaches 100% for procurements valued above $100 million.[497] What is perhaps more important, however, is the rate at which protests succeed.[498] As noted above,[499] 40% of DoD protests are deemed 'effective' at the GAO – meaning that either the protest was sustained or the agency acknowledged fault and took corrective action.[500] Another study found that one-fifth of protesters ultimately won the disputed contract.[501] The fact that effectiveness rates have remained steady with rising litigation suggests that the protests, however plentiful, are not frivolous.[502]

Two other manifestations of America's litigation culture bear mentioning: criminal liability and qui tam litigation. Because these two enforcement mechanisms are not review procedures, this discussion may seem out of place.[503] Yet along with protests, these constitute the main forms

[491] Doke (1995) at S-9, 'One of the most basic requirements of any type of competition (sports, cards, artistic awards, etc.) is that there be rules and that the rules be enforced.'
[492] HR Conf Rep No 98-861 (1984) at 1435.
[493] Schooner (2001) at 693, 709–10.
[494] Perlman at 3214–15.
[495] Arrowsmith, Linarelli, and Wallace at 751. Cf Treumer, *Enforcement* (2011) at 31–32, observing that French courts have had the power to annul contracts for over a century. And protests are also not new to the Royal Navy.
[496] RAND Study (2018) at xv, 26, reporting that the percentage of DoD contracts protested is .3%.
[497] Gordon (2018), ¶244.
[498] Brown (1998) at 91.
[499] See above Section II.F.2.
[500] RAND Study (2018) at 32.
[501] Gordon, 'Dissecting' (2014) at 5.
[502] RAND Study (2018) at 32–33.
[503] This procedure would fit under the second category listed in Arrowsmith, Linarelli, and Wallace at 750.

of legal remedies available for addressing award-phase infringements. Discussing these two provides context and illustrates that the culture of litigation is not limited to protests.

Criminal penalties abound for a range of violations,[504] pre-award through performance.[505] Such risks are not trivial.[506] Given America's obsession with corruption,[507] overcriminalisation is a recurring concern.[508] Even innocents are sometimes caught in this net.[509] Given the cutthroat nature of the fight for public contracts, the fact that minor misrepresentations can result in prison sentences adds a worrisome dimension that is probably unfamiliar in most EU Member States.

Apart from protests and criminal prosecution, US procurement also features qui tam suits, which are another public-private hybrid. Under the False Claims Act,[510] private parties who are aware of fraud, waste, or abuse can bring suits, which the Department of Justice in turn litigates. If successful, the whistle-blower can claim a share of the proceeds. This recourse has existed since the colonial era and is deeply embedded in America's rough-and-tumble litigation culture.[511]

Taken together, protests, criminal prosecutions, and qui tam suits comprise a culture of 'adversarial legalism'.[512] This litigiousness is thought to deter corruption, root out fraud, waste, and abuse, and foster competition among vendors. It may surprise many Americans, however, that the level of bid protest litigation in much of the EU exceeds that found in US procurement.

Whether the EU embodies a litigation culture is a fraught question. France, as mentioned, has had a protest system for over a century.[513] Some Member States first allowed protests only

[504] Dietrich at 522, 524–25; Naftalis at 321–34; Shirk, Greenberg, and Dawson at 936–38; Overly at 613–31.
[505] Shirk, Greenberg, and Dawson at 938.
[506] Kovacic (1998) at 208.
[507] Teachout.
[508] Anderson and Kovacic at 89; Nash and Cibinic (1989) at ¶58.
[509] Overly at 641.
[510] 31 USC § 3730(b).
[511] Ward 299–05; Freeman (2000) at 661–62; Steven Winter at 1407–08.
[512] Brown-Shafii at 18. See also Kagan.
[513] See above note 495.

when the Remedies Directive made them obligatory.[514] Litigation rates still differ across the EU.[515] The Commission found that from 2009 to 2012 at one extreme 26,369 complaints were lodged in Romania and at the other only 29 in the UK.[516] In terms of decisions, Sweden topped the list for that time period with 11,144, followed by Poland with 10,570 and Hungary with 6,939.[517] France, Ireland, Lithuania, and Portugal fell at the bottom end, with less than one hundred.[518] The annual average (mean) of annual decisions per Member State is 553.[519]

Some comparisons can be made with US procurement. Four Member States average far more protests than the GAO, which generally averages a thousand protests each year: Sweden 2,786, Poland 2,643, and Romania 1,735. For the next three, protests are on par with the GAO: Bulgaria 1,103, Germany 1,056, and Latvia 944.[520] But given that the median level averages just 296 per year, other Member States do far less. Comparisons with individual States in this manner make the litigation levels look similar. Yet this crude comparison is misleading for three reasons.

First, comparing the entire US federal government with particular Member States misses the populations being compared. US federal protests are counted for a nation of 327 million, whereas Swedish protests are for a Member State of just 10 million. Comparing the two polities proportionally, Sweden has 279 protests per million inhabitants and US government just 3, making the Swedes' litigation rate 93 times higher than America's. Perhaps a better comparison would be the EU's average aggregate protests adjusted for population, which would be 13,766

[514] Arrowsmith, Linarelli, and Wallace at 751–52, 754–57, noting the UK and Ireland only adopted such procedures when the Remedies Directive mandated.
[515] Sanchez-Graells (2018) at 498.
[516] MARKT/2013/072/C, Final Study at 82, Table 6.1.
[517] Ibid at 83, Table 6.2
[518] Ibid, France (40), Ireland (21), Lithuania (39), Portugal (86), and the UK (47).
[519] Ibid, figures derived from inputting the 2009–12 decisions into an online mean-median-mode calculator four.
[520] Ibid.

for 2009–12 divided by 512 million. The result is 27 protests per million in the EU, again, compared with 3 in America – a difference of nearly one order of magnitude.

The second problem with comparing the US litigation rates with individual Member States is related to the first. For the US supplier contemplating a protest, aggregated European numbers are uninformative, as protests are usually brought at the national level. Overall protest numbers provide a better comparison of the two systems' review systems. Such numbers are useless to US suppliers' decision-making process unless the protest rates are broken out at the national level. This imposes transactions costs.

Last, there is an incommensurability problem because individual country reports in the EU also include subcentral protests, whereas state and local protests are not included in the GAO reports. While aggregate state and local procurement spending is usually about equal or slightly greater than that in federal procurement, based on my correspondence with a half dozen leading experts on US state and local procurement, no data exist on the volume of state and local protests.[521] Yet even assuming that state and local procurement occur at the same rate as at the federal level – which is a generous because such protests are said to be less common – that would only double America's protest rate. Based on this assumption, combined state, federal, and local protests per million in America would still be 6 compared with the EU's 27 per year. I conducted extensive research, contacting the chief procurement official or equivalent in all 50 states and confirmed that my estimate was quite accurate, at least at the state level: such protests are rare.[522]

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[521] This correspondence was conducted in early 2019, and the emails are on file with the author.

[522] Starting in April 2021, I contacted the chief procurement officer for all 50 states. I filed freedom of information act requests when officials were not responsive. Thus far, 27 Member States have provided data on the number of competitive solicitations, protests, and protest rates. Seven states reported that they do not collect information on bid protests (Alabama, Connecticut, Kansas, Mississippi, North Dakota, Ohio, and Oklahoma). Two states refused to answer the freedom of information act requests because I was not state resident, citing *McBurney v Young*, 569 US 221 (2013). Collection efforts are ongoing for the remaining 14 states, five of which the protest data (numerator) have been obtained but not the number of contestable procurements (denominator) (Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, South Carolina). Based on the data so far, the average of the

With these three caveats in mind, some generalisations can be made. Most obviously, despite data limitations, protests are far more common in the EU. European protests are almost 9 times more common than in the US federal level, and my data suggest protests still occur at 5 times the US rate if state levels are included. To Americans, this may be startling. Our vaunted 'culture of litigation' seems mild in comparison. If it is true, that protests started in US and have since spread around the world,[523] the EU has embraced this practice and far surpassed America.[524]

Yet when national figures are isolated, the picture becomes more complicated. US suppliers considering a protest in the EU will find variety at the extremes. The six outliers at the higher end were summarised above, and these far exceed US rates. At the other extreme, five nations had fewer than 100 protest decisions during the timeframe studied: the UK 47, Portugal 86, Luxembourg 39, Ireland 21, and France 40.[525] When converted to annual rates and adjusted for population, rates are, except for Luxembourg, lower than for the America's estimated total rate (6 per million): Portugal 2.1, Ireland 1.1, and France .2 per million.[526]

As discussed, the disparity in litigation can largely be accounted for by cost differences.[527] Yet cost does not have the 'decisive dissuasive effect' that some have supposed.[528] The 'elephant

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27 states protest rates is 3.5%, which is considerably higher than the federal protest rate. New Jersey is an outlier with a protest rate of 50.17%, and if those numbers are removed the average would be 1.7%. Further, one suspects that rates are relatively low in the states that will not share their data (2) or do not collect such data (7), which would reduce the average. If the data gathered from 27 states hold true across all 50 states, that would come to about double the level of protests at the federal level or 5.9 protests per million. If those figure are accurate, US state and federal protests together come to about 9 per million residents, or one-third the level in the EU. I have not attempted to gather data on local or municipal governments, for which there are another 400,000 entities doing procurement and no reports aggregating their protest numbers exist.

[523] 3 Section 809 Panel at 340, describing the influence of the US protest system abroad, including the introduction of similar procedures in the WTO GPA and NAFTA treaties. See also Troff at 129–47.

[524] Another mode of comparison is the percentage of procurements challenged. In US procurement, less than 1% of awards are protested. Gordon (2013) at 496; RAND Study (2018) at 26. Member States' average is 8.5%. SWD(2012) 342 final at 32. See also SWD(2014) 262 final at 278.

[525] MARKT/2013/072/C, Final Study at 83, Table 6.2.

[526] Ibid. After dividing by four to reach an annual protest rate, each number was divided by its country's population in millions: the UK 66.44, Portugal 10.29, Luxembourg .602, Ireland 4.83, and France 66.99.

[527] Pachnou, 'Mechanisms' (2005) at 260; Caranta, 'Paths' (2011) at 81–82.

[528] COM(2017) 28 final at 6.

in the room' is the culture of litigation.[529] Returning to the comparison of Sweden and the UK, cost cannot entirely account for this vast divide.[530] Something else is at work. From the foregoing review of protest rates, it is clear that the differences across the EU are wide and, with only a few exceptions, Member States have litigation rates that are much robust than is America's.[531]

How these contrasting cultures of litigation may affect suppliers on each side of the Atlantic poses an interesting question. Supposing (wrongly) that America is more litigious than the EU, US suppliers could miss opportunities. European suppliers could make the opposite mistake, protesting too often. Variation among Member States also complicates matters. Suppliers from countries that litigate more or less often than is usual in the US may have corresponding biases. Diversity of litigation rates may, therefore, confound efforts to make informed decisions. Last, what may be of greatest importance is the protest success rate, about which EU data are limited.[532] This is consistent with a broader complaint about the dearth of statistics regarding the prospects

[529] Sanchez-Graells (2018) at 498–99.
[530] Above note 151. Cf Davies at 61, noting that in the UK the resort to protest litigation is considered a sign of a failure; Troff at 128, noting that in some developing countries the idea of suing the government is unimaginable.
[531] Litigation rates alone are inconclusive. US procurement may display 'adversarial legalism' to a greater extent even though Sweden, Germany, and Austria litigate more often. Protest rates alone may fail to capture behavioural changes that occur in shadow of litigation. Keleman at 19–23, 93, 103–04. Examples abound in US procurement. Gordon, 'Avoiding', (2014) at 1244; Kelman (1998) at 595; Marshall, Meurer, and Richard at 311–14.
[532] The GAO effectiveness rate has been 44% for the past two fiscal years and was higher in the three previous years: 47%, 46%, and 45% for 2017, 2016, and 2015. GAO-20-220SP at 5. For the most recent EU studies, the average was about one-third. SWD(2012) 342 final at 33; SWD(2014) 262 final at 27. Another study provided success rates for individual States: Cyprus 41%, Denmark 43%, Germany 16%, and Spain 18%. Study to Explore Data Availability, Country Fiche (2018) at 33, 49, 70, 166–67. EU data are insufficient to make conclusive comparisons with the US. Whereas GAO reports are annual, the Commission's reports are infrequent. These reports were also incomplete in that they were based on questionnaires from only a dozen Member States, and reliable data is lacking from several large States. SWD(2012) 342 final at 33; SWD(2014) 262 final at 27. Yet some tentative observations can be made. First, success rates varied widely. On the low end, the Czech success rate was 15%; and in Germany and Lithuania this lay at 11% and 16.6%. Ibid. On the high end, rates in Estonia and Latvia were 37%, Slovakia 39%, and Hungary 45%; the Czech Republic, Cyprus, Poland, and Malta topped the list with success rates at 35%, 38%, 40%, and 45%. Ibid. Second, there were considerable swings. For example, the 2014 study notes that Germany's success rate halved from 20% to 11% and Malta's nearly doubled from 29% to 45%. SWD(2014) 262 final at 27. In addition, the Czech Republic was at the bottom in 2012 (15%) and near the top in 2014 (35%). SWD(2012) 342 final at 33; SWD(2014) 262 final at 27. Such swings will make it harder for American suppliers attempting to gauge the probability of success if they protest in the EU.

of foreign bidders in Europe.[533] This lacuna could dissuade US firms from protesting because they assume, wrongly, that in the EU protests are scarce and chances of successful litigation low.

2. Private Attorneys-General versus 'Old Wish' for Central Oversight

Both the US and the EU procurement oversight mostly relies on private actors. This has long been the case in America and is consistent with a preference for using private litigation to trigger public scrutiny. In the EU, this has also been the norm for several decades. Yet the Commission has long favoured a more centralised and bureaucratic form of oversight.

It would be inaccurate to say that the US government relies exclusively on protests. It takes a diversified approach to oversight.[534] Besides protests, there are more than 70 agencies with inspectors general, each charged to investigate fraud, waste, and abuse, with an emphasis on procurement.[535] Several federal agencies also have auditing functions, including the GAO, the Defense Contract Audit Agency, and the Department of Justice. Further, contractors have a keen interest in curtailing corruption, given the formal and informal sanctions for infractions in this densely regulated field.[536] Yet protests are still the chief oversight mechanism.[537] Some claim there is a causal relationship between the low incidence of corruption and robust litigation.[538]

As recounted above, the federal government's protest system evolved in a piecemeal fashion in the early twentieth century and was not codified until 1984.[539] In 1943, a Second Circuit judge coined the term 'private attorneys general'.[540] Use of third parties for procurement

[533] Woolcock and Grier at 320.
[534] McKeen (2018) at 349.
[535] Inspectors General Act, 5 USC Appendix, §§6(a), 6(e), and 7; 5 USC §451. Cf Ginsberg and Greene at 5.
[536] McKeen (2018) at 351–55.
[537] 3 Section 809 Panel Report at 340; McKeen (2018) at 328; Gordon and Racca at 140; Cibinic, Nash, and Yukins at 58; 4 Report of the Commission on Government Procurement, Part G at 36.
[538] Schooner (1999) at 249.
[539] 3 Section 809 Panel Report at 340.
[540] *Associated Industries of New York State, Inc v Ickes,* 134 F2d 694, 704 (1943 2d Cir).

oversight pre-existed that term by two decades.[541] This is a common practice, with a long history in other fields: antitrust, securities, and derivative litigation,[542] among others.[543] Outsiders are often aghast that any nation, even a large one, should have more than a million lawyers. The reason is not only that Americans are litigious but that litigation serves broader purposes: 'regulation by private litigation.'[544]

For Americans, competition requires oversight not only from public officials but also the competitors themselves.[545] Protest litigation is a *sine qua non* for competition in US procurement. Private attorneys general are a form of decentralised oversight.[546] The system relies not so much on auditors but on competitors, whose interests are thought to coincide with the public interest.[547] The auditor 'lacks the keen motivation of profits, which drives the behavior of the protester.'[548] There is no stronger mechanism for enforcing competition, it is said, than disgruntled contractors.[549] Further, self-interested parties have better information than auditors.[550] Faith in protests' capacity to shape the competitive landscape and thus uncover fraud, waste, and abuse characterises US procurement.[551] Yet scant evidence supports the assumptions underlying this article of faith.[552]

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[541] Freeman (2000) at 661.
[542] Marshall, Meurer and Richard at 4. See also McCarthy, Maltus, and Bay at 38; Magnus at 121.
[543] Freeman (2000) at 661–62, citing environmental regulation; Michaels (2014) at 76, listing civil rights, product safety, and torts; Salacuse at 60–61, discussing the role of litigation in American corporate governance.
[544] Michaels (2014) at 76. Cf Marcus at 710, explaining that America relies on private lawyers to enforce public norms. America's common law system is profoundly different than that of the continental legal systems: there is a close nexus between the law and private interests; its 'from below' orientation makes it more amenable to serving private interests; and litigation intersects with shaping and executing public policy. Ferrarese at 157, 162–64.
[545] Snider Smith at 113. See also Boland and others at 3; Wittie at 30.
[546] Marshall, Meurer and Richard at 3–6, 20–21.
[547] Ibid at 4. See also *Julie Research Lab, Inc*, GSBCA no 8070-P-R, 86-02 BCA ¶18,881 (1986), holding that the legislative history makes clear that congressional intent was to encourage private enforcement via competition.
[548] Marshall, Meurer and Richard at 5.
[549] Perlman at 3215; Schooner (2001) at 650; Nagle (1999) at 497.
[550] Kovacic (1995) at 488–89; Boland and others at 2.
[551] 3 Section 809 Panel Report at 340.
[552] Kovacic (1995) at 507–08. In a ground-breaking research project, a student argued that the government should release more data about protests and presented his analysis of 7,000 protests at the GAO using an algorithm.

Oversight of EU procurement is also supposed to be conducted primarily through protests. This is a remarkable departure because in other areas the EU relies more on centralised enforcement.[553] Fields that rely on private litigation are rare. The Remedies Directive was designed to establish only the harmonisation necessary to enable private enforcement through protests. Operating under these minimal constraints, Member States are to ensure compliance with the procurement directives primarily through protests.[554] While the Commission conducts some centralised enforcement under Article 226, suppliers raise most challenges through national procedures.[555] Reliance on domestic protests is consistent with the EU's model for procurement in which responsibility for implementing and enforcing EU law rests with the Member States.[556] Individual enforcement at the national level, 'lies at the core of public procurement legislation'.[557] The Commission maintains that local venues are best placed to hear individual claims and to enforce procurement law.[558] Both systems have adopted similar bifurcated oversight methods.

Dig a little deeper into the history, however, and it becomes clear that Brussels has had a longstanding preference for more centralised oversight.[559] In recent decades, the Commission has made repeated efforts to compel Member States to create oversight bodies.[560] It did so in its 2011 proposal for an updated procurement directive.[561] This effort failed because of opposition from Member States who opposed the burden associated with these bodies, especially in the

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Dawson at 148–50, 159–66. Without such sophisticated automated monitoring, we will continue to rely on anecdotes, to misunderstand the character of the system, and to ask the wrong questions. Ibid at 139–42.

[553] Magnus at 121; McCarthy, Maltus, and Bay at 38; Salacuse at 60–61.

[554] SWD(2017) 13 final at 14, 42–43. See also Arrowsmith (2018) at 926; Pachnou (2000) at 55.

[555] SWD(2012) 342 final at 32; COM(2017) 28 final at 10.

[556] 2017/C 18/02 at 2; SWD(2012) 342 final at 32.

[557] SWD(2017) 13 final at 55. See also Arrowsmith and Craven at 230, citing Advocate General Jääskinen's Opinion in *Orizzonte Salute*, C-61/14 at ¶21.

[558] COM(2001)309 final at 7, 88.

[559] COM(96)583 final at 17, recommending centralised oversight agencies. See also Arrowsmith (2018) at 1097–98, recounting proposals for establishing such oversight bodies in the 2004 and 2014 directives; Cerqueira Gomes (2017) at 249, 255, describing the Commission's old wish for centralised oversight.

[560] Sanchez-Graells (2018) at 497.

[561] COM(2011) 896 final, recitals 49, 50, Article 84. See also Cerqueira Gomes (2016) at 173–74.

midst of the financial crisis.[562] This fight is not over.[563] Several Member States supplement review procedures with oversight bodies,[564] and the 2014 Directive added a duty to monitor compliance with the procurement directives.[565] The latest question of interest is whether the CJEU will compel Member States to create such bodies based on the principle of effectiveness.[566]

How, then, will subtle differences between US and EU oversight regimes affect the foreign supplier? Perhaps the challenge will not be their differences but their similarities, which can also be misleading. False lessons can be inferred from one's own system if such lessons are applied to seemingly similar foreign systems. Here, both systems primarily rely on private litigation. Both employ external oversight bodies. Analogies to its domestic oversight system will not the tell the supplier when a cause of action is viable or when such matters are handled through oversight bodies. Such uncertainties may discourage protests or may make suppliers' protests less effective.

IV. Conclusion

This chapter commenced with the old saw that rules without sanctions are impotent. This is especially true for procurement, where there is a potential for favouritism, graft, and abuse that is absent in the private sector.[567] Enforcement procedures, whether soft law, recommendations, or formal mechanisms, lie at the core of such a system. Without them laws, regulations, and procedures are merely precatory. Like the previous two chapters, this section revisits the recurring themes introduced in Chapter 2 and also summarises some of the material specific to this chapter.

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[562] Note 9696/12 at 9, 175–79. See also Cerqueira Gomes (2017) at 250–51.
[563] Cerqueira Gomes (2017) at 251, saying that COM(2017) 28 final may revive debates about oversight bodies.
[564] National Review Systems (2019) at 2–3, 9, 14, describing various forms of centralised oversight bodies in Croatia, Czechia, Latvia, and Sweden; Brinker at 557–59, adding Denmark.
[565] Directive 2014/24/EU, Article 83(2), 'Member States shall ensure that the application of public procurement rules is monitored.'; ibid, Article 83(3), mandating that the results be made public. See also Arrowsmith (2018) at 1098–1099; Cerqueira Gomes (2016) at 171–72.
[566] Cerqueira Gomes (2016) at 172, 187–90.
[567] Trybus, 'Hidden' (2013) at 137.

Consider some of the themes from Chapter 2. First, because of its longer lifespan, mastering the US system encompasses a vast web of precedent, customs, and regulations. This may deter protests from inexperienced Europeans, except those who can afford local counsel. Americans may be heartened that bid protests are of a more recent vintage in some Member States. Yet newer does not necessarily mean simpler or more favourable to complainants, and near-term frustration with unsuccessful protests may discourage participation over the long term.

Another recurring theme has been the divide between taxpayer versus supplier orientation. For review procedures, this manifests in a complainant-centric system that concentrates on righting wrongs to suppliers in the US and one that is more compliance-centric in the EU. This can influence whether protests are brought and whether they are brought in an effective manner. Coming from a system whose emphasis is the protester, Americans may complain too often and perhaps may emphasise personal harms suffered rather than the technicalities of the infringement. Coming from a system whose emphasis is enforcement, Europeans may protest too infrequently, sometimes missing opportunities for viable protests. In both cases, misunderstanding the purpose of the foreign protest system will perhaps undermine the effectiveness of the contractor's protest.

Last of these themes is the defence dichotomy. In America, defence receives 'due regard'. The 'expeditious resolution' of defence contracts is considered a matter of national security.[568] But this is more than a preference for hasty resolutions. Deference is also given to military personnel's discretion based on their expertise, the technical nature of the purchases, and the complexity of this field.[569] Defense protests are common, but this deference may discourage domestic protesters at the margin.[570] Although this deference for defence does not exist in the

[568] 28 USC 1491(b)(3).
[569] *M Steinthal & Co v Seamans*, op cit, 1298–99, 1301.
[570] RAND (2018) at 13; Manuel and Schwartz at 17.

EU, there is a separate set of challenges. First, since defence purchases are often exempted under Article 346, covered defence constitute a small share of Member States' overall procurements. Second, if they are covered, it is most often the Defence Directive that applies, which is a further obstacle to Americans, who are accustomed to a unitary system operating under a common set of regulations. Third, not only do the substantive rules differ, but there is a 'hidden' remedies directive.[571] Separate treatment of defence, although not deferential in the same manner as in the US procurement system, perhaps serves as a reciprocal obstacle to American defence contractors in its own way. Both sides of this defence dichotomy, therefore, may influence whether protests are brought and whether they are effective.

Turning to this chapter's subject-matter, several features specific to review procedures are potential obstacles to transatlantic suppliers. For brevity, this closing section touches on only a few examples. Five procedural differences are revisited followed by two matters of constitutional character and legal culture.

Litigation costs may be a significant barrier for suppliers. For Americans, the struggle will be to determine what the costs are for each of 27 Member States[572] – especially in terms of legal fees, about which the EU provides little guidance or standardisation. Of course, suppliers can consult local counsel for estimates, but this presents a dilemma of its own and may discourage participation. For Europeans, the struggle will be that, although filing fees are generally low, legal costs are high and data about such costs are scarce. Thus, although the winners can be awarded up to $150 per hour for legal fees at the GAO, suppliers will be unable to do a proper cost-benefit analysis without knowing what their costs may be. This too may discourage protests.

[571] Trybus, 'Hidden' (2013) at 137
[572] Woolcock and Grier at 320.

Filing deadlines, although perhaps less important than costs, are another potential obstacle. Europeans will be hard pressed to meet the GAO's 10-day deadline, which may discourage protests. Americans may be bewildered with the variety of deadlines Member States impose and may find the deadlines in some places too short, making it difficult to identify valid protests in the allotted time. The variety and in some cases brevity of the deadlines may thus inhibit protests. More often, perhaps, protests will be brought too hastily, which may decrease their effectiveness.

Standards of review are another barrier to participation. GAO and COFC standards differ in ways that can be dispositive and nuances between them sometimes baffle even local suppliers. But the larger impediment to Europeans is that all three US forums have a standard of review that is permissive compared with the EU, meaning that officials receive considerable deference. This alone may dissuade European protests. Americans will be disappointed that the Remedies Directive fails to establish a uniform standard and, thus, Member States' standards vary widely. Such disparate standards will sow confusion and, ultimately, discourage participation. Further, learning from experience, Americans may eventually come to the conclusion that EU protests have 'no chance' under the Member States' standards of review.[573] This too may deter protests.

Interim measures too constitute a barrier to participation. European suppliers may fail to grasp the import of the automatic stay in two respects: first, that even bogus protests will disrupt the process; second, that it affords the time for protesters to make their case and for the review forums to adjudicate such matters so that meritorious claims will be sustained, procurements re-competed, and not uncommonly re-awarded to the protester.[574] This should be a major incentive to protest but will work only if European suppliers understand how generous this measure is.

[573] MARKT/2013/072/C, Appendices at 28, Table 4.14, reporting that 53% of European suppliers decline to use the review procedures because they believe that these procedures afford them 'no chance'.
[574] Gordon, 'Dissecting' (2014) at 5.

Ignorance of this fact may prevent some Europeans protests in the US. Americans for their part may be confused that pre- and post-award interim measures are treated so differently in the EU. Further, compared with the automatic stay, it is a substantial disadvantage to contractors that suspensions can be terminated without reaching the merits. These two issues may dissuade American contractors from lodging protests in the EU.

Last of the procedural differences revisited here is the question of damages. This is, perhaps, the widest divide discussed in this chapter, and thus the greatest obstacle to protests. European suppliers may be dissuaded on three fronts: lost profits are never awarded in America, the compensation for legal costs is very limited, and ascertaining the extent to which the latter are recoverable almost certainly requires hiring local counsel (ironically, one must first consult a lawyer to ascertain what legal fees may be). The wider availability of damages in the EU could incentivize participation among US suppliers, but what suppliers really want the world over is a second chance to compete for the award. Damages are a poor substitute and are unlikely to do much to incentivise protests. On balance, then, the legal uncertainties and practical difficulties associated with successful damage claims within the EU may outweigh the potential enticements.

Turning to constitutional character and legal culture, the doctrine of *pacta sunt servanda* remains an important divide. It does not even exist in America.[575] What may be most confusing to American suppliers is that although this doctrine has been eroded, it persists albeit in a piecemeal fashion. This uncertain state of affairs may necessitate hiring local counsel and thus discourage protests. European suppliers, however, may be enticed to participate, since there is

[575] I am indebted to Chris Yukins for the following observation from his review of an earlier draft of this work. While it is true that *pacta sunt servanda* does not exist at the federal level, Washington state does cut off protests for signed contracts – not because of the need to honour contracts under the *pacta sunt servanda* doctrine per se but rather because in *Dick Enterprise, Inc. v. King County*, 922 P2d 184, 186 (Wash. App. 1996), the court held that the balance of the state's interest shift against the protester once a public contract has been signed.

no bar on protesting finalised contracts. Further, when coupled with not just damages but the possibility to recompete for contract awards, their incentive to participate may be even greater.

What may surprise transatlantic suppliers most about the question of litigation culture is the role reversal in public procurement. America, famed for its litigiousness, has a protest rate much lower than in Europe. How this affects participation depends on awareness of this reversal. It does not appear that this divide is well known. Suppose, then, that suppliers are often ignorant of it. Americans may thus raise fewer protests than they ought, believing such efforts would be futile; Europeans may raise too many, believing that their chances are better in a 'more' litigious environment. Such misunderstandings may further deter protests brought by foreign contractors.

As was noted above, to a large degree a procurement system revolves around its enforcement procedures. Although in a few cases differences between US and EU challenge procedures may increase participation, in most cases these will probably have the opposite effect. Further, even when the procedures themselves are not obstacles, the legal culture, constitutional character, and objectives of each system contrast to such a degree that they may frustrate non-local suppliers, making choices about whether to protest and on what grounds hard. Newcomers to each system may thus struggle in vain to know how and when to protest. That may discourage participation, and, for those who do participate, will almost certainly reduce their effectiveness.

Chapter 6: Conclusion

> To see what is front of one's nose needs a constant struggle.
> – George Orwell[1]

This work's object was to determine what barriers would remain if TTIP were signed and the de jure non-tariff barriers (NTBs) to the transatlantic procurement trade were removed. It predicted that due to divergences of law and culture, hidden barriers would persist. To illustrate, the perspectives of an American supplier deciding whether to compete for EU Member States' contracts and of a European supplier deciding whether to compete for US federal contracts were repeatedly considered. This thought experiment asked how each divergent rule or feature of embedded legal culture would affect a foreign supplier's participation, particularly one whose familiarity with its domestic system could prove a stumbling block to understanding a foreign system. The last four chapters have confirmed that, even if TTIP were signed, sizeable de facto barriers would remain.

Certain themes have emerged. It was shown that divergences from what suppliers would expect from experience with their domestic systems would subvert the quantity and quality of foreign participation.[2] Similarly, it was shown that embedded legal culture may have unexpected effects on how rules work and that such surprises would influence foreign participation. It was also noted that divergences can sometimes be overcome with the assistance of local representation or by establishing local subsidiaries. Yet these solutions are deficient. The problem is two-fold: first, the novice foreign suppliers who are perhaps most in need of counsel are sometimes least

[1] Orwell.
[2] Practitioners familiar with one system may bring with them 'perceptual biases' when attempting to work in an unfamiliar legal system. Gerber at 968–69. This is one example of a wider phenomenon that psychologists call this 'pareidolia', or the tendency to see what one is predisposed to see.

able to afford it; and second, the cost of hiring counsel may dissuade even well-resourced suppliers, at least at the margin.[3]

This chapter revisits some of the key themes. The following section reviews the recurring themes introduced in Chapter 2 and their applications to the procedures discussed in the next three chapters. The section after that considers themes that are particular to one of the three procedures discussed. It concludes with some final thoughts on the prospects for harmonisation.

Recurring Themes

Four recurring themes were discussed in Chapter 2:

- *Enlightenment versus post-war origin.* Although many of the Member States' systems are older than the US system, the European-level system is newer. In this narrow sense, America's procurement system is 'older' and its procedures more settled than in the EU, where the rules of a common European procurement system are still being articulated.

- *Domestic versus international procurement system.* The EU is a unique political entity, and it is neither a nation state, federal government, or international organisation. But its procurement regime functions more like the latter, especially when compared with the US federal system, which is a classic example of a domestic procurement system.

- *End-user versus supplier orientation.* In terms of whom they serve, the US system is oriented toward the end-user, whereas the EU system is oriented toward contractors. The former seeks best value, the latter a non-discriminatory single market to benefit suppliers.

- *Relative composition of purchases.* For complicated reasons, the two systems have radically different compositions of purchases. The US system's is predominantly military. The EU's covers not only procurement at the Member State level but also the regional and local governments levels, which implies that its purchases are predominantly civil.

Specific applications were discussed in the three chapters that followed. Because these recurring themes cut across several procedures, they afford a 'through-line' indispensable to comparing the two procurement systems' constitutional character, embedded legal culture, and policy objectives.

[3] Reich at 15.

First among these themes was the relative ages each of the two procurement systems, one emerging in the late eighteenth century and the other two centuries later. For all three procedures, EU procurement is more unsettled, as its structure is still evolving, while US procurement law is more stable but sometimes harder to locate because its tenets are scattered among a patchwork of two hundred years of regulation, statute, and precedent.[4] Thus, for different reasons foreign contractors may find it difficult to familiarize themselves the transatlantic procurement system.

The second recurring theme was the domestic character of America's system versus the international character of Europe's. The best example lies in the separability and sequencing of qualification and award criteria. Because the EU is an international system, its focus is ensuring non-discriminatory access within the single market. It is therefore wary of the misuse of qualification procedures to reject the best tender only because the winning firm is non-domestic. Qualification procedures are closely scrutinised and come first. Conversely, because the US federal system is domestic in nature, the emphasis is on best value. Having a larger pool increases the likelihood that the contracting officer will find the best offer, and so the qualification procedure comes last. Such differences may confuse transatlantic operators, perhaps leading US suppliers to rest on their laurels and to underappreciate the importance of proving themselves qualified as a prerequisite for participation and perhaps leading EU suppliers to overemphasise qualification and to underestimate the need to demonstrate that their tenders are truly preferable.

Third of the recurring themes was the beneficiaries of each system (that is, *whom* they serve), with the US concentrating more on citizen end users and the EU more on suppliers. Three examples were given in Chapter 2, but for brevity only the second of these is reviewed here. Because the US procurement system primarily serves end users, its goals are as diverse and

[4] Forman, Cliffe, Choi, and Curran at 189.

fickle as its master. Some of these assorted desiderata include competition, efficiency, fairness, participation, consistency, rationality, and impartiality. But none of these, it was noted, concerns openness to foreign trade.[5] By contrast, because the EU system primarily seeks to serve and to protect suppliers, it has one goal: non-discrimination in order to further the single market. Such fundamental differences create challenges for those who may consider participating in transatlantic procurements.

The last of the recurring themes concerned the relative composition of purchases in terms of defence versus civil procurement. It was shown that for complicated reasons having little to do with aggregate defence spending, the proportion of defence contracts covered under one of the directives as share of covered total procurement spending is 240 times greater in the US than in the EU (80% and .3%, respectively). This is perhaps the most striking finding in this work. It has at least three significant ramifications. First, the proportion spent on defence leads US contracting officials to overuse negotiated procedures, treating all requirements, no matter how prosaic, as if they were complex weapon systems. Second, the EU's civil-oriented composition (99.7%) explains its aversion to negotiated procedures. Third, because the US systems is heavily defence oriented, its protests are designed around a cardinal principle: 'due regard for defense'. This stark dichotomy in terms of the composition of purchases marks what is perhaps the single greatest divergence between the two systems.

Procedure-Specific Themes

Not all of the themes were common to all three procedures. Some were specific to qualification and award, competitive, or challenge procedures. This section reviews some of the more prominent. These non-recurring themes are important to understanding and comparing

[5] Craven (2015) at 63.

the systems' distinct constitutional character, embedded legal cultures, and policy objectives, even if they do not manifest themselves in every corner of each system's procedural framework.

One of the key themes in Chapter 3 was that there had once been a wide gap between the two systems and it has narrowed. Previously, experience and qualifications were impermissible award criteria. Under the 2014 Directive these can now be considered under some circumstances, much like America. As Europe's framework becomes a common code[6] and EU and US rules converge in some respects,[7] this introduces issues associated with the small remaining differences. When the rules become similar enough, even local counsel can miss subtle but important cues. Because she is not conversant with a foreign client's domestic system or lacks a full understanding of his frame of reference, she may find it hard to identify potential issues and misunderstandings. Even with similar rules, therefore, small differences may still be significant obstacles and may deter transatlantic participation. Only counsel who are effectively 'bilingual' in both US and EU procurement law will suffice. (One would suspect that such creatures are rare, if not mythical.)

In Chapter 4, a central theme was that there is a sharp divide as to the 'dragon' for each system: Americans mistrust public officials; Europeans fear tribalism (that is, favouritism for local firms). Competitive procedures, thus, serve different purposes. This theme manifests in at least two ways. First, Europeans have traditionally taken a narrow view of negotiation, given the potential for abusing such procedures to favour suppliers because they are domestic. Absence of this fear in America, whose objective is to secure best-value rather than fair treatment in order to further the single market, may help explain the US procurement system's relative comfort with utilising negotiated procedures. Second, responses to different fears also explain the US's willingness to place limits on competition and the EU's efforts to maximise competition.

[6] Arrowsmith (2006) at 338, 350–52.
[7] Yukins, 'Context' (2017) at 265.

Americans are comfortable limiting competition to what is 'optimal' because their purpose is to forestall fraud, waste, and abuse and to secure best value. If these purposes can be achieved with something less than pure competition, they are untroubled. By contrast, for the EU competition is not a means to an end, it is the end. The EU's purpose above all else is to ensure non-discrimination, and consequently any limits on competition are unthinkable. The two systems share a preference for competitive procedures, yet because they have fundamentally different purposes, their understandings of what 'competition' means vary considerably. Such matters may bewilder inexperienced transatlantic suppliers and thus supress participation or reduce its quality.

Several interesting distinctions were made between US and EU challenge procedures in Chapter 5, but one stands out. America has a reputation for litigiousness and the literature on its federal procurement system touts a similar culture of litigation, but EU suppliers' volume of protests far outstrips that of America. This will amaze Americans unfamiliar with the EU system and may even come as a surprise some Europeans. To be sure, comparing litigation rates between a federal system that excludes state and local procurement and a supranational system that covers public procurement at all levels of government present a thorny challenge. Yet the empirical work that was done as to the level of protest litigation at the state level in America confirmed what experts would have predicted: there are outliers, but on average state-level protests are less common than federal protests. Thus, even if state and local protests are added to the sum, the litigation rate is still much lower than that found in the Member States. Greater awareness of this disparity could have ramifications on participation, perhaps stimulating more protests by American firms in the EU and dampening enthusiasm for European protests in the US somewhat.

Conclusion

The question of harmonisation, the most vexing issue in this work, remains unanswered. This issue was raised in the introduction, where it was noted that some procurement scholarship

seems to claim that harmonisation is imminent. Given the countervailing evidence presented here, it appears that if such harmonisation is to come, extensive work still remains. That will include not only the work of legislators but also of scholars' further comparative research.

Optimism about harmonisation is consonant with wider trends in comparative law research. There is often a tendency to find patterns where none exist, which has been called the greatest peril against which the comparatist must guard himself. There are of course similarities even between legal systems without historical relationships. It would be surprising if there were not.[8] Yet when sufficient variations in political, moral, social, and economic values exist, sharing the 'same' rules can be rendered meaningless.[9] It is in this sense that the comparative enterprise is rendered treacherous.[10]

Most procurement systems are, superficially at least, similar.[11] But the ubiquity of common principles belies the variety and complexity that lies beneath.[12] Each system's objectives differ, as do their relative importance. Applying the same rule in two systems will often yield different results. Given the distinct legal cultures around the world, it would be astonishing were that not the case.[13] Despite this, in comparative scholarship in general and procurement scholarship in particular, differences are sometimes ignored, and harmonisation is thought to be close at hand.

As noted, there has been some enthusiasm as to the potential for the global harmonisation of public procurement law.[14] One American scholar has suggested that differences in public procurement systems around the world are 'minor, almost vestigial', and that, despite differences

[8] Watson at 12–13. 'It is extremely difficult to judge the right extent to which one can draw satisfactory parallels and it is easy to overstep the mark'. Ibid at 15.
[9] Ibid at 4–5, 97.
[10] Burbank and Silberman at 675.
[11] Trepte (2004) at 3; Schooner, 'Desiderata' (2002).
[12] Trepte (2004) at 3–4, 7–8. Cf Bruneau and Feehily at 76–77.
[13] Trepte (2004) at 4, 8, 27.
[14] Yukins and Schooner at 530, 558.

in nomenclature, a form of 'convergent evolution' is leading procurement regimes around adopt practices resembling those of the US federal public procurement system.[15] His solution to the lingering challenges in the global procurement market is for the US and the EU to expand their regulatory cooperation and to reduce avoidable regulatory differences.[16] Such harmonisation, he suggested on another occasion, should be 'relatively easy'.[17] Although perhaps less sanguine about the prospects for harmonisation, another author gives similar counsel, suggesting that governments should seek to limit national policies to those that do not create unnecessary obstacles.[18] With differing levels of enthusiasm, both authors urge the minimization of unnecessary regulatory variances so that harmonisation may follow. Their counsel is well taken, as far as it goes.

Previously, the aforementioned American scholar co-authored an essay with another prominent American academic where they called for incremental efforts toward harmonisation. Their approach advocated gradual steps toward unified rules and regulations.[19] This middle position recently received further attention as a third American scholar commended their nuanced proposal and said his colleagues struck the right balance by favouring deliberate harmonisation policies while also acknowledging that harmonisation was still a generation away.[20]

One cannot help questioning whether the bullish views espoused by these three scholars, premised as they are on the idea that procurement systems around the world are fundamentally similar, will be borne out. This work takes a dimmer view about the prospects for harmonisation and suggests that convergence may lie even further beyond the horizon. It has argued that in

[15] Yukins, 'Context' (2017) at 265. As noted, others have described or advocated some form of harmonisation. Grier at 1-1, 1-6; Kovacs at 15–16; Nwogwugwu at 137–38; Casavola at 60–61; Schwartz (2003) at 39–43.
[16] Yukins, 'Context' (2017) at 283.
[17] Yukins (2016) at 126. Cf Schwartz (2019) at 91–92, suggesting the convergence thesis may be too ambitious.
[18] Trepte (2004) at 260.
[19] Yukins and Schooner 564–76, 568–69.
[20] Schwartz (2019) at 92, citing Yukins and Schooner at 532, 556–64.

public procurement law, as in comparative law generally, 'superficial similarity' often conceals 'fundamental differences'.[21] Such profound differences suggest the journey toward harmonisation lies along a path that will not be smooth, straight, or downhill.

What is more, harmonisation efforts will be challenging not only because of existing differences between the two systems but because countries cannot even agree on what the 'right' procurement regulations would look like. This would depend on the embedded legal culture because rules and regulations are downstream of what each system values most. Certainly, a dialogue among stakeholders about what constitutes best practices for public procurement is both desirable and ultimately conducive to developing a consensus.[22] Yet so long as fundamental differences of embedded legal culture persist, such a consensus may prove elusive.

This work has been an exercise in comparative law. This method was employed to identify and elucidate the hidden barriers to the transatlantic procurement trade. The comparisons made do not purport to be comprehensive, but consideration of the divergent procedures and embedded legal cultures has shown that the differences between the two legal systems constitute considerable obstacles. That much is beyond dispute.

Apart from answering the research questions posed, it seems like something more has been accomplished here. Certain practical implications of this work should not go unmentioned. Answering whether the differences between the two procurement systems would serve as obstacles also has secondary value. First, this research furthers mutual comprehension. What was provided was more than a catalogue listing similarities and differences.[23] It is hoped that that this work has also provided an analysis that has afforded some measure of intercultural understanding.[24]

[21] Watson at 96.
[22] Hoekman at 577–78, 596.
[23] Ewald at 1983.
[24] Curran at 49–50.

Second, although much work remains, perhaps the analysis proffered by this research may help to clear the path for freer trade in transatlantic procurement. Third, this work may temper enthusiasm for harmonisation efforts that often ignore differences and so are perhaps too hasty. It is not that harmonisation is impossible, but free trade advocates must answer the sizeable challenges enumerated in this work.

What this work cannot provide is a comprehensive 'translation'. Although space does not permit a one-for-one discussion of functionally similar rules from each system, it is more than that. As the legal culture tradition teaches, when comparing systems there are always distortions; perfect comparison is impossible.[25] The study has been sensitive to the 'malaise' in comparative law generally and comparative procurement law in particular, which would assume that common terminology or similar rules portends facile harmonisation. There are reasons to remain sceptical. Some important features of these two procurement systems cannot be 'unified by the order of a legislator.'[26] Such features may be barriers to the harmonisation of transatlantic procurement systems for the foreseeable future.

If this effort fails to serve as a Rosetta Stone or even to develop a lingua franca, perhaps it succeeds in another sense. The hope is that this work will help each side to see better what is in front of its nose:[27] that is, some of the contours of its own embedded legal culture as much as that of its transatlantic counterpart. Comparative law's value 'resides not in the answers it provides but in the questions it provokes.'[28] It is likewise hoped that this will provoke questions about the legal cultures in the US and the EU procurement systems and about what the differences between them may entail. It does not claim to offer the final word on this subject.

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[25] Ibid at 91.
[26] Kötz at 505, quoted in Danneman (tr) at 400.
[27] Orwell.
[28] Young at 190.

Instead, it seeks to stimulate the debate about how to understand and perhaps someday remove some of the hidden barriers to the transatlantic public procurement market. Given the stakes, that is not an insignificant contribution.

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