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¶ 229 FEATURE COMMENT: The EU Public Procurement Act: A U.S. Perspective

On Sept. 9, 2026, the European Commission published proposed—and sweeping—changes to the rules that govern EU procurement. See Julia Payne, EU Proposes Simpler Public Tender Rules, 'Buy European' Criteria to Cut Foreign Dependence (Reuters, Sept. 9, 2026). The reforms were published in the form of a proposed "regulation," the "Public Procurement Act," and they would affect every participant in the EU public procurement markets. See European Commission, EU Public Procurement Act Proposal Unveiled, https://public-buyers-community.ec.europa.eu/news/eu-public-procurement-act-proposal-unveiled.

These massive reforms (the first since 2014) will likely reach across the European continent and beyond, to affect the EU Member States, the European Free Trade Association (EFTA) states (which generally follow the EU's procurement rules), and the many nations that have trade and association agreements affecting procurement in place with the EU (including the World Trade Organization Government Procurement Agreement (WTO GPA)).

The reforms also would affect exporters to EU public procurement markets. But although the proposed regulation includes a strong "European Preference"—retaliatory measures that could be triggered by ongoing trade frictions—on balance the EU regulation may make it *easier* for foreign vendors, especially from the U.S., to compete for public contracts in the European Union.

The proposed regulation would bring tighter uniformity to procurement procedures across Europe, it would promote the sort of flexible competitive methods common in the U.S., and the regulation would expand data transfers to make procurement more efficient and transparent—all features that could give U.S. vendors an advantage.

Introduction: Directive or Regulation?—Perhaps the most startling aspect of the new EU procurement legislation is its form—a regulation rather than a directive. The decision to abandon the flexibility of the traditional EU directives in favor of a uniform regulation was a surprise to many.

In the early summer of 2026, after many years of consultations, see European Commission, *Public Procurement Act*, https://public-buyers-community.ec.europa.eu/public-procurement-act, a document leaked which indicated that instead of issuing procurement *directives* as it had in 2014 and earlier, the European Union would address procurement reform through a *regulation*, the new "Public Procurement Act." See, e.g., Pedro Telles, The Draft Proposal For The Public Procurement Act Has Leaked (July 10, 2026), https://www.telles.eu/the-draft-proposal-for-the-public-procurement-act-has-leaked/.

The new Act would replace the 2014 EU procurement directives (which merely framed what Member States must transpose into their national procurement laws) with a single new regulation, binding throughout the European Union. As the European Commission has explained, an EU regulation "is a binding legislative act" which "must be applied in its entirety across the EU." A directive, in contrast, is more flexible. An EU directive is a legislative act that "sets out a goal that EU countries must achieve," though "it is up to the individual countries to devise their own laws on how to reach these goals." European Commission, *Types of Legislation*, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en.

The approach was controversial: in an April 2026 joint submission, a majority of the EU Member States, joined by Norway (an EFTA member), argued forcefully that the EU should leave more control with its Member States by continuing to rely on *directives* rather than a regulation. See *Joint Call by the Republic of Austria, the French Republic and the Federal Republic of Germany* (May 4, 2026), available at https://publicprocurementinternational.com/wp-content/uploads/2026/07/Joint-Call-of-Member-States-re-Directive-vs-Regulation-1.pdf.

The Member States raised several objections to using a regulation rather than a directive to legislate in public procurement. First, they pointed out that under the EU principle of "subsidiarity," when the European Union and Member States share competence—such as in public procurement—authority presumptively should be left with the Member States.

As Article 5(3) of the Treaty on European Union explains, under

> the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union intervenes only if, and to the extent that, the objectives of the envisaged action cannot be sufficiently achieved by the Member States, at central, regional and local level, but can be better achieved, by reason of the scale or effects of the envisaged action, at Union level.

The Member States argued that the needs of public procurement could be fully met at the Member States' level using a directive. A revised directive, they urged, "appears to be the most appropriate and suitable instrument for establishing the legislative framework for public procurement," because it would leave Member States with essential flexibility in forming their public procurement systems. The Member States also pointed out the enormous costs of retraining their procurement workforces in a new regulation, and to the delays and inefficiencies that a new legal order will cause.

In a response to the Member States' objections, Professor Pedro Telles argued that only a regulation can unify European markets—what Professor Telles called the "raison d'être" of EU procurement legislation. "[W]e have 50 years of track record of trying to open public procurement using Directives as the legislative instrument to do so," he noted. "What have they yielded? An increase on direct cross-border [procurement] from 1-2% in the 1960s to less than 5% in recent years." Pedro Telles, Fisking The Joint Call By 17 Member States For The Commission To Retain Directives As Procurement Regulatory Instrument (May 14, 2026), https://www.telles.eu/fisking-the-joint-call-by-17-member-states-for-the-commission-to-retain-directives-as-procurement-regulatory-instrument/.

These arguments for a regulation were echoed in a European Commission staff working report which accompanied the proposed legislation, as part of the normal EU legislative process. *Commission Staff Working Document: Subsidiarity Grid,* SWD(2026) 590 final (Sept. 9, 2026). The Commission staff report noted that a review of the existing "procurement directives concluded that significant problems persist that, in absence of EU intervention, would continue to create barriers to the cross-border participation" of vendors in public procurement markets. Continuing to leave the Member States to write their own procurement laws under directives "would lead to a fragmentation of the internal market."

The staff report noted that although the proposed regulation would be "of general application and...

binding upon and directly applicable in all Member States," the regulation "includes a few mandatory minimum measures while giving Member States and public buyers discretion as to the manner of implementation and the level of ambition they wish to pursue." Because the proposed EU regulation is less thorough than the former directives and omits some standard elements of a procurement law (such as reverse auctions) altogether, that flexibility left to the Member States will likely prove important.

The Commission staff report also cited another ground for a regulation, rather than directives: "strategic considerations," including the need to implement "Buy European" preferences, which could affect "the resilience of the Union as a whole." The explanatory memorandum which accompanied the proposed regulation noted that recent Court of Justice for the European Union (CJEU) rulings regarding third-country vendors' access to the EU public procurement markets, *Kolin* (C-652/22) and *CRRC Qingdao Sifang Co.* (C-266/22), confirmed that procurement falls within the EU's common commercial policy. The memorandum argued that only "the Union, and not the Member States acting individually, is competent to establish a coherent and uniform framework governing the participation of third-country bidders"—a nod to the "Buy European" preference, discussed below, which is central to the proposed regulation.

The new legislative approach should, in principle, make it easier for foreign vendors to compete across the European Union public procurement markets. A uniform regulation—standard procurement rules binding across all EU procurements—will reduce vendors' learning costs and legal uncertainties.

At the same time, however, the proposed regulation could raise new risks for vendors from abroad, including the U.S. Most obviously, the new regulation could result in "Buy European" barriers, discussed below. Less obviously, the new approach could wipe away national rules which reduce special local risks, including in corruption. For example, in EU candidate state Moldova (which has agreed by association agreement to track EU procurement rules), Article 71 of Moldova's procurement law makes it difficult for officials to cancel a procurement abruptly to protect a favored vendor. In contrast, Article 102 of the proposed EU regulation leaves officials with much more discretion to cancel. In Kosovo (another candidate for EU membership, and also subject to an association agreement), the Kosovo government's early cost estimates are regularly published so that those estimates cannot be "leaked" corruptly to bidders; in contrast, Article 110 of the proposed EU regulation (which covers publication) is silent on this. These types of national adaptations could be lost in a uniform regulation which applied across Europe, and that loss could raise risks for both European and foreign bidders.

New Competitive Methods Under the Proposed Regulation—The new regulation would radically change the competitive methods available for EU public procurement bidding. Like Section 20 of the recent UK Procurement Act 2023, the EU legislation would recognize far fewer competitive methods, see, e.g., UK Cabinet Office, *Guidance: Competitive Tendering Procedures* (July 13, 2026), and the new EU competitive methods would in some ways parallel those used in U.S. federal procurement. (The similarity with methods used outside the EU is probably not an accident, as the European Commission did extensive outreach abroad while the Public Procurement Act was being prepared.) For many foreign vendors, the new procedures are both familiar and—because they help open the EU market—potentially quite helpful.

Part III, Title I of the new regulation addresses procurement methods. Article 30 on market consultations—which looks strikingly similar to Federal Acquisition Regulation 15.201—says that public buyers "may conduct market consultations to prepare their procurement and gain market knowledge." Like the FAR, Article 30 allows public purchasers to receive information and advice from many sources; that information then may be "used in the planning and conduct of the procurement procedures," so long as the agency respects the principles of "equal treatment, non-discrimination, fair competition and transparency."

The new regulation also would replace the current directives' more traditional procurement methods with:

(1) *"Open" procedures* under Articles 34–35,

open to all vendors and with possible negotiations. Negotiations may be used for this method (and several others, noted below) in accordance with Article 33, which sets minimum requirements for process, and protects the confidentiality of vendor information (known as "contractor bid or proposal" information in the U.S. system, per FAR 3.104). As with other methods, award is to be based on "the tender offering the best quality for money"—not lowest price. Per Article 98 of the proposed regulation, the "weight of quality criteria shall represent at least 30% of total points awarded," and where the contract is labor-intensive, "the weight of quality criteria shall represent at least 50% of total points awarded." As Gian Luigi Albano (a leading economist in public procurement) has noted, this procedure is roughly analogous to competitive negotiations under FAR pt. 15. See Gian Luigi Albano, The Open-Negotiated Procedure and the Limits of the Flexibility Narrative—A First Reading of the European Commission's Leaked Public Procurement Regulation, with Italy as the Empirical Test Case (2026), available at https://lnkd.in/p/gHwPBEpg.

(2) *"Dynamic" procedures* under Articles 36–40 are very loosely similar to indefinite-delivery/indefinite-quantity (IDIQ) contracts in the U.S. system, under FAR pts. 8 and 16. In a "dynamic" procedure, vendors could be admitted to an accepted pool based upon selection criteria (or by random selection, if there were no criteria). Then, the admitted vendors could compete for specific contract award(s). The market structure would be roughly analogous to limited-award IDIQs in the U.S. system: the admitted contractors would enjoy a unique market advantage, in an at-least-partially closed circle of competitors bidding to meet specific agency requirements. See generally Gian Luigi Albano & Caroline Nicholas, The Law and Economics of Framework Agreements: Designing Flexible Solutions for Public Procurement (2018). The Public Procurement Act's new emphasis on "dynamic" procedures would nudge framework agreements (IDIQs or "catalogue" contracts) to the regulatory margins. While the United Kingdom treats "dynamic purchasing systems" and "framework agreements" as different competitive methods for award, see, e.g., UK Government Commercial Function, *Guidance: Module 5: Frameworks and dynamic markets* (Apr. 22, 2024), https://www.gov.uk/government/publications/the-official-procurement-act-2023-e-learning/module-5-frameworks-and-dynamic-markets, under Article 103 the new EU procurement regulation would treat framework agreements merely as a form of contract, which could be awarded under other methods ("open" or "dynamic," for example). In practice, this means that the new regulation would wipe away many of the current directives' guardrails regarding awards of framework agreements, such as limitations on the scope of those agreements. See, e.g., EU Directive 2014/24/EU, Art. 33 & Recitals 60-62.

(3) *"Innovation" procedures* under Articles 41–45 are to be used only when agencies need to "address a societal challenge for which they have not identified an existing appropriate or desirable solution, which is to be developed by the successful tenderer(s) in the course of the innovation procedure." (Article 31.) The innovation procedure is a long and cumbersome process, which requires extensive market consultations on appropriate benchmarks and solutions. Unlike an analogous U.S. program, see, e.g., U.S. Small Business Administration, *Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Program: Policy Directive* (May 3, 2023), available at https://www.sbir.gov/about/policies, which focuses broadly on the development and ultimately commercialization of a solution, an "innovation" procurement under the new EU regulation would be focused much more narrowly on deriving a solution to a

specific social problem so that the agency could purchase that solution.

(4) *Special Procedures and Tools,* including streamlined awards without prior publication or competition (Article 46), are available for sole-source procurements, commodities and special services (Article 47), and for emergencies (Articles 48).

The regulation includes another procedure which is surprisingly lax. Although the competitive methods outlined above are generally rigorous, a new pathway to award under the proposed regulation, "Qualification Lists" (Article 49), is not. These qualification lists would be analogous to traditional "supplier lists," which have long been disfavored because they typically narrow the field of available suppliers. Unlike the safeguards under FAR subpt. 9.2, the EU proposal lacks strict procedural requirements to prevent misuse of a qualified suppliers list. For example, there is no requirement under the proposed EU regulation that a procurement under a qualification list, once launched, be delayed if a new vendor asked for time to join the list. Instead, under proposed Article 49, an agency that hoped to make an award based on a qualification list would invite only those vendors previously admitted to the list, and then could negotiate and award, with far less competition and transparency. Concerns about possible misuse are partly why supplier lists ultimately were not included in the 2011 version of the UN Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement—because supplier lists can cripple competition, and they can be replaced by more reliably competitive framework arrangements. See, e.g., Don Wallace, Jr., Christopher R. Yukins, Jason P. Matechak, UNCITRAL Model Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Contracts, Procurement Law., Winter 2005, at 12, 13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=711401.

For vendors from the U.S., many of the EU's proposed new competitive methods are generally familiar. In contrast, in many European public procurement markets, traditional open tendering against fixed specifications has been the norm. See, e.g., European Commission, *Study on the measurement of cross-border penetration in the EU public procurement market – Final report*, at 66 (Publications Office of the European Union, 2021) (data on the number and value of awards by type of procedure), https://data.europa.eu/doi/10.2873/15626. As a result, U.S. vendors may be more accustomed to streamlined negotiations and awards, which in the U.S. Government continue to evolve quite rapidly. See, e.g., U.S. Government Accountability Office, *Other Transaction Agreements: Improved Contracting Data Would Help DOD Assess Effectiveness* (Sept. 2025), https://www.gao.gov/products/gao-25-107546. Thus, while the new competitive methods proposed by the European Commission may seem alien in an EU procurement market long dominated by more structured methods, U.S vendors may find it easier to compete in the EU under the proposed regulation's competitive methods.

Digital Exchanges—Perhaps the most ambitious changes under the new rule could come in electronic procurement—in how procurement data is exchanged across the EU to improve efficiency and reduce risk.

An expert evaluation prepared for the Commission, released with the proposed regulation, "found that the [current] digital ecosystem for procurement remains fragmented, non-interoperable and insufficiently data driven." Explanatory Memorandum, at 4; see Isabel da Rosa, & Tunde Tátrai, Public Procurement Data—Data Governance, TED, PPDS, (Publications Off. of the EU, 2026), https://data.europa.eu/doi/10.2873/8946570.

To improve digital exchanges across the EU, the proposed regulation would establish a "common digital ecosystem" based on an "interoperability network," harmonized semantic standards and common specifications. The goal is to enable public buyers and economic operators using different eProcurement systems to communicate through interoperable digital services. To accomplish this, the Commission would have the authority to set standards for both "procurement detail" (the information produced or referred to by agencies to describe the elements of a procurement before award) and procurement processes (Art. 129).

To facilitate data exchanges, the European Commission would also have the authority to create, where needed, common specifications for items to be procured (Art. 130). Using common specifications should make it easier to use data to track procurements. See Karolis Granickas (Open Contracting Partnership), A Digital Backbone For EU's Procurement Vision: Our Take On The Current Regulation Draft (Aug. 3, 2026). But giving the Commission this authority to write common technical specifications could have a profound impact on competition, and ultimately on procurement outcomes.

Under the proposed regulation, agencies also would be required to ensure the authenticity and security of vendors' electronic submissions, and to communicate using broadly available information technology to reduce competitive barriers (Article 127). According to the European Commission, a "key innovation" to make this work "is the creation of an electronic eligibility service built around digital business credentials and digital company profiles," to allow vendors to submit their credentials on a "once-only" basis. Explanatory Memorandum, at 4.

On a broader scale, under the proposed regulation the European Commission is to establish "a secure network for data exchange, to enable public buyers and economic operators to communicate using electronic means... using different eProcurement service providers," known as the "interoperability network" (Art. 128). This is reminiscent of Ukraine's Prozorro network, which allows the government there to procure through interfaces with private-sector market operators. See, e.g., European Bank for Reconstruction & Development, *The Impact of the Prozorro Procurement System on the Ukrainian Economy* (2025). Because the Commission views the eProcurement Service Providers as critical infrastructure, those providers would need to be located in, and controlled from, the European Economic Area (Article 131). The Commission itself is to establish a "Commission eProcurement Platform," which it will make available for Member States' use (Article 132).

The Commission also is to establish an "electronic eligibility service" to verify whether vendors are eligible to compete for a procurement, can meet selection requirements and can meet national origin requirements (Art. 133). This vendor verification may be coordinated through the EU's European Business Wallets, which are still being developed. See European Commission, *Simpler EU Digital Rules and New Digital Wallets to Save Billions for Businesses and Boost Innovation* (Nov. 19, 2025). It is too early to assess the potential competitive impact of the verification system, which is years from full implementation.

The proposed regulation would require Member States to establish their own "National Public Procurement Data Spaces," to serve as "central national data access points" for all national procurement information (Article 134). These national data spaces are to publish (and make available for 10 years) budget and procurement data, including data on "strategic objectives" such as environmental, social and innovation objectives. Member States are to assess their procurement systems' performance—including barriers to competition and to small- and medium-sized enterprises (SMEs), risks to integrity and efficiency, the effectiveness of European preferences, strategic objectives such as environmental and social goals and technological innovation, and major contracts in infrastructure and concessions—through their national procurement data spaces.

The national data spaces are to publish "information relating to risk factors in public procurement, including corruption, fraud, collusion, or unfair competition practices" (Article 134). Where information is not publicly available, it is still to be available to public buyers and to enforcement and auditing agencies. In practice this may mean that, even though the proposed regulation does not call for national or EU lists of excluded (debarred) contractors (see Art. 26), information on corruption published through these national data spaces could impact vendors' reputations in procurement markets across the EU, and possibly around the world.

The proposed regulation also calls for an EU-level "Public Procurement Data Space," to ease access to procurement data (Art. 135). Access to other Member States' confidential procurement data would be coordinated by the Commission. The EU Public Procurement Data Space is to amass data from the national data spaces described above, through a procurement data exchange run by the Commission (Art. 136).

The proposed Public Procurement Act thus offers very ambitious plans for electronic procurement across the EU, though implementation may prove challenging. The proposed regulation anticipates a small increase in European Commission staff to handle digital integration but includes no funding for national implementation; those funds would have to come from other sources. The regulation's ambitious roadmap for digitizing procurement also faces technical risks, because improvements in technology—such as artificial intelligence—may overwhelm the regulatory roadmap. That happened in the U.S. procurement system in the 1990s, when an electronic data interchange system carefully mapped out by regulators, the Federal Acquisition Computer Network (FACNET), was rendered obsolete by rapid advances in Internet technology. See, e.g., Scott N. Godes, Note: Government Contracting on the Internet: Abandoning FACNET as the Government's Network for Electronic Commerce, 26 Pub. Cont. L.J. 663 (1997).

For vendors from abroad, including the U.S., the proposed new EU data exchanges offer both opportunity and risks. The opportunity comes from more transparent and efficient EU procurement systems, which make it easier to identify, and win, public contract awards. The risks lie in the standards and digital structures—including new common specifications written by the European Commission—which may, as implemented, obstruct foreign vendors' access to EU procurement opportunities.

European Preference—Historically, domestic preferences in procurement—"Buy National" laws—were anathema to European policymakers. The Union was, after all, founded on unifying principles of free trade across open borders. Europeans criticized the U.S. Buy American Act of 1933 and similar measures as inefficient barriers to trade. But European policymakers' reflexive opposition to protectionism has changed dramatically in the last two decades, for two important reasons.

First, many in the EU fear that China and other low-cost producers pose a direct economic threat to fair competition in the European Union. The EU's proposed Public Procurement Act addresses that threat by allowing Member States to exclude vendors from countries not covered by free trade agreements, such as China. In keeping with the CJEU decisions in *Kolin* and *Qingdao* (see above), purchasing agencies may also impose preferences (evaluation-point preferences, for example) against vendors not covered by trade agreements (Art. 73).

Second, EU policymakers have been deeply concerned by U.S. protectionism under both Presidents Biden and Trump. Under the proposed regulation, the European Commission could seek authorization to exclude vendors from any country—even if covered by a trade agreement—(1) if that country has failed to afford EU vendors national treatment (i.e., to treat EU vendors as the country would treat its own vendors), (2) to ensure security of supply in the EU, or (3) per a justification available under an applicable trade agreement, especially for the protection of economic security interests (Art. 72). These measures are in addition to other protectionist tools available under EU legislation, such as the International Procurement Instrument, the Foreign Subsidies Regulation, the Anti-Coercion Instrument, and the Industrial Accelerator Act. See, e.g., Sébastien Maillard, 'European Preference' Signals a Wider Change of EU Doctrine (Chatham House, Mar. 2026), https://www.chathamhouse.org/2026/03/european-preference-signals-wider-change-eu-doctrine; Anna Haesert, 'Buy European' and 'Made in Europe' Requirements in Public Procurement: An interview with Prof. Dr. Sarah Schoenmaekers (College of Europe), https://www.coleurope.eu/bruges/research/student-publications/competition-pills/buy-european-and-made-europe-requirements; Pascal Friton, Max Klasse & Christopher Yukins, "The EU Foreign Subsidies Regulation: Implications for Public Procurement and Some Collateral Damage," 65 GC ¶ 63 (Mar. 22, 2023).

Because existing trade agreements shield U.S. vendors from many of the EU's protectionist tools outlined above, U.S. vendors' risks from the proposed regulation come largely from within. First, there is the risk that President Trump will withdraw the U.S. from the WTO GPA. His recent move to exclude Canadian-origin goods—despite GPA protections—from the U.S. General Services Administration's Multiple Award Schedule contracts has raised new concerns that, as has been suggested before, President Trump may simply withdraw the U.S. from the GPA. See President Trump: Canadian Products To Be Cut from GSA Schedules (Sept. 2026), https://publicprocurementinternational.com/2026/09/10/president-trump-canadian-products-to-be-cut-from-gsa-schedules/; President Trump and Buy American—The Overlooked Report (Apr. 2025), https://publicprocurementinternational.com/2025/04/06/trump-and-buy-american-the-overlooked-report/. Second, there is the risk that the cumulative impact of Trump Administration policies will grow too onerous for EU policymakers, and they will block access to EU procurement markets to retaliate against U.S. vendors. That latter risk is difficult to assess and calls for careful attention to developments in Europe.

Conclusion—While much of the press attention surrounding the EU's proposed "Public Procurement Act" has focused on the new "European Preference," in fact the regulation would pose both opportunities and risks for vendors from abroad, including the U.S. The new regulation, which would be uniform across the EU's Member States, would make it easier for vendors to compete efficiently in multiple procurement markets across the bloc. The new regulation would also introduce new, more flexible competitive methods that could give foreign vendors—especially those used to complex, negotiated procurements—a comparative advantage. The advanced electronic procurement systems that the new regulation calls for would make it easier for vendors from outside the EU to compete, though the strict requirements of those systems may raise new barriers to entry. But the proposed regulation's "Buy European" preference could pose acute new risks, especially if the Trump Administration dismantles the protections of the WTO GPA or prompts the EU to deploy one of its many retaliatory tools, which could shut foreign vendors (including those from the U.S.) out of EU public procurement markets.

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This Feature Comment was written for The Government Contractor by* Christopher R. Yukins, *Lynn David Research Professor in Government Procurement Law, George Washington University Law School. Author's note: This article is drawn from materials prepared for an Oct. 5, 2026 free webinar on the proposed EU regulation, which will feature experts from across Europe and will be sponsored by George Washington University Law School and the University of Turin; information and registration are at www.publicprocurementinternational.com.