# THE SINGLE MARKET AND HOME BIAS: HAVE THE EU DIRECTIVES OPENED UP PUBLIC PROCUREMENT?

*Assoc. Prof. Pedro Telles, Ph. D.* [*]

UDK: 35.073.7(4)EU
339.923:061.1](4)EU
351.712(4)EU
DOI: 10.3935/zpfz.76.5.2
Izvorni znanstveni rad
Primljeno: ožujak 2026.

*This paper examines the success of EU public procurement Directives in opening up public procurement and integrating it into the single market. Through a secondary analysis of 11 studies conducted between 2007-2023, covering three generations of EU public procurement legislation, the research shows that successive rounds of increasingly detailed secondary legislation failed to substantially increase direct cross-border procurement or meaningfully reduce home bias. In addition to low direct cross-border procurement, import penetration data provide further evidence of persistent home bias, with public sector import penetration remaining significantly below that of the private sector. While the reasons for this lack of evolution are yet to be fully explained, the paper concludes that the path-dependent evolution of the procurement Directives, characterised by growing complexity without paradigmatic change, might have reached its limits for opening up public procurement and integrating it into the single market. With this failure in mind and as the current EU public procurement legislative framework is under review, alternative regulatory approaches, such as shifting to a Regulation as choice of legislative instrument or reverting to general EU procurement principles, may warrant consideration.*

*Key words: EU public procurement; cross-border procurement; home bias; single market; internal market*

[*] Pedro Telles, Ph. D., Associate Professor, Copenhagen Business School, Solbjerg Plads 3, 2000 Frederiksberg, Denmark; pt.bhl@cbs.dk;
ORCID ID: orcid.org/0000-0002-0666-6351

## 1. INTRODUCTION

States and public bodies must enter into contracts to fulfil their objectives, like any other legal person. Often public contracts may serve many purposes beyond fulfilling the immediate need of the public body entering into them, especially in the absence of national or supranational rules stating otherwise. For example, they can be used to pursue industrial and social policy that a government deems appropriate, such as fostering regional development, providing jobs for the long term unemployed or promoting national industry or sectors along a 'buy national' approach. In other words, public procurement can be harnessed for various purposes, including discriminatory ones. However, as the purpose of the Treaty of Rome key objective was to establish a common market composed of its member States based on the four freedoms, it has long been accepted that public procurement should also be part of said common market and that protectionist behaviour amounting to home bias would be considered as discriminatory and frowned upon.

That is not a merely academic or theoretical debate since the discriminatory use of public procurement as a protectionist tool has been well established in economics literature.[1] This discriminatory approach has also been described as 'home bias', whereby the mere presence of national borders affects international trade.[2] Home bias has been identified as well between EU member

[1] See, Mclachlan, D. L, *Discriminatory Public Procurement, Economic Integration and the Role of Bureaucracy*, Journal of Common Market Studies, *vol.* 23, no. 4, 1985, pp. 357 – 372; Matoo, A., *The Government Procurement Agreement: implications of economic theory*, The World Economy, *vol.* 19, no. 6, 1996, pp. 695 – 720; Trionfetti, F., *Discriminatory public procurement and international trade*, The World Economy, *vol*. 23, no. 1, 2000, pp. 57 – 76; Brulhart, M.; Trionfetti, F., *Industrial specialisation and public procurement: theory and empirical evidenc*e, Journal of Economic Integration, *vol.* 16, no. 1, 2001, pp. 106 – 127; Crozet, M.; Trionfetti, F., *Effets-Frontieres entre les pays de l'Union Europeene; le poids des politiques d'achats publics*, Economie Internationale, *vol.* 89-90, no. 1, 2002, pp. 189 – 208; Brulhart, M.; Trionfetti, F., *Public expenditure, international specialisation and agglomeration*, European Economic Review, *vol.* 48, no. 4, 2004, pp. 1707 – 1721; Evenett, S. J.; Hoekman, B. *Government procurement: Market access, transparency, and multilateral trade rules*, European Journal of Political Economy, *vol.* 21, no. 1, 2005, pp. 163 – 183; Shingal, A., *Econometric analyses of home bias in government procurement*, Review of International Economics, *vol.* 23, no. 1, 2015, pp. 188 – 219.

[2] Mclachlan, *op. cit.* (fn. 1).

States.[3] Public procurement is not immune to it and home bias as a concept applicable to it has been described since the 1970s.[4]

This paper looks into how successful the successive rounds of EU public procurement rules have been in countervailing the discriminatory use of public procurement by opening public contracts to undertakings based in different member States. In effect, what this paper will focus on is analysing if the rules have curtailed home bias in public procurement as measured by the evolution of direct cross-border procurement, *i.e.* the percentage of contracts and spend being won by foreign bidders.

This paper proceeds in section 2 with an overview of how public procurement has been regulated in the EU, with a discussion of how it evolved over time and how the single market is even today the key justification for the existence of this regulatory framework. Section 3 introduces home bias and direct cross-border procurement as the analytical framework adopted for the paper as well as the research design, explaining the use of secondary analysis of existing primary studies on direct cross-border procurement and import penetration to answer the question if home bias has been curtailed in EU public procurement. Section 4 presents the findings and their discussion ensues in section 5. The final section concludes the paper.

## 2. EU PUBLIC PROCUREMENT REGULATION

Public bodies inside the EU are subject to specific rules determining how they are to engage with their purchasing activities. The body of rules is known as public procurement and constrains how public bodies undertake their purchases and the goals they can pursue directly or indirectly with their purchasing activities. Public procurement as an area of economic activity represents

[3] Chen, N., *Intra-national versus international trade in the European Union: why do national borders matter?*, Journal of International Economics, *vol.* 63, 2004, pp. 93 – 118.

[4] Baldwin, R., *Nontariff distortions of international trade*, The Brookings Institution, Washington DC, 1970; Baldwin, R.; Richardson, R. D., *Government purchasing policies, other NTBs, and the international monetary crisis*, in: English, H.; Hay, K. (eds.), *Obstacles to trade in the Pacific area, Proceedings of the Fourth Pacific Trade and Development Conference*, School of International Affairs, Carleton University, Ottawa, 1972, pp. 209 – 244; Lowinger, T., *Discrimination in government procurement of foreign goods in the US and western Europe*, Southern Economic Journal, *vol.* 42, no. 3, 1976, pp. 451 – 460.

14% of the Union's GDP[5] with purchases being undertaken by 250,000 different public authorities.

Public contracts within the EU are not all treated equally from a regulatory perspective. Those with a financial value above certain financial thresholds are automatically considered to be part of the single market and are subject to the detailed and prescriptive secondary legislation. Those below the financial thresholds are only subject to EU primary law such as articles 34 (prohibition of quantitative restrictions), 49 (freedom of establishment) and 56 (freedom to provide services) of the Treaty on the Functioning of the European Union (TFEU) and then only if certain conditions are met. These Treaty articles impose negative obligations on member States to refrain from any discriminatory national practices limiting free movement of goods, services or freedom of establishment and constitute the core of what is now known as the internal or a single market. The Commission has put contracts below thresholds as representing at least 42.9% of all contracts awarded in the EU[6] or even 80%[7] meaning that at least a significant proportion of contractual opportunities in the public sector are not treated as part of the single market and mostly insulated from EU public procurement law.

### 2.1. The single market as the driver for secondary EU legislation on public procurement

The bulk of EU rules applicable to public procurement are to be found in secondary EU law, in this case a suite of Directives. While the current set of Directives is from 2014, they represent an evolution in continuity since 1971. The adoption of Directives as a legislative instrument for opening up public procurement can be explained by the expectation that they make it more difficult for discrimination to occur via a harmonising effect upon laws (and practices) being enough to achieve the stated outcome. Their job to be done is primarily one of enabling the integration of public procurement across the

5 European Commission, *Annual Single Market and Competitiveness Report*, COM(2025) 26 final, 2025, https://single-market-economy.ec.europa.eu/publications/2025-annual-single-market-and-competitiveness-report_en.

6 European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Public Procurement Indicators 2022*, 2024, https://ec.europa.eu/docsroom/documents/60615.

7 European Commission, *Communication from the Commission – Public Procurement: A Data Space to Improve Public Spending, Boost Data-Driven Policy-Making and Improve Access to Tenders for SMEs*, 2023/C 98 I/01, OJ C 98 I, 16.3.2023, pp. 1 – 11.

EU, with the expectation that further market integration counterbalances the inefficiencies arising from national preferences.[8]

The importance of opening up the single market as the key driver for secondary EU legislation on public procurement is present from the introduction of secondary law to regulate public procurement to date. While procurement regulation in general may have multiple objectives[9], the *raison d'etre* of the successive rounds of Directives on public procurement has been to pursue this goal of achieving a single market within the EU, even in the most recent round of procurement Directives from 2014.

This is evident from early in the lifecycle of EEC public procurement rules set via Directives. After a first Public Works Directive in 1971 (Directive 71/305), the Charpentier and Clark report from 1974[10] stated that "the common market of public procurement does not yet exist" and further legislative efforts were needed. This yielded new or revised Directives in 1977[11] and early 1980s to adapt them to the GATT code on Public Procurement. However, the real push for public procurement integration in the single market came in the mid-1980s with the Completing the Internal Market white paper.[12] This white paper pointed to national procurement policies as a non-tariff trade barrier to the free circulation of goods and services and led to the inclusion of procurement in the Single European Act 1986 (SEA). Article 130f(2) of the SEA stated that undertakings should be enabled to "exploit the Community's internal market potential to the full, in particular through the opening up of national public contracts, the definition of common standards and the removal of legal and fiscal barriers to that co-operation", yielding another round of Directives

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8 European Commission, *Public Procurement in the European Union: Exploring the Way Forward*, COM(96) 583 final, 1996, pp. 1 – 3.

9 Nielsen, J. U.-M.; Hansen, L. G., *The EU Public Procurement Regime Does It Work?*, Intereconomics: Review of International Trade and Development, *vol*. 36, no. 5, 2001, pp. 255 – 263; Trepte, P., *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, Oxford University Press, Oxford, 2004.

10 Charpentier, G.; Clark, R., *Public Purchasing in The Common Market,* European Commission, Brussels, 1974.

11 Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ L 13, 15.1.1977, pp. 1–14, 1977 (Public Supply Contracts Directive).

12 European Commission, *Completing the Internal Market: White Paper from the Commission to the European Council*, Publications Office of the European Union, Milan, 1985.

between 1988 and 1993.[13] Altogether these later Directives contributed significantly towards a common procurement regime[14] and put in place "an exhaustive supranational regulatory framework in the public procurement area".[15] They operationalised the principles of non-discrimination and equal treatment and transparency as well as establishing the open procedure as the default and constraining the use of national standards as a barrier to the single market. They were described as having "marked the end of the Community's initial assault on protected markets".[16] After further recognition from the Commission that the single market in public procurement was yet to be achieved[17], they were then superseded with a new round in 2004 with a Directive for works, goods and services (2004/18/EC) and another for utilities (2004/17/EC) and finally the current set of Directives from 2014. The Commission once again stressed the importance of achieving the single market both on the run up to 2014[18] and also after the current reform came into force.[19]

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13 Namely, Directive 88/295/EEC and Directive 93/36/EC for supplies, Directive 89/440/EEC and Directive 93/37/EEC for works, Directive 90/531 for utilities and Directive 92/50/EEC for services. During this period the Commission maintained its view on the importance of public procurement for achieving the internal market, European Commission, *Cost of Non-Europe, Vol. 1: Basic Findings – Executive Summary of the "Cost of Non-Europe" in Public Sector Procurement*, Office for Official Publications of the European Communities, 1988.

14 Bovis, C., *EU Public Procurement Law*, 2nd ed., Edward Elgar, Cheltenham, Northampton, 2012.

15 Fernandez Martin, J. M., *The EC Public Procurement Rules: a critical analysis*, Clarendon press, Oxford, 1996.

16 Smith, M. P., *States of liberalization: Redefining the public sector in integrated Europe*, State University of New York Press, New York, 2005.

17 European Commission, *op. cit.* (fn. 8) and European Commission, *Action Plan for the Single Market*, CSE(97) 1 final, 1997.

18 European Commission, *Towards a Single Market Act: For a Highly Competitive Social Market Economy – 50 Proposals for Improving Our Work, Business and Exchanges with One Another*, COM(2010) 608 final, 2010; European Commission, *Single Market Act: Twelve Levers to Boost Growth and Strengthen Confidence – "Working Together to Create New Growth"*, COM(2011) 206 final, 2011; European Commission, *Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market*, COM(2011) 15 final, 2011, and European Commission, *Single Market Act II: Together for New Growth*, COM(2012) 573 final, 2012.

19 European Commission, *Upgrading the Single Market: More Opportunities for People and Business*, COM(2015) 550 final, and European Commission, *Making Public Procurement Work in and for Europe*, COM(2017) 572 final.

Taking Directive 2014/24/EU of the current round of procurement Directives as an example, it is possible to evidence the importance of the single market from its primary legal basis. This Directive is based on Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union (TFEU). These are core single market primary law grounds: right of establishment, freedom to provide services and approximation of laws for the purposes of achieving a single market. Recital 1 of the Directive goes further by stating explicitly that public contracts are subject to three of the four freedoms: free movement of goods, establishment and services and associated principles such as the mentioned equal treatment and non-discrimination, mutual recognition, proportionality and transparency. In addition, the same recital holds that for contracts covered by this Directive "provisions should be drawn up coordinating national procurement procedures as to ensure that those principles are given practical effect and public procurement is opened up to competition".

It is not only in the recitals where such importance is to be found. Article 18(1) of Directive 2014/24/EU – principles of procurement – establishes the principle of non-discrimination as one of the main principles applicable to public procurement and explains the design of many of the regulatory solutions included within said Directive. It is thus quite clear that the legal bedrock upon which public procurement secondary legislation rests on is the achievement of the single market. In consequence, even today procurement Directives should be assessed in their success delivering on this premise.

Beyond policymaker intent and legislation, the importance of the single market to justify the various rounds of Directives is observable in the jurisprudence of the Court of Justice in multiple judgements such as *Teckal*[20], *Telaustria*[21], *Parking Brixen*[22], *Stadt Halle*[23], or *Coditel Brabant*[24] as well as legal academics.[25]

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[20] Case C-107/98 Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia, ECLI:EU:C:1999:562.

[21] Case C-324/98 Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, ECLI:EU:C:2000:669.

[22] Case C-458/03 Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG, ECLI:EU:C:2005:605.

[23] Case C-26/03 Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, ECLI:EU:C:2005:5.

[24] Case C-324/07 Coditel Brabant SA v Commune d'Uccle and Region de Bruxelles-Capitale, ECLI:EU:C:2008:621.

[25] Arrowsmith, S., *The Community's legal framework on public procurement: the way forward at last,* Common Market Law Review, *vol.* 36, no. 1, 1999, pp. 13 – 49; Smith, *op.*

Having established *achieving the single market* as the key reason for the existence of secondary EU legislation in public procurement, and with the upcoming revision upon us, the rest of this paper will look into if they have achieved said objective. How successful have the successive rounds of Directives been in opening up public procurement?

## 3. ANALYTICAL FRAMEWORK AND RESEARCH DESIGN

### 3.1. Analytical framework: home bias

This paper investigates the successive rounds of EU public procurement rules and how successful they have been in opening up public procurement to undertakings based in different member States, adopting home bias as a starting framework. Home bias in public procurement means the preference of contracting authorities to award contracts to national (or local) economic operators. It is in effect a measure of discrimination against foreign firms and thus the counterpoint of what the Directives have been attempting to achieve *vis-a-vis* the single market.

Home bias as a concept applicable to public procurement has been analysed since at least the 1970s[26] and more recently in the context of trade agreements that cover public procurement[27] and the WTO Government Procurement Agreement.[28] Within the EU research on economics has found that home bias

*cit.* (fn. 16); Drijber, B. J.; Stergiou, H., *Public procurement law and internal market law*, Common Market Law Review, *vol.* 46, 2009, pp. 805 – 846; Trybus, M., *Public contracts in European Union internal market law: foundations and requirements*, in: Nogellou, R.; Stelkens, U. (eds.), *Droit Compare des Contrats Publics – Comparative Law on Public Contracts*, Bruylant, Brussels, 2010; Caranta, R., *The changes to the public contract directives and the story they tell about how EU law works*, Common Market Law Review, *vol.* 52, 2015, pp. 391 – 459; Corvaglia, A. M., *Public procurement and labour rights: towards coherence in international instruments of procurement regulation*, Hart Publishing, Oxford, 2017.

[26] Baldwin, *op. cit.* (fn. 4); Baldwin, Richardson, *op. cit.* (fn. 4); Lowinger, *op. cit.* (fn. 4).

[27] Hoekman, B., *Reducing home bias in public procurement: trade agreements and good governance*, Global Governance, *vol.* 24, 2018, pp. 249 – 265; Shingal, A.; Ereshchenko, V., *Public procurement*, in: Mattoo, A.; Rocha, N.; Ruta, M. (eds.), *Handbook of deep trade agreements*, World Bank Publications, Washington, 2020, pp. 393 – 421 and Mulabdic, A.; Rotunno L., *Trade barriers in government procurement*, European Economic Review, *vol.* 148, 2022, art. 104204.

[28] Shingal, A., *op. cit.* (fn. 1), pp. 188 – 219.

is very much still an important border effect[29] and that it has not disappeared from public contracts.[30]

Using home bias as a starting framework to assess the effectiveness of the procurement Directives in opening up public procurement within the EU, we need to consider what is the best way to analyse and measure its effect. The most logical source of evidence for home bias in public procurement within the EU is the data on public contracts available on TED, particularly on the success of undertakings winning contracts outside of their home member State. This is known as direct cross-border public procurement. As an example, a Czech construction company winning a contract to build a bridge in Germany amounts to direct cross-border public procurement. But if home bias is (still) present, then there is a likelihood these foreign firms are being discriminated against and will struggle to win public contracts outside their home member State. How often do undertakings win contracts outside their home member State and how has this share of success evolved over time?

### 3.2. Analytical framework: direct cross-border procurement

Direct cross-border procurement is the better metric to analyse the degree of openness of public procurement since the EU procurement rules exist precisely to reduce the probability of foreign undertakings being discriminated against when taking part in public procurement, as recognised by the Commission in 2025.[31] While the Commission in the past has highlighted indirect cross-border procurement, that is contracts won by subsidiaries controlled by a foreign undertaking, or in some circumstances additional non-national spend in supply chain or sub-contractors, these, however, do not tackle the crux of the openness problem since subsidiaries are effectively national firms that, at that moment, may be controlled by a foreign entity but that is due more to the general EU rules on free movement of capital and not those for public procurement specifically. In fact, those national subsidiaries can be considered to

[29] Garcia Santana, M.; Santamaria, M., *Border effects in public procurement: the aggregate effects of governments' home bias*, Working paper, 2021, https://economics.princeton.edu/wp-content/uploads/2022/01/HB-v17.pdf.

[30] Herz, B.; Varela-Irimia, X.-L, *Border effects in European public procurement,* Journal of Economic Geography, *vol.* 20, 2020, pp. 1359 – 1405.

[31] European Commission, *Evaluation of Directive 2014/23/EU on Concessions, Directive 2014/24/EU on Public Procurement and Directive 2014/25/EU on Utilities*, SWD(2025) 333 final, 2025.

reinforce the home bias issue, since foreign firms may be deciding to establish in other markets to avoid being discriminated against as foreign bidders.

While it is hard to find data about the starting point, *i.e.* how open was public procurement before EU secondary rules came into force, we do know how closed France was in the 1960s, as in 1967 only 1% of public contracts went to foreign suppliers[32] and that across the original member States only 2% of public contracts were awarded to foreign firms before European Economic Community legislation came into force.[33] These give us a base line of 1-2% for direct cross-border procurement and an indication that home bias was present already before secondary European legislation was introduced to open up the public procurement markets. This baseline does not seem to have changed significantly during the 1990s with two studies finding 1.8% and 3% of direct cross-border procurement.[34] In the years since, the Commission itself has recognised procurement rules did not produce tangible results[35] and that cross-border participation in public procurement remains low.[36] It is unsurprising then that the Commission has commissioned many of the studies investigating cross-border public procurement included in the sample that this paper relies upon.

### 3.3. Research design

For its research, this paper does not generate new data but instead adopts a secondary data analysis of direct cross-border procurement indicators found in multiple studies published from 2007 to date. The 11 studies covered in this paper span three generations of procurement Directives: those from the early 1990s, 2004 and 2014. The older studies contained in this analysis pertain to

[32] Bourgeois, J. H. J., *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective*, Common Market Law Review, *vol.* 19, no. 1, 1982, pp. 5 – 32.

[33] European Parliament, *Public Procurement Contracts Fact Sheet*, 2024, https://www.europarl.europa.eu/factsheets/en/sheet/34/marches-publics (27 January 2025).

[34] EuroStrategy Consultants, *The Single Market Review, subseries III: Dismantling of Barriers, vol. II, Public* Procurement, Earthscan and Kogan Page, London, 1997, and European Commission, *Single Market Review, Subseries V: Impact on competition and scale effects Volume 3: Competition Issues*, 1997.

[35] European Commission, *op. cit.* (fn. 8), pp. 1 – 3.

[36] European Commission, *Cross-Border Procurement above EU Thresholds*, Publications Office of the European Union, Luxembourg, 2011, https://op.europa.eu/en/publication-detail/-/publication/0e081ac5-8929-458d-b078-a20676009324.

the tail end of the 1990s Directives being in force and the more recent ones to both the 2004 and 2014 reforms.

Just over half of the studies included in this secondary analysis (6) were undertaken on behalf of the Commission, with the remaining five done independently. The list of the studies included is as follows:

- Commission (2007), Evaluation of SMEs access to public procurement markets in the EU
- Bird & Bird (2008), "Verhältnis zwischen Binnenmarktwirkung der EU-Vergaberegeln und den durch die Anwendung des europäischen Vergaberechts verursachten Transaktionskosten für deutsche öffentliche Auftraggeber"
- Commission (2010), Evaluation of SMEs access to public procurement markets in the EU
- Commission (2011), Cross-border procurement above EU thresholds (2011a)
- Commission (2011), Public procurement in Europe: cost and effectiveness (2011b)
- Kutlina-Dimitrova and Lakatos (2016), Determinants of Direct Cross-Border Public Procurement in EU Member States
- Commission (2017), Measuring impact of cross-border penetration in public procurement
- Herz and Varela-Irimia (2020), Border effects in European public procurement (2020a)
- Blazo (2020), Harmonisation vs real convergence – case of public procurement (2020b)
- Commission (2021), Study on the measurement of cross-border penetration in the EU public procurement market
- European Court of Auditors (2023), Special Report 28/2023: public procurement in the EU

While each study provides a snapshot of a specific timeframe, taken together they paint an overlapping image in motion of how direct cross-border procurement evolved over time and across the three different generations of Directives. This means as well that they cover the single market at different stages of its development and a variable number of member States due to the enlargements of 2004, 2007, 2013 and the UK exit in 2020. Such a long

timeline also means covering various economic and political cycles which are known to affect procurement practice.[37]

All studies cover the percentage of total contracts awarded to foreign bidders as this is the main metric to establish direct cross-border procurement. The majority also covers the percentage of spend with foreign bidders as well, which can indicate if foreign bidders are winning smaller or larger contracts. While they do not distinguish between foreign bidders that come from other member States or further afield, for example from parties to the WTO Government Procurement Agreement or bilateral trade agreements covering public procurement, it is a reasonable assumption that the majority will be from within the EU. In any case, for the purposes of this paper, those figures represent a maximum level of direct EU cross-border procurement even if one starts from the (wrong) assumption that only EU economic operators are winning those contracts.

The studies adopt different methods and use disparage data sources, although in general they all rely on the data contained within the Tenders Electronic Daily (TED), whereas studies conducted priorly used surveys.[38] The data available on TED rely on menial compliance by procurement officers that at the end of the procurement procedure have to fill in a form to report the contract award data, *i.e.* the identity of the winner and the contract value.

In addition to assessing direct cross-border procurement as a marker for the openness of public procurement, some of the studies included in the analysis also look into import penetration and the comparison between public and private sectors. For the purposes of this paper, it makes sense to investigate this area as well since import penetration has also been used as a proxy for home bias or discrimination in public procurement.[39] However, import penetration is less helpful in determining if the EU procurement rules have opened up access in the market since imports would typically fall under free movement of goods

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[37] Eadie, R.; McKeown, C.; Anderson, K., *The Impact of Recession on Construction Procurement Routes*, International Journal of Procurement Management, *vol.* 6, 2013, pp. 24 – 38 and Coviello, D.; Gagliarducci, S., *Tenure in Office and Public Procurement*, American Economic Journal: Economic Policy, *vol.* 9, 2017, pp. 59 – 105.

[38] Eurostrategy Consultants, *op. cit*. (fn. 34); European Commission, *op. cit*. (fn. 34).

[39] Eurostrategy Consultants, *op. cit.* (fn. 34); European Commission, *op. cit.* (fn. 34); Trionfetti, F., *op. cit.* (fn. 1), pp. 57 – 76; Rickard, S. J.; Kono, D. Y., *Think Globally, Buy Locally: International Agreements and Government Procurement*, Review of International Organisation, *vol.* 9, 2014, pp. 333 – 352; Gourdon, J.; Messent J., *How government procurement measures can affect trade*, OECD Trade Policy Papers no. 199, OECD Publishing, Paris, 2017; Garcia Santana, Santamaria, *op. cit.* (fn. 29).

and services rules and less affected directly by public procurement rules more concerned about how purchases are made than what is being acquired.

The study design has limitations arising from its reliance on secondary analysis of existing studies and not on original data gathered specifically for this purpose. Nonetheless it is hard to conceive how collecting data from the same sources as the studies covered would yield significantly different results. More important, however, is pointing out the limitations of the data sources themselves. While TED is the best source of contract award data, it is far from perfect. The data quality issues it generates are well known[40] and affect all studies relying on official data, including those analysed in this paper.

Contracting authorities routinely do not fill in the contract award forms and when that happens, no data about the contract are included on TED, although some might be available if spending matrixes are published by individual public bodies. Furthermore, TED data reporting obligations have changed over the years, for example in 2008, 2015 and more recently in 2023. This means that the studies spanning intervals covering these years within their dataset will be prone to internal data consistency issues as well.

TED data suffer from an additional limitation on data gathering, since there is only a legal obligation to disclose the information about the winning bidder, and even then, affordances need to be made when dealing with consortia for example. Therefore, we do not have data on the participation rate of foreign undertakings in public procurement and only know about winners. Are participation rates going up or are simply foreign undertakings better at choosing what contracts to go for and thus increasing their likelihood of success? Answering those questions would provide a more complete picture about the presence of home bias or if, instead, there is a reduction in cross-border competitiveness and overall participation rate. Unfortunately, that remains impossible to achieve while using data pulled exclusively from TED or while relying on studies based on such data.

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[40] European Commission; Fazekas, M., *Assessing the Quality of Government at the Regional Level Using Public Procurement Data*, Working Paper WP 12/2017, Publications Office of the European Union, Luxembourg, 2017, https://ec.europa.eu/regional_policy/sources/work/201703_regional_pp_governance.pdf; Csaki, C.; McCue, C. P.; Prier, E., *Utilizing Open Data: A Primer for Public Procurement Research*, European Journal of Public Procurement, *vol.* 1, 2019, pp. 19 – 36; Soylu, A.; Corcho, Ó. ; Elvesæter, B.; Badenes-Olmedo, C.; Yedro-Martínez, F.; Kovacic, M.; Posinkovic, M.; Medvešček, M.; Makgill, I.; Taggart, C.; Simperl, E.; C. Lech, T.; Roman, D., *Data Quality Barriers for Transparency in Public Procurement,* Information, *vol.* 13, 2022, art. 99; and European Commission, *op. cit.* (fn. 7).

## 4. FINDINGS

All studies included in the analysis cover direct cross-border procurement as a percentage of contracts won by foreign undertakings, six also include data on the percentage of spend won by said foreign undertakings and four include import data as well.

*Table 1. Direct cross-border procurement – percentage of total contracts. Years refer to study publication date.*

| Year of study publication | 2007 | 2008 | 2010 | 2011a | 2011b | 2016 | 2017 | 2020a | 2020b | 2021 | 2023 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Percentage of total contracts | 1.7% | 2.6% | 1.5% | 1.6% | 3.4% | 1.4% | 1.7% | 1.3% | 9.4% | 2.4% to 5.5% | <5% |

The first table provides an overview of all 11 studies included in the analysis and their findings on the percentage of total contracts won by foreign bidders. Looking at the percentage of total contracts won, there has been an increase since 2007, although the findings from the four most recent studies do not paint a consistent picture. There is an obvious outlier (2020b) that can be disregarded since the three largest member States analysed in that study (Germany, France and UK) have an average of 99% of contracts awarded domestically, so it seems unlikely that the remaining member States would be so integrated as to offset the larger economies of the Union. For the studies published in the 2020-2023 period we are left with a range of 1.3-4.9%, with the study by the Commission (2021) in the middle of the distribution. This study found a 2.4% success rate for contracts between €50,000 and €250,000 and 5.5% between €50M and €1B, indicating a higher success rate for larger contracts. This is a significant discrepancy, but one where the expected distribution of contracts would imply that the overall number of contracts at the top of the market is reasonably small.

While we can say that probably there is an increase in the percentage of total contracts being awarded to foreign firms in the period covered by these 11 studies, it is not possible to conclude conclusively how significant that increase has been. This is all the more relevant since it spans the lifecycle of the two most recent generations of Directives from 2004 and 2014 and we can observe that across this time period the change has not been significant.

The 2023 study by the European Court of Auditors compounds that argument. This study is the most recent one in the sample, covering a ten-year period between 2011 and 2021 in its dataset, thus partially covering the lifecycle

of both Directives from 2004 and 2014. This study only provides a sub-5% figure and claims the share of contracts won by foreign undertakings was stable, thus excluding a tendency of increase over time since at least 2011. However, this most recent study broadly confirms the findings from the other studies included in the analysis of this paper, thus meaning there was no significant evolution on the rate of direct cross-border procurement by percentage of total contracts throughout the three different generations of Directives.

*Table 2. Direct cross-border procurement – percentage of total spend. Years refer to study publication date.*

| Year of study publication | 2007 | 2008 | 2010 | 2011a | 2011b | 2016 | 2017 | 2020a | 2020b | 2021 | 2023 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Percentage of total spend | | 2.4% | 3.7% | 3.5% | | 3.7% | 3% | | | 4.1% to 5.5% | |

The view of relative stability presented by Table 1 is supported by the percentage of total spend going to foreign bidders on table 2. While only six of the studies include this metric, the Commission study from 2021 has the highest value of 4.1% for contracts below €200M which, while showing an increase, is less than the double of the value from 2008 or the percentage of contracts won. The same study found a higher value rate of 5.5% for contracts valued above €200m, which goes in line with the view that larger contracts are more suitable for foreign firms. Overall, while there might be some growth on the total value of contracts being awarded to foreign economic operators, it does not seem this slice of the procurement pie has grown significantly during the 2008-2021 timeframe.

*Table 3. Import penetration. Years refer to study publication date.*

| Sector | 2007 | 2008 | 2010 | 2011a | 2011b | 2016 | 2017 | 2020a | 2021 | 2023 |
|---|---|---|---|---|---|---|---|---|---|---|
| Public | | | | 7.5% | | | 7.9% | 4.7% | 7.4% | |
| Private | | | | 19.1% | | | 18.6% | | 19.6% | |

The third table contains the figures for import penetration for the four studies that included it. This table provides two important messages for this paper. First, the percentage of import penetration in the public sector is significantly below that of the private sector, something that was found as well by Garcia-Santana and Santamaria[41] when looking at France and Spain in 2010

[41] Garcia Santana, Santamaria, *op. cit.* (fn. 29).

specifically. These authors however, found even higher discrepancies of 2% vs 24-25% for public and private sectors respectively. It seems that in aggregate terms import penetration within the public sector is higher than that example, but still just a fraction of that of the private sector.

The second message is again one of stability over time. Once the outlier 2020a is disregarded, we observe that neither the public nor private sector import penetration has changed much. This supports once more the argument of stability made by the European Court of Auditors in its 2023 report. This parallel stability means the public sector has made no progress in closing the gap with the private sector on import penetration. During the decade of studies (2011-2021) there is no evidence from import penetration of any change to the home bias of contracting authorities in EU member States.

## 5. DISCUSSION

The findings show a limited evolution on the level of direct cross-border public procurement from the 1960s to date, with an increase from a base line of 1-2% of contracts being won by foreign bidders to somewhere between 2% and 5%. The data about percentage of spend and import penetration paint a similar picture of limited growth or even stagnation. It is thus possible to conclude that over 50 years of secondary European legislation in the field of public procurement has not opened up the public procurement markets as it was its remit. Stability has translated into stasis. In short, home bias as measured via direct cross-border procurement remains well present in EU public procurement. The ever more detailed Directives from 2004 and 2014 have been unable to solve it, with public procurement still being a drag on the overall single market project as observed via the import penetration figures. While this confirms the large border effects identified by Herz and Varela-Irimia[42], it contradicts the significant reduction in home bias in public procurement found by Mulabdic and Rotunno[43] for countries linked by trade agreements.

[42] Herz, Varela-Irimia, *op. cit.* (fn. 30).

[43] Mulabdic, Rotunno, *op. cit.* (fn. 27).

The causes for the failure are yet to be explained fully, and while the constraints from the gravity model of trade[44] are surely present[45], that can only explain the failure if one assumes that the current level of direct cross-border procurement is exclusively constrained by it. However, the Commission (2021) study found that only 40% of direct cross-border procurement took place within 500km of distance between contracting authority and contract winner. The literature points out potential other general barriers beyond more specific explanations such as sector or procurement level (central vs local contracting authorities). Kutlina-Dimitrova and Lakatos argue that product market regulation, regulatory protection of incumbent firms and barriers to foreign direct investment are responsible here.[46] Not being part of the euro-zone, language issues[47], type of procedure used to award the contract, administrative requirements, information access and lack of knowledge of the legal framework[48] have all been mentioned as well. On the other hand, it is possible that the public sector is internalising consumer preferences[49], maximising citizen welfare or national and sub-national politics[50], that then are represented in the data as a preference for national economic operators.

What seems to be missing from the discussion about the reasons behind the failure of the successive rounds of procurement Directives solving the home bias issue present in the limited direct cross-border procurement figures is the choice of legislative instrument itself.

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44 Head, K.; Mayer, T., *Chapter 3 – Gravity Equations: Workhorse, toolkit, and cookbook*, in: Helpman, E.; Rogoff, K.; Gopinath, G. (eds.), *Handbook of International Economics*, *vol.* 4, Elsevier, Amsterdam, 2014, pp. 131 – 195 and Mulabdic, Rotunno, *op. cit.* (fn. 27).

45 European Commission, *Making Public Procurement Work in and for Europe* (2017), *op. cit.* (fn. 19); Herz, Varela-Irimia, *op. cit.* (fn. 30).

46 Kutlina-Dimitrova, Z.; Lakatos, C., *Determinants of Direct Cross-Border Public Procurement in EU Member States*, Review of World Economics, *vol.* 152, no. 3, 2016, pp. 501 – 528.

47 European Commission, *op. cit.* (fn. 36), and European Commission, *Study on the Measurement of Cross-Border Penetration in the EU Public Procurement Market*, Publications Office of the European Union, Luxembourg, 2021, https://op.europa.eu/en/publication-detail/-/publication/c7fcd46a-b84d-11eb-8aca-01aa75ed71a1/language-en.

48 *Ibid*.

49 Morey, M., *Preferences and the home bias in trade,* Journal of Development Economics, *vol.* 121, 2016, pp. 24 – 37.

50 Grossman, G. M.; Helpman, E., *Protection for Sale*, The American Economic Review, *vol.* 84, no. 4, 1994, pp. 833 – 850 and Garcia Santana, Santamaria, *op. cit.* (fn. 29).

With every passing generation of Directives, the text has become more detailed and prescriptive and expanding in regulatory length and depth to the point that it now looks almost like a Regulation being delivered within the guise of a Directive. For example, while Directives 2004/18/EC and 2014/24/EU cover the same contracts – works, goods and services – and public bodies, the first has 27,000 words whereas second has 58,000 despite a similar number of articles (84 vs 94). The average character count per word has also increased from 5.39 to 5.52 indicating an increase in word length, itself a marker of textual complexity. This increase in complexity of the legal regime made uniform implementation more difficult[51] and despite the increase in European regulation, an increase in market integration overall does not seem to have affected public procurement.[52]

This progressive evolution of increased detail and prescriptiveness of the EU public procurement legal framework more or less along the lines of pre-existing regulatory choices can be explained by path dependency, a theory or concept from social sciences. Under this theory, regulatory institutions obtain increasing returns[53] when following upon existing regulatory pathways, thus restricting change at every level to incremental instead of fundamental.[54] As time passes on, this compounding effect makes it harder to change course and, in the context of public procurement, achieving third order changes for more drastic policy objectives or paradigm shifts.[55]

Taking into account the upcoming revision of the procurement Directives, it is worthy to mention that legal barriers still seem to be present and that there is evidence of them having a significant effect on the home bias puzzle

[51] Knill, C.; Steinebach, Y.; Zink, D., *How policy growth affects policy implementation: Bureaucratic overload and policy triage*, Journal of European Public Policy, *vol.* 31, 2023, pp. 325 – 351.

[52] Weishaar, S. E., *Striking an Uneasy Balance between Competition and Market Integration: The Case of EU Public Procurement*, in: Philipsen, N.; Stefan, E. W.; Guangdong, X. (eds.), *Market Integration: The EU Experience and Implications for Regulatory Reform in China*, Springer, Berlin, 2016, pp. 97 – 121.

[53] Pierson, P., *The Path to European Integration: A Historical-Institutionalist Analysis*, Comparative Political Studies, *vol.* 29, no. 2, 1996, pp. 123 – 163.

[54] Pierson, P., *Increasing Returns, Path Dependence, and the Study of Politics*, American Political Science Review, *vol.* 94, no. 2, 2000, pp. 251 – 267.

[55] Pircher, B., *EU public procurement policy: the economic crisis as trigger for enhanced harmonization*, Journal of European Integration, *vol.* 42, no. 4, 2020, 509 – 525.

for international trade.[56] Legal asymmetries act as obstacles to trade, and it should be posited that they will affect direct cross-border public procurement in similar fashion. In fact, the lack of legal consistency and compliance issues Directives as a regulatory instrument generate in practice are also discussed in the literature[57], including in public procurement.[58]

It may well be that we have reached the limit of what the regulatory framework can achieve on its own in integrating markets without harmonising adjacent areas such as public administration. If so, it may be time to start painstakingly targeting more practical barriers to cross-border procurement, such as electronic procurement systems, which are not harmonised and can operate very differently from one Member State to another.

Even within the existing confines of secondary legislation applicable to public procurement, it is time to discuss if Directives are the right regulatory instrument for opening up and integrating procurement in the single market. The path dependency that produced ever more detailed rules along similar regulatory lines has not been able to open up public procurement as desired. Path dependency thus explains how once Directives were settled upon as the regulatory instrument of choice and a certain approach within them adopted – namely, harmonising public procurement procedures – that most evolution in the legal framework can be subsumed to be more and (of mostly) the same. Therefore, we should not expect significant different results, particularly if

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[56] Turrini, A.; Van Ypersele, T., *Legal Costs as Barriers to Trade*, CEPR Discussion Paper, 5751, 2006.

[57] Falkner, G.; Treib, O.; Hartlapp, M.; Leiber, S., *Complying with Europe: EU harmonisation and soft law in the member State*, Cambridge University Press, Cambridge, 2005; Zhelyazkova, A., *Complying with EU directives' requirements: the link between EU decision-making and the correct transposition of EU provisions*, Journal of European Public Policy, *vol.* 20, no. 5, 2013, pp. 702 – 721; Zhelyazkova, A.; Kaya, C.; Schrama, R., *When Practice Goes beyond Legislators' Expectations: Analysis of Practical Implementation Exceeding Legal Compliance with EU Directives*, Journal of Common Market Studies, *vol.* 56, 2018, pp. 520 – 538; Zhelyazkova, A.; Thomann, E., *'I did it my way': customisation and practical compliance with EU policies,* Journal of European Public Policy, *vol.* 29, no. 3, 2022, pp. 427 – 447.

[58] Gelderman, C. J.; Ghijsen, P. W. T.; Brugman, M. J., *Public procurement and EU tendering directives – explaining non-compliance*, International Journal of Public Sector Management, *vol.* 19, no. 7, 2006, pp. 702 – 714; Gelderman, K., Ghijsen, P.; Schoonen, J., *Explaining Non-Compliance with European Union Procurement Directives*, Journal of Common Market Studies, *vol.* 48, no. 2, 2010, pp. 243 – 264; Treumer, S., *Enforcement of the EU Public Procurement Rules*, in: Treumer, S.; Lichère, F. (eds.), *Enforcement of the EU Public Procurement Rules*, DJØF Publishing, Copenhagen, 2011, pp. 17 – 52.

looking for positive changes if results are not what were expected. The problems raised by this path dependency in EU public procurement secondary legislation are obvious where a paradigm change was required. For example, in the 2004 revision it was possible for public bodies to conduct their procurement electronically and in 2014 this was made mandatory. However, the transition from analogue to digital was done without seizing the opportunity to do things differently. As such, the bulk of the new rules on electronic procurement are simply converting the exact same practice that was done in paper to be done electronically instead. This leads to outdated concepts such as notices as a mechanism to advertise and collect data to be as fundamental today as they were in the 19th century.[59] 2014 was the moment to seize the opportunity of an obvious paradigm change but that did not happen. While the digital *transition* has been achieved, the digital *transformation* is yet to occur in EU public procurement.

If this is the case, then it should be discussed if taking a different course of action for the upcoming revision of the procurement Directives is not the way to go. This would support, for example, a move to a Regulation which would better harmonise the legal rules applicable by reducing the scope for divergence offered by the various procurement Directives, which seems to be the choice of the Commission with its signaling of a Public Procurement Act as the successor legal instrument to the Directives.

A transition from Directive(s) as a regulatory instrument to a Regulation would not be something novel as it has happened quite a few times over the last couple of decades with the most obvious example being the General Data Protection Regulation (Regulation (EU) 2016/679) which replaced the Data Protection Directive (Directive 95/46/EC). However, a change like this just by itself, without further consideration of the legal rules themselves, may struggle with practical compliance and be of limited effect since the rest of legal rules public administrations must follow would remain untouched. Even then, one needs to be aware that perhaps further market integration will not simply occur because of legal harmonisation. As such, in alternative, it is possible to conceive going in the other direction altogether and simply not have secondary legislation applicable to public procurement as it is not fit to open up the single market. In essence this would mean reverting back to the 1960s and subject all public contracts to the general EU public procurement principles, leaving

[59] Telles, P., *Looking into the Public Procurement Data Space and eForms,* Public Procurement Law Review, *vol.* 33, no. 1, 2024, pp. 14 – 27; Telles, P., *The evolution of electronic public procurement under Directive 2014/24/EU,* European Procurement & Public Private Partnership Law Review, *vol.* 19, no. 4, 2024, pp. 242 – 248.

the remaining EU regulatory edifice in place and tasking the member States to decide how they find it best to comply with the requirements set forth by the EU's participation in the GPA and those bilateral agreements covering public procurement.

## 6. CONCLUSION

The analysis presented in this paper demonstrates that EU procurement directives have largely failed in their primary objective of opening up public procurement markets across member states. Despite multiple generations of increasingly detailed legislation spanning over five decades, the level of direct cross-border procurement remains remarkably low, showing only modest improvement from the 1-2% baseline of the 1960s to approximately 2-5% today. This limited progress, coupled with persistent gaps between public and private sector import penetration, indicates that home bias continues to be a significant factor in public procurement decisions.

This persistence of home bias despite decades of attempted integration has not been fully explained but the findings suggest that the current regulatory approach, based on harmonising procurement procedures through ever more detailed Directives, might have reached its limit. The path-dependent evolution of these Directives, while adding complexity and administrative burden, has not delivered on their key objective of integrating public procurement in the single market.

With this failure in mind and looking forward to the upcoming revision of the EU public procurement Directives, consideration should be paid to alternative regulatory approaches that can provide a more significant paradigm change. This would mean moving from Directives to a Regulation as a choice of legislative instrument or, instead, admitting failure and simply accepting that public procurement cannot be fully integrated into the single market and reverting to not having secondary legislation in this field.

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## Sažetak

**Pedro Telles** *

# UNUTARNJE TRŽIŠTE I DOMAĆA PRISTRANOST: JESU LI DIREKTIVE EU-a OTVORILE JAVNU NABAVU?

*Ovaj rad analizira uspješnost direktiva EU-a u otvaranju javne nabave i integraciji javne nabave u unutarnje tržište. Putem sekundarne analize 11 studija provedenih između 2007. i 2023. godine koje pokrivaju tri generacije zakonodavstva EU-a o javnoj nabavi, istraživanje pokazuje da uzastopno donošenje sve detaljnijeg sekundarnog zakonodavstva nije dovelo do znatnog povećanja izravne prekogranične javne nabave niti do značajnog smanjenja sklonosti domaćim gospodarskim subjektima (tzv.* home bias*). Osim niske razine izravne prekogranične javne nabave, podaci o udjelu uvoza dodatno potvrđuju postojanost takve sklonosti, pri čemu je udio uvoza u javnom sektoru i dalje znatno niži nego u privatnom sektoru. Iako razlozi takvog izostanka razvoja još nisu u potpunosti razjašnjeni, u radu se zaključuje da je razvoj direktiva o javnoj nabavi, uvjetovan prethodno zacrtanim razvojnim putem i obilježen sve većom složenošću bez promjene temeljne paradigme, možda dosegnuo svoje granice u pogledu daljnjeg otvaranja javne nabave i njezina uključivanja u jedinstveno tržište. S obzirom na taj neuspjeh i kako je trenutačni zakonodavni okvir EU-a o javnoj nabavi u reviziji, alternativni regulatorni pristupi, poput prebacivanja na Uredbu kao instrument zakonodavstva ili vraćanja na opća načela nabave EU-a, mogu biti vrijedni razmatranja.*

*Ključne riječi: javna nabava EU-a; prekogranična nabava; domaća pristranost; zajedničko tržište; unutarnje tržište*

* Dr. sc. Pedro Telles, izvanredni profesor, Copenhagen Business School, Solbjerg Plads 3, 2000 Frederiksberg, Danska; pt.bhl@cbs.dk;
ORCID ID: orcid.org/0000-0002-0666-6351