



EUROPEAN COMMISSION

Brussels, 21.3.2012
SWD(2012) 58 final

COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

**Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

**establishing rules on the access of third country goods and services to the European
Union's internal market in public procurement and procedures supporting negotiations
on access of European Union goods and services to the public procurement markets of
third countries**

{COM(2012) 124 final}
{SWD(2012) 57 final}

Disclaimer: This executive summary commits only the Commission's services involved in its preparation and does not prejudge the final form of any decision to be taken by the Commission.

Background

Public procurement is about how public authorities spend taxpayers' money in public purchase and investment decisions. Public procurement is considered to be a key driver of public policies. In economic terms, public procurement affects a substantial share of world trade flows. Purchases of goods and services by public authorities account for roughly 17% of the EU's GDP. Public procurement impacts at least 22 key markets of goods and services in which the customers are exclusively or mostly public purchasers, or for which public authorities are large clients. All in all, the turnover of firms operating in these procurement markets may exceed 25% of the EU's GDP and represent some 31 million jobs.

In its negotiations with third countries, the EU has advocated an ambitious opening of international public procurement markets. However, EU companies have to deal with an unlevel playing field in that respect as many trading partners are reluctant to further open their procurement markets to international competition – which considerably limits their business opportunities.

Stakeholder's consultation

This impact assessment report has been prepared taking into consideration the views expressed by a wide range of stakeholders, including Member States, civil society, industry, and NGOs. In order to gather those views, the Commission organised an internet consultation, a public hearing, and other consultation mechanisms. Respondents to the internet consultation generally welcomed the European Commission's initiative and agreed on the description of the problems faced, but held diverging views on the options to choose. A significant majority of stakeholders appear to support a legislative initiative, while an important minority prefer the option 'nothing happens'. There are also divergent opinions as to what that legislative option should be. Although there is large support for the legislative option with approach A¹, there are a significant number of respondents in favour of an alternative approach that is neither A nor B². It is worth noting that, although the least preferred legislative option, approach B also received support from a considerable number of respondents.

¹ Approach A: EU procuring entities would be required in principle to exclude third country goods, services and companies not covered by international commitments of the EU.

² Approach B: Subject to notification to the Commission, EU procuring entities would have the option to decide to exclude third country goods, services and companies not covered by international commitments of the EU. In addition, the Commission would be entrusted with a specific tool to conduct enquiries about the market access situation for EU goods, services and companies and to impose restrictive measures on goods and services originating in third countries when EU goods, services and companies do not have sufficient access to the public procurement market of these countries.

1. PROBLEM DEFINITION

1.1. The limited openness of public procurement markets worldwide

Public procurement is excluded from GATT and GATS, which govern world trade in goods and services. Industrialised countries, among them the EU and 14 other countries (including USA, Japan, Canada and Korea), have become parties to the WTO Agreement on Government Procurement (GPA). Parties to the GPA commit themselves to mutual opening of their markets for certain types of purchases of certain public entities above specific values. The EU and other countries such as Korea or Chile have also committed themselves to opening their public procurement markets through free-trade agreements outside the WTO.

The EU is directly concerned by the global opening of public procurement but in reality, only 25% of contestable public procurement markets have been committed internationally in either the GPA or FTAs. Although, the GPA/FTAs only secure 5 billion EUR of EU exports (0,4% of all EU exports), the opening of public procurement affects some other 5 billion EUR taking place in non-committed procurement markets, altogether affecting the international trade of industrial sectors active in 22 selected markets, whose turnover amounts to 25% of the EU GDP and some 31 million jobs. In total, more than 50% of contestable public procurement markets are closed through protectionist measures such as price preference mechanisms or local content requirements. In addition, some 25% are *de facto* open, but can be closed at any moment. This leaves the EU with some 12 billion EUR of untapped exports. Furthermore, the EU has so far no agreements on public procurement with countries such as China or India, although it is currently negotiating market access commitments with both.

The opening of public procurement markets has been prevented by strong national agendas driven, in industrialised economies, by domestic pressures and, in emerging economies, by the need to climb the technological ladder..

1.2. The EU lacks negotiations leverage to foster the globalisation of procurement

The EU has given wide commitments on its public procurement market when compared to other GPA parties. As a result, the strategic economic interests of several GPA parties are satisfied by the current state of affairs. Also, since the GPA is not part of multilateral trade negotiations, market access in public procurement can only be traded in negotiations against market access in public procurement (and not against lower tariffs, for example). Also, the fact that several high-profile contracts have been awarded in types of procurement not covered by commitments fuels the perception that the EU public procurement market is open even beyond the level of its international commitments.

1.3. Some Member States take national measures to regulate access to their public procurement

In this context, several Member States have taken measures to regulate access to their public procurement market. Others have informed the Commission – informally – that they intend to introduce measures. Since regulating the access to the EU procurement market for suppliers from third countries clearly falls under the remit of the EU's exclusive competence for the common commercial policy, Member States are not entitled to legislate in this area on their own.

More practically, because of the absence of EU guidance or legislation on the access of foreign tenderers to the EU public procurement market, contracting authorities in the EU are at a loss when trying to understand the scope of the EU's international commitments in the area of public procurement. 28% of all contract award notices contain erroneous assessments of the coverage of the GPA – sending wrong signals to foreign bidders.

1.4. Overarching problems

Overall, most public procurement markets in third countries remain closed to EU businesses. EU companies are being denied access to some 12 billion EUR of potential exports. If third countries were able to accept withdrawing protectionist measures only in those sectors where they themselves have strategic offensive interests, they would open access to up to 4 billion EUR of exports for the EU. This impacts on the capacity of EU firms to create economies of scale. In addition, EU companies supplying goods and services in the 25% of procurement markets that are *de facto* open can be hit at any moment by protectionist measures.

Current protectionist policies may distort business investment decisions, and could also lead to jobs being shifted artificially outside the EU. The same could be said of technology transfers that are undertaken for reasons of industrial policy (e.g. China's "indigenous innovation" policy) rather than on purely commercial grounds. In the medium-term, access problems may even extend to those sectors where the EU has a competitive edge to bypass existing barriers (e.g. pharmaceuticals).

EU companies, goods and services do not enjoy from a level playing field. From a sectoral perspective, Chinese construction companies and Japanese railways have been given the opportunity to sell to EU contracting authorities, while sales in the opposite direction are impossible. In several instances, state-supported companies (for example, from Russia and China) have been able to submit abnormally low tenders.

1.5. Analysis of subsidiarity

The question of subsidiarity does not arise in the context of this initiative, as the rules and negotiations on access to the EU's public procurement market fall within the scope of the common commercial policy, an exclusive competence of the EU under Article 207 of the TFEU. Therefore, any action that sets a framework for the implementation of an international trade agreement must be taken at the EU level. .

2. OBJECTIVES

Fair competition and access to public procurement markets are key instruments for economic growth and job creation, in particular in the context of the recent economic crisis. Against this background, the present legislative initiative would serve as a trigger for further opening of public procurement markets in third countries in order to improve business opportunities for EU firms.

In doing so, it is believed that the initiative will: increase the competitiveness of EU businesses, both in the EU and internationally; boost the internationalisation of SMEs in a globalised economy; and increase employment and promote innovation in the EU. These general objectives have been translated into specific and operational objectives in the impact assessment. The specific objectives include: boosting the exports of EU goods and services in public procurement markets outside the EU; giving the EU greater leverage in international

negotiations on procurement; increasing legal certainty in respect of third countries' access to the EU's public procurement market; and ensuring that commitments on public procurement given to the EU as part of its international agreements are respected.

3. POLICY OPTIONS

3.1. Baseline scenario: "Nothing happens" (Option 1)

The baseline scenario shows how the problems described in the problem definition will most likely evolve without any further action by the EU. Under this scenario, the EU would not undertake any new action; the present EU legal framework and the corresponding practices would remain in place; and the EU would continue to negotiate additional market access (accession of China to the GPA, FTAs with India and Japan, bilateral procurement openings with USA) and to rely very largely on current market opening commitments secured in the GPA or in FTAs, together with those that might be secured in the future. In reality, however, there is considerable uncertainty about the likely extent and rate of progress in the current GPA market access negotiations, and about the outcome of ongoing bilateral negotiations.

3.2. Non-legislative option (option 2):

3.2.1. Soft-law and dispute settlement/ infringement mechanism (Option 2A)

Under this option the Commission would clarify in explanatory documents the scope of the EU's international commitments and would provide guidance on the enforcement of existing instruments such as articles 58 and 59 of Directive 2004/17 (procurement by energy, water and transport entities). The Commission would also consider making more active use of existing tools such as its own infringement procedures and existing WTO/FTA dispute settlement mechanisms where trading partners infringe their commitments.

3.2.2. Reinforcement of ongoing negotiations (Option 2B)

Under this option, the EU would systematically encourage trading partners to join the GPA, require public procurement chapters in all FTAs (and re-open the Customs Union with Turkey so as to include a procurement chapter), start new negotiations and further extend the procurement chapters of existing FTAs (Chile, Mexico).

3.3. Legislative option with supervision by European Commission (option 3)

This legislative option would define and regulate access to public procurement covered and not covered by the EU's international commitments and establish "procurement rules of origin" (PROs) to identify the origin of goods and services. In line with the concerns expressed by NGOs, it would also grant full access to goods and services from least developed countries. Beyond these core elements of a legislative policy response, it is possible to distinguish **three alternative approaches** described in options 3A, 3B and 3C.

3.3.1. Approach based on an overall access restriction for not covered procurement at the EU level (Option 3A)

Under the first approach, Member States' contracting entities would be required, in principle, to exclude third country goods, services and companies not covered by the international commitments of the EU. However, in order to avoid obstacles to the procurement of goods

and services unavailable in the EU and/or needed in cases of emergency and/or of overriding reasons of general interest, the initiative would establish legal **exceptions** to the obligation to exclude, and provide the Commission with the possibility to issue additional derogations through **waivers** when required by special circumstances.

3.3.2. *Approach based on individual decisions by the EU procuring entities and a Commission driven mechanism in case of not covered procurement (Option 3B)*

3.3.2.1. At the level of MS: individual procuring entities' decisions under the supervision of the European Commission (3B1)

For not covered procurement, EU contracting entities would have the option either to admit or to exclude goods or service providers originating from third countries from the tendering process. The decision to exclude foreign bids would be subject to an *ex ante* notification to the Commission (through the contract notice). This would allow the Commission to monitor the situation and ensure consistency throughout the EU.

3.3.2.2. At the EU level: the Commission-driven mechanism (3B2)

At EU level, based on a determination of market access difficulties and/or specific complaints, the Commission would decide to open investigations on protectionist measures and other trade barriers imposed on EU suppliers or on bids in third countries. The Commission could then (1) invite the trading partners concerned to enter into negotiations to dismantle the existing trade barriers, and/or to provide reciprocal market access commitments in order to secure access to the other party's public procurement markets and (2) adopt restrictive measures against bids originating in these third countries, if the trading partner concerned refuses to engage in negotiations.

3.3.3. *Option 3C: Option for contracting entities to accept companies, goods and services not covered by the EU's international commitments, subject to notification of the Commission and Commission option to impose access to the EU's public procurement market*

This option would give contracting entities the possibility, subject to clearance of the Commission, to accept companies, goods and services that do not benefit from international market access commitments. They would need, first, to have announced in the contract notice their willingness to accept these companies, goods and services. If they were actually to receive offers of such goods and services they would then have to notify the Commission. The Commission would take a decision based on 'substantial reciprocity' within take 6-8 weeks.

3.4. Legislative approach without supervision by European Commission (extension of Article 58 to the whole scope of the directives)

To avoid burdening contracting authorities with the need to notify the Commission, the provisions of Article 58 and 59 would be extended to services, works, bodies governed by public law, central and local authorities. Guidance on the application of these articles would be provided through explanatory documents (as per option 2). Finally, this initiative would use the same core elements as option 3.

3.5. Option 5: 'Buy Europe'

To level the playing field with main trading partners such as the USA and China, the EU could create a system of price preferences with a 25% margin in order to mirror the existing "Buy American" and "Buy China" policies for non-covered procurement. However, by doing so, the EU would be giving implicit approval to the sorts of price preference mechanism across the world to which it is adamantly opposed. This option should therefore be discarded from the outset and will not be analysed.

3.6. Option 6: correcting unfair 'abnormally low tenders' (complementary option)

The options mentioned above could be complemented by an option that would aim at remedying the problems arising when suppliers from certain third countries offer (very) low prices since they receive subsidies or benefit from other unfair competition practices.

4. ASSESSMENT OF IMPACTS

The impact of each option is assessed taking into account a set of 9 criteria including impact on trading flows, leverage effect of trading partners in international negotiations and impact on administrative burden.

These impacts have to be measured against a potential increase of exports of 4 billion EUR (which represents about 60,000 jobs), if the 12 largest non-EU trading partners open those procurement markets for which they have corresponding offensive interests in the EU. To determine the efficiency of each option, the costs of each of them will be compared to this benchmark. The possibility of retaliatory measures by trading partners should also be taken into account when measuring the costs and benefits of each of the envisaged options.

Option 1 (baseline scenario) and Option 2B (further negotiations) are expected to deliver 1 billion EUR of additional exports (12.000-18.000 jobs).

Under option 2A (legal clarification and enhanced use of existing mechanisms), increased use of the existing restrictions laid down in Directive 2004/17/EC (article 58.2) is likely to produce most of the effects in terms of rules clarification and legal clarity. Guidance on the scope of committed and non-committed procurement indeed improves the level of legal certainty when rejecting offers of foreign goods and services during tendering procedures. Option 2A is not expected to have any significant impact on any other criteria.

Option 3A (overall restriction of access for not covered procurement at EU level) should significantly improve legal certainty as it should avoid the problems caused by incorrect implementation of symmetric reciprocity clauses. A large majority of the procurement markets concerned would be able to apply restrictions, but waivers would probably be applied in the procurement of fuel, pharmaceuticals, medical equipment and computers. The potential impact on trade flows is far-reaching as this option could block up to 4 billion EUR of imports of goods and services. This option might have large retaliatory effects (1 billion EUR) and an important leverage effect. The impact on public finances and administrative burden would remain very limited.

Under option 3B (individual entities, under the supervision of the European Commission, may exclude bids from third countries (3B1), and a Commission-driven instrument to conduct enquiries about the market access situation for EU goods, services and companies in third

countries (3B2)), a greater degree of legal certainty would be obtained as the Commission would have the final word on potential discriminatory measures. This option would cover all relevant sectors of the economy. The initiative could realistically lead to market openings worth 4 billion EUR of additional exports and create 60.000 jobs. The leverage potential of this option would be slightly better than option 3A thanks to the possibility to target offensive interests of third countries under option 3B2. The retaliation risk of this option would be limited since closure of the EU procurement market would itself be limited and targeted. The impact on public finances would be limited, but the administrative burden on contracting authorities, businesses and even the European Commission would be relatively large because of the 6-8 week notification system.

Option 3C and 4 would present similar impacts as option 3A. Yet, option 3C would cause the largest administrative burden of all options (notifications instead of waivers) and option 4 would not improve the level of respect for international commitments as much as options 3A or 3B.

Option 6 (correcting unfair abnormally low bids) would come as a complement to the other options and would only affect foreign bids. Impact on the administrative burden and public finance would be minor but would depend on the number of cases. However, the risk of retaliation exists, because companies excluded on the basis of abnormally low bids are most likely to be state-owned.

5. COMPARISON OF OPTIONS

The proposed policy options have been compared on the basis of their impact on the objectives to be achieved and on the basis of their efficiency.

Option 1 does not meet the identified objectives and has therefore only be considered as the baseline scenario with which to compare the other policy options. Option 2 will have only a limited contribution to the fulfilment of the identified objectives (as regards improvement of legal certainty and access to third countries markets) and also has the least advantages in terms of efficiency, effectiveness and coherence. Options 3A, 3C and 4 meet the identified objectives – but are not efficient because of the retaliation costs that they may entail, as well as the problems for supply chains of EU firms in USA and China. Option 3C generates a substantial administrative burden. None of the options except option 6 can actually target the abnormally low tenders of state-supported firms, goods and services. Option 3B is the most likely to meet all the objectives and to meet them to the greatest extent. It has also received the best scores in terms of effectiveness, efficiency and coherence as compared with the other policy options. As a result, it is recommended to follow option 3B and to complete with option 6 and 2B.

6. MONITORING AND EVALUATION

The Commission will monitor the compliance of Member States and Member States' contracting authorities with the obligations laid down in the external procurement initiative. The initiative proposes a set of indicators to track the achievement of each specific objective, notably by monitoring of:

- additional procurement-related exports

- number of sectors (among the 22 selected) that have been opened abroad compared to the
- current number
- expansion of trade flows in the area of procurement
- number of investigations launched by the European Commission
- removal of procurement trade barriers against EU suppliers in specific third countries
- changes in national law to reflect international commitments in the area of public procurement.