



International Procurement Instrument

Proposed Regulation, adopted by the European
Commission (21 March 2012)

Presentation to IMCO
25 September 2012



European
Commission

1. PROBLEM DEFINITION

Economic context

- The EU's public procurement market is open to third countries (up to 85% in the GPA, in practice even more). More competition allows us to purchase for the best price.
- But in return, there is a lack of market access in non-EU countries for EU companies, goods and services and a lack of fair competition in the Internal Market
- Our trading partners do not commit to open their own markets to the same extent and/or apply restrictive measures to their public procurement. Emerging economies, with rapidly increasing procurement markets, are also moving towards strong restrictive industrial policies

Size of the EU public procurement market

- Total EU public procurement market is +€2 trillion
- Total EU PP market under scope of EU Directives is €370 billion or 18.5% of the total PP market
- The EU market guarantees access to GPA covered goods and services at all levels of government

Public procurement in the US

- US restricts access for GPA covered goods and services to the federal government level and state level of 37 States.
- US offers very limited market access for lower levels of government under the EU-US sectoral agreement on procurement (limited number of cities)

Public procurement in Japan

- Japan restricts access for GPA covered goods and services to its federal government and some levels of higher government (prefectures and some larger cities).
- Japan does not include lower levels of government (sometimes representing more than 500.000 citizens)
- Japan closes almost its entire railway sector through excessive use of Operational Safety Clause

Public procurement in Canada

- Canada restricts access for GPA covered goods and services to its federal government.
- Canada does not include all federal agencies in its market offer.
- Canada limits lower level market access to the central institutions of the provinces
- Canada does not grant access to its utilities such as postal services and railways.

Public procurement in Korea

- Korea does not offer access for GPA covered goods and services in all its lower level governments: it excludes 75 cities, 86 counties and 69 autonomous districts

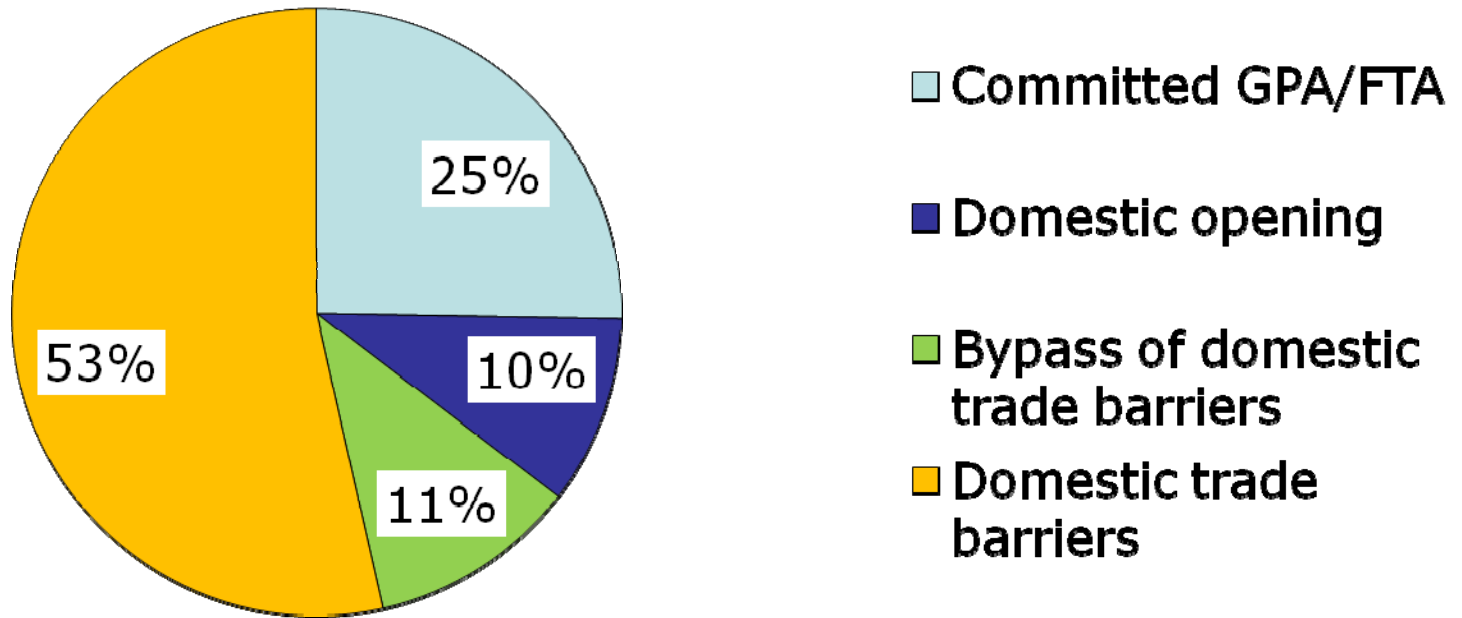
Public Procurement in China

- Estimated market above GPA thresholds: €83 billion
- De jure market fully closed:
 - **Buy national policy**
 - **Local content requirements up to 50% - otherwise 20% price preference**
 - **Ad hoc possibility to raise local content requirement up to 70%**
- De facto almost fully closed

Comparison of commitments

Country	Market in billion €	Market Access Commitments	% market access commitments by EU
US	560	32%	46%
Japan	96	28%	70%
Canada	59	16%	10%
Korea	25	65%	77%
China	83	0%	0%

Openness of main trading partners PP market



Political and legal context

- Given the EU's de facto openness, lack of leverage in international negotiations on procurement
- The EU legal framework setting the terms of access for foreign goods and services is not complete:
 - Only legal provisions: Article 58 Utilities directive (2004/17/EC): Contracting entities may reject tenders that contain more than 50% foreign (non-covered) goods and Recital 18 in Defence Procurement Directive (2009/81/EC)
 - For the general procurement Directive (2004/18/EC) that stands for over 80% of non-defence related procurement there is no clarification on the regime to be applied
 - For example: Although the EU negotiated internationally numerous reservations (examples : Railway/Japan; Air traffic control equipment/US...) there is no legal possibility to act upon them to gain leverage (not to use the threat of using them)
- In the absence of a comprehensive EU policy, several Member States have decided to take action themselves

Differential treatment in MS of third countries – internal market?

- At least one MS does not grant third country companies access to remedies (such as courts) if it concerns non-covered goods and services
- At least two MS only allow access for non-covered goods and services on basis of reciprocity
- National measures result in fragmentation of internal market and weakened EU leverage in international negotiations

Overarching problems

- Loss of potential EU exports between €4 and 12 billion.
- Limited capacity for EU companies to create economies of scale
- Distorted business decisions (not based on economical reasoning)
- No fair competition – no level playing field



European
Commission

2. OBJECTIVES

Objectives

- Boost EU exports in public procurement markets outside EU
- Increase EU leverage in negotiations
- Increase legal certainty regarding third country access to EU procurement market
- Ensure EU international commitments are respected



European
Commission

3. POLICY OPTIONS

Policy options considered

1. Baseline scenario: nothing happens
2. Non-legislative option:
 - soft law
 - use of Articles 58-59 of Utilities Directive
 - use of internal and international corrective measures
 - Enhance international negotiations

Policy options considered - continued

- **Option 3A** - Overall restriction for not covered procurement at EU level

Policy options considered - continued

- **Option 3B:**
 - Option for contracting authorities to reject non-covered goods and services under the supervision of the Commission
 - Centralised Commission mechanism for consultation/investigation and imposition of restrictive measures

Policy options considered - continued

- **Option 3C:** Option for contracting authorities to accept non-covered goods and services under the supervision of the Commission
- **Option 4:** Extension of Articles 58-59 to the whole scope of Public Procurement Directives
- **Option 5:** Imposition of a system of price preference of 25% - "Buy Europe"
- **Option 6:** correct unfair "abnormally low tenders"



European
Commission

4. ASSESSMENT OF IMPACT

Methodology

- Measuring foreign penetration of EU procurement markets
- Measuring EU penetration of foreign procurement markets
- Analysis of 22 priority sectors for procurement
- Leverage: relative size of unfulfilled exports resulting from existing protectionist measures

Parameters used to measure achievement of objectives

- Effectiveness
- Efficiency
- Coherence

These three parameters were assessed through the following 9 criteria.

9 criteria considered in impact assessment

1. Impact on trade and jobs:
1a imports & retaliation, 1b export and jobs, 1c supply chains
2. Competitiveness
3. Leverage effect
4. Rules clarification
5. Public finances
6. Administrative burden
7. Impact on competition and innovation
8. Impact on consumers
9. Environmental impact



European
Commission

5. COMPARISON OF OPTIONS

Comparison of options

- **Option 1** does not meet any of the objectives
- **Option 2, 5** meets limited number of objectives: increase legal certainty and limited increase of potential exports
- **Options 3A, 3C and 4** likely meet the objectives but are not efficient due to high potential retaliation costs and sourcing problems (supply chains)
- **Option 3B** most likely to meet all objectives and to greatest extent. Best score in all three parameters
- **Option 6** is only option addressing abnormally low tenders (level playing field in EU procurement market)



European
Commission

6. PROPOSED REGULATION

Why a separate legal instrument?

- Legal base – Article TFEU 207
- Need for uniform framework: Regulation instead of Directive

Clarification of rules

- **Article 4** confirms that covered goods and services are granted equal treatment as EU goods and services
- **Article 5** establishes principle of openness of EU procurement market unless application of Articles 6 or 8-10.

1st tool: article 6

- **Possibility for contracting authorities to exclude foreign (non-covered) bids**
 - Above the threshold of 5 million Euro, contracting authorities may ask the Commission for authorisation to exclude a foreign (non-covered by EU international commitments) bid if there is a lack of substantial reciprocity or if we have negotiated reservations;

2nd tool: article 8-10

- **Investigations by the Commission** of repeated discriminatory policies in non-EU countries against EU suppliers, goods or services
- **Consultation and negotiation with non-EU countries with a view to solve concerns and open their markets**
- Possibility for the Commission, if all attempts to open their market have failed, **to adopt proportional restrictive measures against the concerned non-EU country (market access restrictions, price penalties)**

Additional tool (Article 7): abnormally low tenders

- Commission proposal for modernisation Directives: **Articles 69/79**
- In case of abnormally low tender: **obligation to ask explanation** (e.g. state-aid, compliance with social/environmental legislation)
- If, for tenders with more than 50% non-covered goods/services the contracting authority **intends to accept the justifications provided, the contacting authority should inform the other tenderers**, including the reasons for the abnormally low character of the price

Conclusion

- **Now:** Absence of a comprehensive EU external public procurement policy. Lack of leverage in international procurement negotiations. A fragmented internal market. Enlarged risk of protectionism.
- **After:** A real comprehensive EU external public procurement policy, with a key role for the Commission. Increased leverage to further negotiate market opening. More « fair play » within the EU.