

## Why China's public procurement is an EU issue

China's public procurement market is huge, but largely untapped by EU companies, since access to it is restricted by laws, regulations and policies favouring domestic over foreign goods and services. Although China's public procurement policy is inconsistent with the WTO's General Procurement Agreement (GPA), the EU cannot legally challenge it, as long as China is not party to the GPA.

### A fragmented legal and institutional framework facilitating local protectionism

Public procurement in China is [governed](#) by two sets of national laws: 1) the 1999 Tendering and Bidding Law ([TBL](#)) and the 2002 Government Procurement Law ([GPL](#)) and 2) local legislation. As shown in Table 1, the GPL regulates procurement by central and local state organs, institutions and public organisations of goods, services and works exceeding certain thresholds. Its coverage is fairly narrow, since it excludes state-owned enterprises (SOEs), even though they provide public goods involving significant public funds. Its scope is limited too, since under Article 4 GPL, government procurement of construction projects of infrastructure and public utilities is regulated by the TBL. Moreover, Article 86 GPL [excludes](#) military procurement which falls under the [realm](#) of the [Central Military Commission](#). The TBL sets out tendering procedures for public tenders of a certain size initiated by [SOEs](#) and private companies to perform infrastructure projects of public interest. Given the two laws' abstract, and at times [ambiguous, wording](#) and conflicting or [non-existent](#) provisions, and despite national [regulatory authorities](#) adding [sectoral regulations](#), government entities at lower administrative levels enjoy large discretion in drafting their own rules in addition to [State Council](#) implementing rules (for the [TBL](#) and the [GPL](#)), thus exacerbating incoherence and complexity and supporting local protectionism (local content requirements of [70 %](#) for certain sectors under the TBL).

**Table 1 – National legal and institutional framework**

	GPL	TBL
<b>Competent authorities</b>	Ministry of Finance (MoF)	National Development and Reform Commission (NDRC)
<b>Procuring entities</b>	Government agencies and public institutions at all levels (national, provincial, municipal, etc.), public schools and universities; hospitals; and research institutions	SOEs and private companies
<b>Scope</b>	Supplies, works and services: listed in the centralised procurement catalogue or exceeding the threshold (except works carried out under the TBL)	Works of public interest: publicly-funded works, related supplies, services or research and development
<b>Thresholds</b>	Supplies/services: central government: over €156 000 and others: over €65 000 Works: central government over €260 000, and others over €78 000	Design: over €65 000. Works: over €260 000. Materials: over €130 000 Works projects: over €390 000
<b>Remedies</b>	Yes	No

Data source: [Public Procurement 2016](#), International Comparative Legal Guides, data converted: RMB 1 equal to €0.13 on 21 September 2016.

### What are the key issues for EU business under the current legal framework?

#### 'Buy Chinese' policy or domestic sourcing requirements

The GPL's '[Buy Chinese](#)' clause in [Article 10](#) is the legal basis for unequal treatment of imports of foreign goods and services and domestic like products. Government entities are required to procure domestic goods subject to rare exceptions: when the goods are unavailable in China or, if available, cannot be procured on reasonable commercial terms (the domestic equivalent must be [20 %](#) more expensive) or are for use outside China. The definition of domestic goods and its interpretation remain unclear, thus creating legal uncertainty, and foreign-invested enterprises find it difficult to assess whether their goods and services qualify as domestic products. The [GPL](#)'s implementing rules do [not](#) distinguish between domestic and foreign suppliers and stress that all bidders be treated equally, but Article 10 remains a guiding principle of national policy.



### Indigenous innovation requirements

Since 2006, China has pursued a policy of boosting '[indigenous innovation](#)', i.e. technologies, brands and products developed and owned by Chinese companies, to lower its reliance on foreign technology. Although in 2011 the State Council [suspended](#) rules linking these policies to public procurement, indigenous innovation catalogues established through [accreditation procedures](#) giving preference to firms having China-based intellectual property rights (IPRs), IP licences or trademarks still [exist](#) at sub-central levels. Indigenous innovation policies are deeply [ingrained](#) in China's system, are vital for its '[Made in China 2025](#)' strategy, and also [feature](#) in China's 13th Five-Year-Plan (2016-2020). Rather than de-coupling these policies from public procurement China is likely to pursue them, also in the name of fighting [threats](#) to national security.

### China's long march towards GPA accession

When China became a WTO member in 2001, it committed itself to joining the [GPA](#), and became a GPA observer in 2002. [Since 2007](#) it has submitted several accession offers, which have shown gradual improvements but which have been [deemed](#) insufficiently ambitious by GPA members in terms of their coverage of sub-central level entities and SOEs. On account of China's largely decentralised governance system (see Table 2), central government procurement accounted only for [4.8 %](#) in 2014, with local governments representing 95.2 %. Non-coverage of sub-central and other entities, above all SOEs, amounts to gross underreporting of China's government procurement. According to 2014 statistics, it accounted for about [2.7 %](#) of China's GDP, far less the figures for GPA parties, which vary between 10 % and 15 %. No official data exist for public tenders carried out by SOEs and private companies under the TBL, but several [studies](#) have published estimates. OECD research suggests that aggregate average procurement spending accounts for [12 % to 20 %](#) of a country's GDP. Based on these assumptions, China's TBL market is likely to be several times bigger than its GPL market.

There are several reasons why joining the GPA or [signing](#) related bilateral agreements appears not to be a priority for China. The potential benefits for China of getting access to the '[relatively open](#)' procurement markets of GPA parties – to Japan at €27 billion, to the USA at €178 billion and to the [EU](#) at €352 billion according to the [European Commission](#) as of 2012 – do not necessarily outweigh the costs, including the [risk](#) of Chinese firms being excluded in general from accessing markets on national security grounds as shown by blocked [merger](#) and [investment](#) cases. Opening up China's TBL market to GPA parties meets with strong resistance from powerful Chinese SOEs and also entails exposing it to the WTO dispute settlement mechanism. China has a vital interest in purging public procurement procedures of pervasive [corruption](#) to get more value for money and in fighting the market fragmentation resulting from local protectionism and lack of competition. It seems to have little interest, however, in giving up a well-proven tool so as to foster industrial policies for its economic development.

### How the EU addresses non-reciprocity with China in public procurement

In its 2012 [resolution](#) on EU and China: unbalanced trade?, the European Parliament expressed its concern about 'the fact that foreign businesses face difficulties in accessing Chinese public procurement, which stands in contrast to the fact that access to European public procurement is guaranteed'. It called 'on the Commission rapidly to develop ... a European instrument to ensure reciprocity as regards openness in public procurement markets'. To level the playing field with non-GPA members reluctant to open public procurement, the European Commission in January 2016 submitted a [proposal](#) for an international procurement instrument (IPI). It amends a 2012 European Commission [proposal](#) that was [adopted](#) by the European Parliament with amendments in 2014, but stalled in a divided Council. The IPI would be based on 'financial adjustment measures', but would avoid EU market closure. Government procurement is *not* included in the scope of the future EU-China comprehensive investment agreement (CIA) under [negotiation](#) since [2013](#).

**Table 2 – Government procurement (GPL) 2012-14, € billion**

Year	2012	2013	2014
<b>Goods</b>	<b>57.0</b>	<b>63.9</b>	<b>67.9</b>
Central government entities	5.2	5.1	4.6
Local government entities	51.8	58.8	63.3
<b>Construction and engineering services</b>	<b>108.8</b>	<b>129.0</b>	<b>131.8</b>
Central government entities	3.3	4.2	4.9
Local government entities	105.5	124.7	126.9
<b>Other services</b>	<b>15.7</b>	<b>19.9</b>	<b>25.1</b>
Central government entities	1.6	1.8	1.2
Local government entities	14.0	18.0	23.8
Total	<b>181.7</b>	<b>212.9</b>	<b>224.9</b>

Data source: WTO trade policy [review](#) 2016 based on Chinese data, p. 98; data converted: RMB 1 equal to €0.13 on 21 September 2016.