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TTIP:
Public Procurement

In-depth analysis for the IMCO Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

TTIP: Opportunities and Challenges in the area of Public Procurement

IN-DEPTH ANALYSIS

Abstract

In TTIP the EU has offensive interests in greater coverage of public procurement markets in the USA. Consumers stand to gain from lower prices and better use of public funds. There is an opportunity to negotiate better access for EU suppliers. EU smaller or medium sized suppliers would especially benefit from more transparent US state and city public procurement procedures.

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CONTENTS

LIST OF ABBREVIATIONS	4
EXECUTIVE SUMMARY	5
1. INTRODUCTION	6
1.1 The nature of procurement markets	6
1.2 The size of EU and US procurement markets	7
1.3 Procurement in transatlantic trade relations	8
3. THE EU'S PREFERENCES IN TTIP NEGOTIATIONS	10
3.1 EU offensive interests	10
3.1.1 Removal of de jure preferences	10
3.1.2 Enhanced coverage	10
3.1.3 Transparency	11
3.2 EU defensive interests	11
4. MAIN ACHIEVEMENTS IN RECENT NEGOTIATIONS	12
4.1 The World Trade Organisation's Government Procurement Agreement	12
4.2 EU – Preferential Trade and Investment Agreements with other countries	12
4.3 OECD Principles on Integrity in Public Procurement	13
5. OPPORTUNITIES AND CHALLENGES	15
5.1 Opportunities	15
5.1.1 Enhanced coverage of US procurement	15
5.1.2 The opportunity to promote competitive, non-discriminatory procurement in the transatlantic market place	15
5.1.3 Removal of de facto preferences	15
5.1.4 Inclusion of US sub-federal level procurement	16
5.1.5 A better deal for small and medium sized companies	16
5.2 Challenges	16
5.2.1 Persuading the States to come in	17
5.2.2 Reciprocal concessions	17
5.2.3 Bid challenge(s)	17
5.2.4 Green procurement policies	18
CONCLUSIONS	19
REFERENCES	20

LIST OF ABBREVIATIONS

AIT	Agreement on Internal Trade
ARRA	American Recovery and Reinvestment Act
CETA	The EU – Canada Comprehensive Economic and Trade Agreement
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
ISDS	Investor-state dispute settlement
OECD	Organisation for Economic Co-operation and Development
SDR	Special Drawing Rights
SMEs	Small and medium-sized enterprises
TTIP	Transatlantic Trade and Investment Partnership
WTO	World Trade Organization

EXECUTIVE SUMMARY

Progress towards more competition in public procurement markets through TTIP is of considerable interest to EU consumers and suppliers. Procurement markets remain less open to competition than those in the private sector. If one excludes core government activities and sectors such as health and education some 3 – 4% of GDP could be open to competitive tendering. This would bring gains for consumers in the shape of reduced costs, more efficient use of public funds and reduced scope for corrupt practices. For EU suppliers TTIP offers the opportunity of enhanced access to public procurement markets in the USA at the federal level, but more especially at the sub-federal level of state and city/municipal contracts that are only partially covered by the existing provisions of the World Trade Organisation's (WTO) Government Procurement Agreement (GPA).

Probably the major challenge in the field of public procurement in TTIP is getting sub-federal government in the USA to agree to be covered by rules that would make these markets more transparent and free from explicit 'buy America(n)' provisions favouring local suppliers. If anything, recent trends suggest that state legislatures are consolidating their control in this field and making negotiation of greater coverage in TTIP more difficult.

Negotiations are also made more difficult because of differences between the EU and US over whose market is more 'open', because it is harder to understand if concessions are reciprocal. While it might be argued that the EU and US markets are about equally open on some measures, EU procurement is more transparent due to the comprehensive coverage of all levels of procurement by uniform EU rules. In contrast, state and city government procurement in the US is not fully covered by the GPA and procurement procedures vary from state to state and city to city making the market less transparent for potential EU suppliers.

Progress on procurement under the TTIP is likely to depend on linkages with other issues because of the scale of concessions the EU is seeking.

1. INTRODUCTION

KEY POINTS

- Public procurement accounts for an important share of GDP, 13% in the USA and 17% in the European Union.
- Competition in these markets continues to be restricted due to de jure and de facto preferences favouring local suppliers.

1.1 The nature of procurement markets

Public procurement markets make up an important part of all economies. In practice however, a smaller share of procurement than indicated by global figures is effectively open to competitive tendering. If one excludes core government activities and sectors such as health and education, some 3-4% of GDP is open to competition. Nevertheless there are opportunities in the TTIP given the size of the US and EU procurement markets. Not all US and EU procurement is currently covered by what are in fact bilateral reciprocal commitments under the 2013 revised Government Procurement Agreement (GPA) of the WTO. Further advances in coverage and thus competition in public contracts can result in important benefits in the form of more efficient use of public funds, enhanced competitiveness and reduced scope for corrupt practices.

Preferences for local suppliers can be seen as a regulatory barrier to trade and clearly distort competition. As for all regulatory barriers their removal is more difficult than removing border measures. Competition in procurement markets is restricted by de jure or legal provisions granting preferences to local suppliers as well as de facto preferences that exist due to, for example, the discretion left in procurement rules. The existence of de facto barriers means that access to procurement markets is often achieved through the establishment of affiliates in the target market. The nature of such de facto preferences in particular makes the introduction of greater competition in transatlantic procurement markets challenging. For the EU there is a major challenge in trying to persuade state or city level government, which accounts for 65% of US public procurement, to accept greater coverage. A further challenge is to get the US Congress to agree to waive the remaining Buy America(n) provisions that represent de jure preferences for US suppliers at the federal level and for certain state level procurement that is conditional upon federal funding.

A feature of public procurement markets is a deep-seated resistance to using tax dollars or euros to pay for contracts for foreign companies and employment for foreign workers. This seldom wins many votes. However, there is less resistance to the awarding of contracts to non-national firms if the goods or services are supplied by a local affiliate, where tax revenue at least goes to provide local employment. This is what the European Commission has termed indirect supply or indirect imports. As will be shown below competition in procurement markets has, at least to date, tended to come more from such indirect imports or supply from the affiliates of non-national firms than from imports. For companies to make the investment in local capacity to supply target public markets however they need to have confidence that they will have a fair chance of winning contracts. This is where rules governing the award of public contracts and especially transparency provisions are important.

Public procurement rules seek to 'open' markets by requiring national treatment and thus prohibiting de jure preferences for purchasing entities covered by them. The coverage of EU and international rules on procurement, such as the GPA, is determined by thresholds and by schedules listing the purchasing entities covered. The thresholds are intended to

limit the compliance costs by focusing coverage on the bigger more important contracts. With millions of contracts awarded in any one year, full coverage would impose too great a compliance cost on the entities awarding the contracts. Thresholds vary according to the type of contract. Thus supply contracts, for example for computers or other high volume equipment orders have a relatively low threshold (of 130,000 SDR), works procurement, such as roads, bridges etc. a higher threshold (of 5m SDR) and some entities, such as private utilities subject to government regulation and thus potentially open to government influence have an intermediate threshold (of 400,000 SDR). As a result of negotiations over recent decades the thresholds used by the EU and US in agreements with other countries, such as in PTAs, are the same as those used in the GPA. Coverage of procurement including that in the US and EU has also been influenced over the years by reciprocity. As a result the limited coverage of sub-federal level purchasing entities in the US has led the EU to limited coverage of some EU procurement (in utilities and sub-central government) in order to achieve a broad reciprocity of coverage.

De facto barriers are much harder to address. International agreements do this by requiring covered entities to comply with rules on transparency, for example with regard to contract award procedures and criteria and calls for tender. More detailed rules on transparency have been developed to try and reduce the scope for de facto preferences due to the scope for discretion in how general principles are applied. Over the last 40 years the EU and US have jointly developed such rules in the OECD and these have been applied in the GPA as well as in both EU and US comprehensive trade and investment agreements with third countries.

Experience in the US, EU and elsewhere suggests that rules requiring national treatment or transparency have little impact unless backed up by the effective enforcement. Compliance rules have therefore been introduced. Initially added to the Canada – US Free Trade Agreement, bid challenge provisions have also been adopted in the GPA and EU. These provide aggrieved tenderers with the ability to challenge illegal contract award procedures via administrative or legal reviews. In recent years there has also been work in the OECD to promote best practice and integrity in public procurement to enhance objectivity and bear down on corruption.

1.2 The size of EU and US procurement markets

According to the most recent OECD figures the US procurement market accounts for 13% of GDP (OECD, 2013) while the EU average is around that of the OECD as a whole namely 17%. The EU and GPA regimes distinguish between type I procurement (central government), type II (state and local government), and type III (parastatal bodies such as nationalised industries or utilities). In the EU types I, II and III each account for roughly one third of procurement, with type III declining with privatisation and deregulation. The EU regime for procurement covers all three in a comprehensive manner. This means that all procurement in the EU above the thresholds is covered by a uniform set of rules, something that enhances the transparency of the EU procurement market(s). There remain, however, some problems with the implementation of these uniform rules.

In the USA about 65% of procurement is at the sub-federal level, in other words at the state and local government/city level. There are few parastatal purchasing entities apart from a number of port authorities and one power utility. Coverage of sub-federal procurement is incomplete, with only 37 states agreeing to coverage under the GPA and then not full coverage. In addition only federal purchasing in the US is covered by a uniform set of rules. State level tendering and contract award procedures vary as do those at the level of cities.

The EU procurement market is therefore both larger than that in the US and is subject to a one uniform set of rules, which is not the case in the USA.

1.3 Procurement in transatlantic trade relations

Precedent shapes all trade policies and this is the case for procurement in the TTIP negotiations. The transatlantic debate on introducing competition into procurement markets is longstanding and can be traced back to the pre GATT period. In the early days of the GATT the US sought to establish multilateral rules for procurement, but without support from European governments. International rules governing procurement have been pioneered in transatlantic negotiations and it is fair to say that the existing WTO GPA has been very largely shaped by the EU – US. In the 1960s and 70s the US sought access to selective EU markets (power and telecommunications) in which contracts were invariably awarded to national champions. The EU favoured a broader approach and one that included state level procurement in the USA. The creation of the EU Single Market from the mid 1980s liberalised EU procurement so that a broader agreement with the USA could be reached in parallel with the negotiation of the Uruguay Round in the form of the 1994 GPA. But coverage was limited because the US could offer only partial access to sub-federal level procurement. In addition to the partial coverage of 37 states there was an exchange of letters in 1995 between the US and the EU that extended partial coverage to two further states and some cities.

Efforts to extend the coverage within the framework of negotiation of the revised GPA resulted, eventually, in a further extension of coverage, but did not succeed in any significant increase the number of signatories to the GPA. Access to the US market remains limited due to de jure Buy America(n) provisions and the fact that sub-federal level procurement is still only partially covered. The EU therefore continues to withhold binding commitments on coverage of some EU procurement from suppliers in the USA to ensure reciprocity. The comprehensive coverage of the EU regime means that it could potentially offer more coverage for the US. Under the GPA the EU is ready to offer coverage of all procurement. Increased binding coverage of procurement in transatlantic trade is therefore constrained by the fact that the US does not offer comprehensive coverage of sub-federal procurement. Note that US purchasing entities may still purchase from EU suppliers at any level even if there is no legal obligation to offer national treatment under the GPA. The same is of course also true for EU purchasing entities.

A contentious issue in transatlantic procurement is the existing degree of openness of the respective markets. The European Commission has argued that the EU market is more open because 95% of procurement above the GPA thresholds (of a total of euro 370 bn in 2011) is 'internationally committed' while the US only commits to 32% (of euro 559 bn above the GPA thresholds) (European Commission, 2012). This measure of openness is based on commitments under the GPA, and as noted above, the EU withholds some coverage in the bilateral arrangement with the US under that agreement. If the reciprocal openness of the two markets were really this different one would have to ask what the Commission was doing when it negotiated the bilateral agreement with the US under the GPA.

Other estimates of relative openness have been made on the basis of the penetration of the total public sector markets by imports. These suggest that the EU and US markets are more or less equally open at 4.5 % for the EU and 4.4% for the US (Messerlin, 2013). But these figures are based on the total public consumption. It is unrealistic to see all public sector consumption as potentially open to competition. The 4.5% figure is also only based on imports and therefore does not account for 'indirect' imports, which in the case of the EU account for 14% of public contracts with US companies being the most significant

suppliers via local affiliates. There are unfortunately no equivalent figures for indirect imports into the USA.

General figures on openness, even if there were reliable comparative figures would however obscure the importance of openness in particular sectors. In some sectors public procurement contracts have a significant strategic impact on markets. Winning a major contract for railway equipment can, for example, mean that the successful company gains a major competitive advantage that can endure for many years. Economies of scale in such 'network industries' mean that the chosen technology will shape procurement, and thus access, for a decade or more. Winning large contracts can also mean that research and development costs can be recuperated and thus the competitive position of the company enhanced. It was these sort of considerations that led the Commission to propose measures to enable tougher, narrower reciprocity to be pursued in certain cases (European Commission, 2012). The Airbus – Boeing competition for air tankers is just one of the most public examples of such contracts (currently competing for orders in Korea).

3. THE EU'S PREFERENCES IN TTIP NEGOTIATIONS

3.1 EU offensive interests

KEY POINTS

- The EU has clear offensive interests in procurement in the shape of the removal of de jure Buy America(n) preferences and greater coverage of state and city procurement markets in the USA.
- It also has an interest in pressing for more uniform procedures across state and city procurement.

3.1.1 Removal of de jure preferences

The transatlantic debate on procurement began in the 1960s when the US introduced strengthened Buy American provisions for US procurement in the defence industry. A desire to remove such de jure restrictions remains an EU offensive objective. The EU would like to see the removal of some remaining buy America provisions that affect EU access. While the US has waived the provisions of the 1933 Buy American Act to signatories of the GPA, there remain some preferences. The Berry Amendment requires the Department of Defence to buy non-lethal equipment from US suppliers. As a major purchasing entity this is an important preference for everyday products supplied to the US military and includes things such as uniforms, delivery trucks, etc. that have no immediate national security relevance.

Buy America Act provisions apply to the purchase of steel and manufactured goods for use in rail and light rail projects through the USA funded by the Federal Department of Transport under the Surface Transport Assistance Act of 1982.

All politicians come under pressure to ensure that tax revenue is spent on creating local employment. This political pressure to apply preferences for US suppliers was illustrated in 2009 when federal investment to counter the effects of the financial crisis in the form of the American Recovery and Reinvestment Act (ARRA) included buy American provisions. Only after EU protests was the US Administration able to waive these provisions for GPA signatories. It would therefore be in the EU's interests to have a commitment not to include de jure preferences that affect EU suppliers in future legislation.

A further de jure preference is that applied for small and medium sized companies and minority owned firms in the US. In the USA, procurement below a threshold of \$150,000 is set aside for small and medium sized companies.

3.1.2 Enhanced coverage

Another enduring aim of EU policy in transatlantic trade and investment as a whole has been to extend the coverage to the state level for procurement but also for services, technical regulations and investment. In the field of procurement it has been only partially successful. As noted above in the 1994 GPA and 1995 exchange of letters between the EU and US parties agreed on partial coverage of 39 US states for EU suppliers. The 1995 exchange of letters, which provided the reciprocal agreement between the EU and US that enabled the implementation of the GPA, also brought in a number of US cities such as Boston, Chicago and Detroit. These cities however only provide for treatment of EU suppliers that is equivalent to that granted to 'out-of-state' suppliers 'when the cities concerned look at out-of-state suppliers.' (Grier, 2014a) In other words only when the city

administrations offer contracts to suppliers from other US states will EU suppliers get 'national' treatment in these cases. Important state level purchasing in construction services, steel and some goods sectors are also excluded and eleven states remain completely outside coverage. The US states also use higher thresholds in some cases, for example for goods/suppliers. As with all state level involvement in trade agreements this is due to state competence, so that the US negotiators can only include state purchasing if the states were ready to be included.

The EU offensive interests in terms of sectoral coverage include coverage of airports, railways and mass transit authorities, where purchasing is of importance to EU rail and transport equipment suppliers.

The EU would also like to see coverage extended for type I and type III procurement. In terms of type I (federal level procurement) the EU could aim for the inclusion of all Federal level purchasing that is covered by the Federal Acquisition Authority, and therefore include such entities as the Federal Aviation Authority (Woolcock and Grier, 2015). Coverage of US utilities other than the one or two public utilities is unlikely.

3.1.3 Transparency

For covered entities the US applies the GPA provisions and thus the transparency provisions on publication of laws, procedures and calls for tender included in the GPA. These are therefore on a par with the EU's obligations, because EU rules and the GPA rules are broadly equivalent. In one area however, transparency in US procurement is inferior to that in the EU and this again involves the sub-federal level procurement. While all purchasing above the thresholds in the EU must comply with EU regulations, this is not the case for state and municipal level procurement in the USA. There is no uniform procedure for the award of public contracts at the state or municipal level in the US. It should perhaps be noted that compliance with EU rules and procedures is less than complete and should of course be improved. But this absence of any uniform set of procedures in the USA poses a particularly important de facto barrier for small and medium sized EU companies that are not all going to have the resources needed to monitor and comply with a range of different procedures across the US procurement markets. There does not appear to be any discussion of the need for more uniform procedures in the USA.

3.2 EU defensive interests

As in any trade agreement the EU would be expected to make reciprocal concessions in order to achieve some of the aims set out above. Within the issue of procurement reciprocity has been a pervasive feature of transatlantic negotiations in the past and is likely to continue to be the case in the future. Those entities currently excluded from in the bilateral balance with the US to achieve reciprocity would therefore be potentially open to enhanced competition from the US in any significant extension of coverage in TTIP.

This would mean that EU sub-central procurement in services could be open to competition from US suppliers as a quid-pro-quo for EU suppliers' access to the US state level procurement. Procurement by EU utilities could also be included in such a reciprocal negotiation. At the moment the EU includes only the power sector in its coverage commitments to the US under the GPA.

4. MAIN ACHIEVEMENTS IN RECENT NEGOTIATIONS

KEY POINTS

- The EU and USA have shaped procurement rules for more than 40 years. These now take the form of the WTO's Government Procurement Agreement (GPA) and have also been adopted in preferential agreements concluded by the EU and US with third countries.
- In CETA the EU has made a significant advance through the inclusion of provincial, territory and crown corporation procurement in Canada.

4.1 The World Trade Organisation's Government Procurement Agreement

As noted above the US and the EU have been the main parties to the GPA and have largely determined the nature and scope of that agreement. The GPA was renegotiated during the 2000s with the major aim of bringing in new members and in particular China. On accession to the WTO in 2001 China had agreed to negotiate membership of the GPA, but this has still not been achieved. The successful conclusion of a negotiation with China could have a significant effect. It would mark a major advance in the promotion of the rules-based approach to public procurement internationally that the EU has actively promoted for many years and could, depending on the scope of China's commitments, bring in far more in terms of future procurement prospects for EU suppliers than is likely with the TTIP. Various revisions of the GPA rules were agreed as early as 2006. For example, provisions were added to facilitate easier membership for developing countries, but these have yet to have any significant effect in increasing the number of developing country signatories.

The estimated additional procurement covered by the revised GPA that came into force in 2014 with the ratifications by two thirds of its members was \$80 - \$100bn per annum. With this extension that part of public purchasing in the EU and US that could be relatively easily brought under international rules has already been included in the GPA.

4.2 EU – Preferential Trade and Investment Agreements with other countries

The EU seeks to include comprehensive provisions on public procurement in all the PTAs it negotiates. With developing country partners it has agreed to asymmetric coverage, such as in the case of the EU – CARIFORUM Economic Partnership Agreement, which is based largely on GPA type rules, but does not initially commit the CARIFORUM parties to make commitments on coverage. PTAs with other middle income developing countries have also offered a degree of asymmetry favouring the less developed party. The agreements with Columbia and Peru as well as with Central America offer these parties more or less the same coverage of EU procurement as offered by the EU in the GPA (to which these countries are of course not signatories). Columbia-Peru and Central America have agreed to rules very similar to those of the GPA and made commitments covering important shares of central government procurement and some sub-central government procurement, but asymmetry remains (Woolcock, 2015).

In 2010 the EU concluded the Comprehensive Trade Agreement with (The Republic of) Korea. As Korea is a signatory of the GPA (since 1997) the EU – Korea provisions were largely based on the GPA. There was some GPA plus provisions in the shape of coverage of build and operate contracts. There are also negotiations under way with Japan that could have an important impact. Other PTA negotiations, such as with India, have great

potential but in the case of India the prospects for a comprehensive agreement on public procurement look fairly remote. The CETA is the most important recent development in terms of completed agreements. In the CETA the EU had similar aims to those in TTIP in that is sought the inclusion of the coverage of sub-federal entities. Like the USA, Canada had only included federal procurement (type I) in the GPA and systematically excluded the Provinces and Territories (type II) from coverage. It also excluded Crown Corporations, which have the character of parastatal bodies and can be classified as type III procurement (EU – Canada SIA, 2011).

Procurement assumed an important role in the EU – Canada negotiations. Indeed, the inclusion of the Provinces in any agreement on procurement was a condition for reopening the negotiations in 2010 on the part of the EU. In the case of Canada the federal government was able to persuade the Provinces to engage in the negotiations, something that has not (yet) happened in the United States. This was facilitated by the fact that Canada had adopted the Agreement on Internal Trade (AIT) in 1995 that provided non-discrimination to out-of-province suppliers in Canada. In other words the Provinces had already begun to give up some scope to maintain preferences for local suppliers. In CETA the EU was therefore able to negotiate an extension of coverage to include Provinces and Territories as well as the coverage of federal and provincial level Crown Corporations. Some exclusions still remain, such as energy utilities in Ontario and Quebec as well as some local content rules for urban transport in these two provinces. But the EU has succeeded in establishing coverage of type II and III procurement.

In terms of the rules the CETA is in line with the now standard GPA model. Thresholds are also in line with the GPA thresholds for federal procurement with slightly higher thresholds for the provincial level, again in line with the practice in other GPA signatories. Canada also agreed to provisions that will enhance transparency, such as the creation of a single electronic website in Canada for all procurement. This should significantly enhance transparency and thus the scope for EU SMEs to bid for contracts, once it is introduced. Canada has five years after the entry into force of CETA to implement this single source.

4.3 OECD Principles on Integrity in Public Procurement

In addition to negotiating the revised GPA and PTAs the EU has also been active in OECD work on public procurement (OECD, 2009). This has led to the development of the OECD Principles for Integrity in Public Procurement. Although 'soft law', in other words a voluntary code, such principles could provide a means of addressing some of the de facto barriers to competition in public procurement independently of reciprocity negotiations on coverage. Transparency provisions in international agreements such as the GPA or TTIP help by providing objective criteria for contract awards, the use of standard documentation and award procedures. But all procurement chapters in trade agreements include scope for discretion in the application of such criteria. The OECD Principles seek to go further by promoting best practice in procurement, which, if generally applied could have as significant an effect on opening procurement to competition as politically charged negotiations over scheduling, in other words the coverage of purchasing entities in annexes of trade agreements such as TTIP. The OECD code includes recommendations on such things as better planning across the whole procurement cycle, including the fulfilment of contracts; better training and the development of professional disciplines among procurement officers; and the provision of proper cost-benefit analysis when procurement is used in the pursuit of other policy objectives, such as 'green procurement', which is finding increasing application. Both the EU and USA fall short of full implementation of the code, so peer review mechanisms are applied in the OECD to promote more application (OECD 2013).

The EU has therefore contributed to shaping international procurement rules through its contribution to the GPA revision and through the inclusion of comprehensive procurement provisions in its recent PTAs. It has thus helped to shape the framework of rules for procurement. This framework has also influenced voluntary approaches such as the UNCITRAL Model Procurement Law. Through cooperation in the OECD with the United States in particular and other OECD states, the EU is also seeking to promote best practice in public procurement at all levels of government and thus reduce the scope for corruption in procurement.¹

¹ Whilst estimates of corruption are inevitably very approximate, surveys by the World Economic Forum have shown that bribes are more prevalent in procurement than any other activity. It has been estimated that as much as 20-25% of the value of public contracts could be lost due to corrupt practices (OECD, 2013).

5. OPPORTUNITIES AND CHALLENGES

KEY POINTS

- TTIP offers opportunities for EU consumers in the form of lower prices, more efficient use of public funds and reduced scope for corruption.
- For EU suppliers, especially small and medium sized firms that do not have the resources to invest in affiliates in the US TTIP offers an opportunity to compete more fairly with US suppliers.

5.1 Opportunities

5.1.1 Enhanced coverage of US procurement

The opportunities in procurement in TTIP are significant and come in the form of potentially greater access to US procurement markets. In the TTIP negotiations procurement is an EU 'offensive' interest meaning that it is the EU that has an interest in having it on the agenda and pressing for a comprehensive agreement. This is essentially because the EU's regime for procurement is comprehensive, covering all types of public procurement. This in turn means greater transparency of procurement markets in the EU and greater ease of access.

5.1.2 The opportunity to promote competitive, non-discriminatory procurement in the transatlantic market place

The inclusion of comprehensive provisions on public procurement in international agreements can be expected to promote increased competition and thus efficiency in procurement markets. It therefore offers the opportunity of better value for money from public contracts and thus for EU consumers and taxpayers. As the experience in the EU has shown, this does not necessarily mean and increase in cross border supply of procurement markets. Greater transparency enables more potential bidders to enter the market. Provisions on transparency and non-discrimination provide potential suppliers with the confidence to bid for contracts they otherwise would not. Access to procurement markets is more likely via the establishment of local affiliates. But potential suppliers will not invest in such local supply capacity unless they are confident that procurement will be transparent and there will be no discrimination in favour of indigenous companies. By providing this confidence an agreement on procurement in TTIP can therefore provide the opportunity of efficiency savings from increased competition.

In the debate on TTIP, the estimates of the potential benefits of the agreement have been questioned. The projections suggest relatively small welfare gains from the removal of barriers in procurement markets. These put welfare gains at euro 10.8 bn per year (in the long run), with greater welfare effect for the EU at euro 9.7 bn per year than in the US euro 0.9 bn (Ecorys study, 2011). While the assumption of a modest 25% reduction in barriers to procurement may be realistic, the model cannot easily measure the confidence factor. In other words the conclusion of TTIP in itself could lead to more investment in supply local capacity and thus result in more gains than models suggest.

5.1.3 Removal of de facto preferences

There remain some significant de jure barriers to EU access to US procurement markets. These have been set out above. TTIP offers an opportunity to remove these remaining Buy America Act provisions of 1983 that provide for de jure preferences for US suppliers for federally funded transport systems and therefore offers an opportunity for EU suppliers of iron and steel and manufactured products for highways, transit systems, railways and

airports. The Berry Amendment requires standard, non-military supplies purchased by the Department of Defence as well as steel products to be US – produced.

In addition to dealing with the existing discriminatory measures, TTIP offers an opportunity to head-off future buy American initiatives.² As the American Recovery and Reinvestment Act of 2009 showed, there remains a strong inclination in the US Congress to make use of buy national policies. A TTIP agreement could discourage such action and possibly include a provision that would exclude the EU from any future de jure restrictions.

5.1.4 Inclusion of US sub-federal level procurement

Perhaps the greatest opportunity in TTIP is the extension of procurement rules prohibiting discrimination and enhancing transparency to more sub-federal procurement in the USA. The inclusion of state level government is a general aim of TTIP. Arguably the most gains in terms of increased coverage of procurement could come at the state and city levels.

5.1.5 A better deal for small and medium sized companies

An agreement in TTIP should offer better access for EU small and medium sized companies that find it significantly harder to overcome de jure and de facto restrictions by investing in local production facilities in the US or to know how to go about bidding for contracts. It has been shown that indirect exports account for 14% of EU procurement. While there are no equivalent figures for the USA, it can be assumed that large EU companies pursue the same strategy when seeking to access US procurement markets. But SMEs may not have the resources to do so. Nor do SMEs have the capacity to monitor the diverse procurement procedures used in the USA. As GPA rules do not cover all sub-federal level procurement there is no obligation on purchasing entities in the US to provide information on their procurement procedures or to advertise calls for tender. An extension of transparency rules to all levels of government in the US, as is the case in the EU, would therefore help SMEs and help to redress what might be seen as asymmetry of information favouring US suppliers to the EU market. In the CETA negotiations the EU was able to establish a single electronic website for all procurement in Canada. Something equivalent for the US would be a great opportunity for EU SMEs.

This leads to a general point concerning the US domestic procurement regime. The lack of uniformity in state and municipal processes can be seen as a significant barrier to competition. TTIP offers an opportunity to get this issue on the agenda. Uniform procedures would offer considerable benefits for competition within the US market.

5.2 Challenges

Given the nature of procurement markets it is in the EU's interests to have a comprehensive agreement on procurement in TTIP. Whilst all trade agreements result in costs and benefits there seems little doubt that more comprehensive coverage of procurement will on balance benefit the EU, hence the EU's clear offensive interest in procurement.

4.2.1 Getting the US Congress to cede on Buy America(n) provisions

The greatest challenges facing the EU would seem to be persuading the US Congress and the states to agree to a more comprehensive agreement. This is the case for the removal of Buy America de jure preferences in federal procurement or on procurement funded by

² The broad Buy American Act of 1933 provides for general statutory basis for the US Congress to introduce de jure preferences for US suppliers. These provisions are waived for signatories of the WTO Government Procurement Agreement, but the position is not clear for new legislation. The similarly named but narrower Buy America Act of 1983 relates to de jure preferences for US suppliers for procurement of mass transport systems that are partially funded by the federal government.

federal money. The Congress is likely to be reluctant to remove the remaining de jure provisions or to agree to any commitment not to apply buy American provisions in the future.

5.2.1 Persuading the States to come in

Equally challenging and equally political is trying to persuade the states and other sub-federal entities to agree to extending coverage. At the time of the 1994 GPA the US Trade Representative's Office (USTR) was able to persuade some states to be included in order to at least partially match the potential increase in coverage made possible by the creation of the EU Single Market. This was done through state governors. Subsequently a number of state legislatures have enacted legislation to remove the power to engage in such negotiations from governors and place it with the state legislatures. This is on balance likely to make it even harder to include the states in any agreement on procurement.

5.2.2 Reciprocal concessions

For better or worse, agreements in procurement have been based on reciprocal commitments on coverage. If the EU is to persuade the US to accept greater coverage it will therefore need to offer something in return. As noted above the EU has withheld coverage of type II services procurement from the US and much of type III procurement (utilities except for the power industry). Just as greater coverage of the US market may benefit EU suppliers, so concessions to include these sectors will mean greater competition for EU suppliers.

Econometric studies suggest that trade flows are projected to grow slightly in procurement on both sides, but in percentage terms more growth will occur in the US. This is not unexpected, as discussed above the nature of the procurement markets on both sides of the Atlantic is such that indirect supply is more the norm. Long term household income and wage level effects range between 0.0 and 0.01 percent for the US and between 0.03 and 0.07 for the EU. With regard to the impacts at the sectoral level, the motor vehicles, chemicals and food & and beverages sectors are projected to benefit (in percentage terms) the most in the EU. In the US, electronics, metal production and machinery would gain the most (in line with the general results). Noticeably, construction is also expected to benefit in both the EU and US (CEPR, 2013).

In this context however, it is worth noting that US companies have been the most successful non-EU suppliers on the EU market via indirect imports. While the EU has retained powers to apply reciprocity in the utilities sector these have not been systematically use of by member state utility companies.

5.2.3 Bid challenge(s)

The debate on TTIP in the EU has focused on the inclusion investor-state dispute settlement (ISDS) provisions. The existence of bid challenge in procurement has been rather overlooked. The bid challenge provisions under the GPA (which are more or less the same as the compliance provisions in EU procurement legislation) enable companies to seek a review of contract awards when they believe these have been made illegally. So this grants certain rights to companies to challenge decisions of governments or public purchasing entities. It is therefore somewhat analogous to granting rights to investors to challenge the treatment of investors by states. But there are important differences to ISDS. First, the bid challenge was introduced with the GPA in 1994 and has not been widely used. Second, review is by means of a judicial or administrative procedure, not private lawyers. And third, financial penalties can be limited to the costs of bringing a complaint.

5.2.4 Green procurement policies

In the past and to some extent arguably still, public procurement has been used as an instrument of industrial policy. In the EU as part of the Single Market Programme and internationally through the various agreements in the field the scope for such use has been disciplined. Today public procurement is being used increasingly in the pursuit of other policy aims such as a cleaner environment and lower carbon emissions. This raises the question of whether stronger disciplines or more effective rules on procurement will limit this 'policy space'. Disciplines on procurement require non-discrimination not deregulation as such. Therefore conditions in procurement contracts that constitute 'green procurement practices' should not be affected.

CONCLUSIONS

TTIP offers an opportunity to enhance efficiency gains by further steps to improve competition in transatlantic procurement markets. For consumers this offers the opportunity of reduced costs, better use of public funds and less scope for corrupt practices and bid rigging.

Greater coverage of sub-federal level procurement in the USA offers an opportunity for increasing access for EU suppliers. Better transparency through greater coverage and improved information on contract award procedures in the US markets will be of particular interest to EU SMEs. TTIP offers an opportunity to get the issue of the lack of uniformity of procurement procedures at the sub-federal level on the agenda. The biggest challenge will be to persuade US legislators at both the federal and state levels to agree to this greater coverage.

In recent WTO GPA negotiations some progress has been made, but this has still not included sub-federal procurement in the USA. In CETA however, the EU has succeeded in extending coverage to sub-federal procurement. This sets a positive precedent for TTIP.

Living agreement elements in the TTIP, such as a redoubling of efforts in the Procurement Dialogue, provide a means of furthering best practice along the lines of the OECD Principles that offer an alternative general, if non-binding approach to objective, competition-based procurement practices;

REFERENCES

- Centre for Economic Policy Research (CEPR) (2013) Reducing Transatlantic Barriers to Trade and Investment, CEPR
http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf
- Ecorys (2009) Non-Tariff Measures in EU – US Trade and Investment – An Economic Analysis, Rotterdam.
- European Commission (2011)(a) DG Internal Market and Services: Final Report. Cross Border Procurement above EU Thresholds, Ramboll Management Consulting (www.rambollmanagement.com).
- European Commission (2011)(b) Commission Staff Working Paper. Evaluation Report, Impact and Effectiveness of EU Public Procurement Legislation. SEC (2011) 853.
- European Commission (2012) Proposal for a Regulation of the European Parliament and the Council on access of third-country goods and services to the Union’s internal market in procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries COM (2012) 124 final, 21 March 2012.
- European Commission (2013), “EU-US Transatlantic Trade and Investment Partnership: Public Procurement”, Initial EU Position Paper, July
http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151623.pdf.
- Grier, J. (2013), “Challenges of Covering State Procurement in TPP and TTIP”, Perspectives on Trade, (website posting), 16 December
<http://trade.djaghe.com/?p=190> (Dec. 16, 2013).
- Grier, J (2014a), “Can the U.S. Offer Comprehensive Coverage of States in TTIP?”, Perspectives on Trade, (website posting), 3 March (<http://trade.djaghe.com/?p=473>).
- Grier, J (2014b), “State Procurement Restrictions in Agreements” (Background), Perspectives on Trade (website posting), 14 October
<http://trade.djaghe.com/?p=906>.
- Messerlin, P.A. and S. Miroudot (2012), “Public procurement markets: Where are we?”, VoxEU, 7 September (<http://www.voxeu.org/article/public-procurement-markets-where-are-we>).
- OECD (2009), “Principles for Integrity in Public Procurement”, Paris.
- OECD (2013), “Implementing the OECD Principles for Integrity in Public Procurement: Progress since 2008”, Paris.
- US Trade Representative (USTR) (2011), “Benefits for the United States from the Revised WTO Government Procurement Agreement”, 15 December
<https://ustr.gov/about-us/policyoffices/press-office/fact-sheets/2011/december/benefits-united-states-revised-wtogovernment-procur>).
- USTR (2013), Final Report of the United States-European Union High Level Working Group on Jobs, 11 February (<https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2013/final-report-us-eu-hlwg>)
- Woolcock, S. (2013), “Policy diffusion in public procurement: The role of regional trade agreements”, International Negotiations, Vol. 18 (1), pp. 153-173.
- Woolcock S and Grier J H (2015) Public Procurement in the Transatlantic Trade and Investment Partnership Paper No 2 CEPS – CTR ‘TTIP in the Balance’, CEPS, Brussels.

- Woolcock. S (2015) Diffusion of norms in public procurement: the high water mark in liberalisation? Paper for Conference in St Gallen 19th January 2015 s.b.woolcock@lse.ac.uk
- World Trade Organization (WTO) (2011), "Historic deal reached on government procurement", 15 December (www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm).
- WTO (2014), "Revised WTO Agreement on Government Procurement enters into force", 7 April (www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm).

NOTES

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