

International public procurement instrument

2012/0060(COD) - 21/03/2012 - Initial legislative proposal

PURPOSE: to improve the conditions under which EU businesses gain access to the public procurement markets of third countries.

PROPOSED ACT: Regulation of the European Parliament and of the Council.

BACKGROUND: in the negotiations on a revised Government Procurement Agreement (GPA) in the context of the World Trade Organisation (WTO) and in bilateral negotiations with third countries, the EU has advocated an ambitious opening of international public procurement markets. Some **EUR 352 billion of EU public procurement** is open to bidders from member countries of the WTO agreement on government procurement.

However, many third countries are reluctant to open their procurement markets to international competition. Currently, **EU suppliers face manifold restrictive procurement practices** in many of the countries that are the EU's main trading partners.

The value of US procurement offered to foreign bidders is currently just EUR 178 billion and EUR 27 billion for Japan, whereas only a fraction of the Chinese public procurement market is open to foreign business.

All in all, **more than half of the world's procurement market is currently closed due to protectionist measures** and this share is only growing. As a result, only EUR 10 billion of EU exports (0.08% of EU GDP) currently find their way in global procurement markets, whereas an estimated EUR 12 billion of further EU exports remains unrealised due to restrictions.

In contrast, the EU has kept its public procurement market largely open to international competition, despite growing pressure on its domestic market, in particular from emerging economies on certain key sectors (railways, construction, IT services). With the exception of some provisions limited in scope to supply and service contracts in the utilities sector, the EU has not exercised its power to regulate the access of foreign goods, services and companies to the EU's public procurement market.

Given the rising importance of emerging economies, **the absence of a level playing field causes many problems**. This initiative aims at solving these problems (i) by strengthening the position of the European Union when negotiating access for EU companies to the public procurement markets of third countries, in order to open up our trading partners' markets; (ii) clarifying, for this purpose, the rules governing access by third-country companies, goods and services to the EU's public procurement market.

This initiative implements the Europe 2020 strategy and the [Flagship Initiative on Integrated Industrial Policy for the Globalisation Era](#). It also implements the [Single Market Act](#) and the [Communication on Trade, Growth and World Affairs](#).

IMPACT ASSESSMENT: several options have been considered by the Commission:

- **Option 1:** not to take any additional action, and continue with business as usual with the international market access negotiations (possibly in a reinforced manner) with the European Union's trading partners.

- **Option 2:** upgrading the implementation of existing tools under Directive 2004/17/EC (Articles 58 and 59), based on better guidance or an extension of the scope of these tools to cover the entire scope of Directives 2004/17/EC and 2004/18/EC.
- **Option 3:** close generally or by sector the EU public procurement market to goods, services and suppliers from third countries, subject to the EU's international obligations in this field.
- **Option 4:** create an autonomous instrument that would strike the right balance between, on the one hand, the need to enhance the Union position in negotiations on market access, and on the other hand, the preservation of a competitive procurement regime in the EU.

The Commission favours the fourth option.

LEGAL BASIS: Article 207 TFEU.

CONTENT: the proposal establishes a **comprehensive EU external public procurement policy** that governs the access of foreign goods and services to the EU public procurement market and includes mechanisms to encourage the EU's trading partners to start market access discussions.

The main points of the proposal are as follows:

Goods and services benefiting from EU commitments: the proposal reflects in EU legislation the principle that, on the EU's internal market in procurement, goods and services benefiting from market access commitments are **treated equally to EU goods and services** and it extends this treatment to goods and services originating in least-developed countries.

Goods and services not benefiting from market access commitments: for contracts with an estimated value **equal or above EUR 5 million**, the Commission may approve Contracting authorities/entities **excluding** tenders where the value of non-covered goods and services exceeds 50% of the total value of goods and services included in the tender.

After informing potential tenderers, in the contract notice, of its intention to exclude such tenders, a contracting authority/entity has to notify the Commission when it receives tenders that fall into this category. The Commission would give its approval to the exclusion if there is a lack of substantial reciprocity in market opening between the EU and the country from which the goods and/or services originate. The Commission will approve the exclusion where the goods and services concerned fall within the scope of a market reservation by the EU in an international agreement.

EU mechanism to increase leverage on market access: the Commission may (i) conduct **investigations** to verify the existence of restrictive procurement practices; (ii) invite the country concerned to enter into **consultation** in order to address such restrictive practices and thereby create a better market access situation for EU companies; (iii) temporarily **restrict** the access of goods and/or services from that country to the EU public procurement market.

Such measures may in principle consist of (i) the disqualification of certain tenders made up for more than 50% of goods or services originating in the country concerned; and/or (ii) a mandatory price penalty on those goods or services tendered which originate in the country concerned.

Abnormally low tenders: as a complement to the provisions on abnormally low tenders in the proposed reform of the public procurement directives, contracting authorities/entities will be required to inform the other tenderers when they intend to accept abnormally low tenders where the value of non-covered goods and services exceeds 50% of the total value of goods and services included in the tender.

BUDGETARY IMPLICATIONS: the proposal does not have budgetary implications. The additional tasks for the Commission can be met with existing resources.

DELEGATED ACTS: the proposal contains provisions empowering the Commission to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union.