

## UNICE COMMENTS ON THE ACTIVITIES OF THE WTO REGARDING PUBLIC PROCUREMENT

(REVISION OF THE GPA, TRANSPARENCY AGREEMENT, GATS)  
- WITH PARTICULAR ATTENTION TO THE PROPOSALS  
OF THE EUROPEAN COMMISSION -

### I. General comments

UNICE welcomes the activities to develop the international provisions for public procurement further, however is of the opinion that a concept aiming at a uniform multilateral body of rules and regulations is lacking. At the moment the following are being discussed as projects for the further development of the WTO body of rules and regulations: revision of the GPA, creation of a multilateral transparency agreement and inclusion of public services contract awarding in the revision of GATS. The result of this would be a fragmented, complicated body of rules and regulations, which would not find acceptance by those concerned, i.e. the contracting authority and the service providers. The three developments should therefore not be pursued separately but must be taken together with the aim of achieving an internationally uniform body of rules and regulations.

### II. Revision of the GPA

#### 1. *General*

- 1.1. The Government Procurement Agreement (GPA) has in practise so far not been given the significance it should have – as compared to the considerable significance it should have been given as an international agreement for such an important market area as public procurement. One of the main reasons for this almost certainly is the fact that the practical application of the GPA is limited by a system of exemptions and annexes which even experts find difficult to follow.

UNICE's central interest as regards the revision of the GPA is therefore to reform the agreement in such a way as to eliminate or greatly reduce the regulations for exemptions, to integrate the regulations on threshold values into the body of the agreement and eliminate the extremely extensive annexes.

In the interests of a further opening of the market, efforts to increase the number of GPA signatory states should be continued. These activities should however be concentrated primarily on winning over major countries among the states who have not signed the GPA, such as China for example.

- 1.2. UNICE welcomes the fact that the European Commission has submitted a proposal of its own towards reforming the GPA. From industry's point of view however it would be more important to reform the GPA even more fundamentally than envisaged in the European Commission's proposal and not only modify the contents of individual provisions.

The following basic structure would seem appropriate for a new draft of the GPA:

- Part 1: Area of application and definitions,
- Part 2: Basic principles and core provisions of the GPA  
(e.g. market openness, transparency, non-discrimination, rules concerning country of origin, a ban on offset transactions; if necessary, also provisions for small and medium-sized enterprises and developing countries),
- Part 3: Provisions for the contract-awarding procedure and legal protection,
- Part 4: Other obligations of the signatory states resulting from the agreement ( e.g. obligations to provide reports and - to a limited extent - statistics).

The complicated system of annexes and regulations for exemptions in the GPA, which is one of the main reasons for its lack of acceptance as a whole, is to be abolished.

## **2. Individual provisions**

### **2.1. Art. I**

The provisions concerning the threshold values, as of which the GPA finds application, should be integrated into the body of the agreement – as envisaged in the European Commission's proposal. The annexes as well as all other provisions relating to special cases and exemptions should be deleted.

### **2.2. Art. V**

The European Commission proposes modifying the special provisions for developing countries in Art. V. so that developing countries may be allowed transitional periods during which they can enjoy all the rights and advantages of the GPA without being bound by it. Such a transitional provision is only acceptable if strict adherence to the time limits of these transitional periods will be guaranteed.

### **2.3. Art. VI Para. 4**

This provision on the pre-tender technical dialogue was originally introduced into the GPA without any discussion with industry. As a consequence there were extremely controversial discussions on the inclusion of this provision in the EU guidelines. We now have the chance of deleting the provision or at least wording it together with industry in such a way that in difficult projects when preparing a selection process contract awarders can make use of industry's expertise, without the companies concerned refusing because they must fear being excluded from the competition for the contract

### **2.4. Art. XI. 3b**

The proposed linking of certain provisions to the area "off-the-shelf products or services" would only be acceptable if an unequivocal and final legal definition of this area can be supplied.

## 2.5 Art. XVI

The envisaged provision on offset transactions does not go far enough. A general ban, with no exemptions whatsoever, on linking contract-awarding to offset transactions is necessary.

### III. Transparency Agreement

UNICE shares the Commission's evaluation that the GPA, so far only plurilateral, cannot be extended into a multilateral agreement in the foreseeable future due to resistance from developing countries. For this reason the drafting of a WTO transparency agreement may serve a purpose in at least expediting the introduction of the general principles of a constitutional, modern public procurement also in all those countries, so far either not willing or not in a position to join the GPA. However it must be clear from the beginning that the transparency agreement is only an instrument for preparing developing countries in a dynamic process to one day accept the GPA as a globally uniform body of rules and regulations for public procurement. In UNICE's opinion it is therefore indispensable to include an obligation in the transparency agreement to regularly develop it further, the final aim being to integrate the transparency agreement into the GPA in the last stage. Industry rejects a transparency agreement leading to or possibly leading to the introduction of a body of rules and regulations split into two parts over a longer period of time or indefinitely, i.e. the GPA for industrialized countries, the transparency agreement for developing countries. Even the developing countries themselves will probably not be interested in such an outcome, as it would imply their being only "second class" partners in the WTO community.

If the transparency agreement is based on this concept, then it will be secondary how detailed the agreement will be made in the first stage. What will be decisive is the consensus, anchored in the agreement, that it is a dynamic regulation to be developed in stages with the aim of integrating it into the GPA in the end. Vice versa this means that the aim of integrating it into the transparency agreement must be considered for the approaching and also later revisions of the GPA, i.e. that the GPA must be simplified as far as possible. It is in this context that our proposals as found in section II are to be understood.

In view of this UNICE cannot agree with the proposal for a transparency agreement drawn up by the European Commission at the WTO Ministerial Conference in Seattle. A concept for a "dynamic regulation" with the final goal of a uniform multilateral agreement is lacking. Also the requirements of the proposal appear too demanding for them to be accepted by the developing countries. This is another reason we consider our concept the right approach.

The Commission's demand that the details of the transparency agreement be drafted with great care is to be welcomed. In particular, careful regulation may not be sacrificed to political demands for a rapid adoption of the new regulation at all costs.

The main thing is to reach agreement on the concept proposed by UNICE in the first stage. Although this may prove difficult, the argument should prove convincing that with this concept difficulties with the present varying views on the textual details of the transparency agreement can be overcome. After agreement on a dynamic regulation, anchored in the agreement, the developing countries' wishes for an individual practical regulation could be complied with to a great extent.

**IV. GATS**

So far no concrete and clear solution for public services contracts has become discernable within the GATS. To date there is also no reason known to us why in addition to the GPA which includes public services contracts and in view of the transparency agreement aimed for which is to include the services contracts, further regulation as part of the GATS revision is needed. UNICE therefore considers the implementation of provisions on public procurement into the GATS counterproductive because on the one hand we can see no advantages and on the other we must note that the consequence would be an unacceptable splitting of the international body of rules and regulations for public services contracts.

It would however be possible to consider including a provision in the GATS referring to the GPA and if necessary also to the transparency agreement.

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