BUSINESSEUROPE

POSITION PAPER

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# *STRIKING THE RIGHT BALANCE: CLARIFYING, IMPROVING AND REFLECTING ON MARKET ACCESS RULES FOR THE EU PUBLIC PROCUREMENT MARKET*


**OBJECTIVE/SUMMARY**

Public procurement has been a key part of the EU's Single Market programme, as well as the EU's trade policy, through the WTO Government Procurement Agreement (GPA) and procurement chapters in Free-Trade Agreements (FTAs). This combination of international commitments and Single Market rules has created a European market that is widely open to international competition.

This openness has spurred the creation of highly competitive companies in large public procurement markets in the EU. However, two challenging issues have come to the fore, which suggest an imbalance in openness. Firstly, there is a concern that the openness of the EU market weakens its ability to negotiate market access in GPA and FTAs. Secondly, there are concerns that Member States and other procuring entities are not fully informed about the precise international commitments that the EU has undertaken.

Some high-profile public procurement contracts won by non-EU bidders in Europe or cases where EU companies were excluded from tenders in third countries have highlighted this imbalance. The recent participation of non-EU companies in EU tenders operating at costs far below the possibilities of the market (which suggests they are operating with subsidies) has further raised concerns.

The objective of this paper is to propose recommendations to clarify, improve and reflect on the framework of rules and procedures governing market access to the European public procurement market.



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## 1. INTRODUCTION

Governments and public authorities are significant purchasers of goods and services, which in turn can be important drivers of international trade. The World Trade Organisation (WTO) and the Organisation for Economic Cooperation and Development (OECD) estimate that government procurement accounts for 10%-15% of world GDP, around 7% of which is potentially open to international competition (contestable). This equals around 30% of world exports. The value of the EU´s public procurement market potentially open to international competition is estimated at €1,600 billion.

Safeguarding transparency, market openness and competitive tendering are vital to support economic growth, ensure quality and innovation, as well as combating corruption. Competition for government procurement helps ensure that government authorities get the best value for taxpayer money. It triggers competitive pricing and gives governments and consumers access to the best products and the latest innovations. In addition, competitive and transparent tendering is vital to combat corruption. The rules put in place through international agreements, such as the Government Procurement Agreement, encourage open, unbiased, transparent and non-discriminatory procurement procedures.

The European public procurement market is currently regulated by directives 2004/18/EC and 2004/17/EC for procurement of classic public purchases as well as purchasers in the area of utilities in the water energy and transport sector. Directives 2004/17/EC and 2004/18/EC lay down rules governing the procedure for public procurement above certain EU thresholds. These two directives are accompanied by a Remedies Directive 2007/66/EC stipulating the right of a bidder to ask for effective remedies in case of an infringement of the provisions regarding the procurement procedure as established by directives 2004/18/EC and 2004/17/EC.

The public procurement directives stress the equal treatment of the participants to the tender and the objective assessment of the tenders to determine which one offers the best value for money. However, it leaves the choice to the Member States whether they want to exclude or include third countries in the tender, subject of course to commitments in the GPA or FTAs. To the extent that Member States tend not to exclude third-country entities, the European public procurement market is among the most open in the world.

Many non-EU markets on the other hand have more restrictive public procurement practices in which European companies are either disqualified outright from tendering, or can only tender on less favourable terms than their local competitors. These barriers to the participation of European suppliers and products lead to a significant loss of export and investment opportunities.

## 2. PROBLEMS FACED BY EUROPEAN COMPANIES ON EU AND NON-EU PUBLIC PROCUREMENT MARKETS

European companies are confronted with four main problems in the field of public procurement:

a) **Competition with subsidised third-country companies**. It could be the case that a company of a third country participating in a tender on the European market can put in offers at an exceptionally low price level because it receives funds from its government. Not all third countries have implemented the same level of competition rules as the EU, which causes an imbalance in the level of competiveness between the companies of the Member State and third countries.

b) **Illegal behaviour of third-country companies.** Specific problems have arisen recently in relation to non-EU companies operating on EU markets in relation to technology theft (Intellectual Property Rights (IPR) violations) and allegations of corrupt practices. This has led to a number of disputes over IPR violations involving non-EU companies operating in EU public procurement markets. In addition, some non-EU companies are not subject to international rules and guidelines on corrupt practices (OECD, World Bank). While it is of course illegal under national and EU law to engage in corrupt practices, some non-EU companies do not face the same degree of scrutiny, notably as regards internal corporate regulations.

c) **Lack of access to markets outside the scope of the GPA**. Third countries have relative easy access to the European procurement market whereas European companies do not receive the same treatment in the public procurement markets of third countries.

d) **Limited market opening due to a weak EU bargaining position**. The EU is involved in negotiations on GPA accessions as well as the expansion of commitments under the current GPA. However, since companies from third countries can already enter the EU market without having to return the same favour, there is not much incentive for third countries to go beyond the status quo, i.e. to become a member of the GPA or to extend their commitments under the GPA.

## 3. RECOMMENDATIONS ON CLARIFICATIONS, IMPROVEMENTS AND NEW INSTRUMENTS

BUSINESSEUROPE favours an open EU market for trade, investment and procurement as a tool to boost our global competiveness. However, EU companies also need to operate under fair trading conditions with their non-EU counterparts. The current situation gives rise to the need for Commission guidance and support. In addition, the EU should reflect with BUSINESSEUROPE on how to strengthen its leverage in procurement negotiations in international trade agreements.

**a) Clarify EU public procurement directives**

A number of BUSINESSEUROPE's concerns over public procurement markets can be adequately addressed through a legal clarification exercise from the Commission towards national and sub-national procurement authorities across the EU. These clarifications could take the form of a Commission declaration or explanatory guidelines addressed to Member States.

i) **Examination procedure for abnormally low bids**: To avoid a situation where subsidised companies might gain an unfair advantage on the EU market, public authorities could be asked to establish benchmarks for procurement tenders by requiring public authorities to examine bids which are abnormally low. Article 55 of Directive 2004/18/EC already authorises procuring entities to investigate "*abnormally low bids*". However, the Commission should clarify this term by establishing an averaging test to determine an abnormally low bid. In such a test, the procuring authority would first calculate the average of all submitted bids. Subsequently, the authority should require abnormally low bidders (x% below the average) to provide additional documentation to explain how the bid can be so low. This would still enable authorities to allow the lowest priced bid (provided adequate documentation justifies the low bid), while also guarding against predatory practices and illegal state aid. In order to determine the threshold of an abnormally low bid careful consideration would need to be given to previous experiences of different sectors. In the context of the EU's Remedies Directive unsuccessful companies should be informed of instances of abnormally low bids to allow them to determine if there are valid grounds for initiating a review procedure.

ii) **Participation of companies from countries that have not signed the WTO GPA or do not have a bilateral agreement covering procurement with the EU**: Under EU law, national and sub-national procuring entities may decide to reject bids from companies originating from countries that have not signed the WTO GPA or do not have a bilateral procurement arrangement with the EU. This right should be communicated more clearly by the Commission to procuring entities. The EU could for instance require that non-EU companies participating in tenders on the EU territory indicate in their application whether or not they originate from a GPA signatory country, whether they have a bilateral trade agreement with the EU covering procurement or whether their domestic market is open to EU companies in some other way (e.g. the company may be required to present an official statement delivered by an official body or entity). Furthermore, the Commission could establish a database which would inform contracting authorities and entities that have to apply EU public procurement rules of the countries that have not signed the WTO GPA, do not have bilateral procurement commitments or are not open to the EU in some other way. Database updates, for example as part of the Commission's Market Access Database, could be sent periodically to the contracting authorities.

iii) **Information on the EU's General Notes and Derogations to the GPA:** With regard to the general notes and derogations to the GPA, when making its GPA commitments, the EU only granted access to the EU market to trade partners when they "*give comparable and effective access for [EU] undertakings to the relevant markets*." The Commission should clarify the extent to which national and sub-national procuring authorities may directly invoke this derogation or whether its entry into force requires transposition into EU and/or national legislations. This will require the EU to review to what extent GPA partners give comparable and effective access to EU companies in the relevant markets. A Commission information point (phone number, e-mail, website) could provide procuring entities with advice in complex cases (e.g. joint ventures or consortia involving GPA and non-GPA originating companies, information on the precise commitment of the EU regarding the sectoral coverage opened to competition and exceptions in each sector, etc.). These clarifications should enable the EU to promote the effective implementation of GPA members' obligations whilst keeping the EU market open.

**b) Improve market access rules in the context of public procurement**

To address challenges associated with securing EU rules against bribery and corruption or ensuring the full protection of intellectual property rights, the EU will need to reflect on the introduction of additional market access requirements:

i) **Apply OECD rules against bribery and corruption**: EU companies operating in Europe and abroad must comply with their legal obligations under the OECD convention on bribery and corruption and the principles set out by the OECD Guidelines for Multinational Enterprises. Non-EU companies operating on the EU market should aim to comply with the obligations on bribery and corruption, as well as the voluntary principles and standards of the OECD Guidelines for Multinational Enterprises. Public authorities should monitor the extent to which non-EU companies comply with these rules.[i]

**ii) Addressing IPR violations through customs mechanisms:** To address the growing concern of non-EU companies entering EU procurement markets using stolen EU technology, the EU should boost customs mechanisms to secure companies' intellectual property rights. The review of the customs Regulation 1303/2003 provides a good opportunity to address the role of customs in preventing IPR violations. The EU should examine instruments used in other OECD countries, such as Japan or the United States.

**iii) Develop relations with public sector organisations in third countries that promote excellence in public procurement:**
BUSINESSEUROPE believes that the EU should play a stronger role in encouraging the professionalisation of public procurement in third countries, for instance by providing training and advice for public sector organisations involved in public procurement in the interest of the public good. The EU's public procurement laws ensure transparent procedures ensuring fair conditions of competition for suppliers. This benefits taxpayers, provides value for money and boosts competitiveness.

**c) Reflect on new instruments**

The imbalance in international trade negotiations on public procurement will not be easily redressed. Consequently, existing instruments should be used consistently and more effectively and the EU should begin reflecting on new instruments that may be used to restore a level playing field. To guard against protectionist abuses, this reflection should be pursued in close cooperation with BUSINESSEUROPE.

i) **Identify an anti-subsidy instrument applicable to goods and services used in procurement:** EU anti-dumping and anti-subsidy rules can be applied to procurement cases. However, in practice recourse to trade defence presents a major challenge because remedies can only be applied to imported goods associated with a procurement project. To address this situation, the EU should examine the possibility to create an updated anti-subsidy instrument that would, in remedy terms, cover both goods and services associated with procurement. From a legal perspective, the WTO leaves open the possibility to apply anti-subsidy to services as the General Agreement of Trade in Services (GATS) has never addressed the issue.

ii) **Outline options for an instrument to address the EU's negotiating leverage problem:** BUSINESSEUROPE does not support a reintroduction of the so-called External Procurement Instrument which was proposed in 2006. This proposal, which focused on imported goods in procurement, would create legal uncertainty for EU companies that rely on complex global industrial production chains. Provided there would be adequate safeguards against protectionist abuses, BUSINESSEUROPE is prepared, however, to examine new proposals from the Commission that would aim to exclude entities (not products) from countries that patently refuse to open their public procurement market to the EU in international trade negotiations. The new proposals must be targeted, avoid creating new burdens for EU companies, and be certain to achieve a negotiating objective within a reasonable time-frame.

[i] **OECD Guidelines for Multinational Enterprises – Section VI**

**VI. Combating Bribery**

*Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:*

*1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.*

*2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.*

*3. Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.*

*4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.*

*5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of "off the books" or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.*

*6. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management.*