

QUESTIONNAIRE FOR CITIZENS, NGOs, TRADE UNIONS, THINK TANK,...

1. Introduction

The European Commission is currently considering the possibility of proposing a new legal instrument to set the terms for access to the EU public procurement markets for goods, services and companies originating in third countries.

Through international commitments (i.e. the WTO Government Procurement Agreement (GPA) and bilateral/regional FTAs), the EU advocates an ambitious opening of international public procurement markets and has thus committed itself to granting market access to its public procurement market for certain foreign goods, services and companies. The exact scope of these commitments is set out in the relevant agreements. These agreements also contain a number of explicit reservations (i.e. exclusions from market access in areas where the countries in question have not made any commitments on their side). The EU has made such reservations, amongst others, for local and regional procurement and procurement in the sectors of railway, public transport and electricity.

Currently, 13 countries outside the EU are covered by the GPA, and roughly 15 by a bilateral agreement (i.e. a procurement chapter in an FTA). For an overwhelming majority of countries, there are no mutual commitments in that area.

In contrast to the EU's policy favouring greater openness, many third countries are reluctant to (further) open their procurement markets to international competition, which limits business opportunities for EU companies in these markets. Similarly, some trading partners have maintained or introduced protectionist measures hitting EU companies.

Notwithstanding the existence of these international commitments, in practice the EU has only partly exercised its powers to regulate access of third countries to its procurement market. There is therefore a gap between what has been agreed and committed internationally and the actual access conditions. Goods, services and

companies from third countries generally enjoy a degree of access to the EU's public procurement market even if their countries of origin have not concluded an international agreement with the EU on the mutual opening of public procurement markets. As a consequence, the European Union's public procurement market is *de facto* more open to goods, services and companies from third countries than strictly foreseen by the EU market access commitments under the GPA and FTAs.

This together with unbalanced market access commitments puts EU companies at a disadvantage. They are faced with foreign competition for procurement contracts within the EU without benefiting from equal or comparable procurement opportunities in third countries; but it also results in a weak negotiating position for the EU in the international context. Consequently, EU businesses and Member States complain more and more about denied business opportunities and unequal competition.

The Commission is currently carrying out an impact assessment analysing in more detail how to reach the objective of improved symmetry in access to public procurement, in order to be able to propose legislation that is proportionate, coherent and effective.

The primary purposes of the new legal instrument would be to clarify the rules governing access to the EU's public procurement market of third country goods, services and companies, thereby ensuring a level playing field on the EU's public procurement market and to strengthen the position of the EU when negotiating access for EU companies' access to public procurement markets of third countries, in order to obtain the (further) opening of our trading partners' public procurement markets.

The replies to the questionnaire will feed the impact assessment with data, information and views of stakeholders on the current situation on the public procurement market of the EU and of third countries and on the (possible) effects of EU legislation in this field.

2. Policy options

Several options will be analyzed during in the impact assessment.

Option 1: Baseline scenario ("Nothing happens")

Overall description:

The EU would continue the current policy, without any new or additional EU intervention.

Option 2: Non-legislative approach

Overall description:

The Commission would use soft law (publish guidance on how applying existing tools) and would make more active use of existing tools such as WTO/FTA dispute settlement mechanisms.

Detailed description:

This option could recommend 'soft measures' such as explanatory documents concerning the scope of international commitments and/or providing guidance for the enforcement of existing instruments (e.g. articles 58 and 59 of Directive 2004/17/EC and Article 106 of the Financial Regulation) and the more active use of existing tools such as WTO/FTA dispute settlement mechanisms (trading partners infringing their commitments).

Option 3: Legislative initiative

Overall description:

The instrument would reflect into the EU internal legal order the international market access commitments the EU has taken in the area of public procurement and, at the same time, define the treatment of goods, services and companies that do not benefit of EU market access commitments. This initiative would help ensure harmonized treatment of third country goods, services and companies not covered by these international commitments throughout the EU. The scope of the envisaged instrument would mirror the scope of the public procurement directives (i.e. same thresholds, etc) with the possible inclusion of services concessions. Defence and security procurement falling under Directive 2009/81 would be excluded from the scope.

Procurement covered by the EU's international commitments

The instrument would provide a definition of goods, services and companies originating in third countries. It would clarify that goods and services benefiting from market access commitments under the GPA or FTAs have the same access to the EU's procurement market as EU goods and services. Goods and services originating in the least developed countries (according to the UN definition) would be granted the same treatment as EU goods and services on an autonomous basis.

Procurement not covered by the EU's international commitments

The instrument would define the treatment of third countries' goods, services and companies that are not covered by the EU's international commitments, which covers, amongst others, procurement not covered towards a particular third country as there is no agreement with this country (e.g. China, India) and procurement explicitly excluded from the scope of the EU's international commitments (GPA derogations).

Two alternative approaches could be envisaged:

Approach (A):

EU procuring entities would be required in principle to exclude third country goods, services and companies not covered by international commitments of the EU.

In order to avoid obstacles to the procurement of goods and services unavailable in the EU and/or needed in cases of “emergency” and/or of “overriding reasons of general interest” the instrument would establish exceptions to the obligation to exclude and provide the Commission with the possibility to issue waivers.

The waivers would be clearly identified (*ex ante*) in the proposed instrument to enable procuring entities, under specific situations, to procure foreign good or services because of the particular nature of the purchase in question (for instance, sole source, public interest, disproportionate costs etc.). It would bring flexibility to the system while ensuring a consistent application within the EU. The proposed instrument would also provide the Commission with the possibility to pursue possible

abuses of waivers through infringement procedures or other appropriate measures in order to ensure compliance and uniform application by the procuring entities of the aforementioned waivers.

In practice, EU procuring entities would be required to notify (ex post) the European Commission of its decision to accept third countries' goods, services and companies that are not covered by the EU's international commitments and its reasons for doing so.

No waivers/notifications would be needed for goods, services or works originating from least developed countries.

Approach (B):

At procuring entities' level :

Subject to notification to the Commission, EU procuring entities would have the option to decide to exclude third country goods, services and companies not covered by international commitments of the EU.

The purpose of a notification procedure would be to ensure EU wide coherence. One possibility could be, on the basis of an ex-ante notification, for the Commission to assess the actual market access situation in the country of origin concerned and the commitments undertaken in the GPA/FTAs within a strict deadline. The Commission would not object where there is a lack of substantial reciprocity in the country and sector concerned or an effective restriction under the GPA/FTA between the EU and the third country in question.

At the EU level:

The Commission would be entrusted with a specific tool to conduct enquiries about the market access situation for EU goods, services and companies and to impose restrictive measures on goods and services originating in third countries when EU goods, services and companies do not have sufficient access to the public procurement market of these countries.

The restrictive measures would consist in prohibiting the access to specific parts of

the EU's procurement market, or for specific contracts or in imposing a departure from national treatment (through price penalties for instance). These measures could only target procurement that is not covered by the EU's international commitments, and would not apply to least developed countries.

Procuring entities would not be obliged to apply the restrictive measure in specifically defined cases: unavailability of the goods or services targeted, and cases of emergency or of overriding reasons of general interest. Misuses of these exemptions could be challenged either via infringement procedures or dedicated review procedures.

The measures would be adopted following a "comitology" or other appropriate procedure.

3. Result of the consultation and next steps

The Commission would like to receive your reply to this questionnaire by 02/08/2011. If you have any questions or comments on this questionnaire you can send them to the following e-mail-address.

markt-trade-procurement-initiative@ec.europa.eu

Please indicate in your reply whether the Commission may contact you if it needs further details on the information and views submitted. If you do not indicate anything, the Commission will assume you do **not** object to this. All contributions will be published after the end of the consultation period, unless otherwise specified by the contributor.

THANK YOU FOR YOUR REPLY TO THIS QUESTIONNAIRE

Respondent profile

You are: * (compulsory)
(at most 1 answer)

- Citizen
- Trade union
- NGO
- Think tank
- Other

Please specify: * (compulsory)

Your name (or name of the organisation you represent): * (compulsory)

Your e-mail: * (compulsory)

Are you (or your organisation) registered in the Commission's Interest Representative Register? * (compulsory)
(at most 1 answer)

Yes

No

If yes, please indicate your ID number: * (compulsory)

Your opinion on the initiative

Do you agree with the introductory description of the current level of access to the EU public procurement market for goods, services and companies from countries outside the EU? * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

Please explain why not: * (compulsory)

Do you agree with the introductory description of the objectives of the initiative?

- clarification of the rules governing access to the EU's public procurement market for goods, services and companies from countries outside the EU

- strengthening of the position of the EU when negotiating access for EU companies to public procurement markets of countries outside the EU, in order to obtain the (further) opening of our trading partners' public procurement markets).

* (compulsory)
(at most 1 answer)

- Yes

No

Don't know

Please explain why not: * (compulsory)

Would you support: * (compulsory)
(at most 1 answer)

Option "nothing happens"

Non legislative Option

Legislative option with approach A

Legislative option with approach B

Legislative option with a different approach from A and B

Please give reasons for your choice (optional)

Are there any other issues affecting the conditions of access to the EU public procurement market for goods, services and companies from countries outside the EU that have not been described and may need to be addressed by this initiative? * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

Please indicate the issues: * (compulsory)

Do you know the applicable conditions by which companies, goods and services from countries outside the EU can participate in public procurement procedures in the EU? * (compulsory)
(at most 1 answer)

- YES, and I find them clear
- YES, but I do not find them clear
- NO

If you know them, but do not find them clear, please explain the reasons for this: * (compulsory)

Do you think that the rules governing the access to the EU's public procurement market of companies, goods and services originating outside the EU should be modified? * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

If YES, please indicate why you think they should be modified and which direction such a modification should take: * (compulsory)

Do you agree with the following statements?

	Fully disagree	Disagree	Agree	Fully agree	Don't know
The openness of the EU's public procurement market supports the procurement of sustainable goods and services* <small>compulsory</small>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The openness of the EU's public procurement market increases the quality of the tenders* <small>compulsory</small>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The openness of the EU's public	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

<p>procurement market decreases the prices in the market*</p> <p><small>compulsory</small></p>					
<p>The openness of the EU's economy in general and its public procurement market in particular helps you doing business in third countries*</p> <p><small>compulsory</small></p>	○	○	○	○	○
<p>The openness of the EU's economy in general and its public procurement market in particular increases competitive pressure and thus promotes greater productivity and innovation*</p> <p><small>compulsory</small></p>	○	○	○	○	○

Do you agree with the following statements?

	Fully disagree	Disagree	Agree	Fully agree	Don't know
Competition from third countries in public procurement procedures leads to job losses in your sector* <small>compulsory</small>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Competition from third countries in public procurement procedures leads to deterioration of social conditions in your sector* <small>compulsory</small>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Competition from third countries in public procurement procedures leads to deterioration of environmental standards in your sector* <small>compulsory</small>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Competition from third countries in public procurement procedures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

provides useful savings for taxpayers* <small>compulsory</small>					
Competition from third countries in EU public procurement procedures undermines the capacity of EU firms to be competitive in terms of price* <small>compulsory</small>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Competition from third countries in EU public procurement procedures undermines the capacity of EU firms to invest in innovation* <small>compulsory</small>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Competition from third countries in public procurement procedures helps to increase the productivity of European firms <small>optional</small>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Competition	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

from third countries in public procurement procedures is an incentive to increase your R&D budget* <small>compulsory</small>					
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Should the initiative address any further issues which are of specific importance or concern for SMEs?* (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

If YES, please indicate which issues should be addressed* (compulsory)

Companies, goods and services from countries outside the EU (choose one option)* (compulsory)
(at most 1 answer)

- should only have access to the EU public procurement market in so far as European firms, goods and services have an equivalent level of access to the public procurement markets of these third

countries

- should only have access to the EU public procurement markets if this has been agreed in an international agreement concluded by the EU
- should always have access to the public procurement markets in the EU
- Don't know

Please give the reasons for your choice keeping in mind the potential advantages and drawbacks of the option selected on the quality of the goods and services provided, the chain of supply, competition in the relevant market; productivity, the environment, employment, labour standards, social protection, public health and safety, investment and overall business strategy, research and development, market structure, the citizen/consumer and administrative burden: * (compulsory)

Companies, goods and services should always have access to the whole of the EU public procurement market if they originate in least developed countries * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

If a new EU policy governing access to the EU public procurement market of goods, services and companies from countries outside the EU is introduced, possible restrictions on access should

(choose one option): * (compulsory)

(at most 1 answer)

- have a general character and apply to all countries outside the EU and all market sectors which are not covered by international commitments
- be imposed only in case of market access problems in specific countries
- target only specific market sectors
- target specific market sectors in case of market access problems in specific countries
- Don't know

Please give the reasons for your choice: * (compulsory)

If a new EU policy governing access to the EU public procurement market of goods, services and companies from countries outside the EU is introduced, possible restrictions on access should take the following form: * (compulsory)

(at most 1 answer)

- an exclusion of companies, goods and services originating in countries outside the EU from public contract award procedures
- the imposition of price penalties
- other differential treatment for companies, goods or services from countries outside the EU
- Don't know

Please give the reasons for your choice: * (compulsory)

If a new EU policy governing access to the EU public procurement market of goods, services and companies from countries outside the EU is introduced, possible restrictions on access should

: * (compulsory)

(at most 1 answer)

- be decided at EU level
- be decided by Member States
- be decided by individual contracting entities
- be decided by individual contracting entities on the basis of uniform, EU-wide principles
- be decided by individual contracting entities that have to notify the European Commission
- Don't know

Please give the reasons for your choice * (compulsory)

Should individual contracting entities, when deciding on restrictions of access to the EU public procurement market, be obliged to notify the European Commission **before the goods, services and companies are excluded** (ex ante notification) so that the Commission can ensure a uniform application throughout the EU? * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

Please give the reasons for your choice * (compulsory)

Should individual contracting entities, when deciding on restrictions of access to the EU public procurement market, be obliged to notify the European Commission **after the award of the procurement contract** (ex post notification) so that the Commission can ensure the conformity/legality of the decision taken with international commitments? * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

Please give the reasons for your choice * (compulsory)

Should the notification procedure reflect that in some situations the EU has established restrictions in current GPA/FTA agreements and that in other situations there is no agreement between the EU and the third country in force? * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

Please give the reasons for your choice * (compulsory)

Would a lack of substantial reciprocity in the country and sector concerned or an effective restriction under the GPA/FTA between the EU and the third country in question be a valid reason for the Commission to agree to a proposed exclusion under approach B? * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

Please give the reasons for your choice * (compulsory)

Should a lack of substantial reciprocity in the country and sector concerned or an effective restriction under the GPA/FTA between the EU and the third country in question be taken into account where the Commission proposes restrictive measures at EU level under approach B? * (compulsory)
(at most 1 answer)

- Yes
- No
- Don't know

Please give the reasons for your choice * (compulsory)

In your opinion, should exemptions from possible restrictions on access to the EU public procurement market of goods, services and companies from countries outside the EU be provided for in the legislation? (you can select more than one option) * (compulsory)

- in the case of unavailability of the goods or services concerned in the EU
- in case of emergency
- in case of disproportionate costs of EU goods and services
- for companies, goods and services from least developed countries
- other

Don't know

Other: please specify (optional)

With regard to the possible application of market access restrictions, is it relevant to make a distinction between SMEs and other companies? * (compulsory)
(at most 1 answer)

Yes

No

Don't know

If yes, please explain (optional)

