



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



PUBLIC PROCUREMENT IN INTERNATIONAL TRADE

INTA



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

PUBLIC PROCUREMENT IN INTERNATIONAL TRADE

Abstract

Ensuring that public procurement markets are transparent and open to international competition is one of the most challenging aspects of trade policy. Countries may have statutory or *de jure* preferences for national companies or more likely, purchasing entities exercise *de facto* discrimination in favour of local suppliers. The Single Market Programme has resulted in public procurement in the EU become relatively transparent and thanks to liberal investment policies foreign suppliers can freely established in the EU to serve procurement markets. The EU has also made commitments under the Government Purchasing Agreement (GPA) that are more or less in line with the coverage of the EU Directives. As a consequence it has sought to persuade other WTO members to make equivalent commitments, but with only partial success. Some progress has been made at the plurilateral level in the shape of greater coverage by existing signatories to the GPA. The EU has also managed to negotiate the inclusion of public procurement in recent free trade agreements (FTAs), but access to major emerging markets such as India, China and Brazil remains an issue. After a good deal of debate the Commission has proposed the draft Regulation with the aim of harmonising the treatment of third country suppliers by EU purchasing entities and enhancing the EU's leverage in negotiations. The Regulation will serve the purpose of enhancing EU leverage, but experience with previous efforts to open markets suggests that genuine competitive procurement markets requires 'buy in' on the part of key economic and political interests in the country concerned. It is not clear that this is the case in the emerging markets or developing countries. Although there are difficulties measuring how open markets, are issues of reciprocity for the EU arise in selected sectors rather than the EU procurement market being generally more open than other major markets. In terms of the Regulation the best outcome for the EU would be if its adoption serves to enhance EU leverage in negotiations without the EU having to actually use it. The more the EU uses the Regulation to pursue a policy of narrowly defined reciprocity, the greater the costs in the shape of potential retaliation against EU exporters and compliance will rise.

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1. INTRODUCTION

1.1 An executive summary of the issues

This section summarises the issues to be addressed by the INTA Committee. In most cases there is no clear cut answer, either because data does not exist or because the answers depend on how Regulation, if adopted, would be used. MEPs will therefore have to make a judgement on the basis of incomplete information. This section provides an introduction to the key questions raised by the proposed Regulation. The following sections then provide guidance in terms of the nature of the challenges faced, the lessons from previous policy in this field, both internationally and within the EU, the relative openness of the EU procurement market and the existing EU legislative framework for the treatment of third countries in the field of public procurement. The study then assesses the proposed Regulation before returning to address the following issues.

Is there a need for a new initiative?

Public procurement markets are relatively closed compared to other areas of trade, because all governments have been reluctant to cede control of public contracts as a potential policy instrument. Using taxpayers' money to give jobs and contracts to foreign workers and companies is not the best way to win votes. For this and other reasons public procurement was excluded from the national treatment and most favoured nation disciplines of the General Agreement on Tariffs and Trade (GATT) in 1948 and to this day there are only plurilateral rules in the shape of the Government Procurement Agreement (GPA) (most recently revised in 2011) not multilateral rules.

The issue of whether there is a need for a new initiative turns on a number of questions (a) how one defines an open procurement market; (b) whether the EU public procurement market(s) is in general more open than other major WTO members; and (c) whether EU producers face competition from the strategic use of public contracts to support national champions in other major markets?

If one defines market openness as the share of imports in all public consumption the EU does not appear to be any more open than other markets. Before the Single European Market programme EU member states pursued national champion strategies and limited effective competition. As the recent assessment of the EU's own internal market in procurement has shown intra EU competition has increased with the Single Market but the job is far from complete. If one defines market opening to include access via subsidiaries or foreign investment, import penetration in the EU is higher, but there are no equivalent figures for the EU's trading partners

If one defines an open market by the scope of commitments in international agreements, the EU would appear to be more open. The transparency and predictability brought about by the Single market Programme has, in effect, been extended to third countries by EU commitments in the GPA and FTAs. EU purchasing entities have also tended to use similar or identical procedures for considering tenders regardless of their origin. The EU has therefore sought to persuade other countries to follow suit, but without much success. Developing countries have not been persuaded of the need to sign up to WTO negotiations, China and other emerging markets have not acceded to the GPA, only in bilateral negotiations has the EU had success in extending the rules.

The strongest argument for the Regulation draws on point (c) which relates to specific sectors including, urban buses, fire-fighting equipment and rail transport and civil construction etc., in which the EU producers face national champions in the EU's trading partners.

What form should the new initiative take?

In its deliberations and consultations the Commission has considered a number of options. (1) The baseline scenario was to do nothing. (2) A non-legislative option would be to use existing EU legislation (covering purchasing in the utilities in the form of Art 58 of Directive 2004/17/EC) and a 'tougher' approach in negotiations to push EU offensive interests. Using existing powers under Art 58 of 2004/17 could cover some of the 'sensitive' sectors mentioned above but not all .e.g. construction. (3) The legislative options are; (a) an obligation on EU contracting entities to exclude companies, goods and services from third countries not covered by existing EU commitments in international agreements; (b) an option for contracting entities in the EU to exclude third country suppliers and an option for the Commission to restrict access (when EU companies do not have equal access); and (c) an option for purchasers in the Member States to accept tenders from third country suppliers and for the Commission impose access. (4) An option to extend the scope of Art 58 of 2004/17/EC to all procurement but effectively delegate policy to the purchasing entities/governments in each Member State. As this option would undermine EU control of policy it has been effectively discounted by the Commission. (5) A general 'buy Europe' preferences in the form of price preferences for all goods and services not covered by EU commitments under the GPA or FTAs. (6) Finally action against abnormally low tenders, such as those made by companies that benefit from state subsidies in one form or another. This option appears to have been seen as complementary to the other options.

Consultations with stakeholders showed a range of views on whether a new initiative is needed and if so what form it should take. Purchasing entities tended to favour no action or a non-legislative option, while business interests favoured legislative action. The Commission has come down in favour of a legislative option that is broadly in line with option 3b.

Will it work?

There is no simple answer to this. Procurement markets are affected by *de facto* preferences for local suppliers as well as *de jure* barriers resulting from explicit preferences or policies.¹ *De jure* preferences probably only form the tip of an ice berg of *de facto* preferences. Most preferences remain below the surface. The proposed Regulation would enhance EU leverage in negotiations, which is intended to enable the EU to get greater commitments from its trading partners. Such commitments can be effective in prohibiting *de jure* preferences, but are much less effective in dealing with the *de facto* preferences. The proposed Regulation would however, enable the EU to act against what it defines as *de facto* preferences.

There must remain some doubt that international agreements will provide genuinely competitive markets in China or India. The use of a narrowly defined reciprocity in the Regulation offers a means of addressing competition from national champions in these markets seeking to compete with EU firms.

Will it be cost effective?

The wider economic costs and benefits of open procurement markets have not been systematically studied. Indeed, there is a general lack of data and research in the field. The costs of reduced competition from third country suppliers in selected sectors in the form of less efficient use of public finance must be set against the benefits of increase exports for certain markets. As with all trade policy, the benefits of greater market access (and the costs of third country competition) are concentrated in a

¹ The use of *de facto* barriers here differs from that used by the Commission Staff Impact Assessment for the proposed Regulation SWD (2012) 57

number of sectors. The Commission impact assessment has argued that sectors in which there is no reciprocity have multiplier effects. In other words a wider set of EU producers are dependent on procurement in railway equipment, urban buses, fire fighting equipment and civil construction sectors etc. The economic benefits of competition from third country suppliers are broadly spread across the EU economy, which means the general consumer and tax payer has less of a voice. In this context the survey of stakeholders conducted by the Commission provides little on the views of consumer bodies.

The costs and benefit will also turn on whether the EU's trading partner retaliate against the threat - or actual closure - of some EU procurement markets.

In terms of administrative costs the Impact Assessment suggests that these are small compared to the costs of administering tenders, but majority view among purchasing entities against legislative action probably reflects a concern about the additional administrative costs. **The wider economic costs and benefits of open procurement markets have not been systematically analysed. The costs will also depend on how any Regulation is used and how EU's trading partners respond.**

Is the Regulation proposed protectionist or market-opening?

The Commission's objective is to use the Regulation as a means of opening markets, not closing the EU markets. But again it depends on whether and how the instrument is used. Protectionism is not easily gauged. In the current context a better measure is how the EU defines reciprocity. The existing international trade regime is based on reciprocity, but a distinction can be drawn between relatively liberal interpretations of reciprocity, such as the 'broad balance of benefits' (as is the GATT/WTO practice), and narrow sector-by-sector reciprocity, which results in more regulated trade. EU trade policy has generally been based on the broad definition and has been critical of narrower definitions, such as that implicit in US trade legislation in the form of Section 301. **The proposed Regulation appears to take the EU down a path towards a narrower definition of reciprocity.**

How might others respond?

Again it is clearly not possible to say *ex anti* how the EU's trading partners will respond to the adoption of the Regulation or to its use. The historical record shows that the US was more than ready to retaliate when the EU adopted the original reciprocity provisions in the utilities Directives in the early 1990s. This was at a time when the economic and trading conditions were better than those today. **The expectation must be that the EU's trading partners will retaliate.**

How would the adoption of the Regulation shape views of the EU?

The debate on the proposals is likely to be seen as a litmus test for EU trade policy both within and outside the EU. If the EU is perceived by developing and emerging markets as moving towards a tougher stance based on narrow reciprocity, this is likely to undermine the EU efforts to persuade developing countries in general that open, competitive procurement markets are in their interests.

Finally, if the EU identifies cases in which the Regulation could find application, but the country concerned does not respond by opening its market what should the EU do? If it does not act to restrict imports from the country the Regulation will have no effect. If the EU acts to restrict imports and the other trading partner retaliates there is mutual closure rather than market opening. This scenario must be seen as a real risk given the current climate in policy circles in emerging markets, which is generally ill disposed towards concessions vis-à-vis OECD countries. **Adoption and use of the Regulation is likely to undermine the EU's efforts to persuade developing countries to adopt more liberal procurement policies.**

1.2 The challenge of opening procurement markets

Public procurement accounts for 13-15% of GDP in the developing and emerging market economies, so that the economic and welfare gains that can be achieved from more transparent, competitive and thus efficient procurement can be considerable, especially at a time of uncertain or slow economic growth.² But public procurement markets represent one of the most challenging areas of trade policy. **Experience over the past half century shows there is no quick fix, no silver bullet that will achieve transparent, competitive and economic efficient markets.**

As noted above, access to procurement markets are shaped by both formal (*de jure*) and informal (*de facto*) preferences. The *de jure* preferences take the form of, for example, 'buy national' policies that grant national suppliers a price preference as in the case of the USA since the 1930s and many developing countries today. India has maintained price preferences for national suppliers of 15% and China introduced them in 2007. There are also *de jure* preferences for small and medium sized companies, used by developed as well as developing countries. Again India, reserves many markets for small and craft industries as a means of promoting employment and economic development. Such *de jure* preferences can be targeted by national treatment commitments, such as in the GPA or FTAs.

But experience suggests that the main barriers to public procurement markets are less obvious, *de facto* discrimination that exists thanks to the discretion available to purchasing entities/contracting authorities. Such discretion is built into even the most extensive rules as a result of the flexibility necessary to accommodate the diverse nature of public procurement. Cost effective means of addressing such *de facto* discrimination are not readily available. Requiring transparency is probably the most effective approach, as is the specification of objective criteria for contract awards, the use of standard documentation and award procedures, etc. Experience, including that with the EU internal market, suggests that increased competition has only really come as a result of a paradigm shift in national policies towards acceptance of open, competitive markets and away from explicit or implicit policies of support for national champions.

1.3 The elements of procurement regimes

Figure 1 Elements of international agreements on public procurement

Coverage may include supplies (goods), works (construction) and services at central (on average around 1/3rd of all procurement) or sub-central government (roughly 1/3rd) levels as well as public enterprise or parastatal organisations (again roughly 1/3rd). In the GPA terminology this is Type I, II and III procurement. The norm for thresholds, which aim to maximise the economic benefits of competition while minimising compliance costs, is SDR 130k, 200k and 400k for type I, II and III respectively and SDR 5million for works/construction.

'Liberalisation' commitments in the GPA or FTAs take the form of introducing **national treatment** for scheduled purchasing, thus prohibiting *de jure* preferences for local suppliers or **offsets** that condition contract awards to investment in the host country or transfers of technology or intellectual property.

Transparency can cover laws, implementing regulations, information on specific calls for tender or technical specifications. Rules requiring information on contracts awarded, reasons for rejecting tenders and statistics on who wins contracts also help to facilitate competition.

² In practice much less than 14% of GDP in procurement is likely to be open to international competition. If one assumes that public spending on health, social and education services, as well as core areas of defence will remain largely outside of competitive markets, only some 3-5% of GDP is still open to international competition (European Commission (2011), pg viii)

Purchasing entities have sought flexible rules on **contract award procedures** to accommodate the diversity of purchasing entities and practices, so that open, selective, limited, negotiated, accelerated negotiated and competitive dialogue tendering are all now common. Such flexibility brings with it scope for discretion, so complex rules are required to ensure transparency.

Technical specifications can prejudice competition by locking in preferred suppliers that use specific design (prescriptive) standards. Procurement chapters in agreements therefore require the use of international or at least performance standards.

Technical Co-operation and Special and Differential Treatment (S&DT) can cover assistance for developing countries (DCs) in drafting laws or procedures, capacity building/training officials etc.. S & DT may also take the form of higher thresholds for DCs, or exceptions allowing for preferential procurement favouring development objectives.

Agreements provide for **exceptions** for reasons of human health, national security and national interest and spending of military equipment (weapons) is always excluded.

Most agreements now include **bid-challenge provisions** for aggrieved bidders as well as general **state-state dispute settlement**. Penalties for non-compliance may take the form of project cancellation or financial penalties (limited to the costs of bids or exemplary damages). There is normally also a provision that allows for no contract to be awarded or to allow illegally awarded contracts to be completed if it is in the 'public interest'.

Agreements often establish **specialist committees** to monitor the application of public procurement provisions and provide technical assistance.

2. THE LEGAL FRAMEWORK IN THE EUROPEAN UNION

2.1 Public procurement in recent EU trade policy

The EU has pursued a policy of including public procurement in its external trade policy for some time. The aim has been to ensure that international trade rules and in particular the rules of the World Trade Organisation (WTO) keep pace with developments in the world economy and the degree of opening (in the form of commitments to procurement rules) of the EU market. The experience of market liberalisation in Europe was that as tariffs were reduced, other more difficult distortions to competition and market access such as local preferences in public procurement markets, assumed greater importance. At the multilateral level the EU therefore pressed for public procurement to be included in what came to be the Doha Development Agenda (DDA). At the first WTO Ministerial meeting in Singapore in 1996, the EU was successful in getting public procurement along with investment, competition and trade facilitation included in the WTO's work programme as what became known as the Singapore issues.

The EU however, had limited success in persuading other WTO members to agree to the inclusion of public procurement. Developing countries in particular opposed its inclusion. The refocusing of EU trade policy in 2006 with the Global Europe strategy took account of this lack of multilateral progress and the EU (re)engaged in active FTA negotiations with major economies. The Global Europe policy rejected protectionism at home, but argued that it must be 'accompanied by activism in creating open markets and fair conditions' in export markets (Commission, 2006, pg 5). This had two elements, 'a stronger engagement with major emerging economies and regions and sharper focus on barriers to trade behind the border'. This then provides the basis for a policy of actively seeking to open procurement markets in the major emerging markets an 'areas of significant untapped potential for EU exporters' (Commission, 2006, pg 8).

Whilst the Global Europe statement set the familiar target of creating a 'level playing field' it also recognised that this would be no easy task. The 'challenge (was) to find a way of opening up major foreign procurement markets without closing our own' (Commission, 2006). This remains the challenge today. The 2006 policy also stated that 'where important trading partners have made clear that they do not want to move towards reciprocity, we should consider introducing carefully targeted restrictions on access to parts of the EU procurement market to encourage our partners to offer reciprocal opening.' This approach would not be considered for poorer developing countries' (Commission, 2010). In the 2006 document it was stated that the Commission would 'propose measures to open procurement markets abroad'... 'in the months ahead.'

This position was reaffirmed in the 2010 policy statement on Trade, Growth and World Affairs, which called for 'fairness' in trade and stressed the areas of services, foreign direct investment and public procurement as areas in which the EU was competitive and therefore desired to see progress in international market opening. Sectors where the EU was competitive that significantly influenced by public contracts were also identified, namely public transport equipment, medical devices, pharmaceuticals and green/low carbon technologies. The aim was therefore to gain improved access to major procurement markets, such as the USA, China, Japan and India through negotiations in the shape of the revised coverage of the GPA or in the case of China early accession to the agreement.³ The Trade, Growth and World Affairs policy statement also stated that the Commission would in 2011 bring forward proposals for EU legislation 'to increase leverage' in negotiations on access to public procurement in developed and emerging markets. The current proposals for a Regulation on access of third-country goods and services to the Union's internal market in public procurement (COM (2012) 124 final) can therefore be seen as consistent with these previous policy statements. That it has taken five years to produce them is due to both the ongoing efforts to negotiate more reciprocal access and the lack of agreement within the EU on the advisability of such a policy.

2.2 The EU legislation on international procurement

The evolution of EU legislation has gone hand-in-hand with international negotiations

The EU/EC Supplies and Works Directives of the 1970s were based on rules developed in the OECD in negotiations primarily with the United States, but had limited coverage, left scope for discretion with purchasing entities, which split contracts to avoid thresholds, or drafted technical specifications that favoured 'court suppliers' and thus entrenched preferences for national champions. Competitors from other EU Member States had little confidence they would get a fair chance and so did not bother bidding. As a result non-national suppliers accounted for only 4% of public contracts in Germany and less than 1% in Italy and Britain prior to the SEM (European Commission, 1986).

The SEM Programme addressed *de jure* preferences through a range of Directives (Arrowsmith, 1992), but genuine competition came when the structure of supply changed from closed national oligopolies to pan-European competition due to company mergers and investment on an EU wide basis. The EU legislation provided for transparency and standard contract award procedures. Firms invested in production facilities in other Member States because they had confidence that they would have a fair chance of winning contracts. In so far as transparency facilitates market opening the EU market therefore became more open than many other countries.

The SEM provisions also significantly extended coverage of the rules and thereby facilitated the extension of the GPA. The EU included all levels of government including sub-central government,

³ As discussed below in more detail, China agreed to accede to the GPA 'as soon as possible' when it joined the WTO but only formally applied for membership until 2007.

something that other GPA signatories such as the USA, Canada etc. had - and still - have difficulty matching. The EU rules also covered *services* for central, state and local government (Council Directive 92/50/EEC) using a two-speed approach starting with the 'easier' service sectors, such as telecommunications, financial and professional services. More sensitive sectors, such as rail transport, legal services, education and health were left for a later date, although calls for tenders in these fields still had to comply with the transparency provisions of the EU's Directives. The EU rules also covered utilities in the telecommunications, power, gas, water and transport services (Council Directive 90/531/EEC) (Type III procurement under the GPA), something the US for example made fewer commitments on because there were no federal level utilities and most US utilities were privately owned. The EU model shaped the content of the GPA, for example through the thresholds used. But it also put the EU ahead in terms of transparency and predictability of its procurement, which in turn meant the EU market was more competitive. In the early 1990s some Member States therefore argued for reciprocity provisions to 'ensure a level playing field.' As the EU had already made commitments for supplies (goods) in the GPA there was no scope for reciprocity there. In services there was strong opposition to reciprocity provisions because of the negative experience with the reciprocity provisions in the 1989 Second Banking Coordination Directive, which had provoked the 'fortress Europe' debate with the USA. So it was only in the utilities directives that provisions were added that allowed purchasing entities to reject bids if more than 50% of the value of the contract was non-EU origin. These provisions were then carried over into Arts 58 and 59 of Directive 2004/17/EC and form the starting point for the current draft regulation. It should be recalled that even the simple inclusion of powers to use reciprocity provisions (rather than their actual use) provoked strong opposition from the US government. (Office of the United States Trade Representative, 2000; Congressional Research Service, 1993). The stand-off with the US threatened the political deal on the Uruguay Round and had to be resolved by a Memorandum of Understanding in which the EU waived the right to apply its reciprocity/third country provision for power and telecommunications equipment (Memorandum of Understanding, 1993).⁴ In terms of the question of potential retaliation against the adoption of the current draft Regulation, this earlier episode does not set a very comfortable precedent.

2.3 Existing EU legislation relating directly to third country suppliers

The only existing provisions in EU legislation relating to reciprocity or the treatment of bids from third country suppliers are those in Articles 58 and 59 of Directive 17/2004/EC. Article 58 enables EU purchasing entities to reject bids from third country suppliers with which the EU has not concluded any multilateral (i.e. the GPA) or a bilateral agreement 'ensuring comparable and effective access for (EU) undertakings' (Art 58 Directive 2004/17/EC). Tenders from such undertakings 'may' be rejected when they are more than 50% non-EU origin, where the origin is determined by means of the standard EU rules of origin. Art 58(3) provides that a 3% price preference may be applied in such cases, but only if this does not create technical difficulties due to incompatibility of systems or 'disproportionate costs' for the purchasing entity. The procedures set out in Directive 2004/17 require the Commission to report annually to the Council on any difficulties EU undertakings have in third country markets and to seek to remedy cases where third countries do not provide 'effective access comparable to that granted by the EU.' There is also a provision in Art 59(4) for the Member States to inform the Commission of difficulties 'in law or in fact due to non-observance of international labour laws' (defined in an annex as the core ILO standards). The Commission may then, either at its own initiative or that of a Member State, propose that the Council decide to suspend or restrict access for companies from the third country

⁴ Differences between the Member States on the advisability of using the reciprocity provisions led to Member States adopting divergent approaches.

concerned or from affiliates of such third countries established in the EU if these affiliates do not have an effective link with the economy of an EU Member States. Decisions by the Council would be by qualified majority voting. As will be shown below, this is broadly the approach used in the current draft Regulation, which covers all procurement not just that in the utilities and some have argued that their effective use would dispense with the need for a new Regulation.⁵

2.4 How effective has EU legislation been in opening the EU procurement market?

That opening procurement markets is a challenging process is amply illustrated by the difficulties the EU has itself had. As noted in section 2.1 above, Member State procurement markets were largely closed due to the pursuit of national champion strategies until well into the 1980s. Despite extensive EU legislation cross-border provision of public contracts within the EU remains very low at only 1.5% of total contracts or under 4 % by value in 2009 (European Commission, 2011, Evaluation Report). The picture in terms of indirect provision through affiliates illustrates the nature of competition within the EU. Such provision via affiliates accounts for 11% of contracts or 14% of value (European Commission, 2011, pg xiv). In terms of the 'nationality' of these affiliates 60% were from other EU member states, 24% from the US, 7% for Switzerland and 7% from other countries. In other words taken across the board third country access to the EU appears to be mostly via the affiliates of OECD countries.

Another overall indicator of the openness of public markets is offered by a comparison of the ratio of imports in the public sector compared to the private sector. Table 1 suggests that general import propensity is lower in the public sector than the private sector and shows that smaller countries tend to have more 'open' public sectors. This presumably results from limited supply capacity for the products concerned or from the general openness of the economy as a whole. On this very general measure foreign penetration of EU public sector markets is not much greater than in China, although rather greater than in Japan and the USA. These countries have generally much lower important penetration than the EU. If one considers the import penetration for the EU as a whole the level of extra-EU penetration will be lower at around 3% (Ramboll, 2012; see also Messerlin and Miroudot, 2012) providing ammunition for the EU's trading partners in any debate on whose market is more open. It is important to also consider the sectoral break down of these patterns. As the evaluation report concludes, cross-border procurement liberalisation within the EU has not been very extensive. 'While these import penetration figures for above threshold procurement contracts are an improvement on the situation as seen in 1987 and 1996 they are also evidence that the full potential for cross-border procurement [within the EU] has still not been realised in many sectors. (European Commission 2011, page xv)

⁵ In actual fact most large, commercially important contracts are awarded by utilities (power, water, and transport), construction (where there is a threshold of EUR 5m) or services. Telecommunications was taken out of the coverage because liberalisation was deemed to have created effective market forces in purchasing in that sector.

Table 1 Import penetration in the public and private sectors in selected cases

Country	Imports as share of use in the public sector	Imports as share of the private sector
Romania	18%	19%
Ireland	9.4%	27%
Germany	6.5%	17%
European Union	7.5%	19%
China	6.1%	10.2%
Japan	4.7%	7.1%
USA	4.6%	7.5%

Source Commission Staff Working Paper: Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation Part 1 SEC (2011) 853 final 27 June 2011.

A recent comparison of the trends in export penetration rates for public procurement markets in major EU Member States such as France and Germany show broadly parallel development, from 2% in 1995 to 4% in 2008. (Messerlin and Miroudot, 2012, pg 10)

The scale of the challenge ensuring compliance is illustrated by the fact that there are typically 2 million contract award procedures conducted by 250,000 purchasing entities in the EU (although only 35,000 notify tenders in the Official Journal via Tenders Electronic Daily) sharing an estimated total value of EUR 420 billion (2009) in contracts. Whilst expenditure on works, goods and services accounts for 17% of GDP in the EU only about 3% is covered by calls for tender in the Official Journal. The rest takes the form of health, education and social spending (6%), energy (oil and gas) (2.5%) and the hard end of defence procurement (0.6%). The evaluation report found significant differences between EU Member States in terms of how the Directives were applied and in procurement practice. For example, some Member States have an average of 8 bids for each contract notified in the Official Journal, while some have an average of less than 3 bids. It is generally considered that effective competition requires at least 3 bids for each contract. Most contracts publicised concern works (i.e. construction) or services contracts (75%) compared to supplies (goods) (25%) and 20% of calls for tender come from utilities. The average value of contracts awarded under selective/restricted tendering is around EUR 8m and that under open tendering EUR 2m. This is relevant for the threshold of EUR 5m proposed in the draft Regulation.

Another noteworthy finding of the evaluation report was the fact that the Member States of the EU are turning more and more to public contracts as a means of pursuing other policy objectives, such as the promotion of the green economy through green purchasing or support for innovation. While such policies can be pursued through non-discriminatory means, whereby all bidders that satisfy the conditions get an equal chance at winning contracts, it is an indication of how public contracts are still seen as an instrument in public policy in the EU, as indeed elsewhere.

The evaluation report therefore appears to conclude that the EU market is still not as open as it could be and broad comparisons with other major economies suggest that the level of foreign penetration of public markets in the EU is not much different to that of other major economies.

3. PUBLIC PROCUREMENT IN INTERNATIONAL TRADE

3.1 An Assessment of the EU's multilateral efforts

As noted in section 2.0 the EU has promoted the inclusion of international rules on public procurement in the WTO and led efforts to establish a WTO Working Group on Transparency in Government Procurement (WGTGP) after the Singapore (World Trade Organisation, 1996). But opposition from developing countries to the inclusion of binding rules limited the WTO work to transparency.⁶ A summary of the issues in the WTO debate is informative because it rehearses many of the issues in the current debate on EU policy vis-à-vis emerging markets. In the WTO however, market access issues (defined as the removal of *de jure* preferences for national suppliers) were off the negotiating table.⁷ This decision did little to make issues much easier, because of the lack of a clear distinction between market access and transparency (Linarelli, 2003). As indicated in Figure 1 transparency effectively increases competition and thus the scope for liberalisation, provided potential suppliers have enough confidence in the fairness of the process to bid for cross-border contracts or to apply via a local affiliate.

In the WTO the EU has argued that transparency should apply to all procurement because of the general economic efficiency gains. But developing and emerging market countries saw the debate as one about reciprocal market access (not unreasonably given the way the previous negotiations on the GPA had been framed) and argued to restrict coverage including transparency rules to procurement covered by schedules and above thresholds thus 'open to competition.' The majority view in the WTO also favoured limiting transparency rules to central government, with many countries pointing to the impracticability and costs of extending transparency rules to cover state or local government (World Trade Organization, 1999). There was a broad consensus in the WTO on the continued use of flexibility in contract award procedures, but differences over the degree of detail needed to ensure transparency in the use of these procedures. The EU (and US) argued for extensive transparency provisions. Developing and emerging market countries argued for voluntary and less extensive rules. Finally, the WTO discussions included forms of special and differential treatment for developing countries such as a development exemption from the rules and higher thresholds for developing countries to reduce costs and provide more 'policy space'. The developed countries offered technical assistance in drafting procurement laws and implementing the transparency rules (World Trade Organization, 2002).

The response from the emerging market members of the WTO was that while they accepted transparency was to be desired they did not see the case for a multilateral agreement in WTO agreement on the topic (Brazil). India argued it was premature to enter into negotiations because the scope of any agreement on transparency remained unclear (World Trade Organization, 2003). And China was nominally still committed to negotiate accession to the GPA as part of its commitments on accession to the WTO.

3.2 The plurilateral Government Procurement Agreement

The GPA was first negotiated (within the broad political context of the Tokyo Round) in 1979 and covered only central government procurement (Type I procurement) in goods. Subsequent negotiations extended coverage to include sub-central government (type II) and other purchasing entities such as utilities and parastatal companies (Type III) (in 1994) as well as build-to-operate

⁶ In the WTO discussions a number of developing countries led by India, with the support of Malaysia, Pakistan and Egypt have consistently questioned the benefit of including any form of rules on PP in the WTO. See Report of Meeting of 4 May 2001 WT/WGTGP/M/12.

⁷ This was confirmed in the Doha Ministerial Declaration that launched the Doha Development Agenda (WTO, 2001)

contracts (in 2011). The rules governing transparency and contract award procedure have been developed and bid-challenge provisions were added in 1994.

Despite repeated efforts over the last 30 years the GPA has not achieved the aim of expanding membership to include developing countries. There are 15 current signatories counting the EU 27 as one; the USA, Canada, Japan, Chinese Taipei, Hong Kong China, Israel, Singapore, Norway, Switzerland, Lichtenstein, Korea, (The Netherlands with respect to) Aruba, Iceland and the latest, Armenia. Intensive negotiations in 2011 failed to reach agreement with China on the latter's commitments, see discussion below on China's offers. China and Jordan remain in the accession process and a further six WTO members are in various stages of negotiating accession. The Chair of the GPA negotiating group has argued that the new GPA sets the stage for a new wave of accessions. This view appears to be based on the strengthened special and differential treatment (S&DT) provisions included in Article IV of the revised 2011 GPA that offer developing country signatories the scope to use, or continue to use, price preferences or offsets, as well as phase in national treatment commitments. Higher thresholds are also envisaged to provide more 'policy space' and reduce the costs of compliance. These concessions would however, need to be negotiated with existing GPA signatories. It should be noted that some important OECD countries such as Turkey and Australia are also not members of the GPA. These argue that their procurement markets are based on commercial criteria or that the rules envisaged by the GPA will result in excessive compliance costs. India became an observer in 2000 but Brazil and South Africa are not even observers.

The main result of the 2011 GPA was an extension of the coverage of services procurement and the addition of Build-to-Operate agreements for existing members. These additional commitments have been estimated by the WTO Secretariat to add a further EUR 80 bn to the coverage of the agreement, which is equivalent to a 20% increase on the previous EUR 400bn. Of this coverage the EU procurement market (all 27 Member States) accounts for EUR 312 bn, the USA EUR 34 bn, Japan EUR 22 bn and Korea EUR 15 bn. If China were to join, the rough estimate made by the WTO Secretariat is that it would add a further EUR 80 bn to the coverage of the GPA.

Progress in extending the coverage of procurement at the multilateral and plurilateral levels has therefore been slow and has not included the major emerging markets.

3.3 Public procurement in FTAs negotiated by the EU

The EU has included efforts to open public procurement markets in the preferential agreements it has negotiated. The scope of rules and coverage of sectors has increase over time. Earlier EU preferential agreements, such as the Association Agreements with the Euro Med partners and the Trade, Cooperation and Development Agreement with South Africa included only a short non-binding objective of opening procurement markets. This is also the case for the Stability and Adjustment Agreements with the western Balkan states.⁸ More recent FTAs negotiated by the EU include both transparency requirements and rules governing the notification and award of public contracts that are broadly in line with the GPA rules and commitments in terms of coverage.

⁸ The EU Israel agreement also includes only the general objective of opening procurement markets, but Israel is a signatory to WTO Government Procurement Agreement under which it makes specific commitments with regard to the rules governing the award of contracts and to reciprocal market access.

Table 2.1 A broad overview of procurement provisions in EU FTAs

FTA	Inclusion of rules analogous to the GPA	Only short general objective of opening	Coverage commitments
EU – Central America*	yes	no	yes
EU – Colombia – Peru*	yes	no	yes
EU – Korea 2010	yes (Korea is GPA signatory)	no	yes
EU – CARIFORUM 2007	yes	no	yes
EU – Chile 2003	yes	no	yes
EU – South Africa 2000	no	yes	no
EU - Morocco	no	yes	no
EU - Algeria	no	yes	no
EU- Montenegro	no	yes	no
EU – Lebanon	no	no	no
EU – Ivory Coast 2008	no	no	no

* Negotiated but not yet ratified

Source: Anderson et al (2012) 'Government Procurement provisions in regional trade agreements: a stepping stone to GPA accession?' in Anderson and Arrowsmith, 2012.

Table 2.1 illustrates the three general types of procurement provision in EU FTAs. There are those with developed economies or the more recent FTAs with developing economies that include both rules and commitments on coverage. The 2000 EU-Mexico agreement of 2000 (implementing the EU-Mexico co-operation agreement) was the first EU-bilateral agreement (apart from the Europe Agreements) to include substantial provisions on public procurement. This effectively extended GPA provisions to cover Mexico, a non-signatory to the GPA. Mexico had already made similar commitments in the NAFTA. In fact Mexico used the NAFTA text and the EU the GPA text in the 2000 agreement (see table 2.2).

Table 2.2 Coverage of procurement in EU FTAs

EU FTA with	NT	MFN	GPA type rules	Bid challenge	Dispute settlement	Ban on offsets	Cooperation, capacity building	Specialist joint committee
Colombia-Peru*	yes		yes	yes	yes	yes	yes	yes
Central America*	yes		yes	yes	yes	yes	yes	yes
CARI-FORUM	[yes]	no	yes	yes	yes	no	yes	yes

Korea (Rep of)	yes		yes	yes	yes			
Chile	yes	no	yes	yes	yes	yes	yes	yes
Mexico	yes	no	yes	yes	yes	yes	yes	yes
Albania	yes	no	no	no	yes	no	no	no
Euro-Med partners	no	no	no	no	yes	no	no	no
South Africa	no	no	no	no	yes	no	no	no

NT = National treatment; MFN = most favoured nation status

* Not yet adopted. The coverage of EU Colombia-Peru and Central America agreements are broadly similar

[yes] Art 167 (3) of CARIFORUM states that the Joint EU-CARIFORUM Council shall specify where national treatment applies (to non-CARIFORUM based suppliers).

Source: adapted from Anderson et al. op. cit.

The EU-Chile FTA provisions on procurement were of a similar 'generation' to those of EU – Mexico and are interesting in that Chile had been one of the most consistent critics of the GPA as unduly complicated and costly to implement. For this reason Chile, despite its otherwise liberal trade policies, refused to sign the GPA. But the EU-Chile FTA, along with the US-Chile FTA, had the effect of bringing Chile into the fold. There have also been some EU FTAs with no reference to procurement such as the EU – Lebanon and the recent EU – Cote D'Ivoire agreement.

Of the post 2006 FTAs concluded the Comprehensive Economic Partnership Agreement with CARIFORUM was the first. This was a GPA minus. The framework of rules on transparency was as in the GPA, but with some simplification to reduce compliance costs, such as on post award transparency. Art. 167 of the EU – CARIFORUM EPA provides for progressive 'liberalisation'. Decisions by the Joint Council are to decide which purchasing should be subject to national treatment. The EU offered asymmetric concessions by including in its schedule virtually all of the procurement covered by its GPA schedule. In line with the policy of promoting regional integration, the EPA also enables CARICOM to grant preferential purchasing within the Caricom region.

The EU – Korea FTA was next. As Korea is a signatory to the GPA the provisions in the EU – Korea FTA refer to the GPA commitments. Korea also waived any rights to special and differential treatment on procurement under the revised GPA. The agreement included build-to-operate (BOT) contracts thus anticipating the revised 2011 GPA.

The yet-to-be-ratified agreements with Colombia – Peru and Central America negotiated in 2010, represent a significant step towards the adoption of GPA type commitments by EU middle income developing country partners. The basic disciplines require national treatment for scheduled entities and types of procurement. In the case of Colombia for example, these include substantially all central government departments, all departments and all municipalities (Annex I EU Colombia – Peru FTA), but exclude certain key utilities such as energy and sewage and water treatment. As with the EU – CARIFORUM EPA all locally established affiliates of EU companies are to be offered national treatment. In terms of the rules the Colombia-Peru and Central America agreements essentially replicate the GPA type transparency rules. As indicated in table 2.2 there are provisions for bid challenge (Art 190 EU Colombia - Peru) and a sub-committee on public procurement is established to ensure implementation of the agreement including provisions on capacity building and cooperation.

The question is whether this model can be extended in the FTAs currently under negotiation? The negotiations with Canada (a GPA signatory) on a Comprehensive Economic and Trade Agreement (CETA) represent an effort to include the Canadian Provinces (and Territories) in procurement rules. This is something the Federal Government has not been able to achieve in the past and was one of the major reasons earlier negotiations between the EU and Canada broke down in 2006. If the EU can negotiate comprehensive coverage of the sub-central government in Canada it will open up important markets for EU suppliers in the sectors in which the EU has offensive interests (e.g. urban buses and construction) and set a precedent for negotiations with other federal states. Negotiations are currently (June 2012) at a decisive stage.

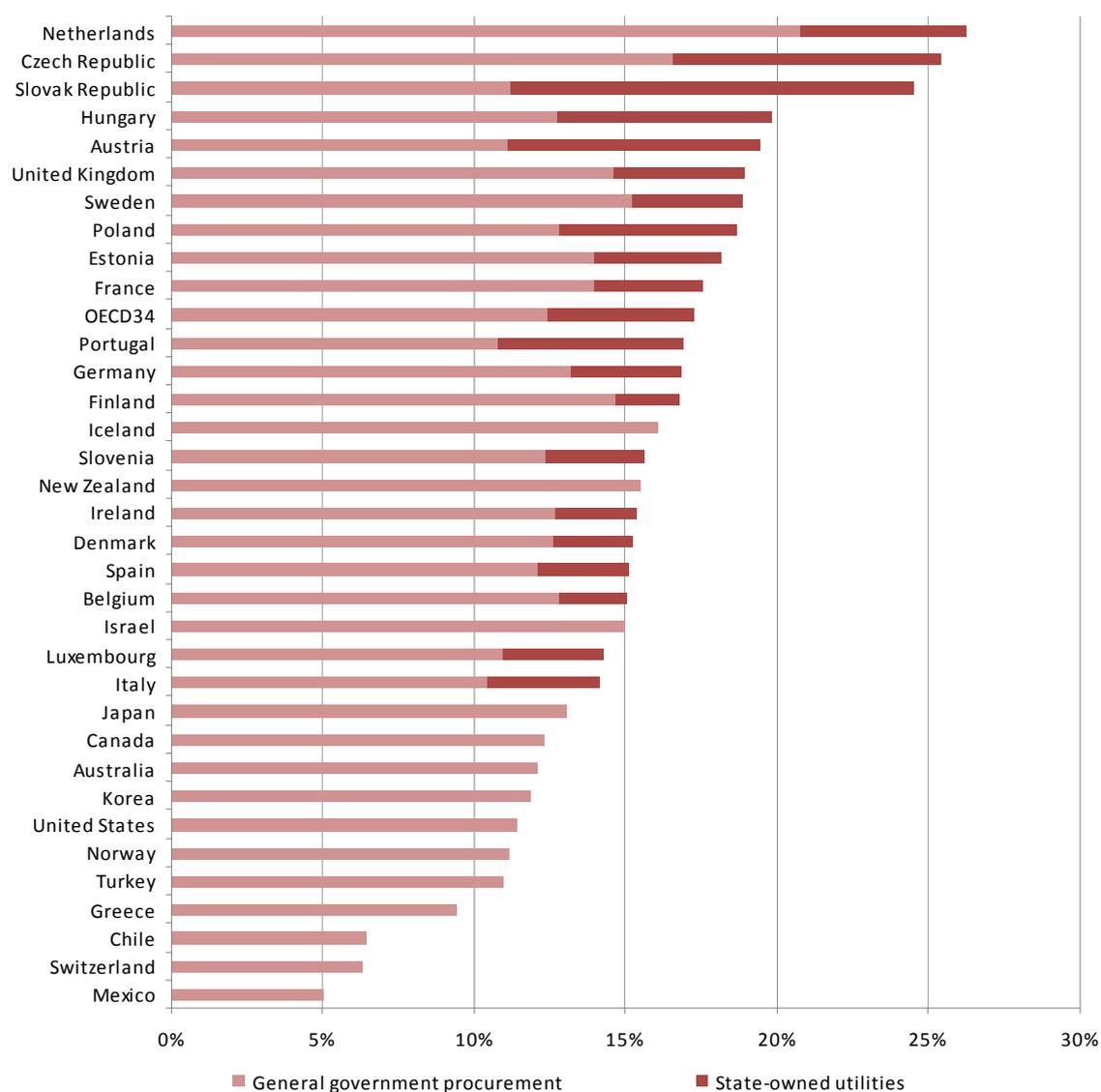
No less important are the negotiations with India, one of the major opponents of inclusion of procurement provisions in the WTO and a non-signatory to the GPA. Inclusion of procurement is an important offensive interest of the EU. If it is possible to include significant transparency provisions in an EU – India agreement and a commitment to negotiate on national treatment/liberalisation sometime in the future this could tip the balance in favour of a strengthened GPA.

In terms of the other emerging markets there are no negotiations under way with Brazil as such although there are with MERCOSUR. The earlier EU efforts to negotiate with MERCOSUR broke down in the early 2000s in no small part due to Brazil's rejection of any inclusion of public procurement. Brazil sees procurement as one of the few remaining policy instruments it can use to promote national industries and the economy. The ongoing FTAs with ASEAN countries will also be important. EU – Singapore is likely to follow the pattern of EU – Korea in that Singapore is also a signatory to the GPA. The scope of provisions in the other EU - ASEAN country negotiations are then likely to reflect their level of development.

To sum up, the EU's efforts have had some success in extending coverage of procurement rules and commitments, mostly via the bilateral route. Any final assessment of whether this is a success or not must wait the outcome of current bilateral negotiations, with India and MERCOSUR and the negotiations on Chinese accession to the GPA. But it must be recognised that even if these agreements can be concluded they will represent only the beginning of the effort to gain access to the markets concerned. Effective access requires that the agreements are implemented and this in turn requires that the countries concerned are convinced it is in their interest to have open competitive markets. While the EU can perhaps be patient when it comes to procurement in middle income markets, the pressure to act in the form of the Regulation comes from sectors that believe they face growing competition from national champions in the emerging markets.

3.4 The scale of the international procurement market

There are no adequate figures for the size of public procurement markets. The best comparable figures have been provided by the OECD, but these are clearly based on OECD country data. Figure 2 shows that the OECD average for public procurement as a percentage of GDP is 17%. Public procurement accounts for a larger share of GDP in the EU (with variations between member states) than for example in the USA or South Korea. This means that the volume of procurement covered by EU commitments under any agreement will be higher than in these countries as is shown by table 5. As discussed above not all procurement is subject to competition with large shares going to expenditure on health and social programs, education, energy and defence, so that procurement equivalent to only about 3% of the total procurement market falls within EU procurement rules (i.e. above the thresholds) and is notified in the Official Journal of the EU. As Table 5 shows, a roughly equivalent percentage of procurement in other major markets falls above the GPA thresholds.

Figure 2 The share of public procurement in GDP for general government and utilities

Source: OECD National Accounts Database and Eurostat. Data for Australia are based on a combination of Government Finance Statistics and National Accounts data provided by the Australian Bureau of Statistics.

3.5 Openness of the EU market

The general picture

The relative openness of the EU public procurement market has been discussed above and it is an issue on which there are divergent views between the Commission in its impact assessment (Commission, 2012) and some recent studies (Messerlin and Miroudot, 2012). If one takes the overall penetration ratios of public procurement based on imports, the EU appears to have a lower penetration rate than China and India, but higher than that of the USA, see table 3. The penetration ratio here is based on imports as a share of the total public demand for goods and services, defined as the final consumption expenditure (government final consumption expenditure consists of expenditure, including imputed expenditure, incurred by general government on both individual consumption goods and services and collective consumption services). This definition of market opening therefore considers the general picture for the public sector as a whole.

Table 3 Penetration ratios of public procurement markets selected countries and years

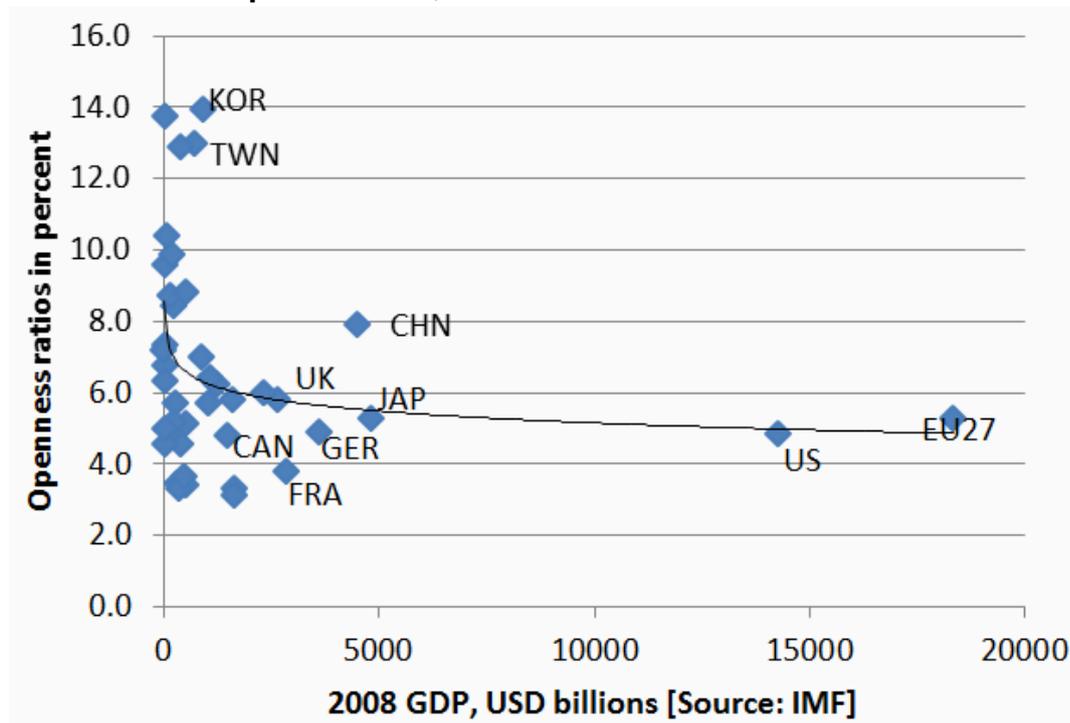
Market	1995	2000	2005	2007
European Union	2.6	3.6	4.2	4.5
Brazil	2.1	3.1	3.1	3.0
China	3.8	3.4	5.6	5.2
India	4.2	4.4	5.8	6.3
Japan	1.9	2.3	3.2	4.2
Turkey	5.4	5.8	9.5	10.9
USA	2.7	3.6	4.4	4.4

Summary of data provided in Messerlin and Miroudot, 2012.

As the data in figure 2 showed small markets, including the small EU member states tend to have a higher import penetration ratio. This is logical given that small markets do not have the local/national capacity to supply all the goods and services required. If one takes the EU as a single market than one would clearly expect import penetration to be lower than in small markets. Table 4 below shows a strong correlation between market size and ‘openness’ (in other words imports to total public consumption).

This is important for developing countries, especially small developing countries, and may go some way to explaining their reluctance to sign up to provisions on procurement. In other words if market size correlates to openness of procurement markets, developing countries and particularly smaller developing countries will be more open than the developed economies. This seems reasonable given that public procurement above threshold levels in developing countries is likely to be made up of capital goods in which the DCs have limited or little supply capacity.

Table 4 GDP and openness ratios, 2008



Messerlin and Miroudot, 2012, <http://www.voxeu.org/article/public-procurement-markets-where-are-we>

Access via investment

The penetration in table 3 also to relate to 'imports' or what the Commission has terms direct imports, in other words goods and services crossing borders. It is however, a feature of procurement markets that access is often achieved through foreign investment in the target market, which helps get around de facto preferences in that contracts granted to the supplier create local jobs and economic activity even if the firm is foreign owned. As noted above, in the EU such indirect access is more important than direct imports. Such indirect access therefore depends on the ease of establishment and whether inward FDI is blocked or discouraged. This may be the case when the host state wishes to defend its national champion against such competition. EU legislation promoting transparency in government procurement and competitive markets, combined with liberal investment policies and the ease of establishment within the EU means that 'indirect' access to the EU market is likely to be easier than in emerging markets, especially when these pursue national champion based development policies.

Commitments

The data provided by the Commission on relative market opening, summarised in table 5 appears to be based on commitments made in international agreements for contestable markets above the thresholds in the GPA (see figure 1). By no means all contestable procurements markets fall within the scope of international agreements. For example, procurement in the form of public works/construction projects costing less SDR 4 million falls below the thresholds so does not come within the scope of international commitments. In its assessment of the relative market access, the Commission has sought to account for these factors, and suggests that the EU is far more open in terms of commitments made. Of course some key markets, such as China, Brazil and India have to date made no commitments under international agreements, but this does not mean they do not buy from foreign suppliers.

Strategic market access

In its impact assessment of the proposed Regulation the Commission considered the impact of relative market openness on specific sectors. The rationale here is that the EU's trading partners are pursuing industrial policy/strategic trade policy objectives by the use of preferences for national champions. This is of course an age old practice in public procurement and one the EU Member States have also used. The Commission's approach in the Impact Assessment study was therefore to first assess the dependence of certain industries on public markets and then show that the (procurement) markets for these sectors in the EU's trading partners are relatively closed compared to the EU market. In the case of the emerging markets, and in particular China, there is an absence of any commitments under international agreements and thus no limits on their scope to pursuit such national champions' policy. In the case of countries that have signed the GPA the schedules have been analysed to identify sectors that remain outside the scope of the disciplines.

The Regulation is therefore justified on grounds that the EU industries concerned must have equivalent access to other major markets if they are not to loose out to the national champions

Table 5 Share of procurement covered by commitments

	EU	US	Japan	Canada	Korea	Brazil	India	China
Total procurement Above GPA threshold (EUR bn)	370	559	96	59	25	42	20	
% of GDP	3%	3%	3%	6%	3%	4%	2%	
Percentage of procurement Internationally committed	95%	32%	28%	16%	65%	0	0	0

Source European Commission, 2012

De facto access

There is yet another aspect to market access that none of the above assessments fully cover and this is *de facto* access.⁹ Even if a country makes commitments in an agreement there can still be *de facto* preference for local suppliers. This can be done by splitting contracts so they come below thresholds, by the use of discretion in contract award criteria based on 'the most economically advantageous contract' or by corruption. Even in systems that have tough rules on corruption there can be occasions when the award of a major contract to a foreign supplier creates such political opposition that governments are forced to reassess the criteria or reopen the competition.¹⁰ Ultimately such *de facto* barriers to competition will only disappear when there is both transparency to contain corruption and a competition based culture and no *de facto* promotion of national champions. The alternative is a more regulated form of trade based on a narrow definition of reciprocity as is arguably the approach inherent in the proposed Regulation.

3.6 International Public Procurement Rules Implemented by Third Countries

3.6.1 The USA

The US was the main demandeur for international rules on procurement in the 1970s and has had a significant impact on the structure of procurement agreements. Its aim was to open the European and Japanese procurement markets for key US offensive interests in the utilities supplying sectors. At the time the US sought to deal with what it saw as 'unfair' competition from European national champions that benefitted from preferential access to national procurement markets, in sectors such as power equipment and telecommunications. The US has also developed the bilateral route. The procurement provisions of (Chapter 13) of the Canada – USA FTA were both based explicitly on the 1979 GPA (Government of Canada, 1989), but also set precedents for future procurement agreements also broke new ground with the addition of a bid –challenge provision. This in effect reflected US domestic practice and required, among other things, that each party established an independent review authority to consider bid challenges (United States General Accounting Office, 1988). This bid-challenge approach then became the model for other international agreements and was incorporated in the 1994 GPA, as well as emulated by the EU in its compliance directives.

With regard to the issue of reciprocity, an origin test was included in the CUSFTA according to which only 'eligible goods' were to be accorded national treatment in all measures concerning government procurement (Article 1305). Eligible goods were defined (Article 1309) as those manufactured in the territory of either Party 'if the costs of the goods originating outside the territories of the Parties and used in such materials is less than 50% of the cost of all goods used in such materials'.

The approach used in the CUSFTA was then applied in NAFTA and in subsequent US FTAs. Coverage of NAFTA was greater than CUSFTA in large part because of developments in the GATT/GPA negotiations in Geneva. Offers made by the EU on utilities facilitated concessions from the US on state level purchasing and purchasing of some 37 US states was included to a greater or lesser degree. The NAFTA rules also emulated the EU's approach in the thresholds adopted (USD250k for goods and services and USD8 million for construction/works).

⁹ The Commission discusses *de facto* access in the Impact Assessment Report but defines it as access affected by local preferences or set-asides. But if preferences are explicit or set down in a policy statement or regulation they are covered by national treatment commitments, subject to coverage of schedules.

¹⁰ Note that international agreements on procurement generally have a national interest opt out that allows governments or contracting authorities to decide NOT to award a contract. This then provides an opportunity to repeat the call for tender with revised specifications or criteria that can, if the contracting authority wishes, be worded to help the local supplier.

The US approach as reflected in these agreements is essentially the same as the GPA, but those on transparency slightly more detailed. NAFTA provided for open, selective and negotiated tendering. As in the EU, there remains potential scope for purchasing entities to use this flexibility to retain existing suppliers. Thus negotiated tendering, with selected tenders is possible when there is a need for network operators to maintain the compatibility of equipment used in the network. NAFTA rules on technical requirements are weaker than the EU. But in contrast to the EU, which has made significant efforts to ensure the necessary international standards were drafted, the NAFTA approach places less emphasis on the development of international standards. This reflects the general North American aversion to what are seen as 'bureaucratically' determined international standards in preference for industry or market driven standards. The criteria for awarding contracts also reflect an awareness of the need for flexibility. The lowest tender or that 'determined to be the most advantageous' can be chosen. In determining the most advantageous tender the purchasing entity can consider a broad range of non-price issues. As in the EU and GPA, there is also a public interest over-ride (Article 1015), which qualifies price and other economic criteria.

There are no reciprocity/third country provisions in the NAFTA rules on procurement, but there is a 'substantial presence' origin test for third country suppliers of *services* in Art 1005, which states that 'a Party may deny to an enterprise the benefits of (the procurement chapter) if: (a) nationals of any non-party *own or control* that enterprise; and (b) that enterprise has *no substantial* business activities in the territory of the Party under whose laws it is constituted.' This 'origin' rule applies to services only because the 1979 GATT GPA, which prohibited such origin rules, did not cover services. The NAFTA, as with the CUSFTA, required a renegotiation of the agreement in the light of the outcome of the multilateral negotiations.

Recent policy developments have revived debate about the old 'Buy America' controversy. The US has had 'Buy America' legislation since 1933 when it was introduced at the time of the Works Progress Administration (part of the New Deal) with the aim of ensuring that the public expenditure created jobs in the US and not overseas. This legislation remains in force in the US and requires among other things a price preference for US suppliers. In order to comply with the 1979 GPA however, the 1979 Trade Act implementing the Tokyo Round of the GATT provided the Executive Branch with powers to waive the Buy America provisions for products covered by the GPA (Linarelli, 2012).

In 2009 the Obama Administration introduced the American Recovery and Reinvestment Act to inject USD 787 bn into the US economy in the wake of the 2008 financial crisis. USD150 bn of this was to go on infrastructure expenditure. In the initial draft of the legislation there was a buy America provision that prohibited the use of funds under the programme to pay for infrastructure projects unless all the iron, steel and manufactured goods used were US origin. Origin was based on a 50% origin rule.¹¹ Again in the initial draft there was provision for waivers on the grounds of public interest, insufficient US material being available or if the use of US products resulted in costs increases of more than 25%. This last point suggests a de facto 25% price preference for materials for such infra-structure projects. The draft led to major protests from the US's trading partners, including the EU, and an amendment was added to the effect that the legislation would have to be consistent with the US's international obligations (under the GPA and any bilateral agreements).

Perhaps the most important lesson to take from this episode is that old habits die hard. The argument that public funds should not go to create jobs elsewhere appears to be as pervasive today as it was in

¹¹ It is interesting to note that the US also excluded least developed countries from this ban. So as in the case of the EU policy, the application was appeared to be aimed primarily at the major exporters of goods to the US with which the US had not signed any agreement on government procurement, namely the major emerging market economies or the BRICS.

1933. The only thing that prevented the return to the full use of 'Buy America' provisions was the US commitments in international agreements. There may also be a lesson in difficulties applying the new US provisions. The origin requirement applied to broadband (telecommunications) equipment that was to form part of the infrastructure expenditure. But broadband equipment production, like many other high technology products was more integrated into global supply chains than iron and steel. The requirement to determine the origin of this equipment therefore created considerable difficulties and delays in projects.

3.6.2 India

India like many developing countries is in the process of modernising its national public procurement practices and laws. Following independence and during the period when India pursued a strict import substitution policy, public procurement at both the central government, state and public enterprise levels was geared to promoting national or regional producers. The substantial sums spent on public procurement, estimated to be in the region of 20% of GDP, were therefore channeled to local production. Although there was some purchasing from foreign suppliers this was actively discouraged. Foreign suppliers had to be approved by the central supply agency; there was limited foreign direct investment, especially in sectors such as power generation, transport, and other suppliers of key products to utilities. Price preferences favouring local suppliers ranging up to 15% and in some cases higher were applied and there was preferential purchasing for smaller and craft companies, with the purchase of some products reserved for such suppliers.

The general economic liberalisation that began in 1991 eased some of these restrictions on competition. Foreign investment was allowed in some sectors that had previously been virtual monopolies for local Indian suppliers. A few states introduced legislation requiring transparency in public procurement, but the Indian system of public procurement has remained very fragmented. The effects of liberalisation on procurement practices have been (very) slow coming. Although there are nominal common rules broadly in line with the UNCITRAL Model Law on government procurement, the 246 central purchasing entities and around 800 state level entities effectively pursue different procedures and there is as yet still no standard bid documentation or criteria. This provides ample scope for discretion in the awarding of contracts and thus abuse. Surveys conducted by the Confederation of Indian Industry found bribes in the order of 5 -15% of the contract value were required to win public contracts (Debroy and Pursell, 1997).

The World Bank Country Procurement Report of 2003 found a range of weaknesses in India procurement practices including: no harmonised rules or legal framework, no credible complaint procedure, no standard tender documents, the use of price preferences, extensive use and sometimes abuse of negotiated contract award procedures etc. (World Bank, 2003). All these would have made tendering for contracts from the EU a challenging process and there were also specific rules for key sectors.

In 2000 India became an observer to the GPA negotiations and appears to have taken more interest in international procurement rules. However, it still opposed inclusion of procurement in the DDA as discussed above. In 2005 further reforms were introduced in the shape of General Financial Rules (GFR). These set out common objectives and principles for all purchasing, such as accountability, efficiency, economy and transparency and delegated the responsibility for ensuring procurement meets these aims to the purchasing entities.

The Indian reforms set out in more detail the procedures to be followed when contracts are awarded and thus should enhance transparency. For example, all bids over Rs 2.5m had to be subject to open contract award procedures, rate contracts (similar to framework contracts used in the EU) are provided

for, but there is no post award transparency provision and no bid challenge equivalent to that in the GPA (Chakravarthy and Dawar, 2012). Special rules apply for utilities that will also be important for EU exporters. The phasing out of price preferences, which was to have been achieved under earlier reforms, has been put back and these are now renewed on a yearly basis. The preferences for small and craft companies also remain in place, including the policy of purchasing certain products (including for example, some pharmaceutical products) from small and medium sized firms. The broad conclusion therefore appears to be that India has gone some way to reforming its procurement regime, but it still a good way off providing a rigorous transparent system.

This then raises the question of India's ability and willingness to sign up to commitments on government procurement. In terms of India's ability to make commitments the diverse nature of procurement practices in India means full coverage of all entities including state level procurement would involve considerable time and cost. It is therefore more feasible to envisage India accepting progressive application of procurement rules, starting for example with goods at the central government level. Exemptions for certain national policy objectives such as the discrimination in favour of small and craft producers may also be needed to facilitate an agreement.

In terms of its willingness, it is necessary to assess the interests of the various parties concerned. Some interests in central government might well see external disciplines as helpful in maintaining the momentum of reform. But it must be recognised that public procurement and payoffs for influencing procurement especially in some utilities such 'as irrigation and electricity are also generally considered to be an important factor in state politics' (Debroy and Pursell, 1998: pg 189). The use of public contracts as a means of dispensing patronage is a feature in all countries and Indian local and state politics is certainly no exception. In terms of stakeholders, those companies benefiting from rents thanks to national or regional monopolistic or oligopolistic structures sustained by procurement contracts will not support market opening. Guaranteed access to the existing markets is more interesting than the chance of access to far more competitive foreign markets. The sectors and small businesses that continue to benefit from price preferences can also be expected to oppose India making commitments that threaten these privileges. Having said this there is a growing number of internationally competitive Indian companies that would be more than able to compete on international markets. Consumers stand to benefit from the more economic use of public funds resulting from increased competition in public procurement, but the general public has limited impact except perhaps in pressing for action against corruption. So in so far as transparency in government procurement can contain corruption there should be support for it.

In other words there is a diverse picture in terms of the interests for and against commitments to greater transparency and liberalisation. The general trend appears to be towards greater opening to competition, but there is also clearly a very strong inertia holding back such moves. Any move to commit to liberalisation would most likely need to be progressive and whilst provisions in an EU – India FTA on procurement would certainly be a start, they are unlikely to have much of a meaningful impact for some time.

3.6.3 China

There are no figures for China that allow a real comparison with the EU or other OECD procurement markets. For one thing there is no clear definition of what is public procurement in China, because of the lack of any clear distinction between the public and private sectors of the economy. According to the recent statistics on public procurement released by China's Ministry of Finance, the size of the *central government's* procurement market has increased significantly from CNY 3.1 billion in 1998 to CNY 741 billion (approximately 2% of GDP in 2009, and an expected CNY 1 trillion (15% of GDP) in 2012

(Office of Public Procurement, Ministry of Finance). These figures show an annual growth in procurement market of approximately 23.5%, which presumably reflects both economic growth and the growth in the use of arm length tendering by public bodies. Its proportion to national GDP is at present roughly the same as in developed economies, but can be expected to grow given the much larger state sector in China.

Provincial government

At the provincial level, 15 provinces have been particularly active in establishing a procurement market. These include Beijing, Guangxi Zhuang Autonomous Region, Guangdong Province, Jilin, Fujian, Sichuan, Zhejiang, Shandong Province, Gansu Province, Hebei, Anhui, Heilongjiang, Henan, Tianjin, Shanghai and Jiangsu Province. It has not been possible to get comprehensive or reliable figures on the market sizes of all regional governments, so this study provides an illustration of the position in some of the more important provinces. Government procurement markets open to any form of competitive bidding has only been established in the more developed provinces.

In the highly-developed region of Beijing – according to the Beijing Municipal Procurement Office’s statistics, in 2011 – the overall size of the procurement market was CNY 5.73 billion from 2042 contracts. However, this figure is thought to be well below the potential procurement market (if more activity were subject to competitive tendering), which is approximately 10-fold greater. Tianjin as an example of a large developed region has a procurement market of CNY 21 bn in 2011 according to the Tianjin Municipal Procurement Office’s statistics.¹² However, the statistics also indicate that Tianjin’s potential procurement market capacity is around CNY 70 billion and growing. An example of a medium-level development region is Hebei province. Here according to the Hebei Provincial Office of Public Procurement, the procurement market in 2010 was CNY 39.61 billion and CNY 43.76 billion in 2011. Of this amount, some 85% were spent on engineering and construction projects. It is not clear how close this is to the potential procurement market.

State-owned enterprises

In the state-owned enterprises’ (SOEs) procurement market, market size statistics are not readily accessible, largely because there is no clear distinction between their procurement and that of the provincial and central government. With this said, it may be helpful to summarise the market size of different sectors of procurement as an indicator of the potential size of the SOEs. The table below illustrates the market size of the main procurement sectors according to the most recently released data from the first quarter of 2010.

Table 6 Sectoral shares of recent SOE procurement

Sector	Awarded Amount (CNY million)		
	January 2010	February 2010	March 2010
Aggregate Total	785454	556975	196719
Construction	230349	79634	57902
Service	68183	17637	21073
Medicine	57862	13901	12603

¹² Of this amount, the government centralised procurement agency accounted for CNY 10.03 billion, the centralised department procurement agencies account for CNY 313 million ,and social agencies accounted for CNY 7.22 billion .

Automobile	18583	4019	6177
IT	6262	3529	3702
Home Carpentry	5733	2447	3128
Electrical	1060	82	2489

Source: Public Procurement Office, Ministry of Finance, PRC.

From the table above, the SOEs' procurement is largest in construction. But high value-added goods also account for a large proportion of the market. For instance, in 2010, China's government procurement in automobiles alone reached about CNY 100 billion, which was about 14% of China's total government procurement for that year. Likewise, the IT sector has in recent years accounted for approximately one-third of China's entire annual procurement.

Foreign Penetration in the Chinese Procurement Market

The data publically available on foreign-firm penetration of the Chinese procurement market is fragmented and unsystematic. According to the statistics of the Ministry of Finance, foreign penetration is concentrated in the high-tech procurement markets with little if any penetration in other areas of procurement. Within the high-tech markets, it is estimated that overall foreign firm penetration is about 58 %. In some sectors, such as automobiles, laser printers, projectors, and digital copiers, foreign penetration is approximately 75%.¹³ This is seen to be because domestic suppliers are inferior in terms of technology and quality. On this evidence foreign penetration in China's procurement market is sector-specific.

Chinese Procurement Policies

Over the last 15 years, the National People's Congress enacted two national laws on government procurement: the "Tendering Law" (which entered into force on 1 January 2000), and the "Government Procurement Law" (on 1 January 2003).

The main task of the Tendering Law is to provide a unified legal and institutional framework for tendering regulations. However, the law consists of a combination of compulsory and voluntary coverage. On the one hand, Article 2 of the Tendering Law provides that it should apply to all tendering activities within the territory of China, which means that, if any procurement entity, including state enterprises, governmental or quasi-governmental institutions "voluntarily" binds itself to procure goods, services, or works through open or selective tendering, the procedures specified in the Tendering Law must be followed. At the same time, Article 3 of the Tendering Law requires mandatory use of the Tendering Law for construction projects that are vital for public interests and security.¹⁴ What is unclear from the Tendering Law is therefore whether it applies exclusively to the procurement of works or whether it also applies to the procurement of goods and services that are not related to construction projects. The Tendering Law was not actually designed for government procurement, but for all tendering activities whether public or private. Hence, it is questionable whether the Tendering Law actually qualifies as a government procurement law.

13 According to the Treasury Department of the Ministry of Finance, in 2011, the national government procurement statistics shows that the national government procurement in automobiles in the year of 2011 generated a market of CNY 15.47 billion. Of this, foreign brands constituted larger shares of this market.

14 I.e., construction of large-scale infrastructure and public utilities; construction projects fully or partially financed by State fund or fund borrowed by the State; and/or construction projects financed by loans or financed aid from international institutions or foreign governments (Ping Wang 2009, p. 22).

Government Procurement Law

In an effort to bring China's government procurement policies in conformity with international practices, the National People's Congress implemented the "Government Procurement Law" (GPL) on 1 January 2003. The law inherited the main features of the regulations under the Provisional Measures of the Ministry of Finance. The regulations include the following:

- The term "government procurement" refers to any procurement of construction works, goods, and services by government agencies, institutions and societies under budgetary control with fiscal funds in the form of purchasing, leasing, trust or hiring.¹⁵
- Modern procuring methods in addition to open tendering and restricted tendering (i.e., competitive negotiation, requests for quotation and single source procurement) were provided.¹⁶
- Government Procurement should be divided into centralised and decentralised procurement; centralised procurement of items listed in the Centralised Procurement Catalogue should be conducted by Centralised Procuring Entities.
- The procuring entities are refrained from procuring foreign goods, construction works and services without approval. Here, "foreign goods" refers to finished goods that are imported and locally produced or assembled products with less than 50% local value-added content. Foreign suppliers may apply for "single-entry" access to the government procurement market through the Ministry of Finance and relevant provincial level governments. "Multiple-entry" market access may be available through the regulations of conventions, treaties, and bilateral agreements entered into by China.¹⁷

Two Laws in conflict

To date, the Chinese government has not been able to turn the Tendering Law into the real government procurement legislation, and any attempt to incorporate the tendering regulations in the GPL has thus far been unsuccessful. The lack of harmony between the two laws has caused uncertainty concerning the scope of China's government procurement regime. A striking example is the procurement of state enterprises, which is clearly subject to compulsory regulated tendering procedure and yet is excluded from the definition of government procurement provided by the GPL (Wang 2009, p. 35). To reconcile the two laws, it was provided that the "Tendering Law shall apply when tendering procedure is conducted in the procurement of works (Art 4 GPL)." Yet, the Tendering Law also claims to be applicable to "all tendering activities within the territory of the People's Republic of China." Meanwhile, the legislative intent of the GPL is that so far as government procurement of works is concerned, if no tendering procedure is to be conducted, the GPL should apply. However, detailed tendering procedures embodied in the MOF rules do not appear to apply in the GPL. Since the two laws are contentious and overlapping, it has undermined their general effectiveness.

Domestic Preference

Embodied within the MOF rules is a "Buy National" policy confirmed by the GPL. According to Article 10 of the GPL, domestic goods, construction and services shall be procured for government procurement. The exceptions to this policy are:

- When the needed goods, construction or services are not available within the territory of the People's Republic of China; or if available, it cannot be acquired on reasonable commercial terms and conditions;

15 Articles 2 & 3, Provisional Measures on the Administration of Government Procurement, Ministry of Finance, 1999.

16 Ibid. Articles 20-24.

17 Articles 6, 10 & 12. Provisional Measures on the Administration of Government Procurement, Ministry of Finance, 1999.

- When the items to be procured are for use abroad; or
- In other circumstances provided by laws and administrative regulations.

However, given that one of the exceptions to the implementation of this policy is based on the impracticability to procure the needed goods, construction and services on “reasonable commercial terms,” this policy is arguably ineffective. Moreover, the phrase is general and flexible enough to be manipulated by procuring entities in order to acquire cheaper supplies. It may well be the case that this buy national policy can only be complied with when domestic and foreign suppliers are offering goods, services, and works on similar terms and conditions (Wang 2008, p. 56).

China’s Accession to the GPA

China delivered their initial offer along with their application to accede the GPA in late-2007. In its initial offer, under Annex I¹ for Central Government Entities, China listed all central government departments (i.e., Commissions, Ministries, Administrations, Bureaux, Offices and the Central Bank). But the thresholds for covered procurement of supplies, services and works are significantly higher than those of existing GPA Parties. For instance, they proposed 500,000 SDRs for supplies, 4,000,000 SDRs for services, 200,000,000 SDRs for works. In contrast, the EU’s Annex I (Type I) thresholds are 130,000 SDRs for goods and services, 5,000,000 SDRs for works (Wang 2010, p. 95). Furthermore, coverage proposed for procurement by central government entities covered selective goods (i.e., office equipment and furniture, limited services and works). Annex 2 (Type II) for sub-central government entities was almost non-existent in China’s initial offer, which meant that China excludes the application of the GPA to its provincial authorities. Compared to existing GPA members, this is not a big variation as other countries also have limited coverage in other countries for sub-central entities. For instance, the US only covers 37 of its 50 states; and Canada until 2010 did not cover any of their provinces. Under Annex 3 (Type III) for Other Entities, China, unlike the existing GPA Parties, made no offers for state enterprises, in particular public utilities. Moreover, China made its intention clear that it wants to retain the freedom to promote industrial and social policies through government procurement even after accession to the GPA. Clearly at issue here is whether China’s GPA partners will see it as a developing country able to avail itself of exemptions set out in the new GPA text. China’s initial offer therefore received a very frosty reception from its negotiating partners in the GPA.

Under continuous pressure from the US and EU, China presented a revised offer on July 9, 2010. This contained modest improvements in terms of their coverage of central entities under Annex I, agreeing to lower the thresholds over time, and made their first offer on service procurement. But the offer fell below the expectations of the GPA signatories. At the 2011 Ministerial Meeting of the GPA signatories in Geneva, China provided a second revised offer with much better improvements, including its first offer on sub-central entities as well as agencies under the central government, although there remained ambiguity on what entities and/or services would be covered. State-owned enterprises were still omitted from the offer. Nonetheless, the second revised offer drew a lukewarm response from some countries with the US Trade Representative Ron Kirk stressing that China “still has some distance to go” before its coverage is on par with that of current GPA parties. The US is seen as at the forefront of requesting greater commitment and coverage from China including the inclusion of state-owned enterprises, more sub-central entities and services and reduced thresholds.

China’s hesitations

Behind China’s slow progress in the GPA negotiations lay several underlying factors. The first factor concerns China’s uncertainties about the definition of “government procurement” and of “national goods and services”. This is particularly problematic for China because of the nature of its economy and the large role played by state owned enterprise. Secondly, the government is not certain about the

benefits of joining the GPA. In qualitative terms, the benefits of GPA entry are questioned because of the poor implementation of the Agreement and of the perceived discrimination against Chinese SOEs in some member countries' investment and procurement policies. China argues that neither the US nor the EU have shown solid statistical evidence that their procurement markets are open and to Chinese suppliers. Chinese officials point to the fact that, as noted above, the general figures for import penetration of the Chinese public market are at 6.1% higher than those of the US (4.6%) and Japan (4.7%), and the EU if one considers extra EU import penetration. Meanwhile, Shingal (2011) found that despite the GPA, the proportions of service contracts awarded to foreigners have declined over time particularly for Japan and Switzerland. Therefore, the government views the space of expanding foreign market share through GPA accession to be quite limited. Third, the government is concerned with the cost of accession, particularly the fact that the government will lose its discretion of choosing between government control and market forces. As the government control over investment and consumption is considered as a vital tool to facilitate economic and social development, the thought of losing this as a result of GPA accession appears to be unacceptable.

The Chinese government also believes that a GPA accession poses significant challenges for the domestic procurement market and law – areas of which are poorly developed, so that the costs of adaptation to GPA type rules would be high. One example of this is the incompatibility between the Tendering and Government Procurement Laws; another is the need to improve the existing operational mechanisms including the role of the centralised procurement authority and agencies. Thirdly, as in all developing countries, there is a need for more professional staff. Finally, there appears to be no political commitment to the GPA. Unlike the case of WTO accession the GPA negotiations have been largely neglected by the elite leadership. No leading politician neither Jiang Zeming nor Hu Jintao have expressed a view, so Chinese negotiators are unclear whether the Chinese leadership is positive or negative. With this said, one incentive for the government to negotiate accession into the GPA is to take the opportunity to streamline the domestic procurement regime. The government recognises that since the state sector will still be very large in the foreseeable future, its procurement should be put under strict and transparent regulatory system to ensure value for money and freedom from corruption.

3.7 Conclusions on procurement in other major markets

The discussion above has sampled some of the EU's major markets. Those not covered due to space are Japan, which is a signatory to the GPA and with which the EU is discussing a bilateral agreement that would include public procurement. Clearly there is a distinction to be made between signatories to the GPA or other bilateral agreements and the major emerging markets. The discussion of India and China above suggests that even if an agreement could be reached with these countries (either in the form of the FTA with India or Chinese accession to the GPA) it will be some considerable time before the national procurement regimes begin to offer the sort of transparency and predictability of the EU regimes. In short while negotiations to include the emerging markets in procurement regimes are important, they cannot be expected to provide results for many years to come.

4. THE DRAFT REGULATION

This chapter analyses the draft Regulation (COM (2012) 124 of 21 March 2012) in some detail.

4.1 The options considered

By way of introduction it should be recalled that the Commission considered a number of alternative options to strengthen the leverage of the EU in international negotiations. Figure 8 summarises the Commission's conclusions on the impact of the various options. The positive effects of a Regulation are

seen to be in the form of increased jobs and contracts in third countries as well as in retaining or strengthening the cohesion of EU (trade) policy. The costs are seen in terms of the costs of retaliation by third countries, the added administrative burden and less efficient use of public finance. The findings from the impact assessment exercise are of course based on judgments, but support the case for an option 3a.

The positive effects depend on whether the Regulation will help promote exports and create jobs. The gains are of course by no means certain as they depend on the EU's trading partners agreeing to more commitments in negotiations and to the effective, de facto, opening of the markets concerned. The Regulation should enhance the EU's leverage in negotiations compared to the current position. On the costs side, as discussed above retaliation can be expected. The costs in terms of supply chains comes in the form of a limitations on the ability of EU based suppliers using products sourced from abroad because of the origin requirements. The Regulation is also seen as a means of ensuring consistency in the way the various contracting bodies in the EU treat tenders coming from third country suppliers. This would seem to be a clear benefit of the Regulation.

Table 8 Comparison of options compared to 'no policy change'

	No policy change	Option 2	Option 3a	Option 3b	Option 3c	Option 4	Option 6
Increased exports and jobs	0	+	++	++	++	++	=
Clarify rules of access to EU PP market for non-EU tenders	0	=	++	++	++	+	0
Leverage effect	0	=	+	+ / ++	+	+	=
Strengthen the level playing field for EU companies	0	+	+	+	+	+	=
Retaliation effects	0	-	--	- / =	--	-	- / =
Impact on supply chains for EU firms	0	-	--	- / =	--	-	- / =
Impact on public finances	0	=	- / =	=	- / =	=	=
Administrative burden	0	=	-	--	--	-	- / =
Consistency of EU trade policy	0	=	+	++	+	+	0
Consistency of internal market	0	=	++	+	+	+	0
Ensure respect for international agreements	0	=	+	++	+	+	0

0 – no change; = minimal change; + improvement; - worsening

Source: European Commission, 2011; Impact Assessment Annex Table 14.

These options have been discussed within the Commission and were subject to a consultative process. There was a division of opinion on the best option to follow. One option was to do nothing. This appears to have been favoured more by purchasing entities, due to the potential costs of implementing the proposals on the treatment of third country suppliers. Purchasing entities also tend to favour

retaining flexibility in their procurement policies in order to respond to commercial and market developments. A number of governments favoured doing nothing, either because they feared retaliation from the EU's trading partners or because the proposals could be interpreted as a protectionist move. Option 2 is the use existing provisions, such as Art 58 of Directive 17/2004. The impact assessment judges that this option would not help to ensure consistency of EU policy, but there is no doubt some scope for non-statutory policy guidelines to improve coherence. The limitation with this is that purchasing entities would not be very restrained from 'breaking ranks' and buying from third country national champions if they have no domestic industry to protect.

A restrictive legislative option (3 a) was to give the purchasing entities scope to exclude tenders that include non-covered goods or services. This was seen in the impact assessment as enhancing EU leverage and thus the (prospect) of better access and more jobs, but at a higher potential cost in terms of retaliation and administrative burdens. The compromise option chosen by the Commission was therefore one that provides an ability for purchasing entities within the EU to seek to exclude tenders from countries that do not offer sufficient access for EU suppliers, but to have the Commission retain control by authorising any such exclusion. The option also includes scope for the Commission at its own initiative or of interested parties or the Member States, to start investigations into the procurement practices in third countries as a prelude to negotiating enhanced access for EU suppliers.

4.2 Scope and definitions

Chapter 1 of the draft Regulation entitled General Provisions covers the scope of application. This states that the Regulation would cover all EU public procurement, both so called conventional procurement of goods, works and services by central and sub-central government and purchasing by utilities. There is also reference to a future Directive on concession contracts that would also fall under the provisions of the Regulation. As provided in the later Article 20, the existing third country provisions in Article 58 and 59 of Directive 2004/17/EC would therefore be repealed.

Article 2 contains a series of definitions that are essentially the same as those used in existing EU legislation on procurement. Important here are the terms 'covered' and 'non-covered goods and services.' 'Covered-goods and services' are those originating in a country with which the Union has concluded an international agreement on procurement including market access commitments extending to the goods or services concerned. 'Non-covered goods and service' are then those that originate from countries that have not signed an agreement on procurement, or goods or services from countries with which the EU has an agreement but which are not covered by the relevant schedules, i.e. the schedules annexed to the GPA or bilateral or region-to-region trade agreements. There is also reference to a 'mandatory price penalty,' which is one of the options that would be available in responding to tenders from third country suppliers where the home country does not satisfy the conditions for market access for EU suppliers set out in the Regulation. This would be the increased price that EU purchasing entities would impose on such tenders.

4.3 Origin

Article 3 sets out the rules for determining the origin of goods or services supplied to EU procurement markets. This is important because with extensive value chain networks and globalised production it is not always easy to determine the 'origin' of any product or service. Determining origin represents one of the main components of implementation costs for the Regulation.

In addition to the costs of determining origin there is the question of whether the Regulation would also affect EU suppliers of goods to the EU procurement market when these suppliers use components

or inputs from different countries. The criterion used in the Regulation is 50% origin.¹⁸ If more than 50% of the value of goods or services for a contract is 'non-covered' then the provisions of the draft Regulation that make exclusion of such tenders possible can be applied. If an EU based company makes extensive use of global supply chains it is possible that the products it offers would also fall under the Regulation. This was an issue when the third country provision were first discussed when the original utilities Directive was adopted by the EU. The increase in global supply chains since that time will have made the issue more important today. Clearly purchasing entities have discretion when it comes to the decision of whether to seek exclusion of such tenders, but to exclude a third country tenderer because 51% of the value does not originate in the EU, but not to exclude a tender from an EU supplier when more than 50% of the value is non-covered goods or services would be clearly discriminatory.

Article 3(2) illustrates the challenges applying the origin rules. This addresses the origin of service providers. In this case there is no established definition of origin for the Commission to fall back on so it introduces what is in effect a three level test that draws on services agreements.¹⁹ Without going into great detail the first test for a legal person (i.e. company) is whether it has a commercial presence within the Union. Commercial presence is then defined as 'substantive business operations' in a Member State'. This is the (vague) definition of services origin used in services agreements (and NAFTA). There is then the question of how to determine substantive business operations, which is further defined as 'a direct and effective link to the economy of a Member State'. There is then the need to define the ownership of a company (legal person), which is defined as a 50% equity share and an ability to name a majority of its directors. Such provisions are intended to deal with situations such as the supply of a good or service by a Hong Kong based or owned company to the EU procurement market. Hong Kong is a signatory to the GPA so its goods and services are 'covered' goods and services, but there are clearly very close links between many Hong Kong and Chinese businesses and China is of course one of the main targets of the Regulation. If Chinese suppliers were able to route through Hong Kong they would effectively bypass the provisions on reciprocity in the draft Regulation.

4.4 Treatment of countries that have signed agreements

Article 4 in Chapter II of the Regulation states that goods or services provided by countries that have signed agreements with the EU will be treated 'equally' to goods and services originating within the EU. The use of the word 'equally' appears to imply that this is national treatment. Indeed the agreements the EU signs with third countries on procurement are based on the provision of national treatment. But if this is the case it is not clear why the term 'equally' rather than the normal terminology for national treatment has been used.

4.5 Treatment of developing countries

The second paragraph of Article 4 clearly states that goods or services from *least* developed countries, as listed in Regulation EC No 732/2008 (applying the EU GSP scheme) are not subject to any potential controls. This is in line with the EU's policy that offers asymmetric access to the EU procurement market for least developed countries. The key question of course is not LDCs but DCs, in other words how will middle income developing countries be treated? The EU's practice in FTAs, such as those negotiated with Colombia and Peru or Central America suggests that the EU will follow a policy of graduation, so that DCs will be asked to sign agreements that are based on GPA type rules and transparency, but with

¹⁸ This is the measure of origin used in both the US and Chinese third country rules.

¹⁹ In cases of trade with GPA partners the EU is obliged under the GPA to use the same rules of origin for procurement as it uses in the normal course of trade policy.

a phased extension of coverage. As drafted the Regulation could therefore be used to strengthen the EU's leverage in negotiations with developing countries in such cases.

The one short paragraph exempting LDCs does not say much about how the EU would apply the Regulation to goods originating in developing countries, including some ACP states. Another issue is the absence of any specific reference to possible exemptions for policies aimed at promoting small and medium sized companies or even time-limited exemptions for other explicit development policies. These have been included in the S&DT provisions of the revised GPA. There is of course discretion for the EU to exclude such policies when it negotiates with developing countries, but these provisions have been included in the GPA in order to make accession more attractive.

4.6 Exclusion of tenders by the Commission at the request of purchasing entities

Articles 5 and 6 provide the meat of the Regulation on how the EU will deal with tenders from countries that do not offer satisfactory, reciprocal access to EU suppliers. Article 5 sets out how individuals contracting entities may request approval from the Commission to exclude tenders comprising non-covered goods and services. It also grants the Commission the powers to exclude such tenders. The examination procedure would be used in the case of such a decision to exclude tenders. The Commission can only act upon request of 'individual contracting entities' (Art. 5(a)).

4.7 Thresholds

In order to reduce the costs of compliance and to target only the most economically important tenders a threshold of EUR 5m is established. So the Commission will only consider exclusion of large, one might say strategically important tenders. This clearly makes sense as the EU's offensive aim in markets such as China is to ensure that national champion strategies by third countries do not result in the exclusion of EU companies from important growth markets, while the EU market remains open to exports from such national champions. Article 6 does not however, state how to deal with one of the traditional 'dark arts' of tendering for public contracts, namely splitting contracts in order to come in below thresholds. This has been a widespread practice in the past to avoid disciplines and could possibly be used to avoid being potentially caught by the Regulation.

Article 6 (1) refers to 'contracts with an estimated value' of EUR 5m, so it would depend on whether this could be interpreted to mean a group of (split) contracts or specific individual contracts.

4.8 A chilling effect

Article 6 (2) contains an interesting provision requiring contracting authorities that 'intend to request (such) exclusion to indicate this in the contract notice they publish.' This appears to mean that purchasing/contracting entities can announce in advance that they will not accept tenders containing 'non-covered' goods or services. This could have a chilling effect on bids from suppliers from third countries that have not concluded agreements with the EU. As such it could therefore reduce the need for the EU to act against tenders from such countries. Whilst this may reduce the administrative costs of dealing with a lot of contentious tenders it may have a general chilling effect on international competition.

Purchasing entities in the EU 'shall require tenderers to provide information on the origin of goods and services contained in the tender' (Article 6(2) paragraph two). Here they may accept self-declaration of preliminary evidence, which is clearly a provision aimed at reducing the costs of proving origin. Purchasing entities have to provide information to the Commission when they notify a tender for possible exclusion and there are powers for the Commission to adopt implementing acts detailing how this is done.

Once notified to the Commission, the Commission has two months to come to a decision on whether to exclude the tender. This period may be extended by two months. Article 6(4) then contains key provisions on the criteria for a decision to exclude the tender. The Commission 'shall' approve exclusion if there is an agreement between the EU and the third party but that the purchasing concerned is covered by reservations. This means exclusion if the tender concerns procurement not covered by the schedules to any such agreement.

4.9 'Substantial reciprocity'

The Commission 'shall' also agree to the exclusion of the tender when the third country does not provide 'substantial reciprocity' in 'market opening' between the Union and the third country concerned. Clearly the definitions of 'substantial reciprocity' and 'market opening' are important here. Again there are levels of definition proposed. A lack of 'substantial reciprocity' is presumed where there are 'serious and recurring discriminations of Union economic operators' (Art 6(4)). The next paragraph then offers another definition of 'substantial reciprocity' that requires the Commission to examine whether the third country procurement laws both 'ensure transparency' in line with international standards (not specified but these would presumably be GPA type transparency provisions or perhaps UNCITRAL Model Law type transparency) and 'preclude' any discrimination against Union goods, services and economic operators (Art 6(5) (a)). The Commission will also have to consider the degree to which there are discriminatory practices. These are high standards and would appear to cover de facto discrimination as well as any de jure preferences for local suppliers in the third country. With some justification central governments in India, China or other large developing countries, where there is still a very fragmented system of public contracts and little central control, could claim that they will have great difficulties precluding all forms of discrimination at lower levels. Given the nature of public contracts this is arguably difficult to do even in the EU. So the wording of the Regulation does not appear to limit the ability of the Commission to exclude tenders that are not covered by the GPA or bilateral agreements.

4.10 Abnormally low tenders

Analogous to subsidies in general trade it is possible that some tenderers are able to make abnormally low bids in order to win a contract and thus establish a presence in a particular market. When the product concerned exhibits network externalities, such as the adoption of a particular standard or technology, established suppliers can then achieve a privileged position in the market for years or decades. On the other hand, low prices for a tender clearly favour the purchaser who gets more for his/her/the tax payers' money. The Regulation therefore provides that purchasing entities/contracting authorities must notify cases in which they intend to accept an abnormally low tender. This leaves the discretion in the hands of the purchasing entity to select such a tender. There is no sanction against abnormally low tenders.

4.11 Investigations and consultations

Articles 8 and 9 lay down the procedures and powers for the Commission, either at its own initiative or on the instigation of 'interested parties' or a Member State, to initiate an 'external procurement investigation'. Interested parties here could clearly include industry interests. Such investigations would be undertaken when there is evidence of some degree of systematic use of restrictive procurement practices by a third country. The Commission would have 9 months to investigate, extendable to a year. The decision making rule for terminating an investigation would be according to the examination procedure. So this gives the Commission rather less discretion. If the Commission finds the third country concerned has restrictive policies in procurement it would then engage the third party in

consultations with a view to resolving the problems. The Commission would have 15 months to negotiate national treatment for EU suppliers (Art 9(1)).

These provisions for investigation and negotiation apply to third countries that have not concluded an agreement with the EU as well as those that have. But Article 9(2) states that where third countries have signed the GPA the procedures set out in that agreement would be used. When negotiation of an agreement is considered the best course of action to resolve the lack of access for the EU suppliers, the Commission then has the power to ensure no actions are initiated against tenders from that country.

Broadly speaking the approach adopted here is very similar to that used by the USA in Section 301 of US trade legislation. In other words cases of 'unfair' trade can be brought to the attention of the Commission; the Commission is obliged then to investigate and if there are restrictions negotiate better access. If better access cannot be negotiated Article 10 then provides the EU with powers to temporarily limit access for non-covered goods and services when third countries do not provide 'substantial reciprocity'. These limits can either take the form of exclusion of tenders that are more than 50% by value made up of non-covered goods or service, or a price penalty. Article 10(2) (b) contains no reference to how the price penalty would be calculated. As this is equivalent to a price preference for EU suppliers one could assume that it might be intended to match any price preference provided for local suppliers in a third country, but this is not explicit. Decisions on limiting access to the EU procurement markets would be taken using the examination procedure. Article 11 provides for the withdrawal of measures limiting access, again taken using the examinations procedure.

Article 13 provides for exceptions so that purchasing entities/contracting authorities can still buy from a third country supply against which restrictions on access have been taken by the Commission under Art 10. This is presumably included at the insistence of purchasing entities that wish to retain flexibility and are not altogether happy with being restricted in their purchasing policies. Entities wishing to use the Art 13 exemption have to notify the Commission of their intention not to apply the measures (Art 13(2)) and to notify when they actually go ahead with the purchase (Art 13(3)). There appears to be no formal means of preventing purchasing entities going ahead with such procurement, except of course the prior notification would provide an opportunity for consultations and discussion on the topic within the EU.²⁰

4.12 Decision-making

Article 15 covers the delegated powers and provides for equal scrutiny by the Council and European Parliament. Delegated powers are conferred on the Commission for an indefinite period subject to revocation by the Parliament or Council at any time. The Commission is to inform the Council and Parliament of all delegated acts and these enter into force after two months unless the Parliament or Council objects within two months.

As noted in the discussion above the advisory procedure is used for the more procedural measures delegated to the Commission and the examination procedure for more sensitive decisions such as when to limit access for non-covered goods or services (which may be opposed by liberal interests) or when to terminate an investigation (which may be opposed by those with more offensive interests).

²⁰ This procedure will therefore highlight cases such as the British purchase of Japanese railway equipment. The EU sees access to the Japanese rail equipment sector as an important objective, but its negotiating leverage is affected if some Member States continue to buy from Japan. The UK appears to be the only major Member State that has a trade deficit in railway equipment with Japan.

4.13 Implementation

Article 16 provides for contracts concluded in violation of the Regulation to be declared 'ineffective'. Presumably this would not apply in cases of a purchasing entity applying for an exception under Article 13. It is not clear what 'ineffective' means here. As noted above it has been practice in EU and other international practice to provide a national interest exemption in cases of contracts being declared null and void, because of the disruption caused by projects stopping half way through. For example, if a dam is half built when it is found that a contract was illegally awarded the public interest may be in completion. Just what declaring a contract 'ineffective' means is unclear?

5. CONCLUSIONS: RETURNING TO THE MAIN ISSUES

5.1 Is the Regulation necessary?

It cannot be firmly established that the EU market is in general more open than other procurement markets. If anything the general figures suggest that import penetration is less, as would be expected in a large market with significant supply capacity. The fact that more EU procurement above GPA thresholds is covered by commitments does not mean that the EU market is as such more open. But the EU market is more open than emerging markets in that it is more transparent, predictable and liberal investment rules mean non-EU suppliers can access it indirectly via affiliates. If a Regulation is needed it is to address cases in which third countries use public contracts to pursue national champion strategies thus closing their national markets to EU competition while pursuing their offensive interests on the EU market.

The alternative to the adoption of the Regulation would be to press on with efforts in the GPA and FTAs. The GPA offers the prospect of extending coverage of rules on procurement to all major economies, but it must be recognised that countries such as China will need many years before they are able to effectively apply the rules expected of GPA signatories. Even accession to the GPA is unlikely to result in early effective access to all Chinas procurement.

The EU has had more success in bilateral negotiations, such as in the agreements with Colombia-Peru and Central America. These include GPA type rules and commitments on 'liberalisation' (i.e. national treatment); whilst at the same time accommodating the legitimate interests of these middle-income partner countries. These results have been achieved thanks to the interest of the parties concerned and presumably the leverage the EU has in the broader FTA negotiation.

The outcome of the current negotiations with Canada, India and members of ASEAN are at the time of writing unclear. The Comprehensive Economic and Trade Agreement with Canada has provincial procurement in Canada firmly on the agenda and progress here will open important markets for EU suppliers. From the restart of the negotiations with Canada the provincial governments were included. In the case of India the challenges are rather greater given the diversity of procurement practices in India at the central, state and public enterprise level. In the circumstances an agreement that includes transparency and possibly some national treatment commitments for central government and an agreement to continue to negotiate could be seen as a positive result. Simply discussing the idea of enhancing EU leverage through the adoption of the Regulation could perhaps add the EU's leverage in negotiations, but in the case of India the nature of the domestic procurement practices suggest that effective transparency and opening will be a long job.

With no FTA in prospect with China the EU has only the GPA negotiations to work with in terms of formal negotiations. The Regulation would therefore find most use in efforts to open the Chinese procurement market.

The strongest argument for the Regulation is that it may help specific sectors in which the EU producers face competition from national champions in a few of the EU's emerging or developed country trading partners.

5.2 What form should EU action take?

There is no broad consensus on what form an EU initiative should take. Some stakeholders, such as purchasing entities and some Member State governments would prefer to avoid new legislation. This is presumably out of concern that EU action will result in retaliation and market close with costs in terms of exports and the economic efficiency of public procurement. EU action may also be seen as prejudicing efforts to make progress in the GPA or FTA negotiations.

Business interests, especially those in a number of sectors, and other Member State governments favour legislative powers to give the EU more leverage without which real access in some third country procurement markets is seen as unlikely.

Consultations with stakeholders showed a range of views on whether a new initiative is needed and if so what form it should take. The Commission has come down in favour of a legislative option that is broadly in line with option 3b.

5.3 Will it work?

In public procurement markets the official de jure discrimination in the shape of declared preferences for national suppliers or price preferences generally represents only the tip of the ice berg of informal de facto discrimination that is made possible thanks to the scope for discretion in interpreting contract award procedures. The fact that some countries make use of de jure 'buy national' policies does not change this fact.

Past experience with efforts to achieve transparency and competition in public procurement suggests that this can only really be achieved when key interests in government, industry and purchasing entities are persuaded that this is the best policy. The use of reciprocity based leverage is unlikely to achieve this.

Alternatively, effective transparency rules combined with the right of establishment for EU suppliers are probably a most effective means of accessing procurement markets. Transparency facilitates access, because without it foreign companies will not risk investing and bidding for contracts they have no confidence will be allocated according to clear objective criteria and procedures.

There must remain some doubt therefore that the Regulation will enable the EU to negotiate genuinely competitive procurement markets in countries such as China or India. But it offers a means of addressing national champion/strategic trade policies.

5.4 Is it cost effective?

If the adoption of the Regulation acts as an incentive for third countries to engage in serious negotiations with the EU then it is very cost effective. The objective will have been achieved without the EU having to use it and thus incur any compliance costs.

In a rather more negative sense the Regulation may be effective in reducing competition from foreign suppliers of goods and services through a chilling effect. This of course has an economic cost in the sense that EU purchasers and thus EU tax payers will be paying more for the goods and services if there is a reduction in competition. On the other hand, the benefits will accrue to the EU suppliers in certain sectors who will be able to retain or gain markets in the EU.

The Commission has not provided a detailed cost – benefit breakdown. This would have to include an assessment of the costs of reduced competition on EU procurement markets and possible increased prices against the gains for EU suppliers. The Commission’s Impact Assessment (COM (2012) 124 final 21.3.2012; pg 17) suggests EU suppliers are missing out on EUR 12 bn in potential export markets in such sectors as railway equipment and construction.

The wider economic costs and benefits of open procurement markets have not been systematically analysed. The costs will also depend on how any Regulation is used and how EU’s trading partners respond.

5.5 Is the draft Regulation protectionist or market opening?

The GATT/WTO trading system has to date been built on the principle of reciprocity, but a distinction can and should be made between ‘a broad balance of benefits’ from the trading system and narrow reciprocity. The approach adopted in the Regulation represents an adjustment of the EU’s position towards a narrower definition of reciprocity that is analogous to the US Section 301 legislation. The US Section 301 approach was also presented as a market opening instrument.

The proposed Regulation is based on a narrower definition of reciprocity than has been the practice in EU trade policy in recent years.

5.6 What is the danger of retaliation?

Until the Regulation is actually applied it is difficult to assess the danger of retaliation. The general concern would be that the use by the EU of a narrow definition of ‘substantial reciprocity’ would be followed by other countries with the result that procurement markets would become more closed rather than more open.

More concretely action in one sector, such as rail equipment, might lead to retaliation in other sectors. While China does not buy European railway equipment public agencies buy rather a lot of European automobiles, so the risk of retaliation cannot be neglected. Trying to help sectors that have been excluded from public contracts may result in retaliation that hits companies that have been successful in selling into markets such as China.

The use of the Regulation as leverage depends on how important the EU market is to key interests in third countries. If third countries have strong offensive interests in EU procurement markets the leverage will be more effective. In the case of China, for example, this would depend on how important the EU markets are compared to retaining oligopolistic or monopoly structures in secure domestic markets by keeping out foreign competition. The issue would therefore seem to be how to gauge the use of the Regulation in order to maximise leverage whilst limiting the risk of retaliation.

There must be an expectation that there will be retaliation

5.7 How will the Regulation be received by the EU’ trading partners?

While the Regulation is presented as market opening it is likely to be seen by the EU’s trading partners as a move towards a more value claiming approach and away from a value creating approach in EU trade policy. In other words a move to an approach that emphasises EU claims rather than the mutual gains from opening public procurement markets. In its efforts during the 1990s and 2000s to persuade other countries to strengthen rules on procurement, and especially in its efforts to persuade developing countries of the case for transparency and competition, the EU has to date made the case that this is in the interests of the countries concerned and has not stressed EU offensive interests.

Developing countries have turned away from negotiations on procurement because of the way the earlier negotiations in the 1970s were framed (by the United States) by reciprocity aims. Developing countries declined to sign up to the GPA because they saw this as primarily serving the offensive interests of the developed OECD economies.

The adoption of the Regulation is therefore likely to be seen by developing countries as confirmation that the issue is market opening rather than the adoption of international best practice in public procurement.

An aggressive use of the Regulation is likely to undermine the EU's ability to persuade developing countries of the case for including procurement in bilateral trade agreements.

6. RECOMMENDATIONS

Genuine competitive procurement markets will only be created when there is significant 'buy-in' from national suppliers and governments/purchasing entities. Such conviction in favour of more liberal policies can best be achieved through persuasion rather than value-claiming by means of threats of closing the EU market. The EU should therefore continue to make the case that transparent, open competitive public markets are in the interests of the country that adopts them.

- The Parliament should emphasize that the EU should continue to make the case that open markets are in the public interest of all countries and to negotiate procurement liberalisation through the GPA and as part of FTAs.

The Parliament should however, recognise that international agreements are unlikely to provide early solutions to problems created by national champion policies pursued by other countries based on preferential public procurement. It should therefore support the adoption of the Regulation but stress that its use should be restricted to cases when there is a clear case of offensive national champion strategies.

- The European Parliament should support adoption of the Regulation, but stress that it should only be used in very exceptional circumstances

The provisions on treatment of developing countries could be developed further in order to reassure those developing countries that have started the process of reform of public procurement that the EU is ready to recognise that the challenges of reform take time.

- The Parliament should recommend that the Regulation spells out how the EU will support the transition to open, competitive procurement markets in developing countries.

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