



EUROPEAN COMMISSION

Directorate-General for Trade

Directorate E : Neighbouring countries, USA & Canada
Unit E1- USA & Canada

Brussels, 29 March 2016

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 <p>Council of the European Union General Secretariat</p>	
Trade Policy Committee	
m.d. :	74/16
source :	Commission
for :	Information
date :	29 - 03 - 2016

NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE

SUBJECT: *TTIP – Messages on public procurement*

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OBJECTIVE: *For information*

REMARKS: The enclosed non-paper is destined to provide information and background regarding some claims made with respect to the relative openness of EU and US procurement markets, and to help in any discussions on the issue.

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Arguments on TTIP – Public Procurement

Public Procurement is a key component of the TTIP negotiations and an area where almost all Member States have offensive interests, and in consequence the EU has been requesting a substantial market opening outcome in this area. However, to counter such request, there have been some claims like the following:

- The US market is already more open than that of the EU, and
- European companies are already very successful in the US procurement market so that market access obstacles are not an issue.

Such claims cannot be substantiated for the reasons explained below. Entertaining long discussions about the openness of our markets or about figures on procurement is a distraction from the priority, which should be how to provide new significant market access opportunities.

A policy brief was also published by CEPS regarding claims of relative foreign penetration of the EU and US procurement markets, a summary of which is attached.

Argument 1: The US procurement market is more open than the EU market

There have been some claims that figures indicate that the value of the US procurement market open to competition and committed in the GPA is higher than that of the EU. These figures however overestimate the value of the US market which is open and committed, and significantly underestimate the value of the EU market which is open and committed. The US has committed much less in the GPA than the statistics submitted to the WTO suggest.

Here are the main reasons:

- For State (i.e. sub-Federal) level procurement, the GPA statistical report is only an "estimate of total procurement" based on US national accounts for the States. These statistics cover substantially more procurement than what is actually committed in the GPA. Thus, US State level figures include:
 - Procurement below the GPA thresholds (which is not committed).
 - Entities, supplies and services which are not covered by US GPA commitments.
 - All State procurement for the 37 GPA-covered States is computed as fully covered. But in reality only some State entities are committed and these are generally subject to specific derogations/restrictions. The exact scope varies by State. To give two concrete examples:
 1. According to figures from a study sourced by the Commission services, GPA coverage in the State of Michigan is less than 1% of its total state and local capital expenditures.
 2. No US city or county is currently committed in the GPA. But some cities procure more than States. For instance, New York procures more than 17Bn USD every year and it is not yet covered. But it is included in the statistics.

- Federal level procurement subject to domestic content and other requirements, such as the Buy American or Buy America-related restrictions (which has a broad flow-down impact at sub-central level), the SMEs set-asides or the Berry Amendment, is counted as if such restrictions were not applied. For example, important SME set-asides, including above thresholds, are not subtracted from US figures. According to the most recent US GPA statistical report, the value of SME set asides is worth 38 Bn USD for GPA covered contracts at Federal level and 92 Bn USD for all Federal procurement. These statistics confirm that US SME set-asides significantly affect contracts including above threshold values as close to half of Federal contracts set aside for US SMEs exceed threshold values.

As a result, claims that the US market is more open than the EU are not sustainable¹.

Conclusion:

- The US procurement market is still subject to important restrictions while the EU market is open and not subject to any discriminatory measures. The fact that there is explicit Buy-America/Buy-American legislation affecting all levels of procurement underpins this.
- The debate on figures should be put aside and the focus should be on discussing how the EU and the US can improve market access on both sides. This is what was agreed when the TTIP negotiations were launched.

Argument 2: European companies have won big public contracts in the US

- There are indeed EU companies that do win contracts in the US. But to do so, they have to comply with stringent and burdensome Buy America requirements which often require the use of US material even in some cases up to 100% of the product:
 - European companies are often obliged to change their supply chain partially or fully in order to comply with buy-local provisions and to establish a local business/manufacturing/assembly plant in the US in order to fulfill US requirements.
 - For US high speed rail projects, all components of trains must be made of US-material and the trains must be assembled in the US.
 - If a component cannot be made of a US material, a company must apply for an exemption from the US administration. This may take up to 6 months or longer. This is already difficult for large companies, and heavily penalises small companies.

¹ There are no reliable statistics about the size of US procurement markets actually committed under the GPA or open to competition. However, some Commission estimates point to a value of US procurement market accessible to EU companies within a range of 102-188 Bn USD, whilst the value of market committed by the EU under the GPA is 329 Bn USD (= 237 Bn €), of which it is estimated that around 234 Bn USD are open to US bidders (with the application of the exchange rate (of 2011) of 0.719). This does not take into account the fact that, contrary to the US, the EU does not apply discriminatory procurement measures.

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- Although the US has criticized domestic preferences in other countries, for example in the 2015 report "National Trade Estimate Report on Foreign Trade Barriers", new Buy America measures have been, or are being, introduced in the US. There are no complaints from US companies about access to the European procurement market, because it is de iure and de facto open. The EU does not have any "Buy Europe" or similar measures.
- The lack of easy access to information on procurement opportunities, especially in the US States, is a key deterrent for European companies to participate in US procurement. EU businesses can bid for contracts only if they are able to find information on them. EU companies need to navigate through hundreds of different procurement portals and suffer from various obstacles to register as bidders. This is a very big obstacle especially for SMEs.
- In contrast, the EU has a real and transparent internal market for public procurement. All contracts throughout the whole of the EU are advertised in one single portal: the Tenders Electronic Daily – TED, which is free of charge. All companies and in particular SMEs have all the necessary information at their fingertips. From this year on, an automatic translation tool is available on TED, to improve translation of notices; this has met, among other requests of EU SMEs stakeholders, a request of the US to have a translation into English of the full notices.
- The US has excluded the majority of sub-central procurement in the GPA, such as all cities. Only specified State Governments have the legal obligation to accept bids by European suppliers. Considering that over 60% of US procurement is sub-central, considerable new opportunities could be found in this sector.
- In contrast, Europe's sub-central procurement is open and could be offered (to note that the EU maintains US specific reservations in the EU GPA commitments vis-à-vis US bidders, goods and services, in order to counter-balance, at least partially, the limited commitments and broad exemptions of the US GPA).

Conclusion:

- The focus of TTIP discussions should be on improving market access opportunities.
- Both sides agreed in the High Level Group Report that in TTIP "the goal of negotiations should be to enhance business opportunities through substantially improved access to government procurement opportunities at all levels of government on the basis of national treatment".

TTIP and Public Procurement: Going beyond the tip of the iceberg

Summary of the CEPS Policy Brief, 9 March 2016 (<https://www.ceps.eu/publications/ttip-and-public-procurement-going-beyond-tip-iceberg>)

- A recent paper by Patrick Messerlin (“The Beauty of Public Procurement in TTIP”, ECIPE, 2016) made an attempt to provide a range of estimates for the EU and the US and found relatively low and comparable rates of import penetration. P. Messerlin’s assessment, however, looked at only one vehicle of international procurement i.e. at the ‘tip of the procurement iceberg’, namely direct cross-border purchases by public authorities (modality 1).
- Even this assessment of modality 1 procurement is prone to serious caveats as it does not include: (i) the government investment component of public procurement and (ii) procurement of public utilities providers whose import penetration share is the highest in EU Member States. Besides that, the Messerlin’s indicator is based on data that covers below and above threshold procurement and as such is biased as there is evidence that import penetration shares are higher for high-value contracts.
- The importance of modalities 2 and 3 is crucial as it can be seen on the base of foreign participation rates in Europe:
 - **Mode 1 (direct cross-border):** 3.7% of the value of government procurement contracts is awarded to foreign companies in the EU (2008-2012). For the US, estimates at federal level point to a share below 2% before 2006 and to a share of 3.6%-4.1% from 2006-2010.
 - **Mode 2 (procurement from foreign affiliates):** A previous EU study estimates the share of modality 2 being 13.4% of the value of government procurement contracts in EU Member States. Strikingly, US foreign affiliates have obtained one quarter of the extra-EU foreign penetration rate, the largest share of any EU trading partner.
 - **Mode 3 (indirect GVC procurement):** The same study estimates the share of indirect procurement through subcontracting to be at around 12% of the total EU procurement market.
- The above figures make clear that once all procurement modalities are taken into account, the EU openness in procurement is much higher. Unfortunately, comparable data across all modalities do not yet exist for the US and hence a comparison on the ‘de facto’ level of openness cannot be made.
- However, we do have clear evidence on the ‘de jure’ discriminatory measures in the US which affects negatively all three modalities of international public procurement. Moreover, the fact that the US has introduced the largest number of protectionist procurement measures since 2008 shows that protectionist measures in the field of government procurement in the US are on the rise. This compares with the absence of any such discriminatory measures or local content requirements in the EU.