

EUROPEAN COMMISSION IMPACT ASSESSMENT BOARD

Brussels, D(2011)

# **Opinion**

<u>Title</u>

## DG MARKT/TRADE - Impact Assessment on an Initiative on Third Country Access to EU's Public Procurement Market

#### (draft version of 26 October 2011)

#### (A) Context

Access of third country producers to the EU procurement markets (and vice versa) is regulated through a variety of voluntary and negotiated agreements in the context of the WTO's Government Procurement Agreement (GPA) or under specific chapters of various bilateral free trade agreements (FTAs). However, no comprehensive EU regulatory framework reflects this complex set of international engagements in EU law (the only exception being art. 58 and 59 of the "Utilities Directive" 2004/17/EC which allow discrimination against third countries goods or service provision under specific circumstances). The resulting legal uncertainties have led to uneven implementation across Member States and weakened the EU position in international trade negotiations. The report considers how best to clarify the rules governing access to EU public procurement markets by third countries' companies, goods and services while strengthening the prospects for more open third country markets.

#### (B) Overall assessment

The report does not provide adequate analysis to effectively support decisionmaking. In order to do so, it should first clarify the nature and scale of the main problems and desired effects in terms of the accessibility of public procurement markets in the EU and in third countries, as well as with respect to single market fragmentation. The report should also better explain how the options presented would address these issues, and should examine a wider set of policy alternatives and combinations thereof, including notification when giving market access (as opposed to limiting access) or a more targeted use of the opportunities provided by the on-going trade negotiations and revisions of the public procurement directives. The impacts of the options should also be better assessed, including with regard to the administrative implications for the Commission and other relevant stakeholders. Underlying methodological assumptions should be more transparently presented and convincingly justified, especially with regard to the risk of retaliation from third countries. Against this background, the report should make a stronger case for the preferred option in terms of both its relative and absolute effectiveness and efficiency. Finally, stakeholder views should be presented more completely and taken into greater account. It should be explained why the least favoured option for nearly all stakeholders is the preferred one.

Commission européenne, B-1049 Bruxelles - Belgium Office: BERL 6/29. E-mail: impact-assessment-board@ec.europa.eu

Given the nature of these recommendations, the Board asks DG MARKT and TRADE to submit a revised version of the report, on which it will issue a new opinion.

## (C) Main recommendations for improvements

(1) Strengthen the problem definition and clarify the intervention logic. The rationale for the proposed initiative should be more clearly and coherently presented throughout the report. First, the analysis of the problem should clarify what the main issues are and discuss their relative significance in view of the size of national procurement markets and their current and potential level of penetration (taking into account the evidence from the EU single market and the constraints imposed by existing market access commitments). In order to establish more firmly the continued relevance of the identified problems, the report should also provide a more robust baseline scenario clarifying all powers at the EU's disposal to influence the degree of openness of third countries markets and considering alternative outcomes for on-going trade negotiations. Building upon this strengthened analysis of the problems, the report should then clearly spell out what the intended effects are in terms of the accessibility of EU and third countries' public procurement markets, the degree of Single Market integration and environmental and labour standards.

(2) Better present and design options. The report should simplify the presentation of the existing policy options, clarify their content and explain how they would address the identified problems. The report should also consider a wider set of alternatives and possible combinations of options. These should include envisaging notification when allowing access for third country providers (as opposed to limiting access), more forcefully targeting third countries' procurement markets in the context of existing trade negotiations, considering specific tools to address abnormally low bids (or other instances of unfair competition), and envisaging ad hoc changes in the context of the on-going revision of the EU public procurement directives (for instance, extending the provisions of Art. 58 and 59 beyond the utility sector or better exploiting strategic procurement provisions to complement value for money considerations when awarding contracts). The report should explain the reasons why any of these additional options may be discarded without an in-depth analysis.

(3) Improve the analysis of impacts. First, the report should better explain the nature of some of the impacts considered, such as those on the supply chain and public finances. Secondly, it should improve the analysis of several impacts, more extensively discussing social and environmental effects, better assessing economic impacts on consumers, competition and sector competitiveness, and comprehensively analysing all the administrative cost impacts of the preferred option on enterprises, contracting authorities and Commission services. While following these recommendations, the report should provide a more user-friendly explanation of the underlying methodology and assumptions.

(4) Discuss more extensively the case for the preferred option. Against the background of a strengthened intervention logic, a wider set of policy options and a more robust baseline scenario, the report should discuss in greater detail the effectiveness and efficiency of the preferred option both relative to the other options and in terms of its likelihood to substantially increase access to third countries' procurement markets for EU enterprises. In order to do so, the report should take into due account the reasons for the

current asymmetries in openness, provide practical examples of the ways in which greater leverage in international trade negotiations would be achieved and explain whether there would be any risk of violation of international agreements. It should also better justify the hypotheses made concerning the risk of retaliation and show whether different assumptions on this would affect the choice of the preferred policy options. In this context, the report should assess the extent to which the threat of a substantial reduction in access to EU markets would be credible given the advantages of (unilaterally) open markets and should also clarify how third countries that already deny any access to their procurement markets could effectively retaliate.

(5) Better present and take into greater account stakeholders' views. Although the annexed summary of stakeholders' views is rather transparent, it should be improved by incorporating the views expressed during the consultation of European social partners in February 2011, presenting separately the opinions expressed by trade unions and NGOs and explicitly indicating the percentage of stakeholders with the same view. Most importantly, the report should reflect stakeholder opinions more systematically throughout and should explain the reasons why it does not share the views of the majority of stakeholders on major issues such as the problem definition and the preferred policy option.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.

## (D) Procedure and presentation.

The text of the report should be shortened and considerably simplified. All sections and annexes should use the same formatting (LegisWrite). Tables and figures should be systematically explained and data sources and measurement units explicitly indicated. A complete table of content should be included. The report should also seek a better balance between the main text and its annexes, in particular with regard to the significant amount of background analysis on the level of access of various procurement markets which is not always directly relevant and/or proportionate to the arguments developed in the main text.

Given that the Impact Assessment Steering Group was not fully consulted on the draft report submitted to the Board, the Steering Group should be allowed to comment on the revised report before this is resubmitted to the Board.

(E) IAB scrutiny process	
Reference number	2011/MARKT/011
External expertise used	No
Date of Board Meeting	23 November 2011