



EUROPEAN COMMISSION  
IMPACT ASSESSMENT BOARD

Brussels,  
D(2012)

## Opinion

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

**(resubmitted draft version of 8 February 2012)**

### **(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 Articles 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**

**While the report has been improved along the lines of the recommendations issued by the Board, the analysis and the evidence base supporting the need for, and the proportionality of the proposed EU action, remain weak. In particular, the report should discuss more transparently the relative magnitude of the problems and expected benefits. It should also further improve the analysis of the impacts, better explaining and justifying the underlying methodology and assumptions, as well as checking for possible biases in the estimation of both positive and negative impacts. Due to all of these weaknesses, the report still fails to satisfactorily establish the proportionality of the preferred legislative option, and to appropriately explain such a policy choice given stakeholders' preferences for alternative policies.**

### **(C) Main recommendations for improvements**

**(1) Provide greater evidence of the magnitude of the problems.** While the revised report presents the rationale for the proposed initiative more clearly and has clarified the initiative' objectives, the evidence on the magnitude of the problems remains weak. Estimated foreign participation in EU procurement markets is low relative to market size, not significantly different in value from EU exports to international procurement markets,

and mostly linked to "covered procurement" under existing trade agreements. Procurement-related imports or (actual or potential) EU exports, represent less than 0.5% of the turnover of the 22 industries under analysis. In addition, the strengthened description of the baseline seems to indicate that trade negotiations already deal with procurement (and related labour right) issues fairly successfully, and that trade partners may not be interested in trading concessions within the procurement field. Finally, from a legal point of view, there remains little clarity about the actual risks posed by national measures, as well as the amount of unfair competition from third country suppliers, and the ways in which this could be established under international law.

**(2) Further refine the presentation of the options.** The report has significantly simplified the presentation of the existing policy options, while considering a wider set of alternatives as recommended. However, it could still further clarify the presentation of some options, spelling out for the non-expert the content of Art. 58 and 59 of the 2004 Directive, explaining which core elements of option 3 would be included in option 4 and specifying whether option 3B2 can be a stand alone option (or a component of option 2).

**(3) Further improve the analysis of impacts.** The report has improved both the scope and the quality of the analysis of the impacts, including those on jobs. However, several important weaknesses remain. While a lot of information is provided in the main text and annexes, a clear and synthetic presentation of the model used to estimate impacts is still missing and comprehension of the nature of all analysed impacts is not straightforward. More importantly, the results of the model would seem to be largely determined by the assumptions made with respect to contracting authorities rejection rates, effectiveness of option 3B2, and increased exports (4 billion EUR). Justifications for these assumptions should also be strengthened, in particular by explaining why all options under 3 deliver the same increase in exports despite very different impacts in terms of "leverage". Finally, the estimation of some individual impacts needs to be improved (or the underlying methodology more convincingly justified). In particular, the report may underestimate the costs of the time required for Commission approval under option 3 (as no account is taken of the uncertainty introduced by the procedure and its irritant component) as well as the Commission administrative costs for option 3B2 (assumed to be proportional to export value, rather than number and complexity of investigations launched). Positive employment impacts, on the other hand, may be overestimated as they assume no spare capacity or efficiency gains in the EU economy. Finally, the report should explain whether a Commission decision on a proposal from a contracting authority may expose it to liability risk.

**(4) Better justify the proportionality of the preferred option.** The report provides an improved comparison of options, and a better presentation of the advantages of the preferred option. However, it should establish the proportionality of the latter. First, estimated impacts suffer from the methodological weaknesses highlighted above (in particular with respect to the expected increase in export, despite lower leverage gains). Second, cost-benefit ratios are likely overestimated because of the underestimation of costs and because export gains are not compared against the baseline (as the 1 billion increase resulting from business as usual is not discounted). Third, estimated net benefits only represent a very small share of EU exports or relevant industrial turnover. The interplay between the preferred options and option 6, on abnormally low bids, should also be further discussed. Finally, while the report has improved its presentation of stakeholders' views, it still does not convincingly explain why the option which is least preferred by all stakeholders is selected as the preferred 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.**

A table listing annexes should be included, and text should be double-checked throughout to ensure that all cross-references are correct after editing changes and deletion. Tables and figures should be systematically explained and data sources and measurement units explicitly indicated.

**(E) IAB scrutiny process**

Reference number	2011/MARKT/011
External expertise used	No
Date of Board Meeting	Written procedure The present opinion concerns a resubmitted draft IA report. The first opinion was issued on 25 November 2011.