



EUROPEAN COMMISSION

Brussels, 21.3.2012
SWD(2012) 57 final

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the document

**Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

**establishing rules on the access of third country goods and services to the European
Union's internal market in public procurement and procedures supporting negotiations
on access of European Union goods and services to the public procurement markets of
third countries**

{COM(2012) 124 final}
{SWD(2012) 58 final}

Disclaimer: This impact assessment commits only the Commission's services involved in its preparation and does not prejudge the final form of any decision to be taken by the Commission.

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1. INTRODUCTION

In the negotiations on a revised Government Procurement Agreement (GPA) in the context of the World Trade Organisation (WTO) and in bilateral negotiations with third countries, the EU has advocated an ambitious opening of international public procurement markets. However, many third countries are reluctant to (further) open their procurement markets to international competition, which limits business opportunities of EU companies in these markets as they have maintained or even introduced protectionist measures, especially in the wake of the economic crisis.

In contrast, the EU has so far kept its public procurements (PP) markets largely open to international competition. With the exception of some provisions which limit the scope to supply contracts in the Utilities-sector¹, the EU has not fully exercised its power to regulate the access of foreign goods, services and companies to the EU PP market.

In the context of the rising importance of emerging economies, the absence of a level playing field leads to an important number of problems. The EU's principal problem is a lack of leverage in its international negotiations with trading partners to redress the imbalance and to gain substantial market access commitments to the benefit of EU business. Also, contracting authorities face several problems when applying the international commitments of the EU, although there is no clear evidence of discriminatory practices against foreign tenderers.

The initiative being assessed in the present report aims at solving these problems by firstly strengthening the position of the EU when negotiating access for EU companies' access to PP markets of third countries, in order to obtain the (further) opening of our trading partners' PP markets. Secondly, it seeks to clarify the rules governing access to the EU's PP market of third country companies, goods and services. Ultimately the objective is to improve, in line with the new EU 2020 strategy, business opportunities for EU firms with the consequent benefits for economic growth in the EU, competitiveness of EU businesses within and outside the EU, an increase in employment and promotion of innovation.

2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

The European Commission announced in its Communications "Towards a Single Market Act"² and "Trade, Growth and World's Affairs"³ its intention to present in 2011 a proposal to strengthen the position of the EU when negotiating further access for EU companies to PP markets of countries outside the EU and provide the means for creating a more level playing field for EU industry active in PP market. This initiative would at the same time clarify the rules governing access to the EU's PP market of goods, services and companies from outside the European Union. This proposal is part of the Commission's work programme for 2011 (COM (2010) 623 final), but had a short delay.

2.1 Organisation and timing

Directorate-General for Trade and Directorate-General Internal Market and Services are the lead services for conducting the impact assessment related to this proposal. The impact assessment was initiated in the second part of 2010 and was supported by an inter-service steering group that

¹ Articles 58 and 59 of Directive 2004/17 on utilities public procurement procedures

² COM(2010)608

³ COM(2010)612

involved 12 DGs⁴ in addition to the 2 lead DGs. The inter-service steering group met on five occasions: 19 January, 27 May, 27 July, 5 October 2011, and 30 January 2012.

2.2 Consultation and expertise

To gather the views of interested stakeholders, the Commission services organised, in addition to individual meetings, a series of consultations and outreach activities.

An open internet consultation⁵ was carried out between 7 June and 2 August 2011⁶. It consisted of three detailed questionnaires aimed at (i) contracting authorities and Member States (MS), (ii) businesses and/or their representatives and (iii) other potentially interested stakeholders (citizens, NGOs, trade unions). The Commission received a total of 215 contributions⁷. A summary report of the contributions is given in Annex I. As part of this process the Commission services organised a public hearing on 8 July 2011 in Brussels. Social partners also had the opportunity to express their views in the Liaison Forum organised by DG Employment on 7 February 2011. Specific consultations were also conducted with EU Delegations in third countries and the MS in the Advisory Committee for Public Contracts. Specific topics (Article 58 and abnormally low tenders) have been also addressed in the consultation on the Modernisation of Public Procurement Policy.

At the outset it should be noted that not all stakeholders took equal part in the consultation or expressed their views with the same force. In fact, not all Member States responded to the consultation. Equally some stakeholders were overrepresented both in terms of the MS in which they were based or the sectors they represented. For these reasons, the open consultation did not provide a necessarily fully representative picture of opinions and the results should therefore be read with some caution. Still, the Commission's minimum standards for consultations were met.

However, stakeholders consulted generally welcomed the initiative from the European Commission. A large majority emerged among all types of respondents in agreement with the Commission's description of the current level of access to the EU PP market for goods, services and companies from outside the EU as well as in support of the identified objectives of the initiative.

As regards the outlined policy options it is important to note that the views expressed were divergent: overall, a significant majority of stakeholders appear to support a legislative initiative (around 65%), while an important minority of around 35% prefer the option 'nothing happens'. However, views within the different groups of stakeholders also diverge as to the preferred option. Among contracting entities and government authorities (including from third countries), for example, two-thirds are in favour of the option 'nothing happens' or the non-legislative option, while for businesses and other stakeholders some 75% are in favour of a legislative initiative. There are also divergent opinions as to what that legislative option should be. Although almost half of respondents support for the legislative option 'approach A'⁸, while a significant number of respondents also favour alternative approaches. It is worth noting that,

⁴ DG Budget, DG Competition, DG Economic and Financial Affairs, DG Taxation and Customs Union, DG Employment, Social Affairs and Inclusion, DG Enterprise and Industry, DG Environment, DG Energy, DG Mobility and Transport, the Legal Service, the European External Action Service (EEAS) and the Secretariat-General.

⁵ Commission databases from DG Trade, DG Internal Market, DG Employment and DG Enterprise were used to raise awareness about this consultation.

⁶ Replies received until 15 September 2011 were nonetheless taken into account

⁷ Written submissions were also received in addition to the on-line responses

⁸ Approach A: EU procuring entities would be required in principle to exclude third country goods, services and companies not covered by international commitments of the EU.

although being the least preferred legislative option, 'approach B'⁹ also received the support from a considerable number of respondents.

The main reasons put forward by stakeholders in favour or against one or the other policy option included the importance of best value for money, the competitiveness and productivity that could be undermined by some of the policy options, the risk of retaliation by our trading partners, the administrative burden that could be attached to such an initiative and the fact that the initiative would endanger the status of the EU as an advocate of open markets. Trade unions and non-governmental organisations (NGOs) have been fairly neutral on the choice of options and have rather focused their contributions on the need for third countries to respect ILO Conventions when tendering in the EU or urging the EU to open its borders to maintain fair trade vis-à-vis least developed countries.

Also, a slight majority of respondents (all from the business community) believe that other issues like different labour costs and rights outside the EU or abnormally low tenders by foreign state-supported firms are affecting the conditions of access of foreign goods, services and companies to the EU PP market.

In the Liaison Forum of DG Employment the European construction industry explained the difficulties they face to compete with state-owned firms from third countries like China, whereas the EU business trade federation explained that the focus of this initiative should be the opening of third countries market (rather than the closure of the EU procurement market). The EU business trade federations also called for the EU to be more forceful in international negotiations.

The views of stakeholders were taken into account in preparing this impact assessment, including in the problem analysis, as is highlighted in several instances in the analysis that follows, including the annexes (e.g. the experiences of respondents with foreign trade barriers in PP have been collected in Annex 9).

2.3 Impact assessment Board

This impact assessment was first reviewed by the Commission's Impact Assessment Board (IAB) on 9 November 2011. Based on the Board's recommendations, the impact assessment has been revised as follows: the problem definition has been reshuffled in order to focus on the central issue identified across the impact assessment, the need for further opening of third countries' procurement markets and the problems of compliance of EU international commitments. The scale of options to be considered has been broadened. In addition to a more active negotiating policy the impact assessment takes into account the extension of the current regime of articles 58 and 59 of directive 2004/17 to all procurements covered by the EU directives and the possibility for selective acceptance of non covered procurement. Finally, the analysis of impacts has been refined to upgrade the measurement of retaliation and the employment figures. Annex 10 provides a more detailed review of how the IAB's first opinion has been incorporated in the revised report, resubmitted on 8 February 2012.

In its opinion on the resubmitted report, the IAB acknowledges the improvements made to the report and the incorporation of the recommendations it made in its first opinion. However, the IAB believes there are still a number of areas where the assessment could be strengthened and identifies a number of actions to further improve the report (i.e. refine presentation of the

⁹ Approach B: Subject to notification to the Commission, EU procuring entities would have the option to decide to exclude third country goods, services and companies not covered by international commitments of the EU. In addition, the Commission would be entrusted with a specific tool to conduct enquiries about the market access situation for EU goods, services and companies and to impose restrictive measures on goods and services originating in third countries when EU goods, services and companies do not have sufficient access to the public procurement market of these countries.

options, improve the presentation of the model used to estimate the impacts, better justify the proportionality of the preferred option, etc). The present final impact assessment report has integrated to the extent possible these recommendations. Annex 11 provides a more detailed review of how the IAB's second opinion has been incorporated in the final report.

3. PROBLEM DEFINITION

3.1 Context

3.1.1 Background

Governments are in all countries major actors in the economy. Purchases of goods and services by public authorities and the entities they control represent 17%¹⁰ of the world's GDP.

International trade of a wide array of industries, for which public purchasers are either the sole purchaser or a very large client, is strongly affected by the policies pursued by countries in the area of PP, not least measures taken to reserve public contracts to domestic companies, goods or services.

To ensure open, transparent and non-discriminatory procurement the EU has been one of the founding Parties to the GPA in the WTO together with 14 other major industrialised economies¹¹. In addition, the EU has also actively sought to open PP of other countries when engaging in bilateral free trade agreement (FTA) negotiations¹². But PP is excluded from the GATT and GATS and this leaves room for many countries to depart from national treatment principle and to maintain or introduce measures that reserve public contracts for domestic firms and goods.

Notwithstanding these efforts and as explained further, the EU has not been able to obtain an ambitious opening of PP in the world mainly because it has lacked leverage to do so in international negotiations. Because of the economic consequences for EU businesses that result from uneven level of market access some MS are taking measures to limit access to their procurement markets, although these would be most likely illegal. In addition, EU contracting authorities lack guidance on how to apply the existing international commitments and restrictions.

3.1.2 The importance of public procurement to certain sectors of the EU economy

Some 10 billion EUR of EU exports find their way in global procurement markets (0,08% of EU GDP), out of which 5 billion EUR have been secured through binding commitment in GPA/FTAs (0,4% of all EU exports). Although the impact of GPA/FTAs PP chapters¹³ on EU trade is relatively small in absolute terms, it directly affects industries active in 22 key markets¹⁴ of goods and services - with a total turnover estimated to amount to 25% of the EU GDP and to employ 31 million persons¹⁵ - in which the customers are exclusively or mostly public

¹⁰ Government consumption of the world, The World in figures, The Economist, 2010

¹¹ EU, US, Japan, Canada, Korea, Taiwan, Israel, Singapore, Hong Kong, Switzerland, EEA countries and Aruba

¹² For example in the agreements concluded with Switzerland, Mexico, Chile, Columbia, Peru, Korea, and countries in the Balkans as part of the Stabilisation and Association Agreements (hereinafter "SAA") plus in on-going FTA negotiations with Canada, India, Singapore, Malaysia, and Mercosur.

¹³ Free Trade Agreements contain chapters of public procurement with commitments to ensure transparent and non-discriminatory procurement (often modelled on GPA) and on procuring entities and types of purchases (the latter two are the so-called market access commitments)

¹⁴ Additional information in annexes: identification of markets in Annex 5, methodological box 1 of Annex 3 and Annex 9 on the industrial analysis (correspondence NACE/key markets)

¹⁵ Including private demand

purchasers¹⁶ or for which public authorities are large clients¹⁷. It also affects "niche" industries (fire-fighting equipment, postal machinery). Also, rules in the area of concessions affect a wide array of large companies involved in the management of public-private partnerships and infrastructures like motorways.

Table 1 - Overview over 22 selected markets and their dependence on public procurement

	US	JP	CA	KR	IL	MX	CN	RU	IN	BR	TR	AU
Defence	2	2	2	2	2	2	2	2	2	2	2	2
Aerospace	1,5	1,5	1,5	1	1	2	1,5	2	2	2	2	1
Post & Apt sorting	2	1,5	2	1	2	1,5	2	1,5	2	2	1	1
Fire-fight Sea rescue	2	2	2	2	2	2	2	2	2	2	2	2
Construction	1	1	1,5	1	1	1,5	1	1	1	1	1	1
Constr. Equipment	1	1	1,5	1	1	1,5	1	1	1	1	1	1
Railway equipment	1,5	1,5	2	2	2	1,5	2	2	2	2	2	1
Urban buses	1,5	1	1	1	1	1	1,5	2	1,5	0	1,5	1,5
Power generation	1,5	0	1,5	2	2	2	2	2	2	1	1	0
Water & Sewage	1,5	1,5	1,5	1,5	2	2	1,5	2	2	1,5	2	2
Waste mgmt & env	1	1,5	1,5	1,5	2	2	1,5	2	2	2	2	2
Pharmaceuticals	0,5	1	1	1	1	1	1,5	1,5	1	1	1,5	1
Medical equipment	0,5	1	1	1	1	1	1,5	1,5	1	1	1,5	1
Specialised textiles	1	1	1	1	1	1	1	1,5	1	1	1	1
Business services	0,5	0,5	0,5	0,5	1	0,5	1	1	1	1	1	0,5
Financial services	0,5	0,5	0,5	0,5	1	0,5	1	1	1	1	1	0,5
Oil, Gas & Min eq.	0	0	0	0	0	2	2	1	2	2	1,5	0
Fixed telecom eq.	0	2	0	0	0	2	2	2	2	2	2	0
Computer & ITserv	1	1	1	1	1	1	1	1	1	1	1	1
Street lighting	2	2	2	2	2	1,5	2	2	2	1,5	2	1,5
Broadcasting equip	0	0,5	0,5	0,5	0,5	0	1,5	0	0	0	0,5	0,5
Port equipment	1,5	2	2	2	2	2	2	1,5	2	2	1,5	1
Average sectors	1,09	1,18	1,25	1,16	1,30	1,43	1,57	1,52	1,52	1,36	1,45	1,02

Legend

0= no dependency (customers are private); 2= full dependency (customers are public)

Source: analysis of dependency is provided in Annex 8 and in methodological box 1 of Annex 3 (p.2)

3.1.3 The exposure of EU businesses active in these sectors to foreign competition.

EU industries active in the 22 markets strongly influenced by PP legislations are exposed to increasing foreign competition within the EU while their exports are not protected against protectionist measures or practices by the EU's trading partners.

¹⁶ For instance, defence, urban transport and railways equipment, power generation, telecom equipment

¹⁷ For instance, medical equipment and pharmaceutical industries, the construction industry, the IT services, and the "green economy"

Table 2 - Public procurement markets that the EU has committed internationally vis-à-vis 13 selected countries (and their relative dependency to public procurement)

	International current commitments vis-à-vis 13 selected													
	UE*	US	JP	CA	KR	IL	MX	CN	RU	IN	BR	TR	UA*	AU
Defence	2	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1
Aerospace	1,5	0	1	0	0	1	0	-1	-1	-1	-1	-1	-1	-1
Post & Apt sorting	2	-1	0	-1	-1	0	0	-1	-1	-1	-1	-1	-1	-1
Fire-fight & Sea Rescue	2	1	1	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Construction Dredging	1	0	1	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Constr. Equipment	1	1	1	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Railway equipment	2	-1	-1	-1	0	0	-1	-1	-1	-1	-1	-1	-1	-1
Urban buses	2	-1	-1	-1	-1	-1	1	-1	-1	-1	-1	-1	-1	-1
Power generation	1,5	1	-1	-1	0	0	1	-1	-1	-1	-1	-1	-1	-1
Water & Sewage	2	-1	1	-1	1	1	1	-1	-1	-1	-1	-1	-1	-1
Waste mgmt & env	2	1	1	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Pharmaceuticals	1	1	1	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Medical equipment	2	1	1	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Specialised textiles	2	1	1	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Business services	0,5	0	0	0	0		-1	-1	-1	-1	-1	-1	-1	-1
Financial services	0,5	-1	-1	0	0	-1	-1	-1	-1	-1	-1	-1	-1	-1
Oil, Gas & Min equipmt	0													
Fixed telecom equipmt	0													
Computer & IT serv	1	0	0	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Street lighting	2	1	1	1	1	1	0	-1	-1	-1	-1	-1	-1	-1
Broadcasting equip	1	1	1	1	1	1	0	-1	-1	-1	-1	-1	-1	-1
Port equipment	2	1	1	-1	1	1	1	-1	-1	-1	-1	-1	-1	-1

*Dependency from PP of each sector (from a scale of 2 full dependency to 0 no dependency at all) - coverage by EU PP directives (same indicators as in table 1)

** Degree of openness: 1= fully COMMITTED, 0=Partially COMMITTED (e.g. only some goods have a secured access), -1= NOT COMMITTED AT ALL

Examples: The EU has not committed its urban transport and railway operators to Japan (hence the -1 for the railway sector), business services procurement has been committed vis-à-vis the US for central government but not for local government tenders (hence the 0); there are no restrictions against Korean construction materials (hence the 1). **The methodology of the assessment of openness is provided in the Annex 3 "Problem analysis" and detailed in Annex 8.** Sources: cf. Annex 8

Box 1: Estimating foreign participation in the EU public procurement market

Two methods for estimating foreign participation in the EU PP market have been used since there is no way to trace statistically the nationality of the imported goods purchased by EU contracting authorities:

- (a) Actual participation of foreign firms in the EU PP market based on an exhaustive analysis of all contract award notices of 2007 to identify all contracts awarded to non-EU firms¹⁸ and a sample-based analysis of contract award notices in 2007-2009, with the help of a D&B database (in the context of the analysis of cross-border procurement in the EU)¹⁹. This leads to **10.7-14.7 billion EUR** estimation for the 12 main trading partners.
- (b) Potential penetration rates of foreign goods and services in the EU PP market either by extrapolating the overall import penetration rate of the public sector or the specific import penetration rate of each NACE category. This leads to **10-17 billion EUR** estimation for the 12 main trading partners.

Finally, in the consultation of stakeholders, 20% of responding contracting authorities indicated that they had received bids from abroad or containing foreign goods and services, 19% indicated that they had awarded a contract to a foreign firm and only 3% indicated that it had rejected a foreign bid.

3.1.4 But most public procurement markets in third countries remain closed to EU business

While realistically, the EU cannot expect a full liberalisation of PP, it is important, as highlighted by several stakeholders in their submissions, to ensure that businesses in sectors where it has a so-called "*offensive interests*"²⁰ can access foreign procurement markets (e.g. construction, railways...). But only 25% of the PP of the 12 major trading partners²¹ has been committed internationally (i.e. subject to international procurement agreements)²². For instance, only 5% of metro networks (in passengers) or only 18% of the estimated procurement of the 50 world largest cities is currently committed internationally. Furthermore, many of the **Parties to the GPA** have either not committed their regional and local procurement (e.g. USA, Canada) at all or only very little. The US and Japan protect their railways and construction industries by applying sector-specific restrictions in the GPA. Commission services estimate that the US, Japan and Canada have, in spite of market access increases granted in the recent revision of GPA, only committed 32%, 28% and 16% of their respective "contestable"²³ PP markets (cf. tab 1).

¹⁸ Including their subsidiaries, data used for GPA Statistical Report 2007

¹⁹ Cross-Border Procurement Above the EU Thresholds, Ramboll HTU Chur, March 2011

²⁰ The notion "offensive interests" covers sectors where a country has comparative advantages and where its companies are competitive compared to their foreign competitors. Sectors to be protected where a country's companies are not very competitive are known as "defensive interests".

²¹ The 12 major trading partners are: US, Japan, Canada, Korea, Mexico, Israel, China, Russia, Brazil, Turkey, India and Australia; EEA and Switzerland, who are among the very largest trading partners of the EU are not included given their imbrications with the EU economy and the fact their legal regimes are akin to the directives. Ukraine has been analysed (cf. annex 8), but since Ukraine has committed to apply a legal regime akin to the EU public procurement in the recently completed EU-Ukraine FTA, it shall be assimilated to the EEA-EFTA countries in this impact assessment.

²² For more details on the measurement of public procurement markets, please refer to the methodological boxes 3, 4, 6 and 7 of Annex 3 (Prob. analysis)

²³ I.e. above the thresholds applied by the EU in the GPA (the so-called 'above-threshold procurement') - data reflects latest GPA negotiation outcomes

Additionally, at this stage, the EU has to date not concluded any agreement on PP with key developed or emerging economies, such as **China, India, Brazil (Mercosur), Russia, Turkey and Australia**. Although the EU is currently negotiating an opening of PP with China, India and Mercosur, negotiations are difficult and the EU expectations are still largely unfulfilled²⁴. There is no PP chapter in the customs union agreement with Turkey. A positive note, though, is the conclusion of FTA negotiations with Ukraine, Colombia, Peru, Iraq and Central America together with substantial PP commitments (e.g. canal de Panama).

Table 3 - International commitments with main trade partners

	TRADING PARTNER		EU27
	Contestable PP Market (Contracts above the GPA thresholds)	Internationally committed (above thresholds)	EU commitments vis-à-vis TRADING PARTNERS (country specific derogations included)
European Union	370	95% (maximum coverage offered)	
United States	559	32%	46%
Japan	96	28%	70%
Canada	59	16%	10%
Korea	25	65%	77%
Mexico	20	75%	n/a
Israel	2,1	75%	n/a
China	83	0%	0%
Russia	18	0%	0%
India	19	0%	0%
Brazil	42	0%	0%
Turkey	23,7	0%	0%
Australia	20	0%	0%
TOTAL	967	25%	18%

Sources: WTO, MARKT own estimations (reflect GPA after conclusion of negotiations 2011)

In fact, some 50% of the PP of the EU's 12 major trading partners is actually affected by domestic barriers such as offsets, set asides, price preference mechanisms, local establishment and national content requirements, leaving the EU with a maximum estimate of 12 billion EUR of untapped exports²⁵ (0,1% of EU GDP). In Annex 8, there is a substantial analysis of all these measures (for each main trading partner and each market).

²⁴ As regards China, its GPA accession process started in 2008, but as the negotiations currently stand, the EU's market access expectations are still largely unfulfilled. Similarly, procurement is one of the most difficult subjects in the on-going FTA negotiations with India and Mercosur.

²⁵ This amount represents the 53% of public procurement closed by domestic measures - cf. table 4

Box 2: Measuring the openness of the EU's 12 main trading partners

*The size of contestable PP markets of the 12 main trading partners of the EU (outside the EEA/EFTA) has been measured on the basis of an in-depth analysis of national accounts and GPA statistical reports (for GPA trading partners) and/or on the basis of estimations made by the WTO itself. For GPA Parties, the objective has been to measure the percentage of purchases of goods and services by governments actually covered by the GPA. All the details of these calculations are provided in **Annex 6**.*

*The analysis of markets detailed on table 5, which takes into account of the opening of 22 markets on the basis of domestic legislations laid down in Annex 8, has served to estimate the "correction" to apply to the percentages of procurement committed. Additionally, based on the **industrial analysis** laid down in **Annex 9**, some industries like the pharmaceutical industry have been considered "fit" to the jump the **trade barriers** identified in **Annex 8** (price preferences, local establishment and local content requirements...). More details can be found in Annex 3 (meth. box 7).*

The real degree of openness of each of the 12 trading partners has been done on the basis of the re-corrected rate²⁶. Ratios of exports in the normal course of trade are then extrapolated to these open markets, taking into account the natural lower penetration of imports in the public sector.

Many of the countries with which the EU has signed an agreement in the field of procurement have closed certain parts of PP market not committed internationally to foreign bidders through set asides for SMEs²⁷, 'buy national measures'²⁸, local content requirements²⁹ and substantial carve outs within their international commitments³⁰.. EU companies also experience enormous difficulties in trying to participate in procurement procedures in **non-GPA/FTA/SAA**³¹ **countries**. Many of these countries maintain a range of protectionist measures.³²

Respondents to the public consultation have largely echoed these problems by highlighting in their contributions trade barriers in railways (US, Japan, China, Korea and Canada), construction (Japan, China and Korea), textiles (US, Canada and India), power (Korea, China) and computers (US).

²⁶ As all sectors are weighted equally, this rate could be distorted in countries where the degree of domestic opening is different from the scope of international commitments (Japan). Yet, as US and China represent two-thirds of all EU potential export markets, this bias is not likely to significantly influence the overall rate of opening

²⁷ For example, an important portion of procurement in the US and Korea is earmarked for domestic SMEs.

²⁸ In the context of the financial and economic crisis, the US included additional "buy national measures" to shield from international competition procurement funded by its stimulus package or new subsidizing policies.

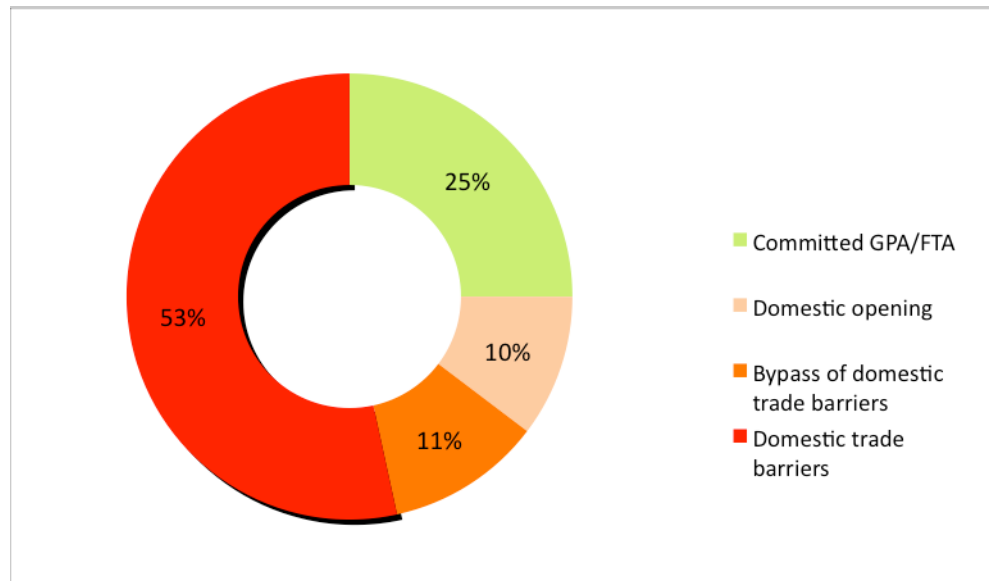
²⁹ Canada has added local content requirements for solar panels

³⁰ Countries like Japan maintain carve outs within their international commitments (operational safety clause in urban transport and railways in Japan), further reducing the portion of procurement legally opened to EU suppliers.

³¹ Stabilisation and Association Agreements with FYR of Macedonia, Serbia, Bosnia and Herzegovina, Albania, Montenegro, Kosovo and Croatia

³² China, Russia and Brazil have recently introduced or reinforced "Buy national measures" imposing either the exclusion of goods originating in third countries, or a strong preference for domestic goods through price bonuses. Other measures consist in allowing competition from third countries but only on less favourable terms than those foreseen for domestic suppliers (e.g. in China, EU suppliers often have to set up joint-ventures with a Chinese partner in order to be allowed to bid).

**Table 4 - Exporting through public procurement - what is open and closed?
(12 main non-EEA/EFTA trading partners)**



Source: own estimations based on data from COMEXT, WTO, DG MARKT and national accounts

EU firms in highly innovative sectors like pharmaceuticals or sorting equipment sometimes manage to bypass these measures due to the specialised nature of their products (cf. Annex 9 - industrial analysis). The EU remains, together with the US, the largest exporter of pharmaceuticals in the world.

However, such a degree of specialisation is difficult to attain in the remaining sectors like construction and railways where the space for differentiation is narrower. As a result, international trade remains low in these sectors and firms often need to move their industrial activities to third countries, most often through joint ventures, to gain access. The share of international trade in these sectors remains low³³.

3.1.5 Domestic barriers are driven by strong national agendas to protect and promote domestic industry

The opening of procurement markets in several of the EU's trading partners has been prevented by strong national agendas driven by domestic pressures from sectors that have been sheltered from international competition for years ("protectionist hysteresis") and in emerging economies, by the desire to climb the industrial technology ladder ("infant industry argument"). Also, federal administrative structures often complicate market openings. Overall these barriers serve purposes of industrial policy as several domestic barriers coincide with markets where trading partners have offensive interests³⁴.

³³ International infrastructure works represent only 11% and 15% of the total turnover of EU and Chinese construction companies and international trade flows of railway equipment only represent 10%)

³⁴ Annex 3, pp 19-20, tables 9a-9b

Box 3 - Drivers of protectionist measures in the main trading partners

In US and Japan several sectors have, for example, been sheltered from competition for many years and the adjustment costs of moving away from current restrictions are considered to be very high ("protectionist hysteresis"). Most of the measures affecting foreign goods in the US PP market date back to the New Deal in the 1930s and 1940s (preferences for US steel in the Buy American, preferences for textile of the Berry Amendment) or the Eisenhower administration (procurement set asides under the Small Business Act). In Japan, the construction industry has relied for many years on public projects to survive and railway orders appear to be split among several domestic manufacturers.

Emerging economies often protect their nascent industries initially to get a toehold in the market, and later to climb the technological ladder and/or to create the economies of scale to create national champions active around the world (this also involves imposing technology transfer requirements). China has had a very active industrial policy to promote its telecommunications, railways and green technologies, and this policy objective is also reflected in its PP policy. India has been trying to foster its pharmaceutical industry³⁵ and is moving towards a National Industrial Policy protecting industries considered strategic such as green technologies, among others. Furthermore, governments of emerging economies are often themselves the owners of their national champions (20% of all Chinese exports are made by state-owned firms).

Finally, federal or quasi-federal countries like US, Canada, India or Japan face institutional and political difficulties in committing the procurement of their sub-central and/or local governments that use procurement as tool of local economic developments and that have the authority to decide individually whether or not to open their own procurements to non-domestic bidders (e.g. US States decide individually whether to join the GPA).

In addition, several major trading partners combine these protectionist policies with unregulated subsidisation of some of their "national industry champions". Based on these distortive state aids and sheltered in captive domestic markets these companies can submit excessively low bids in EU tenders procedures.

3.2 The EU lacks leverage to open up public procurement markets

3.2.1 The EU's current difficulties in opening public procurement markets in third countries

In the WTO trade negotiations, market openings in PP can currently only be "traded" against market openings in PP. As the GPA is a *plurilateral* agreement³⁶ it is not part of the overall multilateral trading system that is part of the Doha Development Round. As a result, within the WTO market openings in PP cannot be traded against, say, lower tariffs.

While this is not the case in EU bilateral procurement negotiations the EU still tends to have major difficulties in opening PP, in particular with emerging economies like Brazil and India, that consider PP an "offensive interest of rich countries" that has to be traded against an "offensive interest of developing countries" (services for India and agriculture for Brazil). Yet, some of these "offensive interest of developing countries" like services and agriculture are extremely sensitive for the EU.

3.2.2 The unconditional openness of the EU's non-committed procurement undermines the EU's negotiating leverage.

The negotiation position of the EU is weakened by the existing asymmetry between market access commitments and effective market access. The EU approach has been to negotiate on the

³⁵ Pharmaceuticals is the only sector where India applies price preferences vis-à-vis foreign goods

³⁶ i.e. it only applies to those members of WTO that wish to accede to it -

basis of a maximum opening, possibly restricted via country specific derogations (which do not make up to the possible asymmetry anyways). As a result, the EU has already made extensive commitments covering large parts of its procurement market. Besides, in areas not committed internationally, the EU PP market remain *de facto* open³⁷ and this has reduced the EU's room of manoeuvre in negotiations as it has few additional areas left to "offer" to commit. On that basis, no specific regulatory framework has to date been adopted at EU level in order to reflect in EU law the exact extent of procurement committed internationally via the GPA/FTAs etc ("covered procurement") or of procurement subject to country specific derogations and reciprocity clauses in those international agreements. Also, the EU not adopted any regulatory measure setting the terms of access of third countries' bids to EU procurement procedures, except in the area of utilities (i.e. Articles 58 and 59 of utilities Directive 2004/17/EC). Besides, there is no implementing legislation in the EU for the treatment of services. Most of these contracting authorities, both as a result of this absence of legal clarity but also on a mere economic consideration, tend to admit all foreign bids, regardless of whether that specific procurement falls under the scope of the EU's international commitments (cf. *infra*). The same appears to be true for the use of existing restrictions in the utilities directive (the so-called Article 58) - for which contracting authorities appear to have no guidance on how to use it and no Member State has reported cases where Article 58 has actually been used. The *de facto* openness is confirmed by high profile contracts awarded to non-EU firms in areas not only not committed internationally but also in areas where EU companies reciprocally face huge difficulties (railways in Japan, construction in China)³⁸.

Moreover, countries like US and Japan have secured access to their offensive interests in 1994 - most of their exports go through the existing commitments that the EU has made vis-à-vis them. If one extrapolates the composition of EU imports in the normal course of trade to the EU PP market, imports through non-committed markets are likely to be 5 times those of committed markets³⁹. As a result, third countries don't feel the need to negotiate with the EU to obtain any international commitments. This lack of incentives to negotiate is even stronger when trading partners are currently able to both satisfy their offensive interests in the EU and face strong domestic pressures to maintain their markets closed (railways procurement in Japan and construction in China). If third countries opened those markets where they also have offensive interests, they could free up to **4 billion EUR of EU exports and create some 60.000 jobs** (cf. pp 11-13 of Annex 7).

3.3 Some Member States appear to have taken national measures that may be infringing the common commercial policy (CCP)

The public consultation has confirmed that MS and contracting authorities feel they lack practical instruments and detailed guidance to understand and cope with the complexity of EU's international procurement commitments and with the range of country specific derogations, which increases the risk of mistakes in their assessment of whether contracts are covered by international commitments of the EU⁴⁰. MS and procuring entities have reacted differently to a

³⁷ Although, as explained, implementation problems may point to a less optimistic situation.

³⁸ For instance, out of the 10,7 billion EUR of contracts awarded to non-EU companies (including their subsidiaries), one third (3,5 billion EUR) were awarded in non-covered procurement. A Japanese rolling stock producer is, for example, the selected bidder for a 5 billion EUR contract for trains in the UK, although GPA commitments do not cover railways. The metro networks of 2 of the largest cities in Europe run with Russian and Korean rolling stock. A major state-owned Chinese works contractor obtained the 300 million EUR for the construction of a motorway in Poland.

³⁹ cf. pp 29-30 of Annex 3

⁴⁰ Contracting authorities have to indicate in their publication notices whether a contract is covered by GPA. The analysis of contract award notices (CANs) in TED reveals that contracting authorities either make mistakes on the coverage of GPA (28% of CANs contain erroneous assessments), either don't even bother responding (16% of cases). Contracting authorities have difficulties to identify the category of entity to which they belong and often consider themselves as falling in the category "other" (some 30% - cf. evaluation of EU public procurement directives). 38% of contracting authorities

situation some have perceived as a "legal vacuum". As explained above, most procuring entities do not appear to systematically discriminate⁴¹. For instance, the rates of error were above average among the contracts awarded to foreign firms. None of the MS has reported precise cases of discrimination. Neither have trading partners, if ever, complained of systemic problems in accessing the EU PP market.

As explained previously, several MS have on the other hand taken measures to regulate the access by non-EU firms, goods and services to their procurement market. Except in Spain, the measures are optional (Austria, Cyprus, Hungary and UK). It is unclear whether these measures are always compatible with the international commitments of the EU⁴² and there are examples of national legislations or isolated court decisions based on the concept of "strict reciprocity"⁴³ for the procurement sector concerned.

Notwithstanding this, the present situation retains the risk of commitments not being applied consistently or divergently between authorities⁴⁴ and also reduces significantly the EU leverage and credibility in international negotiations. This was also noted by several respondents to the consultation. In particular, the possible differences in the treatment of foreign bids on each MS nationwide procurement markets send conflicting signals to trading partners⁴⁵.

Since regulating the access to the EU procurement market for suppliers from third countries clearly falls under the remit of the Common Commercial Policy (CCP), MS are however not entitled to legislate in this area on their own. Equally, contracting authorities would not have the authority to take decisions on their own without any previous authorisation from the EU level, except when applying Article 58 of the "Utilities" Directive.

Finally, because of their lack of consistency, these measures have failed to fulfil their objective, namely to provide negotiations leverage to open new PP markets.

3.4 Consequences

responding to the stakeholder consultation did not know how to assess the scope of GPA, 27% considered that the GPA applies to all the purchases covered by the directives and 95% indicated that they never used rules of origin.

⁴¹ 19% contract award notices did not indicate whether the contract fell under the GPA or not and 36% indicated that their contract was not covered by GPA while it actually fell in the scope of the GPA. In the Commission consultation, only 3,8% of contracting authorities actually disregarded a bid because of its origin. Also, trading partners have not complained of systemic problems in the EU public procurement market. The issues touched upon by 3 trading partners (US, Japan, Mexico) in several foras are identical to those experienced by EU firms in the internal market (access of SMEs, delayed payments and language barriers).

⁴² cf. Annex 3, methodological box 8.

⁴³ For instance, one of the Member States applies a strict reciprocity clause on construction. This could put at risk the EU commitments in GPA where the EU has sometimes offered, to other trading partners, access to contracts of threshold values lower than those offered by the trading partners to the EU. However, the European Commission has so far never been informed of any case of discrimination based on 'strict reciprocity' clauses.

⁴⁴ The analysis of contract award notices (CANs) in TED reveals that contracting authorities either make mistakes on the coverage of GPA (28% of CANs contain erroneous assessments), either don't even bother responding (16% of cases). Contracting authorities have difficulties to identify the category of entity to which they belong and often consider themselves as "other" (some 30% - cf. evaluation of EU public procurement directives). 38% of contracting authorities responding to the stakeholder consultation did not know how to assess the scope of GPA, 27% considered that the GPA applies to all the purchases covered by the directives and 95% indicated that they never used rules of origin.

⁴⁵ Third countries, aware of the gaps between the level of access to EU procurement markets subject to international commitments and the actual access conditions, remain reluctant to undertake market access commitments. At the same time it puts into question the capacity for the EU to ensure that its Member States apply the market access rules uniformly across the EU

3.4.1 EU companies are being deprived of business opportunities abroad, thus reducing their leadership and preventing them from creating economies of scale

EU firms are missing out some 12 billion EUR of untapped exports (if procurement markets were fully open, the EU could potentially add some 180 000 jobs) in several sectors and in particular in sectors where they are strong⁴⁶. Also, among of the businesses responding to the consultation, 75% considered that greater access to foreign markets would lead to greater economies of scale, 75% that it would reduce fixed costs to enter the market in question and 80% that it would allow them to obtain references to win other private/public orders.

3.4.2 The exports of companies that bypass domestic measures can be affected at any moment by protectionist measures

As shown in graph 3, some 25% of the procurement non-covered by international commitments is either open (no domestic barriers) or EU exports manage to bypass domestic barriers. For instance, in Turkey, restrictions against foreign goods are only applied in 23% of procedures. EU firms and their subsidiaries have obtained landmark contracts awarded in various countries. Also, thanks to their high skills and high revealed quality elasticity, the EU pharmaceutical industry and the airport or postal sorting equipment industries have the capacity to bypass existing domestic barriers (cf. Annex9).

However, the 2,2 billion EUR of exports bypassing domestic barriers cannot be taken for granted. They can in the absence of the guarantees provided by legal commitments be hit at any moment by the reinforcement of the use of domestic barriers. Additionally, at the same time several emerging economies are climbing the quality ladder⁴⁷, improving their revealed quality elasticity and reliance on high skills, further reducing their dependence on EU goods, services and firms (Israel and India have developed important industries of generic medicines), ultimately reducing the potential to bypass domestic barriers.

3.4.3 EU jobs are not created and in some cases they are destroyed by the distortions resulting of protectionist measures

The case of the local content requirements of the Buy American measures is a telling example. These measures have been successful in artificially transferring industrial activity to the United States, departing from the purely rational allocation of resources and factors that would have taken place if procurement markets were 100% fully open (job creation or destruction due to the normal course of trade owing to decisions of business strategy, due to lower labour costs or to transportation costs).

Although it is difficult to quantify how many EU jobs have been lost to artificial US domestic procurement barriers, available information or examples received in the framework of the public consultation illustrate the problem⁴⁸. Finally, there are also industrial relocation effects: civil

⁴⁶ The EU railway industry, which has a 50% market share in the world (UNIFE), has been prevented from participating in any substantial order of rolling stock in Japan. The EU construction industry - still the most internationalised in the world (8% of all non-EU public works⁴⁶) - is completely absent of the Japanese, Korean and Chinese markets for public works. The EU telecom industry has also been discriminated against in Brazil (and India).

⁴⁷ ECB (2011), Working Paper Series, N° 1310, Is China climbing the quality ladder?

⁴⁸ A EU supplier of electric goods has explained that it had to move its industrial operations to the US to meet the requirements of its main client, the US federal government. Similarly, the Alliance for American Manufacturing provides several examples of EU firms that moved their industrial activities to the US creating jobs in the US thanks to Buy American and ARRA (an Austrian and a German railway manufacturer, a Dutch steel producer...). Information on ARRA and jobs by the Alliance for American Manufacturing is available under http://www.americanmanufacturing.org/files/buyamericaworks2_10v2_0.pdf

aerospace industries have had to relocate to the US because of industrial plants serve both public and private customers⁴⁹.

3.4.4 Many sectors dependent on public procurement are being forced into technology transfers, further reducing their competitiveness, or to conduct innovative activities abroad

Several emerging economies force foreign companies to enter into technology transfers as a condition for participating and/or being awarded a contract in PP procedures. Thus PP is used in several emerging economies as part of broader industrial policies to force a transfer of technology in ways departing from the normal commercial considerations. This is notably the case of China⁵⁰ and its 'indigenous innovation initiative'⁵¹.

This has also been a problem for sectors like railways. Although 43% of all railway equipment exports originate in the EU, international trade only represents 10% of the whole sector sales. PP restrictions in the US, but also in all the BRICs, have further pushed the EU railway factories away from the EU through joint ventures. In contrast, Japanese, Korean and Chinese rolling stock producers have been able to export to the EU without setting up any meaningful manufacturing activity in the EU.

3.4.5 Domestic barriers are also preventing the internationalisation of SMEs

SMEs face particular difficulties to overcome local establishment and national content requirement barriers as they generally lack the means to set up subsidiaries or even to have any kind of permanent commercial presence⁵². In reality they almost never have access to procurement that is not legally opened via international agreements⁵³. As proximity and a common language plays an important role in cross-border procurement participation, access to some non-EU markets (North and South America, Russia and Turkey) may even be more vital for some SMEs than access to other MS' procurement markets (typically SMEs from UK, Spain, Portugal, Bulgaria, Poland, Estonia, Latvia, Lithuania, Ireland, France and Belgium)⁵⁴. PP barriers can therefore contribute in holding back the internationalisation of EU SMEs⁵⁵.

3.4.6 An uneven level playing field for EU firms

EU companies are more and more exposed to competition from foreign companies that are protected in their home market by domestic legislations (as indicated previously, the closure of procurement markets where trading partners have themselves offensive interests represents some 4 billion EUR of potentially untapped exports for the EU) and that are actively (financially)

⁴⁹ ECORYS/ DG Enterprise (2009) - FWC Sector - Competitiveness of the EU Aerospace Industry

⁵⁰ Additionally, there is no guarantee that China will open its protected sectors to competition once these are industrially mature. China agreed to many exemptions in WTO negotiations for high-technological products. Through parallel technology, it started producing similar technologies. After a few years, China introduced its tariff in line with WTO to protect its newborn industry.

⁵¹ Under the "indigenous innovation initiative", preference is given to high-tech equipment (computers, telecom equipment, green technologies) produced in China and whose intellectual property rights has been registered in China and is disclosed to the Chinese government, who becomes its owner

⁵² In the EU public procurement market, SMEs have won 47% of direct cross-border procurement contracts. Indirect cross-border procurement through affiliates is dominated by large enterprises.

⁵³ In fact, as SMEs face other difficulties like language, lack of local contacts, market openings are not even a necessary condition for access, but not even a sufficient condition. More generally, it can be assumed that SMEs cannot participate in procurements not committed internationally (cf. example of Mexican SMEs in EU PP in 2.3).

⁵⁴ Spanish SMEs export more to Latin America than to the EU12 Member States (BRUEGEL, The Global Operations of EU firms)

⁵⁵ According to the most recent study on the internationalisation of SMEs by ENTR, only about 13% of EU SMEs are active in markets outside the EU.

supported by their governments at home and abroad, as voiced by several respondents to the stakeholder consultation.

The closure of the PP market through domestic protectionist measures for specific industries ensures a guaranteed source of state-supported revenues in their home market (Japanese railway industry), even if these companies are not actually State-owned (e.g. Chinese construction giants, Russian aerospace industry) it may put them in a position to submit abnormally low bids. These problems have been extensively explained by the EU construction industry during the Liaison Forum. Several businesses have highlighted problems such as the "financial dumping" of state-owned firms from certain emerging economies that also benefit from very low credit lines of national banks.

While open trade is to the benefit of all a, distorted competition based on state aid and abnormally low tenders acts ultimately to the detriment of the competitiveness of the EU industry not only in its own market but also in its export markets.

The current rules on abnormally low tenders (Articles 57 of Directive 2004/17/EC and Article 58 of Directive 2004/18/EC) give contracting entities the option to exclude tenders, amongst others if this operator has illegally received state-aid, after enquiring in writings about the elements likely to explain the price gap. However, this procedure presents some certain weaknesses⁵⁶, most of which are being addressed in the proposed new PP directives.

3.4.7 The EU could face WTO/FTA litigations for not respecting its international obligations

Finally, the implementation problems of the EU international obligations could lead the EU to face WTO/FTA litigations in the WTO, which would undermine its credibility in international procurement negotiations.

3.5 Subsidiarity

The question of subsidiary does not arise in the context of this initiative, since the access of companies, goods and services from third countries to the EU's PP market falls into the scope of the CCP, an exclusive competence of the EU (Article 3 of the TFEU). Therefore, the rules that govern the access of third country companies, goods and services must be taken at EU level and can not be taken by MS. Also, the rules on award of contracts are coordinated by the EU public procurement directives 2004/17/EC and 2004/18/EC and transposed by MS.

3.6 Desired effects

In this context, actions should be taken to:

- Fully open PP markets across the world to unleash 12 billion EUR of potential EU exports, or at least force third countries to open those markets where they have themselves offensive interests (this could unleash some **4 billion EUR** of opportunities and create 60.000 jobs). In the EU, the level of foreign penetration should remain as it is (in line with the normal course of trade).
- Ensure that, on a sector-by-sector basis, third countries are not applying domestic protectionist measures to support their own industries that are exporting to the EU.

⁵⁶ The notion of "an abnormally low tender" is vague and is left to the discretion of contracting entities. In addition, the investigation on the elements justifying the price gap is mandatory only when the entity intends to reject the abnormally tenders. Also, other tenderers are not informed that the entity intends to accept abnormally low tenders.

- Ensure that, in spite of the openness of its contracting authorities, the EU will not face WTO/FTA litigations for lack of respect of its international commitments, which would undermine the credibility of EU in international trade negotiations.
- Ensure that measures are applied consistently in the EU both in terms of conditions of access (i.e. which markets are open?) but also in terms of PROs (avoid therefore the so-called "fragmentation of internal market").

It is also important to indicate that the present initiative does not envisage any additional specific actions focused on solving problems relating to different labour standards notably or promotion of fair trade as suggested in the response to the consultation by trade unions and NGOs respectively⁵⁷. These are issues that affect trade overall and imports dependent on PP is too small to exert any solution to these questions. These actions will neither serve to solve the problem of leverage of the EU in procurement negotiations, nor to improve the respect of EU international obligations. Finally, policy choices relating to strategic procurement belong rather to the revision and modernisation of PP policy and other policy initiatives.

4. OBJECTIVES

4.1 General objectives:

The 2010 Commission Communications on a "Single Market Act" and "Trade, Growth and World Affairs" have both highlighted fair competition and access to PP markets as one of the key tools for economic growth and job creation, in particular in the context of the recent economic crisis.

Against this background, the present legislative initiative would serve as a tool for further opening PP markets in third countries to improve business opportunities for EU firms. In doing so, it is believed that the initiative will:

GO1: Increase the competitiveness of EU businesses, both in the EU and internationally;
GO2: Boost the internationalisation of SMEs in a globalised economy;
GO3: Increase employment in the EU.
GO4: Promote innovation

The present impact assessment shall identify the most suitable policy option that will reach the above-described general objective. To this aim, the general objectives have been translated into specific and operational objectives:

⁵⁷ However, the Commission will continue addressing these issues, notably the respect for the ILO core labour standards, in other relevant frameworks, including FTA negotiations and policy dialogues with partner countries, as well as modernisation of PP policy. Labour standards will also continue being addressed through promotion of corporate social responsibility practices, including along the supply chain and other actions, such as taking social considerations into account in public procurement.

4.2 Specific objectives:

SO1: Increase exports of EU goods, services and firms in non-EU PP markets
SO2: Create EU leverage in international procurement negotiations
SO3: Strengthen the playing field for EU companies in the internal market
SO4: Improve legal certainty with regard to access to the EU's procurement market by third countries' companies, goods and services.
SO5: Ensure respect for the EU's international agreements
SO6: Avoid breaches of the EU Treaties

4.3 Operational objectives:

OO1: Improve market access for EU goods, services and firms in non-EU PP markets (cf. SO1 and SO3)
OO2: Create incentives for trading partners to remove barriers to the access of their public procurement markets (cf. SO2)
OO3: Clarify the rules of access to the EU's public procurement market for non-EU tenders, including on how to determine the origin of goods and services in the context of tendering procedures (cf. SO4)
OO4: Reduce the risk of challenges against the EU in the framework of the WTO or dispute settlement mechanisms in bilateral FTAs (cf. SO5)
OO5: Preserve the consistency of EU trade policy towards non-EU economic operators in tendering procedures (cf. SO6)
OO6: Preserve the consistency of the EU internal market and in the customs union (cf. SO6)

5. POLICY OPTIONS

The Commission has identified a number of policy options that are most likely to achieve, on their own or in combination, the objectives set out in the previous chapter.

1. Baseline scenario ("Nothing happens")
2. Non-legislative approach
Approach A ("Soft-law"): more active use of existing provisions for utilities (Article 58 of Directive 2004/17/EC) on EU's international commitments, use of infringement- and dispute settlement- procedures
Approach B: Tougher approach of the European Union in negotiations on public procurement
3. Legislative approach: Instruments with supervision by the European Commission
Approach A: <u>obligation</u> for contracting entities to <u>exclude</u> companies, goods and services not covered by EU's international commitments
Approach B: <u>option</u> for contracting entities to <u>exclude</u> companies, goods and services not covered by the EU's international commitments, subject to notification of the Commission and Commission option to restrict access to the procurement market
Approach C: <u>option</u> for contracting entities to <u>accept</u> companies, goods and services not covered by the EU's international commitments, subject to notification of the Commission and Commission option to impose access to the procurement market
4. Legislative approach: Instrument without supervision by European Commission
Extension of the existing provisions for utilities (Article 58 of Directive 2004/18/EC) to all contracting entities and works contracts (with guidance) and use of strategic procurement provisions
5. Legislative approach: 'Buy Europe'
Application of price penalties for non-covered goods and services
6. Complementary approach: correcting unfair 'abnormally low tenders'

5.1 Baseline scenario ('Nothing Happens')

The baseline scenario shows how the problems described in the problem definition will most likely evolve without any further action by the EU. Under this scenario:

- The present legal framework regulating market access remains in place (Article 58 of Directive 2004/17)
- The new PP legislation is extended to cover service concessions, to include production processes and life-cycle cost in awarding/selection criteria
- The EU continue to negotiate (1) bilaterally with US, Japan, India, ASEAN, Canada and Mercosur and (2) the accession of China to GPA
- The FTA with Ukraine enters into force

- MS maintain their domestic legislations on access to procurement (without any action from the Commission).⁵⁸

Box 4 - Detailing the 'baseline scenario'

In terms of **improvement of the access to third countries procurement markets** through existing negotiations, a *pessimistic scenario* and an *optimistic scenario* shall be analysed. In both scenarios, the results achieved so far with in GPA (opening of Korean railways market, opening of Japanese concessions and lifting of offsets in Israel) and full opening of Canadian procurement market can be reached. It is nevertheless very difficult to predict when and under what conditions China or Russia would accede to GPA, how the US will conduct its bilateral procurement negotiations and whether the EU will start procurement negotiations with Turkey, Australia, South Africa and ASEAN nations (but Singapore and Malaysia).

Under a *pessimistic scenario*, it cannot be excluded that (1) bilateral trade negotiations with India or Mercosur are never concluded (eventually for other reasons than procurement) and (2) bilateral trade negotiations with Japan are never started.

Under an *optimistic scenario*, it can be expected that: (1) India and Brazil (Mercosur) commit their central government procurement (including railways in India and power generation in Brazil) and (2) Japan opens its railways as a fulfilment of its commitments under the GPA.

The **implementation problems** will not significantly change - and actually could worsen - as additional MS may be tempted to take domestic measures, in disregard of the EU's exclusive competence of CCP. As indicated earlier, this could lead the EU to face WTO/FTA litigations and ultimately undermine the credibility of the EU in international procurement negotiations. Alternatively, the Commission may have to take MS to the ECJ for infringing the exclusive competence of the EU for the CCP, but this would increase the perception of openness of the EU precisely at a moment when the EU is lacking leverage.

Finally, the recently adopted new PP legislation does not solve the leverage of the EU in international trade negotiations although the extension of the current rules to most services and, in particular, to service concessions may, if adopted, open new possibilities in negotiations. Also, the possibility to include life cycle cost and production processes in selection/awarding criteria may also allow contracting authorities to block products that do not respect minimal environmental and social standards (e.g. child or prison labour, disproportionate carbon footprint...).

5.2 Non-Legislative Approach

5.2.1 Option 2A: 'Soft Law'

To give incentives to trading partners to negotiate market access and to strengthen market access in particular in railways, the Commission would provide **guidance**⁵⁹ on how to better use articles 58 and 59 of the so-called 'Utilities'⁶⁰ Directive 2004/17/EC (these articles were introduced at the time of the first GPA negotiations). Guidance would ensure that international commitments are respected. Furthermore, the Commission would make a more active use of existing tools such as infringement procedures against those MS that violate Article 58 of the Directive 2004/17/EC or the exclusive competence of the EU on the CCP. Finally, a more active use of **dispute settlement mechanisms** in the context of WTO/FTAs would target direct infringement of international commitments by trading partners.

⁵⁸ It is also assumed for the purposes of this Impact Assessment that EU trading partners will not add discriminatory measures affecting the level of domestic openness.

⁵⁹ **Explanatory documents** would help contracting entities to identify procurement covered by the international market access commitments of the EU under the GPA/FTAs/ SAAs sector-by-sector or/and country by country and apply the relevant rules of origin of goods (Community Customs Code).

⁶⁰ Utilities are an important part of the excluded procurement.

5.2.2 Option 2B: Reinforcement of on-going negotiations

During the Liaison Forum, the business trade associations asked that the EU could negotiate more forcefully to further open up PP across the globe. It should be reminded that since the adoption of the Communication "Global Europe" the EU has systematically sought the inclusion of comprehensive procurement chapters, including market access, in all of its trade negotiations.

Box 5 - Detailing what could be a reinforcement of on-going negotiations

Under this option, the EU would reinforce this approach and thus (1) encourage trading partners to join GPA, (2) seek the development or the expansion of market access commitments on government procurement in existing FTAs (Chile, Mexico) or (3) try to convince trading partners to include market access in the discussions of the trade provisions of on-going PCA negotiations (such as EU-Australia PCA). The EU would also reinforce its consultations with industry so as to enhance its assessment of the market issues and opportunities in third countries

In fact, except for Australia and Turkey, the EU is already negotiating forcefully along the aforementioned lines. The EU has recently successfully concluded the GPA negotiations offering new market access (Canada, Korea, dismantling of Israeli offsets) or commitments to further negotiations (US, Japan⁶¹), has linked the conclusion of the EU-India FTA negotiations to a substantial procurement chapter and the EU-Mercosur negotiations were only re-launched on the condition of the inclusion of a PP chapter.

In this context it should be noted that India has submitted a new bill on procurement and Mercosur countries are negotiating the opening of procurement to each other.

The EU has still an ambitious set of negotiations programmed in the medium-term: Russia has taken commitments to join GPA, China's accession to GPA and bilateral negotiations with Japan and US, and possibly with a number of ASEAN countries beyond those with which negotiations are already on-going.

In reality, this option would basically amount to a continuation of existing policy and would fail to address one of the core issues, namely the lack of proper leverage to open third country PP markets⁶². It shall therefore be considered as an extension of the baseline scenario.

5.3 Legislative Approach with supervision by European Commission

To ensure that international obligations are respected and to increase the leverage in procurement opening negotiations, under this legislative option (with three alternative approaches), the Commission would, as responsible for the conduct of the common trade policy and the consistency of the internal market, have the final say for each award to be either refused (options 3B) or accepted (options 3A and 3C) by contracting authorities.

Under the different approaches set out below the legislative initiative would define and regulate access to PP covered and **not covered** by the EU's international commitments⁶³ and establish "*procurement rules of origin*" (PROs) to identify the origin of goods and services⁶⁴. In line with the concerns expressed by NGOs, it would also grant full access to goods and services from least developed countries.

⁶¹ Public procurement is an important consideration for the possible launch of the EU-Japan FTA.

⁶² Pessimistic/Minimalistic and Optimistic/Maximalist outcomes of negotiations are described in the baseline scenario

⁶³ The definition of not covered procurement would include "unscheduled procurement" (procurement not explicitly offered in GPA/FTAs - e.g. railways and concessions in GPA - or not committed vis-à-vis countries that have no public procurement agreement with the EU) and "excluded procurement" (procurement explicitly excluded in GPA through country-specific derogations and reciprocity clauses. Country specific derogations regulating access to remedies would not be implemented as they could infer with rights that are constitutionally guaranteed in some Member States.

⁶⁴ The PROs for goods will be those in the Community Customs Code and the origin of services will be established on the basis of the origin of the service supplier. On the basis of GATS definitions, this would mean that if the supplier is established outside the EU or in the EU, but owned or effectively controlled by foreign companies, the service would be considered to be foreign.

Options 3A and 3C take as a starting point that non-covered PP is a priori closed (acceptances to open have to be cleared by the Commission), whereas option 3B considers that it is a priori open (rejections have to be cleared by the Commission).

The scope of the legislative initiative would mirror the scope of the PP directives⁶⁵ with the possible inclusion of service concessions at a later stage. The initiative would also exclude defence procurement, which is subject specifically to EU Directive 2009/81/EC⁶⁶.

5.3.1 Option 3A: Approach based on an overall access restriction for not covered procurement at the EU level (option 3A)

Under the first approach EU contracting entities would be required, in principle, to exclude third country goods, services and companies not covered by the international commitments of the EU. However, in four cases (cf. infra) the initiative would establish "exceptions" to the obligation to exclude for instance in cases of "emergency" and/or of "overriding reasons of general interest", but also in those areas identified in the consultation of contracting authorities (to avoid obstacles to the procurement of goods and services unavailable in the EU (e.g. fuel)⁶⁷, for health-related procurement (e.g. pharmaceuticals, medical equipment - whose number of bids is also below-average 2-3 bids on average) or in case of disproportionate sourcing costs (e.g. fuel or computers⁶⁸).

EU contracting entities would be required to notify (*ex post*) the European Commission of their decision to accept third countries' goods, services and companies not covered by the EU's international commitments and the derogation on which they are based. This *ex post* notification would be made, for instance, in the *contract award notice*⁶⁹.

5.3.2 Option 3B: Approach based on individual decisions by the EU contracting entities and a Commission driven mechanism in the case of not covered procurement (option 3B)

5.3.2.1. At the level of MS: individual contracting entities' decisions under the supervision of the European Commission (3 B 1)

Under this approach contracting entities may exclude bids from third countries after being cleared by the Commission and provided that they announced in the contract notice that they intend to reject foreign bids that consist of non-covered goods and services. This will allow the Commission to monitor the situation and ensure a consistent treatment of foreign bids throughout the EU. The decision from the Commission would be assessed on the basis of a 'substantial reciprocity test'⁷⁰, which takes into account the current market access situation in the country of origin concerned and the commitments undertaken in the GPA/FTAs/SAAs, as well on the basis

⁶⁵ The choice of this scope is based on the consideration that procurement contracts within the scope of these Directives present the most important business opportunities for cross-border trade within and outside the EU.

⁶⁶ Under this directive, Member States have retained the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures.

⁶⁷ The consultation of contracting authorities shows that 10% of contracting authorities have procured goods outside the EU because these were not available in the EU. The level of bids in fuel is very low (2 bids)

⁶⁸ Imported computers represent up to 70% of all computers and the EU public procurement market absorbs up to 8% of the whole EU demand of computers (source: SBS, EU GPA statistical report, own estimations).

⁶⁹ In complement to infringement procedures based on the TFEU, the initiative would also provide the Commission with the possibility to pursue possible abuses of these derogations (exceptions) through other appropriate measures in order to ensure compliance as well as uniform application of the aforementioned derogations.

⁷⁰ The substantial reciprocity test will consist in an desk-based analysis of existing protectionist measures in national legislation (as in Annex 8) in a relevant market and the effective level of access granted to EU economic operators, goods and services in public procurement in the country concerned ; it will also take into account retaliatory aspects

of situation of existing trade negotiations⁷¹. The Commission would take a decision within take 6-8 weeks.

5.3.2.2. At the EU level: the Commission-driven mechanism ("3 B2")

As a complement to 3B1, the Commission would be entitled to conduct enquiries about the market access situation for EU goods, services and companies in specific third countries, and, based on the evidence of existing trade barriers, to initiate negotiations with these countries to remove the existing trade barriers or undertake market access commitments. Should negotiations fail, the Commission would have the power to consider and adopt restrictive measures⁷² on goods and services originating in third countries when EU goods, services and companies do not enjoy sufficient access to the PP market of these countries. The assessment would take place on the basis of similar criteria to those of 3B1, and upon positive conclusion to remove these barriers⁷³. In addition, under this approach, exemptions would allow contracting entities not to apply the restrictive measures adopted at the EU level in the 4 specific cases also applying to option 3A.

5.3.3 Option 3C: Option for contracting entities to accept companies, goods and services not covered by the EU's international commitments, subject to notification of the Commission and Commission option to impose access to the EU's public procurement market

This option would give contracting entities the possibility, subject to clearance of the Commission, to accept companies, goods and services that do not benefit of international market access commitments. They would, first have to announce in the contract notice that they would like to accept these companies, goods and services. If they actually receive such goods and services they must notify the Commission. The Commission would take a decision based on 'substantial reciprocity' within take 6-8 weeks.

5.4 Option 4: Legislative approach: Instrument without supervision by European Commission (extension of Article 58 to the whole scope of the directives)

The provisions of Articles 58 and 59 would be extended to services, works, bodies governed by public law, central and local authorities. Guidance on its use would be provided through explanatory documents (as per option 2). Finally, this initiative would use the same core elements as option 3.

5.5 Option 5: 'Buy Europe' type legal framework

Another option could consist in introducing prohibitive price preference mechanisms in the EU akin to those used in the US or in Brazil, either in specific sectors or for all procurement, to shelter EU goods and services from foreign competition. Yet, the credibility of the EU in its fight against precisely the same protectionist measures in PP would be severely damaged. As a result, this option would not solve the main problem (i.e. the closure of foreign PP markets), and as a

⁷¹ When there is a need to avoid possible interference of rejection by contracting entities with negotiations with a trading partner conducted on the basis of the instrument outlined under "3 B2", the Commission could impose a standstill or "pre-emption" period blocking the possibility for contracting entities to reject non-covered goods and services from a specific country. However, this pre-emption system does not apply when the Commission negotiates with trading partners on market access in the context of GPA accessions or regular FTAs negotiations.

⁷² The restrictive measures would consist either in prohibiting access to (specific parts of) the EU's procurement market, for specific contracts or in imposing a departure from equal treatment (through price penalties for instance). These measures could only target procurement that is not covered by the EU's international commitments, and would not apply to least developed countries.

⁷³ If the trading partner accepts to negotiate or to remove the barrier in question, the Commission would, following appropriate decision making procedures, have the authority to lift/suspend authorise the suspension of the restrictive measures adopted.

result will not be further analysed⁷⁴. Last but not least, in the consultation of stakeholders, price penalties were dismissed both by contracting authorities and businesses.

5.6 Option 6: correcting unfair 'abnormally low tenders' (complementary option)

The options outlined could be complemented by an option that would, in addition to the strengthened rules on the proposed PP directives and in line with our international obligations, increase the transparency requirements in case of abnormally low bids from third countries resulting from unfair competition practices (in non-covered PP). On this basis, contracting authorities could be required to inform in writing competing bidders every time they intend to accept abnormally low bids⁷⁵.

6. ANALYSIS OF IMPACTS

6.1 Key impacts to be analysed

The instrument is expected to generate a certain number of jobs and a certain increase in exports against which the costs of each option have to be analysed (sensitivity analysis). As a result, a number of key impacts shall be analysed for each option: **trade** (exports, imports, potential retaliation, supply chains of EU firms), **foreign direct investment (FDI)**, **jobs**, **competitiveness** (identification of sectors affected by each option, effect on level playing field, internationalisation of SMEs), **leverage**, **rules clarification effect**, **public finances**⁷⁶, **administrative burden**⁷⁷, **competition** (impact on the number of bidders), **innovation**, **consumers** (final users of public services), **and environment**.

6.2 OVERALL ASSUMPTIONS

Assumptions are explained in detail in Annex 4 ("Analysis of impacts") and can be summarised as follows:

- **Market behaviour:** the main incentives of contracting authorities are to lower as much as possible the risk of litigation, to purchase efficiently and quickly (cf. PwC study): optional restrictions will not be used systematically by contracting authorities (and certainly not for fuel, pharmaceuticals, medical equipment and computers⁷⁸): depending on the option, we will assume a rate of rejection of 25%, 50% or 75%⁷⁹; businesses are always interested to participate in procurement procedures
- **Retaliatory effects:** - cf. 6.3.2 (cf. infra)

⁷⁴ In addition to this undermining effect for the EU overall negotiating position, such options would directly encourage sectoral protectionist tendencies within the EU and create major irritants to further opening in the context of GPA/FTA negotiations

⁷⁵ Definition of abnormally low tenders as per the proposed directives

⁷⁶ Calculations on the basis of procurement savings as a logarithmic function of the number of bidders - cf. Annex 4 for more details

⁷⁷ Calculations on the basis of the standard cost model – includes burden on Commission, more details in Annex 4

⁷⁸ Contracting authorities will have much difficulty to discriminate against products that are massively imported (fuel or computers - 70% of EU computers are imported) or with low competition (pharmaceuticals and medical equipment) as this would generate "disproportionate costs" or "unavailability". Health-related products also fall in the concept of "overriding reasons of general interest").

⁷⁹ 50% is the neutral rate of use of rejection (if no transaction costs to reject or accept), 25% is the rate of rejection if contracting authorities have to ask the permission to reject foreign tenders and 75% is the rate of rejection if contracting authorities have to ask the permission to accept foreign tenders. The objective is to rank options (rather than an absolute value). Contracting authorities may be actually keener to use 'abnormally low bids' - further reducing the potential rate of rejection from abroad.

- **Leverage:** Leverage is calculated on the basis of a leverage index that measures the percentage of closed markets of the trading partner in comparison to the EU (cf. Annex 7 methodological annex)

Box 6 – Overview of the models used to calculate impacts

The impact on exports is derived from an analysis of the markets that the EU's trading partners will open (cf. box 7 and Annex 7). The jobs that would be created as a result of the additional exports are based on an extrapolation of an on-going analysis of the impact of exports and jobs conducted by DG TRADE and the JRC (this model might slightly overestimate job creation as it does not take into account efficiency gains and spare capacity). The impact on public finances is calculated on the basis of a model measuring the relation between savings and competition (number of bids). The impact on competition is measured on the basis of the number of bids received on average by specific types of purchasers. Finally, the impact on administrative burden is calculated on the basis of the standard cost model. The cost of opportunity caused by periods of notification has been taken into account, but quantification of uncertainty and litigation costs remains subjective and difficult to quantify.

6.3 Cross-cutting impacts:

6.3.1 Exports, jobs, FDI and internationalisation of SMEs

The success of this legislative instrument largely depends on the third country market openings that would be achieved following its adoption, and these are difficult to predict as they depend on the outcome of international trade negotiations. If these fail, the problems previously identified⁸⁰ will continue.

To determine the efficiency of each the options, the costs of each option will be compared to the more realistic objective of 4 billion EUR additional exports (cf. box 7).

Box 7 – Additional exports and jobs

Full opening scenario - If the 12 largest non-EU/EEA trading partners fully open their PP markets in all negotiations due notably to the leverage generated by this instrument, it could increase EU exports by a 12 billion EUR (although this situation is probably too optimistic), which in turn would then generate 180 000 jobs (cf. Annex 5).

Realistic opening scenario- If the EU negotiates symmetrically and obtains the access of all the markets where these 12 trading partners have offensive trade interests (which is more realistic since these are areas which our trading partners need to secure), then the instrument could result in 4 billion EUR of additional exports, which in turn would generate 60.000 jobs.

The contribution of this instrument to the internationalisation of SMEs will depend on the countries and sectors, whose procurement markets will be opened through negotiations. An opening of the Brazilian procurement market will particularly impact Portuguese SMEs, whereas the opening of the Russian procurement market is more likely to impact SMEs in, say, Poland or Bulgaria. Similarly, the capacity of SMEs to participate will depend on the sector in which they are involved.

Finally, the impact of the instrument on FDI is difficult to evaluate. For goods in non-covered procurement, some companies may have to set up manufacturing activities in the EU. However, for services, the fact that restrictions would apply to subsidiaries of foreign companies could discourage FDI in the EU.

⁸⁰ E.g. artificial measures leading to relocation or technology transfers.

6.3.2 Retaliatory measures

Predicting reactions by trading partners is a difficult and subjective prospective exercise. The problem of retaliation is analysed in-depth in 1.3.2 of Annex 4 (pages 3-4). In this context, it is proposed to envisage 3 scenarios of retaliation⁸¹ by trading partners: "no retaliation", "simple retaliation" and "massive retaliation/boycott" (cf. infra). Still, the scenarios "no retaliation" and "boycott" will be used as boundaries to measure costs and benefits of each of the envisaged options.

Box 8 – Retaliation scenarios

(a) No retaliation - none of the trading partners takes measures restricting exports of EU goods and services to their procurement market.

(b) Simple retaliation - the trading partners that have not enacted crosscutting retaliatory measures (like India and Australia) introduce such measures and Turkey reinforces its existing measures on the same scale as the EU.

(c) Boycott (or 'massive retaliation') - trading partners completely close their PP open domestically but not committed internationally, to "boycott" EU goods and services.

The "simple retaliation" scenario shall be considered as the average scenario, as it is the most plausible. Not considering any retaliation would be a too optimistic approach, whereas a "boycott" scenario is most likely too pessimistic (trading partners also thrive under open trade, trading partners that maintain protectionist measures lack arguments to retaliate, trading partners may find it less costly to negotiate than to retaliate and trading partners may be bound within pre-existing agreements).

6.3.3 Overall environmental and social impacts

Measures imposing barriers to foreign goods and services ' access to EU markets may indeed undermine the incentive of foreign firms to adopt stricter environmental and social standards used by EU firms. Given the large size of the EU procurement market, this can eventually slow down the shift of foreign firms towards the adoption of less polluting techniques, production of environmentally friendly goods and services and higher labour welfare standards.

6.4 Baseline scenario ('nothing happens')

The pessimistic and optimistic scenarios of negotiations point to respectively some 0.8 – 1.2 billion EUR of additional exports and between 12.000 - 18.000 new jobs. There would still be about 11 billion EUR of untapped exports. Current protectionist policies may distort business investment decisions and could artificially lead to jobs being shifted outside the EU.

6.5 Option 2A: 'Soft Law'

1) Impacts on trade and jobs:

- Imports and retaliation: As contracting authorities have little incentives to use Article 58 (2), if we assume a 50% usage, option 2A could lower imports of foreign goods for 1 billion EUR (cf. table below and impact analysis)⁸². Based on the analysis performed China appears to be the most impacted (their exports would decrease by 0.5 billion EUR)⁸³. Option 2A could possibly result in retaliation of around 0.4 billion EUR (costing some 6 000 jobs).

⁸¹ It is assumed that trading partners would if they react only take measures in areas not committed vis-à-vis the EU.

⁸² Or 2,5 billion EUR in the boycott scenario

⁸³ See table 9 in Annex [?]

- Exports and jobs: the option 2A could at the very maximum deliver 2 billion EUR of exports and create 30,000 jobs, as it does not fully close the EU PP market⁸⁴.
- Supply chains⁸⁵: the impact will be limited as utilities sectors do not depend much on the import of computers, telecom equipment or pharmaceuticals from the US or China (not more than 5 % of their purchases).

2) Competitiveness (equal level playing field): This initiative will impact 7 utilities' sectors⁸⁶ out of the 22 analysed. In those sectors, some of our trading partners have offensive interests⁸⁷, as for instance, Japan and Korea in railway equipment. A more level playing field could be obtained in all the utilities' sectors, but not elsewhere. Still, this option alone does not solve the problem of state-supported abnormally low tenders. The initiative will partially stimulate the internationalisation of SMEs.

3) Leverage effect: Based on the ratio of closed markets in the EU and in the trading partners, we have calculated a leverage index (cf. Annex 7 - methodological annex). In particular, the leverage vis-à-vis Korea, Brazil, Japan and Turkey, but remains very limited vis-à-vis US and Mexico.

Table 7 - Leverage index

	Option 2	Baseline
	Leverage index	Leverage index
USA	1%	0%
Japan	27%	0%
Canada	21%	0%
Korea	56%	0%
Mexico	0%	0%
Israel	0%	0%
China	11%	0%
Russia	17%	0%
India	10%	0%
Brazil	35%	0%
Turkey	25%	0%
Australia	0%	0%

Sources: WTO, DG MARKT, Eurostat, own calculations

4) Rules clarification: The guidance on the scope of committed and non-committed procurement as well as on PRO would improve the legal certainty when rejecting foreign goods in the tendering procedures of utilities improving the consistency of EU trade policy, without fully ensuring it. Also, as the use of restrictions is optional, several patterns of use may emerge throughout MS and the cohesion of the internal market may not be guaranteed. However, the improvement will be confined to the utilities purchases and no clarification will be provided for

⁸⁴ We have extrapolated the leverage of option 2A to option 3 (full closure of the market). the ratio varies between 20% and 50% (except for the US, where it stays at 6%)

⁸⁵ For further details are available in page 25 of Annex 4 with references to literature (Vanassche, Branstetter-Foley (2007), Zhi Wang/Shang-Jin Wei

⁸⁶ Aerospace, airport and postal sorting equipment, railways, urban buses, water, power generation, port equipment but not construction

⁸⁷ cf. competitiveness analysis in Annex and in problem analysis

the remaining sectors not covered by Article 58 which constitutes about 90% of the EU PP market).

5) Public finances: The impact is negligible (up to 50 million EUR if Article 58 is applied systematically) and reduces the current savings of the PP directives by only 0.25%⁸⁸.

6) Administrative burden: The impact is negligible (2 million EUR)⁸⁹: total administrative burden of PP increases by 0.05 % and there is no effect on the total cost of PP procedures⁹⁰ (cf. Annex 4, page [?]).

7) Impact on competition and innovation: Competition could be affected in electricity, railways and postal operators' procurement, which have some 3 bids on average. This could reduce incentives to innovation for key technological purchases (smart grids, high-speed trains, renewable energy...).

8) Impact on consumers: The financial impact for utilities' consumers is minimal (0,1 EUR per person per year)⁹¹

9) Environmental impact: Enhanced application of Art. 58 could negatively impact the worldwide diffusion of EU standards in utilities' sectors (Buses in Clean Vehicles Directive). (cf. Annex 4, page [?]).

6.6 Option 3: Legislative Approach with supervision by European Commission

6.6.1 Option 3A

1) Impact on trade and jobs

- **Imports:** The potential impact on trade flows would be important as option 3A could affect up to 9.1 billion EUR of imports of goods and services. However, as contracting authorities are very likely to waive the restrictions for fuel, computers (both because of sourcing constraints), medical equipment and pharmaceuticals (for obvious reasons to overriding interest), probably the *real* impact will amount to only around 4.1 billion EUR. Also, non-GPA/FTA countries will be severely impacted by the restrictions, and imports may be shifted from them to GPA/FTA countries (e.g. computers from China would be replaced by Taiwanese computers) - restrictions on goods in GPA are very limited⁹².
- **Supply chains:** We estimate the impact on supply chains to be between 0.6-0.8 billion EUR with China and US (cf. Annex 4, pp.25)
- **Potential retaliations** by third countries could impact up to some **1.1 billion EUR** of EU exports of goods and services (16 500 jobs) or, in the Boycott scenario, some 4,6 billion EUR.

⁸⁸ See pp [?] Annex 4]

⁸⁹ If all utilities would decide to apply Article 58 and thus request systematically a certificate of origin then the maximum total administrative burden will amount to 115.000 EUR The cost of the certificates of origin has been estimated to be 5 EUR (cf. Impact assessment Rules of origin in the General System of Preferences). The burden on the resources of the Commission would amount to some 2 million EUR for the additional WTO/FTA litigations and infringements.

⁹⁰ cf PWC study that estimates the cost of PP procedures to 5 billion euros.

⁹¹ Further explained in Annex 4.

⁹² For further details see table 8 in Annex 4.. Japan, Korea and Taiwan face few restrictions in GPA in terms of market access (70% to 85% of the EU procurement market has been committed to these countries), there are almost no restrictions on goods and, last but not least, most of Chinese producers of computers are also themselves companies from these countries.

- Exports and jobs: The initiative can realistically lead to market openings worth 4 billion EUR of additional exports (60.000 jobs)

2) Competitiveness (equal level playing field): This option would affect 19 out of 22 sectors concerned, as contracting authorities will not be in a position to apply restrictions for high-tech medical equipment, pharmaceuticals ('reasons of overriding interest') and computers ('supply constraints')⁹³. It would not substantially change the low EU market share in high performance computing (HPC)⁹⁴ because of exceptions due to 'sourcing constraints'. Still, this option alone does not solve the problem of state-supported abnormally low tenders.

3) Leverage: Leverage increases for all countries, in particular with Brazil, but less so vis-à-vis the US because of the large trade in pharmaceuticals with the index ranging from 0% in the case of Mexico and Israel to Brazil with 181%⁹⁵.

4) Rules clarification: Under option 3A, the guidance on the EU international commitments as well as on PRO would improve legal certainty and should avoid the problems caused by the erroneous use of symmetric reciprocity clauses. This would respectively improve the consistency of internal market (restrictions are applied identically in all MS) and trade policy. However, as contracting authorities apply the restrictions themselves, the problem of implementation errors and noncompliance with the EU's international commitments is not mitigated.

5) Public finances The overall impact on public finances is negligible, reducing the current estimated savings of the directives by only 0,6%⁹⁶.

6) Administrative burden: The administrative burden is expected to amount 5,5 million EUR, (production of certificate of origin for businesses and exceptions for pharmaceuticals, medical equipment, fuel and computers) increasing therefore the total administrative burden of PP by 2,7 % and would not affect the total cost of PP procedures⁹⁷ (for more details, p. 31 of Annex 4).

7) Impact on competition and innovation: Effects on competition depend on the type of good and service (overall there are 5 bids per tender in the EU). Still, those areas where competition is weakest (pharmaceuticals), contracting authorities will be able to use exceptions. Similar effects to those of option 2 can be expected in railways and energy.

8) Impact on consumers of public services: The financial impact for taxpayers and consumers of public services is minimal (0,2 EUR per person per year).⁹⁸

9) Environmental impact: The use of an instrument modelled on option 3A could negatively impact the worldwide diffusion of EU standards in utilities' sectors (Buses in Clean Vehicles Directive).

6.6.2 Option 3B

1) Impact on trade and jobs:

⁹³ This is not a problem for the pharmaceutical industry and, to some extent, the medical equipment sector, at least for the moment, in terms of conditions of access, since they tend to be able to bypass the existing barriers.

⁹⁴ European High-Performance Computer suppliers have a market share of only 4,3%

⁹⁵ For further details see Table 10

⁹⁶ See Annex 4 page [?]

⁹⁷ cf PWC study that estimates the cost of PP procedures to 5 billion euros.

⁹⁸ See Annex 4 page [?]

- Imports: The potential impact on trade flows would amount to 1 billion EUR - we assume a rate of rejection of 25% (cf. supra). Contracting authorities would most likely not apply these restrictions for computers, pharmaceuticals, medical equipment and fuel. As in option 3A, one can expect a trade reallocation between GPA/FTA countries and non- GPA/FTA countries.

Table 11 - Impact on imports (billion EUR)

	EU IMPORTS (Bn EUR)		
	Total	Option 3B closed	OPEN
USA	6,7	0,20	6,5
Japan	2,0	0,08	1,9
Canada	0,4	0,03	0,4
Korea	0,9	0,05	0,9
Mexico	0,1	0,00	0,1
Israel	0,2	0,00	0,2
China	5,2	0,43	4,8
Russia	0,7	0,10	0,6
India	0,3	0,06	0,2
Brazil	0,1	0,03	0,1
Turkey	0,3	0,03	0,3
Australia	0,1	0,02	0,1
	17,0	1,0	16,0

Sources: WTO, DG MARKT, Eurostat, own calculations

- Supply chains: Under the assumption of a rate of rejection of 25%, the impact on supply chains is set to be between 0,1-0,2 billion EUR with China and US
- Potential retaliations by third countries could impact up to some 0.3 billion EUR of EU exports of goods and services (some 4 500 jobs).
- Exports and jobs: The initiative can realistically lead to market openings worth 4 billion EUR of additional exports (60.000 jobs)

2) Competitiveness (equal level playing field): This option will cover all the relevant sectors of the economy. The mechanism foreseen under 3B2 will allow industries that consider having problems of level playing field to carry forward their request to the Commission. Still, this option alone does not solve the problem of state-supported abnormally low tenders.

3 Leverage: Leverage increases for all countries⁹⁹, but remains influenced by the rates of rejection of the notification mechanism under option 3B1, **while a major element of leverage of option 3B is to use the capacity to close specific markets as a threat (option 3B2)**¹⁰⁰.

4) Rules clarification: This option will provide maximum clarity and reduce the margin of errors as the Commission will have the final say on the possibility to discriminate, hence ensuring the consistency of the CCP, while reducing the risk of any breach of the Treaty. Still, as the use of restrictions is optional, several patterns of use may emerge and the cohesion of the internal market may not be guaranteed.

⁹⁹ In particular with Brazil, but less so vis-à-vis the US because of the large trade in pharmaceuticals. Based on the ratio of closed markets in the EU and in the trading partners, we have calculated a leverage index ranging from 0% in the case of Mexico and Israel to 45% in the case of Brazil.(cf. methodological annex).

¹⁰⁰ For further details see Table 12 in Annex 4.

5) **Public finances:** Similarly, the overall impact on public finances is negligible, reducing the current estimated savings of the directives by only 0,21%.¹⁰¹

6) **Administrative burden:** The administrative burden, in particular in relation to option 3B1, is expected to amount 3,5 million EUR, (production of certificate of origin for businesses and exceptions for pharmaceuticals, medical equipment, fuel and computers) increasing therefore the total administrative burden of PP by 2,7 % and would not affect the total cost of PP procedures¹⁰² (for more details, p. 31 of Annex 4). Still, the management of notification and complaints under this option amounts to 0,1 million EUR.¹⁰³ The cost of opportunity of 6-8 weeks waiting amounts to 38 million EUR¹⁰⁴. It is difficult to assess the cost of uncertainty resulting from the notification process as well as of any potential, if any, litigation risks. Overall, the total quantifiable cost of option 3B is expected to amount to up to around **41 million EUR**.

7) **Impact on competition and innovation/ 8.Impact on consumers/ 9. Environmental impact– cf. option A**

6.6.3 Option 3C

Under option 3C, contracting authorities must notify if they intend to accept offers from third countries. Probably they have no incentives to do so, except (again) for fuel, computers, medical equipment and pharmaceuticals (cf. option 3A). For the remaining purchases, we shall assume a rate of acceptance of 25% (or a rate of rejection of 75%) since contracting authorities will have no incentives to accept a foreign offer. Several impacts will be similar to those of option 3A.

1) Trade and jobs

Impact on incoming trade flows: This option would have 75% of the retaliation, supply chain and import impacts of option 3A (rate of usage, as contracting authorities may opt to accept foreign offers). In terms of exports, it could lead to 4 billion EUR of additional exports (60.000 jobs)

2) **Competitiveness (equal level playing field):** cf. option 3A

3) **Leverage:** The leverage index under this option ranges from 0% in the case of Mexico and Israel to 136% in the case of Brazil.¹⁰⁵

4) **Rules clarification:** cf. option 3A

5) **Public finances:** cf. option 3A

6) **Administrative burden:** Option 3C has dramatic implications in terms of administrative burden as it applies a 6-8 week period on the goods covered by a exception in option 3A1 and on 25% of the remaining procedures, resulting in some 200 million EUR of administrative burden (for more details, cf. Annex 4 pp. 44-46)

¹⁰¹ See Annex 4

¹⁰² cf PWC study that estimates the cost of PP procedures to 5 billion EUR

¹⁰³ We carefully assume that 3 full-time officials would analyse the yearly an estimated 550 notifications (each notification should at least last 1 day to handle), leading to a cost of 187.000 EUR (with 25% of overhead). Option 3B2 should be handled by an additional official (as EU procurement exports amount to only 1% of EU exports, if the anti-dumping service of DG TRADE has 154 officials, proportionally the Commission only needs an additional official. This assumption is careful as option 3B2 would rely on trade investigation and negotiation tasks covered by current human resources available to the Commission, and would benefit from their economies of scale.

¹⁰⁴ The cost of opportunity was calculating by applying an interest rate of 3% to the total value of contracts (1,1 billion EUR) (for 6-8 weeks)

¹⁰⁵ For further details see Table 12b in Annex 4.]

7) **Impact on competition and innovation:** cf. option 3A

8) **Environmental impact:** cf. option 3A

6.7 Option 4: Legislative Approach without supervision by European Commission ('Article 58')

The effects of option 4 will be similar to those of a weaker option 3A, except for the administrative burden. Article 58 will never be used for medical equipment, fuel, pharmaceuticals and computers. For other goods, as in option 2, we can assume a rate of use of 50%.

1) Trade and jobs

- Imports: The potential impact on trade flows would be as important as in option 3A and could affect up to 9.1 billion EUR of imports of goods and services. However, as contracting authorities are very likely to waive the restrictions for fuel, computers, medical equipment and pharmaceuticals, probably the *real* impact will amount to only 2 billion EUR will be impacted (because the assumed rejection rate is 50%). Also, non-GPA/FTA countries will be severely impacted by the restrictions, and imports may be shifted from them to GPA/FTA countries (e.g. computers from China would be replaced by Taiwanese computers).
- Supply chains: We estimate the impact on supply chains to be between 0.3-0.4 billion EUR with China and US (cf. Annex 4, pp.25)
- Potential retaliations by third countries could impact up to some 1 billion EUR of EU exports of goods and services (some 15,000 jobs).
- Exports and jobs: The initiative can realistically lead to market openings worth 4 billion EUR of additional exports (60,000 jobs)

2) Competitiveness (equal level playing field): cf. option 3A

3) Leverage: Leverage increases for all countries, in particular with Brazil, but less so vis-à-vis the US because of the large trade in pharmaceuticals. The leverage index under this option ranges from 0% in the case of Mexico and Israel to 91% in the case of Brazil.¹⁰⁶

4) Rules clarification: Under option 4, the guidance on the EU international commitments as well as on PRO would improve legal certainty and avoid the problems caused by the erroneous use of symmetric reciprocity clauses. **Yet, final decisions on access would be taken by contracting authorities themselves.** This would improve the consistency of internal market and trade policy, but would not fully ensure it.

5) Public finances: The overall impact on public finances is negligible (less than in option 3A).

6) Administrative burden: The administrative burden is expected to amount 3,5 million EUR, (production of certificate of origin for businesses) increasing therefore the total

¹⁰⁶ For further details see Table 12b in Annex 4..

administrative burden of PP by 1,7 % and would not affect the total cost of PP procedures¹⁰⁷.

7) **Impact on competition and innovation:** cf. option 3A

8) **Impact on consumers:** cf. option 3A

9) **Environmental impact:** cf. option 3A

6.8 Option 5: Buy Europe

Not further analysed (cf. 5.5)

6.9 Option 6: correcting unfair 'abnormally low tenders'

This complementary option would practically mostly affect bids originating from China, India and Russia. It is important to underline that 20% of Chinese imports originate from State-owned enterprises¹⁰⁸. Contracting authorities, afraid of possible challenges by other bidders based on the information received from the contracting authority, would carefully weight decisions to accept abnormally low tenders. This option could have some negative impacts on administrative burden and public finances¹⁰⁹. Also, retaliation cannot be excluded, in particular, if the award of an important contract to third country is affected. Overall, option 6 can reinforce the leverage of the EU when combined with each of the options envisaged.

7. COMPARING THE OPTIONS

7.1 Review of different options by objectives and impacts

The following table compares how well the different options examined above meet the objectives sought by a review of the scheme. This comparison is based on three criteria: effectiveness (clarification, PROs, leverage, level playing field); efficiency (retaliation, public finances, administrative burden); and consistency of EU trade policy, EU internal market and respect of EU's international obligations. All the options can be complemented by option 5.

¹⁰⁷ PWC, Ecorys, Public Procurement in Europe: Cost and Effectiveness - the cost of PP procedures is estimated at 5 billion euros.

¹⁰⁸ Zhi Wang, Shang-Jin Wei, The Chinese export bundle in Emerging Giants: China and India in the world economy (Eichengreen-Gupta-Kuma), p.171

¹⁰⁹ Although abnormally low prices are not a guarantee of sound public expenditure. The Chinese state-owned construction company that apparently submitted an abnormally low tender for the construction of a Polish highway was ultimately not in a financial position to finish its works

Table 14 - Comparison of options compared to 'no policy change'

		No policy change	Option 2	Option 3A	Option 3B	Option 3C	Option 4	Option 6
Effectiveness	Increase exports and jobs	0	+	++	++	++	++	≈
	Clarify rules of access to EU PP market for non-EU tenderers (define what is open and what is closed and PROs)	0	≈	++	++	++	+	0
	Create incentives for trading partners to open their PP market (= leverage effect)	0	≈	+	+ / ++	+	+	≈
	Strengthen the level playing field for EU companies in the EU	0	+	+	+	+	+	++
Efficiency How limited will be:	The retaliation effect from trading partners?	0	-	--	- / ≈	--	-	- / ≈
	The impact on supply chains of EU firms?	0	-	--	- / ≈	--	-	- / ≈
	The impact on public finances?	0	≈	- / ≈	≈	- / ≈	≈	≈
	The impact on administrative burden?	0	≈	-	--	--	-	- / ≈
Coherence	Preserve the consistency of the EU trade policy	0	≈	+	++	+	+	0
	Preserve the consistency of the EU Internal Market	0	≈	++	+	+	+	0
	Ensure the respect of International Agreement	0	≈	+	++	+	+	0

0 - no change; '≈' minimal change; '+'improvement'; '-' worsening'

7.1.1 Comparison in terms of effectiveness, efficiency and coherence

7.1.1.1 Effectiveness:

Exports and jobs: Option 2 is likely to create 2 billion EUR of additional exports and 30.000 jobs, whereas options 3 and 4 are likely to create 4 billion EUR of additional exports and 60.000 jobs. Option 6 has a limited scope and cannot be considered to have a broad impact on exports. However, the 1 billion EUR of additional exports and 15.000 jobs of the on-going negotiations have to be deducted from all the options. Also, the ability of each option to reach the export 4 billion EUR will vary with the leverage of each option (cf. infra). To compare the options, we shall therefore consider a prudent 3 billion EUR for options 3B, 3C and 4 and consider 4 billion EUR only for option 3A, which has the greater leverage.

Clarification of the rules and PROs: The main element to distinguish options here is the scope of the instrument. Legislative acts as described in Options 3A, 3B, 3C and 4 will clarify the whole scope of the legislation, by reflecting in EU law all the international commitments of the EU, compared to Option 2 which will do that but will remain confined to the utilities. Yet, Option 4 scores a little less as it relies on explanatory documents, whereas under Options 3A, 3B and 3C international commitments would be annexed to the legislation.

Leverage: Option 3A, 3C and 4 creates more leverage than Option 3B1, but the capacity of option 3B2 to tailor threats vis-à-vis trading partners and their offensive interests (and EU's defensive interests) gives Option 3B a leverage superior to Option 3B1 alone but slightly inferior or equal to Option 3A. For instance, in option 3B, the Commission can start at any moment enquiries on the access of the railways and construction sectors that are the most affected by protectionism in PP.

Strengthening of the level playing field: Option 2 only creates level playing field in industries selling to utilities, whereas both Option 3A, 3B, 3C and 4 cover all industrial sectors. Options 3A and 3B don't create leverage in fuels, medical equipment, pharmaceuticals and computers, whose purchases would be waived under option 3A or not notified under option 3B. This is not a problem for the pharmaceutical industry, which is capable of bypassing restrictions of trading partners thanks to its high-quality differentiation. Still, none of the options addresses directly the problem of state-sponsored abnormally low tenders.

In varying degrees, option 3A, 3B, 3C and 4 are the most effective options compared to option 2. Option n°5 will contribute to improve the level playing field, but will alone neither solve the problems of leverage to open third countries' markets (in particular in countries like US or Australia that have a small degree of government intervention) nor questions related to the respect of international commitments by the EU.

7.1.1.2 Efficiency:

Retaliation: It seems reasonable to assume that the level of potential retaliation would be proportional to the level of usage of the restrictions in the EU. In this context, the consequent result is that options 3A, 3C and 4 retaliation is 2 times larger than option 3B (in the simple retaliation scenario). The latter is therefore the option that causes the least potential negative impacts in terms of inter alia job losses.

Supply chains - Supply chains of EU firms in China or US are mostly affected in options 3A, 3C and 4.

Public finances: None of the options affects significantly public finances, although Option 3A "costs" more – some 0.25% of the directives savings. This is mostly due to the very small number of procedures involved and the large level of competition in the EU PP market anyway (5 bids on average).

Administrative burden: While the costs for the production of certificate of origin is higher for 3A, 3B and, in particular 3C, generate an important burden, with a 6-8 week delay of consultation of the Commission. Option 6 could generate additional burden to courts and delays in contracts. Options 2 and 6 have a much smaller administrative burden because they do not rely on the Commission's prior authorisation, hence speeding up the award procedure.

As shown in table 15a, the efficiency of each option is in all options mostly derived from the costs of retaliation and supply chains of EU firms in US and China, which are in absolute terms more important than administrative burden and public finance impacts.

Table 15a - Total costs of each option (Bn EUR)

	Retaliation			SC	PF	AB	Total (ret scenario)		
	None	Simple	Massive				None	Simple	Massive
Option 2	0,0	0,4	1,3	0,0	0,1	0,0	0,1	0,5	1,4
Option 3A	0,0	1,1	4,6	0,7	0,1	0,0	0,8	1,9	5,4
Option 3B	0,0	0,5	1,0	0,2	0,0	0,0	0,2	0,7	1,2
Option 3C	0,0	1,1	4,6	0,7	0,1	0,2	1,0	2,1	5,6
Option 4	0,0	1,1	4,6	0,7	0,1	0,0	0,8	1,9	5,4

SC= supply chains of EU firms in US and China; PF= public finances and AB = administrative burden

Options 3B is the most efficient of all options both in absolute and relative terms. Option 2 also scores well but mostly because its scope is more limited (otherwise it scores as option 4). Option 3B (and 2) is the only option whose costs do not offset the 4 billion EUR of additional exports if trade partners open those markets - cf. table 15d. The comparison is based on the ratio total costs to the net benefit (i.e. the benefits of the baseline scenario are deducted from the total benefits).

Table 15b- Costs & benefits of options (Bn EUR) - simple retaliation scenario

SIMPLE RETALIATION	BENEFIT			COST (% net benefit)			
	Baseline	FULL	OI	COST	Baseline	FULL	OI
Option 2	1	12	2	0,5	-	4%	45%
Option 3A	1	12	4	1,9	-	18%	65%
Option 3B	1	11	3	0,7	-	7%	37%
Option 3C	1	11	3	2,1		21%	107%
Option 4	1	11	3	1,9	-	19%	97%

Baseline= baseline scenario (negotiations); FULL= trading partners fully open their markets; OI = trading partners only open those markets where they have offensive interests to obtain the symmetric markets in the EU

Table 15c- Costs & benefits of options (Bn EUR) - No retaliation scenario

No retaliation	BENEFIT			COST (% net benefit)			
	Baseline	FULL	OI	COST	Baseline	FULL	OI
Option 2	1	12	2	0,1	-	0%	5%
Option 3A	1	12	4	0,8	-	7%	27%
Option 3B	1	11	3	0,2	-	2%	10%
Option 3C	1	11	3	1		10%	50%
Option 4	1	11	3	0,8	-	8%	40%

Table 15d- Costs & benefits of options (Bn EUR) - Massive retaliation scenario

Boycott - massive retaliation	BENEFIT			COST (% net benefit)			
	Baseline	FULL	OI	COST	Baseline	FULL	OI
Option 2	1	12	2	1,4	-	13%	140%
Option 3A	1	12	4	5,4	-	49%	180%
Option 3B	1	11	3	1,2	-	12%	60%
Option 3C	1	11	3	5,6		56%	280%
Option 4	1	11	3	5,4	-	54%	270%

7.1.1.3 Coherence:

Preserve the consistency of EU trade policy: Options 3B and 3C preserve better the consistency of EU trade policy as it ensures that decisions are taken at EU level i.e. in full knowledge of all the legal, economic and political consequences. In option 3A and 4, this is left to the discretion of contracting authorities.

Preserve the consistency of the EU internal market: Option 3A, 3B and 3C ensure that there are no varying practices in the treatment of foreign goods and services in the EU. Option 2 also, but only for utilities. However, under option 3B and 3C, there may be diverging patterns in the notification by contracting authorities, implying that the consistency of the internal market may not be ensured.

Ensure the respect of international agreements: Option 3B ensures that the Commission controls discriminatory practices against foreign services and goods, mitigating the risk of erroneous practices. In options 3A, 3C and 4, this is left (partially in 3C) to the discretion of contracting authorities.

As a result, Option 3B that scores better overall in terms of consistency.

7.1.2 Comparison by type of stakeholder

PP is a market with sellers (businesses), that want to maximise their business opportunities (they have all incentives to reduce competition), and buyers (contracting authorities) that are keen on minimising litigation costs, speed and better value for money.

It is therefore unsurprising that contracting authorities have chosen option 2 or 'nothing happens' as their favourite options and businesses have opted for option 3A and, to some extent, option 3B.

7.1.3 Choice of the legal instrument

The objectives presented in Chapter 3 can only be achieved with a legally binding instrument, whether a regulation¹¹⁰ or a detailed directive¹¹¹. A non-binding legislative instrument would not be appropriate to implement the policy options as there is a need for a harmonised legal framework governing foreign access to the EU PP market to ensure the consistency of CCP and

¹¹⁰ A regulation is of a general application and is binding in its entirety and directly applicable in all Member States

¹¹¹ A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods (Article 288 TFEU)

internal market. A regulation appears to be the best regulatory choice for these policy options in terms of **effectiveness**, **legal certainty** and **uniformity**¹¹².

7.2 Preferred Option

Option 3B scores overall better in terms of consistency, but, more importantly, it is the most efficient of all options. This situation results from the lower retaliation costs of option 3B (compared to option 3A and 4) and the fact that it optimises leverage (the Commission can chose the sectors to close to obtain satisfactory results in terms of market access). At the same time, option 3B (and 3C) fares worse in administrative costs. Of course, retaliation and impact on supply chains of EU firms are short-term impacts. The evaluation of this instrument in the future will allow determining whether the other options are not most efficient to deal with the more long-term impacts of administrative burden and public finances.

Option 3B can be completed by option n°6 which gives it more force to ensure the equal level playing field by addressing the problem of abnormally low tenders. Finally, this should not weaken Commission efforts in negotiations.

As a result, the combination of options that best meets the objectives of the scheme in the most effective, efficient and coherence are option 3B together with options 6 (mechanism to address abnormally low tenders) and 2B (continuation of forceful negotiations).

8. MONITORING AND EVALUATION

The table below includes suggestions for indicators that can be used to assess the progress and effectiveness of the preferred option in achieving the specific policy objectives set out for the external procurement initiative.

Specific objectives	Proposed indicators
Increase export of EU goods, services and firms in non-EU PP markets	• Additional procurement-related exports • Number of sectors (among the 22 selected) that have been opened abroad compared to the current number • Expansion of trade flows in the area of procurement • Data on overall impact on European economy and competitiveness: GDP and job growth due to additional PP markets • Rate of EU SMEs participating in international trade and public procurement.
Create EU leverage in international procurement negotiations	• Leverage index • Number of investigations launched by the European Commission • Increased number of procurement bilateral dialogues/negotiations • Removal of procurement trade barriers against EU suppliers in specific third countries • Number of third countries against which trade "restrictions" are implemented

¹¹² A regulation would directly apply and would avoid varying interpretations in the Member States and their contracting authorities, ensuring a better consistency of the common commercial policy and the internal market).

Specific objectives	Proposed indicators
Strengthen the level playing field for the EU companies in the internal market	• Number of sectors (among the 22 selected) that have been overall opened abroad compared to the current number • Number of sectors (among the 22 selected) that have been symmetrically committed compared to the current number • Use of the notifications system • Number of notifications approved/refused by the European Commission
Improve legal certainty with regard to the access to the EU procurement market of third countries companies, goods and services.	• Effective reflection of international procurement commitments in EU legislation • Changes in national law to reflect international commitments in the area of public procurement
Ensure the respect of the international agreements of the EU	• Decreased recourse to WTO/FTAs dispute settlement mechanisms
Avoid breaches of the EU Treaty	• Number of infringements against Member States directly related to the access of non-EU companies, goods or services to the EU's public procurement market

The Commission will ensure that the MS' (and their contracting authorities') compliance with obligations laid down in the external procurement initiative is adequately monitored. The Commission will inform the European Parliament and Council regularly on the implementation of the new initiative.

The effectiveness of the instrument put into place should be subject to regular monitoring and an independent evaluation should be conducted three years at the latest after entry into force of the initiative in order to assess the extent to which its implementation, results and impacts on the European economy, businesses opportunities for EU suppliers and society in general are consistent with the objectives set.

The Commission will communicate the evaluation results to the European Parliament and Council.

List of Annexes and Glossary

Annexes

Annex 1 – Problem tree

Annex 2 - Consultation analysis

Annex 3 – Problem analysis

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Annex 10 – Follow-up of the first opinion of the Board

Annex 11 – Follow-up to the comments of the second opinion of the Impact Assessment Board

GLOSSARY

Public procurement directives - Public procurement directives 2004/17/EC and 2004/18/EC coordinate public procurement procedures in the EU. Defence procurement is regulated by Directive 2009/81/EC. Directive 2077/66/EC coordinates the remedies system in the area of public procurement.

The EU Public procurement directives do not cover contracts falling under certain values (the so-called **thresholds**), **defence procurement contracts and service concessions**. The directives have a simplified legal framework for public contracts for the so-called **'IIB services'** (e.g. social and health services, utilities services,...)

- **Government Procurement Agreement (GPA)**: WTO plurilateral agreement with 15 Parties (EU, Japan, US, Canada, Israel, Chinese Taipei, Korea, Singapore, Hong Kong, Norway, Aruba, Liechtenstein, Armenia and Iceland). Each Party commits parts of its public procurement market. Commitments are expressed in terms of purchases covered (goods, services, construction services) and purchasers covered (central government, local government, entities operating in the utilities sectors-including state-owned companies-, namely energy, transport and drinking water).

Free Trade Agreements (FTA) - The EU has negotiated (and is negotiating) a wide range of bilateral and regional trade agreements, mainly **Free Trade Agreements**, which include a specific public procurement chapter modelled on the rules of GPA together with market access commitments

Defensive interests - cf. "offensive interests"

Offensive interests: Sectors where a country has comparative advantages or where its companies have a substantial share of international trade have a high turnover ranking compared to their foreign competitors or where foreign companies employ a substantial number of workers. Sectors to be protected are known as "**defensive interests**".

Procurement committed internationally: Public entities and types of purchases that are included in the GPA or in the Public Procurement Chapter of an FTA.

Procurement not committed internationally:

(a) **Excluded procurement** - Purchasers and types of purchases that are expressly mentioned in the GPA or in the FTAs as falling outside the scope of the agreement - i.e. procurement expressly not committed. The GPA contains for instance country specific derogations due to the lack of reciprocity on a particular sector or for purchases of certain entities (e.g. The EU does not extend the benefits of the GPA to Japan for the procurement of its urban transport entities).

(b) **Unscheduled procurement** - (1) public procurement not explicitly committed in GPA/FTAs/SAA's and (2) all EU public procurement vis-à-vis third countries with which the EU has not signed an international agreement.

Procurement "open" domestically - public procurement that is not closed by national protectionist measures, although not internationally committed by a country in the GPA or in FTAs.

Procurement open de facto - public procurement which remains de facto open in spite of national protectionist measures that are bypassed by sophisticated products/services or measures that are not applied systematically.

Procurement rules of origin (PROs) - Rules of origin for bidders in public procurement: i.e. rules of origin for goods and nationality of bidder in services.

Procurement trade deficit/surplus - Difference between the exports and imports resulting from the opening of public procurement in the EU and other markets.

Strict reciprocity clauses - clauses in national legislation that condition the opening of a specific procurement market to the opening of exactly the same procurement market in another country (e.g. if Israel does not open the procurement of its airports to EU companies/goods/services, then the procurement of EU airports should not be open to Israeli companies/goods/services).