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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**

Annex

{COM(2012) 124 final}
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ANNEX 3

PROBLEM ANALYSIS

Economic scope

In spite of world trade liberalisation in the 90s and following the first steps initiated in the 80s, public procurement, namely the trade of goods and services purchased by public authorities and state-owned companies, has only been partially liberalised *de jure* in the WTO or through bilateral agreements.

Yet, since government consumption amounts to 17% of the world's GDP, public procurement disciplines affect a substantial share of world trade flows. It affects industries whose customers are exclusively or mostly public purchasers (e.g. defence, railway equipment) or for which governments are large clients (IT and business services, office equipment).

Public procurement disciplines affect sales and exports of many European firms for which customers are exclusively or mostly public purchasers. All sales and exports of **defence material, aerospace equipment, railway equipment, fire-fighting equipment, port equipment, dredging, water management goods and services, street lighting, sorting machineries for airports and posts** are subject to public procurement procedures. Two-thirds of the EU top **construction** companies export sales depends on foreign public procurement¹. Similarly, a substantial² share of the exports of **urban buses, pharmaceutical products, medical, fixed telecom, machinery for oil and gas extraction, specialised textiles, and power generation equipment** are still subject to public procurement procedures.

Also, public procurement disciplines affect sales and exports of other goods and services like office equipment and business services.

Finally, because of the size of the EU public procurement market, public procurement disciplines also affect EU imports, in particular in the main public expenditure headings like **infrastructure construction, IT services, business services, airport equipment³, defence materials, railway equipment, urban buses, pharmaceutical products, medical and power generation equipment**. Postal machinery, fixed telecom and oil extraction equipment are only marginally affected as oil companies, postal and telecom operators are for the most part outside of the scope of the EU public procurement directives.

All in all, the turnover of all the industrial sectors active in those markets represents some 25% of the EU's GDP and up to 3,7 billion jobs.

¹ Own estimates based on ENR 250 Top contractors data (Mc Graw-Hill)

² The shares are currently being calculated for the partial "sectors"

³ ATC equipment and airport sorting machinery.

Methodological box 1 as per Annex 5

Defining the sectors impacted by public procurement trade disciplines

Government consumption takes two forms: either public authorities or undertakings actually purchase products and services as other economic actors, or public authorities and/or undertakings are *monopsonists* (i.e. they are the sole to purchase specific products or services).

Businesses that find themselves in the second category actually fully depend on public procurement procedures to sell their products and services. The openness Opening of public procurement markets in the world directly affects the business model of these companies and their business prospects.

It is difficult to use public procurement statistics across the world to measure the degree of dependence from the public sector. Only GPA Parties produce procurement data (but not always), and only for the procurements committed in the GPA. We have therefore no data on the total public purchases of specific goods and services. On the other hand, we have difficulties in reconciling EU input-output matrices with EU public procurement statistics because of the distortions caused by the thresholds (public expenditure can go through subsidies or grants instead of procurement).

To solve this problem, we have established a typology of economic sectors captive of the public sectors using the UN COFOG classification of public services, which is presented in detail in Annex 5 and we have reviewed the status of corresponding “*potential*”⁴ public purchasers/ customers outside the EEA/EFTA. We have of course reviewed the main trading partners and economies with which the EU has a formalised agreement opening public procurement (US, Canada, Japan, Korea, Mexico and Israel) and/or none (China, Brazil, India, Russia, Australia and Turkey). The analysis has not been extended to EEA countries, nor to Switzerland and Ukraine, which apply a legislative regime analogous to the EU public procurement directives (in the case of Ukraine, this application is contingent to the entry into force of the EU-Ukraine FTA),

On the basis of the COFOG analysis, we have established a list of 22 markets (i.e. specific goods and services sold to specific operators):

Defence: warlike goods for army, navy and air force

Aerospace: production of satellites, ATC equipment, and navigation systems

Postal machinery/Airport sorting systems: production of postal machinery and airport sorting systems

Fire fighting and sea rescue equipment and transport: fire-fighting vehicles/aircraft and rescue helicopters purchased by fire-fighting authorities; sea rescue vessels.

⁴ COFOG is a UN classification that aims at listing all public services in the world; yet, as typologies vary across the world, it is necessary to verify their public nature - i.e. whether these are not delivered by private operators or by a mix of private and public operators

Infrastructure Construction and dredging: infrastructure construction (highways, mass transit, power, water and dredging) and general public works (general public buildings) - this also includes architectural and engineering services.

Construction materials: cement, concrete, steel, glass, and stones for public works projects

Railway equipment: rolling stock for trains, urban railways, metros and tramways

Urban buses: public buses and coaches purchased by mass transit authorities

Power generation: All forms of energy power generation equipment (solar panels, nuclear reactors, windmills, hydroelectric power turbines,...) purchased by utilities.

Water management / sewage: Goods and services relevant to all the aspects of water management, canalisation, desalination, sewage and distribution purchased by federal and local authorities.

Waste management and other environmental services: Urban cleaning services, noise abatement, waste collection purchased by cities and urban agglomerations.

Pharmaceuticals: pharmaceutical products purchased by public hospitals or health authorities.

Medical equipment: medical equipment products purchased by public hospitals or health authorities. Includes laboratory research equipment and precision instruments (like cyclotrons, scanners).

Specialised textiles: Specialised textiles for defence, fire fighting and health

Business services (consulting, auditing/accounting, advertising, legal services sold government-wide): Consulting services, auditing services, advertising and legal services sold government-wide.

Financial services: Banking and insurance services sold government-wide. These can entail very general financial services sold government-wide to very specialised services (clearing, investment banking, portfolio management)

Oil, mining and gas exploration equipment: Equipment for mining and quarrying, oil and gas extraction and transport. (Infrastructure works covers Installation of pipelines)

Fixed telecom equipment: Telecom equipment for fixed telecom operators providing universal service-like public services.

Computer/IT equipment and software: Computer equipment and software services sold government-wide; supercomputers, servers and specific software for hospitals, universities, research centres, infrastructure, aerospace and power generation.

Street lighting: Lighting for streets and highways

Port equipment: port equipment like cranes (container, general and general cranes)

Broadcasting equipment: specific equipment for public radio and television.

Determining the degree of dependency from public procurement

For each of the 12 countries in the framework of analysis (and the EU), we have determined whether the main purchasers of the 22 sectors were public or private and whether they conducted calls for tender – either by reviewing the national legislation and/or the entities' websites.

For those sectors that have been completed, the analysis will be available for the annexes.

By its very nature, defence has been considered as systematically public.

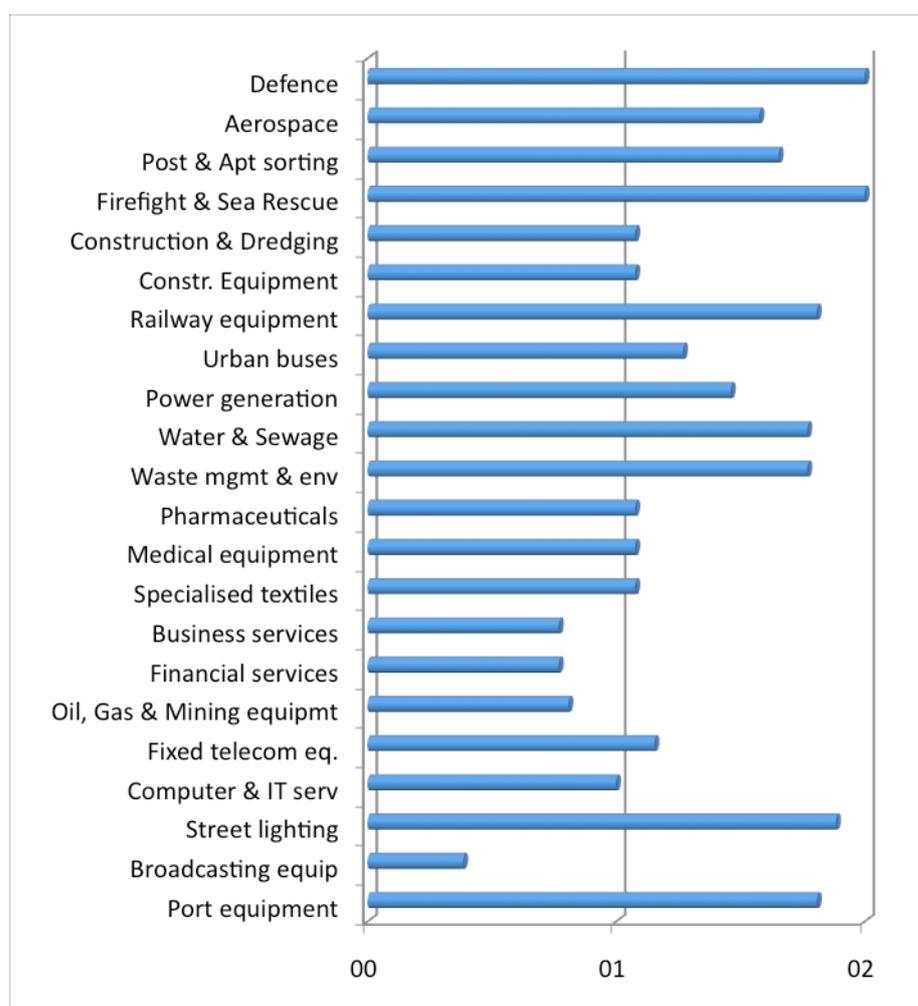
Table 1a hereunder summarises the findings in terms of dependency (more details can be found in Annex 8). We have categorised dependency with 4 marks: 2 (full dependency - all the purchasers are public and follow public procurement rules), 1,5 (high dependency - almost all purchasers - or at least the main ones are public and follow public procurement rules), 1 (partial - part of the purchasers are public or follow public procurement rules), 0.5 (almost none - maybe one purchasers follows public or follow public procurement rules) and 0 (the whole sector is private).

This analysis allows identifying both sectors and those countries most dependent on public procurement disciplines. Defence, railways, fire fighting, port equipment and street lighting have high degrees on dependency whereas business services, broadcasting equipment, oil extraction equipment have several private clients and have low degrees of dependency. There is also a stark contrast between countries which important state intervention in the economy and thus a high reliance on procurement disciplines as China, India and Russia and countries with lower state intervention like the US and Australia, where many services usually public are private (e.g. hospitals, universities).

Table 1a - Degree of dependency of selected markets in 12 countries

	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
Firefight & Sea Rescue	2	2	2	2	2	2	2	2	2	2	2	2
Construction & Dredging	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 & Mining equipmt	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 & IT serv	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

Table 1b - Degree of dependency in main trading partners⁵



International commitments of public procurement markets in the EU and abroad

Public procurement and concessions have been excluded from the scope of GATT and GATS and only 14 industrialised economies (among them, the EU, US, Switzerland, Japan, Canada and Korea) have taken the decision to partially open up *de jure* their public procurement in the Government Procurement Agreement (GPA). China is currently negotiating its accession to the GPA. Some countries have opened their public procurement markets through bilateral agreements with several countries (e.g. Mexico has opened its market to the US and Canada through the NAFTA and to the EU and Japan through FTAs).

In the EU

The EU has committed internationally to GPA Parties some 85% of its public procurement market (this percentage may raise to 95% further to the recent conclusion of GPA negotiations)- explicitly excluding **defence procurement**, the so-called "**IIB services**" and the

⁵ Indicative average - no account has been taken of the economic weight of each trading partner

purchases of **fuel** by utilities (we will call this "uncovered procurement"), but not mentioning **concessions, railway operators, gas entities** (which are implicitly not covered) (concessions and railways have been committed in the recent conclusion of GPA negotiations). At the same time, because of disparities in commitments, the EU has negotiated targeted restrictions, the so-called "general notes or specific derogations" (cf. table 2b, e.g. US has not been granted access to public works and services contracts of local contracting authorities, Japan has not been granted access to urban transport entities procurement). The principle of "most favoured nation" does not appear to apply in the GPA⁶.

As indicated earlier, the EU has not opened committed internationally its public procurement market to Brazil, China, India, Russia, Turkey and Australia (cf. table 2c).

Table 2b - Public procurement markets that the EU has committed internationally vis-à-vis 14 selected countries (and their relative dependency to public procurement)

	International commitments vis-à-vis 13 selected countries													
	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		-1	-1	-1	-1	-1	-1	-1
Post & Apt sorting	2	-1	0	-1	-1	0	0	-1	-1	-1	-1	-1	-1	-1
Firefight & 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	-1	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 eq.	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

⁶ MFN is "altered" in the GPA allowing for specific derogation.

Main world economies

Further to the GPA, the EU, in particular, has partially secured additional opening of public procurement markets in its FTAs with Mexico and Chile, and a gradual opening in its Stabilisation and Association Agreements (SAAs) in the Balkans. FTAs with existing GPA Parties (Korea) have allowed to further securing additional *de jure* market openings.

However, opening of public procurement committed internationally has so far fallen short of its expectations. Commission services estimate that 75% of US and Japanese public procurement markets are *de jure* NOT opened internationally to other GPA Parties and, as shown in Table 3 only some **25% of worldwide above-threshold procurement** or 5% of world government consumption is accessible through the GPA⁷ - i.e. **internationally committed**. None of the emerging economies of the G20 (except Mexico) has taken up market access commitments opening internationally *de jure* its public procurement market, to the EU or to any other Party to the GPA. Turkey declined to include public procurement in its customs agreements with the EU and Russia just became a member a WTO member in 2011 .

Table 3 - Estimation of the main procurement markets

	TRADING PARTNER		EU27
	Contestable PP Market (Contracts with value above the GPA thresholds)	Internationally committed	EU commitments vis a 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%	82%
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, MARKET own estimations

⁷ If one assumes that 20% of world government consumption is public procurement above the thresholds, then the GPA only covers 25% of the world's above-threshold public procurement, although GPA Parties represent some 60% of the world's GDP.

Methodological box 3

Taking stock of openness of public procurement in international agreements

Statistics in the area of public procurement are rare as, differently for instance from trade in goods or national accounts, there is no common worldwide international reporting system. GPA Parties have put in place a system of data reporting for public procurement, yet many methodological challenges have not yet been addressed. For instance, the US includes so far values of contract options in its statistics, as opposed to actual expenditures, which results in international comparability problems. US and Japan do not manage to capture statistics for all their covered procurement. Finally, there are no full-fledged statistics for any of the main economies of the world, including China.

In this context, an in-depth review of the international commitments was made for the US, Japan, Canada, Korea (cf. Annex 2). An in-depth estimation was made for each of the derogations maintained by each of the 4 analysed GPA Parties. DG MARKT also conducted an in-depth review of these figures with the US authorities (US Trade Representative and Office of Management Budget), which provided the necessary clarifications to adjust them. Commission services then based themselves on preliminary estimations made by WTO to estimate the overall contestable procurement markets of countries that are not Parties to the GPA.⁸

To complete the analysis based on public procurement statistics, each of the 22 selected markets was reviewed in light of international commitments. The market was deemed "not committed internationally" if a restriction existed at international level either on the good or service relevant to the market or the main purchaser. The previous analysis on dependency allowed discarding "B2B markets" not relevant for this exercise. A mark of 1 was given if the sector is "open" and -1 if it is "not committed internationally". In several cases, international restrictions were found not to fully open or close the market in question: in this case a neutral mark of 0 was provided.

The final result is in Table 4 and all the details can be consulted in Annex 8.

The international opening of public procurement has not managed to fully open trade in any of the sectors that depend (in varying degrees) from public procurement. As indicated previously, none of the emerging economies has taken commitments in the GPA or in FTAs. As shown in the sector analysis of Table 4, the situation is acute for infrastructure construction and for most of the high-dependency sectors (defence, railways, fire fighting) even in countries that are Parties to the GPA or with whom the EU has signed FTAs. In this context, it is worth underlining that only 18% of the public procurement of the 50 largest cities in the world is covered, the metro networks covered by GPA or FTA represented only 5% of all the transported passengers and up to two-third of all main public infrastructure

⁸ The WTO has used an estimation of 2,5% GDP to determine the contestable market in public procurement.

projects reported in May 2011 in the *Infra-deals* database were not open under any international commitments⁹.

Table 4 - Markets committed internationally by main trading partners

	US	JP	CA	KR	IL	MX	CN	RU	IN	BR	TR	UA	AU
Defence	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1
Aerospace	0	0	0	-1	0	0	-1	-1	-1	-1	-1	-1	-1
Post & Apt sorting	-1	1	0	0	1	1	-1	-1	-1	-1	-1	-1	-1
Firefight & Sea Rescue	-1	0	-1	0	-1	-1	-1	-1	-1	-1	-1	-1	-1
Construction & Dredging	0	0	-1	0	0	0	-1	-1	-1	-1	-1	-1	-1
Constr. Equipment	-1	0	0	1	0	0	-1	-1	-1	-1	-1	-1	-1
Railway equipment	-1	-1	-1	-1	0	-1	-1	-1	-1	-1	-1	-1	-1
Urban buses	-1	-1	-1	0	-1	-1	-1	-1	-1		-1	-1	-1
Power generation	0		-1	-1	-1	1	-1	-1	-1	-1	-1	-1	
Water & Sewage	-1	0	-1	0	0	1	-1	-1	-1	-1	-1	-1	-1
Waste mgmt & env	-1	0	-1	0	0	1	-1	-1	-1	-1	-1	-1	-1
Pharmaceuticals	1	0	-1	0	0	1	-1	-1	-1	-1	-1	-1	-1
Medical equipment	1	0	-1	0	0	1	-1	-1	-1	-1	-1	-1	-1
Specialised textiles	0	0	0	0	0	0	-1	-1	-1	-1	-1	-1	-1
Business services	0	0	0	0	0	-1	-1	-1	-1	-1	-1	-1	-1
Financial services	-1	-1	0	0	-1	-1	-1	-1	-1	-1	-1	-1	-1
Oil, Gas & Mining equipmt						1	-1	-1	-1	-1	-1		-1
Fixed telecom eq.		1				1	-1	-1	-1	-1	-1	-1	-1
Computer & IT serv	0	0	0	1	1	0	-1	-1	-1	-1	-1	-1	-1
Street lighting	-1	1	-1	1	0	0	-1	-1	-1	-1	-1	-1	-1
Broadcasting equip		1	1	-1	1		-1	-1	-1	-1	-1	-1	-1
Port equipment	0	1	-1	1	1	-1	-1	-1	-1	-1	-1	-1	-1

⁹ MARKET estimates.

De facto closure of public procurement markets in the world

This leaves almost 75% of the above threshold procurement market either subject to a de facto closure through national measures (national or local price preference mechanisms, discriminatory set asides, national or local establishment or content requirements – See methodological box) or *potentially* subject to those measures - as some markets remain currently open (no domestic protectionist measures) and/or national protectionist measures are not applied systematically (but that could change)¹⁰.

If the national measures actually prevent foreign goods or service from access in public procurement market that has not been committed internationally, the market is deemed CLOSED *de facto*. However, if the measures are weak or if the national government decides not to take measures, the procurement market is considered as OPEN *de facto* (cf. methodological box 4).

The applicable national procurement legislation has been reviewed for the 22 selected markets in the 13 analysed countries. This analysis is detailed at length in Annex 8 and is summarised in Table 5 and methodological box 5). Discriminatory measures have been examined on the basis of their real impact - discrimination on the basis of equally valued bids was not considered as really discriminatory.

Table 5-Procurement markets of main trading partners: analysis DE FACTO

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

¹⁰ As it will be seen at a later stage, these measures can be bypassed through local subsidiaries (for services) or for highly specialised products (pharmaceutical products).

In terms of domestic legislation, the public procurement markets of US (not committed internationally), China are fully closed *de facto*, whereas those of Brazil and Russia are also substantially closed (except for concessions). The US closed *de facto* in its national legislation the procurement NOT covered by international agreements under the 1933 Buy American Act and the 1982 Buy America Provisions and secured a full closure of the procurement foreseen in the ARRA stimulus plans launched in the aftermath of the financial crisis of 2008. At the same time, China launched its “indigenous innovation” initiative, Russia set up its preferential margin and Brazil prepared a legal instrument giving itself the right to set up preferential margins up to 25%. Turkey's legislation contains a reference to reciprocity and applies a preferential margin of 15%.

It is worth underlining that, many countries with federal or similar structures like US, Australia or Canada (and probably Japan and India) have been able to open their central public procurement but maintain a vast array of local preferences taken by regional and local authorities that have the effect of closing *de facto* the access to several public procurement markets.

The areas open *de facto* in spite of no international commitments are confined to Australia, India, and Ukraine and in a limited fashion to Russia and Brazil. The Australian federal government does not maintain discriminatory measures, whereas countries like India, which have so far taken no international commitments in the area of public procurement, maintain national measures that are neither explicitly discriminatory *vis-à-vis* foreign bidders nor explicitly non-discriminatory. The procurement regimes for concessions in Brazil and Russia contain "softly discriminatory clauses that are however hardly practicable in daily- practice and probably serve rather as a political message."¹¹ - - This is not surprising in the domain of concessions as these countries have huge infrastructure needs.

Finally, there is the unfortunate case of countries like Japan or Israel that have applied nationally discriminatory measures on public procurement that they have theoretically opened internationally. Japan closes all the procurements of railway equipment on the basis of the "operational safety clause" and Israel applies a systematic policy of offsets. Weak remedies regimes create additional problems of enforcement of non-discriminatory rights (Japan).

¹¹ In Russia and Brazil, a foreign bidder can be excluded from a concession awarding procedure only if national bidder has submitted a equally-priced tender - the probability of this happening is very small. It is therefore not surprising that Brazilian motorways have been mostly awarded to Spanish and Portuguese firms

Methodological box 4 - Assessment model for de facto openness

There are varying degrees in openness, which are presented hereunder:

Markets that have been opened in the GPA or in FTAs are deemed **internationally committed**; they are considered as OPEN De Jure and De Facto, unless a country deliberately violates its international obligations or has been given under the GPA rights to apply measures that affect de facto EU goods and service providers (e.g. Israeli offsets)

Markets that have NOT been opened in international agreements (**NOT OPEN De Jure**) are either explicitly CLOSED (i.e. the GPA/FTA contains a specific derogation) or UNKNOWN (i.e. the GPA/FTA is silent on the coverage of the sector in question). In these two cases, it is necessary to analyse the situation from the angle of national legislation to identify measures that concretely (or not) prevent EU exports of goods and services.

If a country does not apply protectionist measures ("NO protectionist measures") in the public procurement markets that are **NOT OPEN de Jure**, the public procurement market is considered as **de facto "open domestically"**.

If a country applies protectionist measures that are optional, then the public procurement market is considered as **"open domestically"**. This is also the case for "softly discriminatory measures" like discrimination of equally valued bids.

If a country applies protectionist measures like national or local price preference mechanisms, discriminatory set asides, national or local establishment or content requirements and/or offsets, then the public procurement market is considered as **CLOSED De Facto**. This also includes those cases where a country deliberately violates its international obligations or has been given under the GPA rights to apply measures that affect de facto EU goods and service providers (e.g. Israeli offset regime).

The analyses of remedies and corruption have been deliberately excluded from the scope of the analysis as they go beyond the needs of this impact assessment and are therefore outside its scope.

- Efficient remedies systems are instrumental for contracting authorities to provide contracts in fair and non-discriminatory manner. Still, this analysis would require judging the speed and efficiency of judicial systems in the reviewed countries (moreover, so far, problems have been only reported for Japan).

- Analyses of corruption are highly subjective and this issue would have to be equally covered in the impact assessment also for the EU, if we were to provide for a fair comparison.

Methodological box 5 - Assessment of discriminatory measures

Discriminatory measures vary in impact and scope.

Preference regimes applied only on tenders equally marked or priced have *de facto* a negligible impact as this situation hardly happens in practice (see the case of the concessions in Brazil and Russia).. However a generally imposed 25% price preference in favour of the national bidder renders the given procurement market effectively closed. regimes fall above the average added value of the EU industry, making any sale unprofitable.

Set asides are *de facto* a deterrent when they are discriminatory (US SBA), but much less so if they are based on voluntary targets.

The real impact of **local establishment requirements** depends on the number of days and the initial capital required to set up a business, and the size of the economy of the area where the preference applies (cf. small State, city). Yet, local establishment requirements are discriminatory for SMEs¹² who can typically not afford to set up subsidiaries.

Finally, **national content requirements** and to a certain extent the **offsets** necessarily imply the relocation of economic activity outside the EU, and are *de facto* a market closure.

Measures taken by main world economies - cf. Annex 8

US, Canada's, Australia's and Japan's state and local procurement does not fall in the scope GPA or even under a single national regime. As a result, their local authorities apply a vast array of local (and not national) establishment requirements. The Australian government, albeit not part of GPA, claims to apply a non-discriminatory system.

Moreover, the **US** applies price preference regimes (25%) and national content and establishment requirements for the public procurement of railways, highway and airport construction. Discriminatory set-asides for SMEs and minorities further close *de facto* the US public procurement market overall.

China public procurement market is largely *de facto* closed, as it applies a national content requirement and, with its “indigenous innovation” initiative requires Chinese intellectual property rights on goods and services sold to the Chinese governments, including the release of “sensitive information”.

Russia and Turkey apply price preference margins (15%) - Russia only on goods -, whereas **Brazil** has given itself the legal instrument to do so– in addition to its current national establishment requirement. Interestingly, none of the *de facto* closing measures of Brazil and Russia actually affect concessions, which are *de facto* open – which is unsurprising given these countries huge infrastructure needs.

¹² An SME and a multinational will not react similarly if faced with a 100-day procedure to set up a subsidiary or with the obligation to open up piles of companies in several locations to comply with local preference regimes.

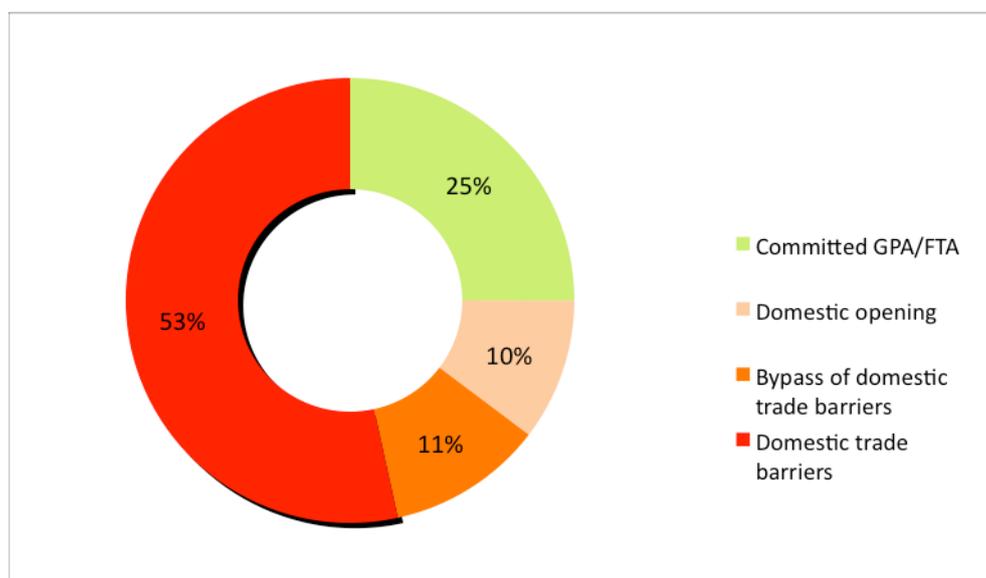
India legislation is silent on foreign access. For products and services that cannot be found in India, the Indian legislation actually requests Indian ministries to advertise tenders at international level.

The main areas of the public procurement in **Mexico** have been opened through the FTA (federal public procurement, state enterprises). However, for procurements not covered by the FTA, the Mexican federal government and the main States (Mexico, DF, Jalisco, Nuevo Leon) maintain local content requirements

Economic implications of de facto closure of non-EU PP markets

One could extrapolate that at least **53%** of the foreign worldwide¹³ above-threshold public procurement market is probably **closed de facto**, whereas up to **22%** of it would be **open de facto** in spite of the lack of international commitments (cf. methodological box 6).

Table 6 - Exporting through public procurement - what is open and closed? (Outside the EU/EEFTA)



In this context, by applying the share of EU exports to the public demand of these 13 countries, the following figures can be derived:

- Some **5 billion EUR**, thus only some **0,5% of all EU exports** of goods and services are exported by the EU thanks to the GPA/FTAs
- Some **5 billion EUR** of goods and services are exported by the EU in the context of public procurement procedures not covered by GPA/FTAs in the 12 selected countries

¹³ The situation in the selected 13 main trading partners is extrapolated as representing the world - the main non-covered economy are Taiwan and Indonesia - the latter has the same GDP as Sweden or Belgium

- Some **12 billion EUR** of goods and services could have been exported by the EU *ceteris paribus* in the context of public procurement procedures in the 12 selected countries, but weren't because of the de facto market closure - **it's the "EU export loss"** because of de facto closed procurement. In reality, the "export loss" should be diminished by the export of highly differentiated products that still manage to bypass existing restrictions (cf. pharmaceuticals).

To bypass protectionist measures, the two following scenarios are the most likely choice:

- **Establish a subsidiary**, but that's far from easy: the easiness to do business varies from country to country. It may still be possible to open up a branch in a timely fashion and for a fair price only in the US, Canada or Australia (cf. methodological box 7), if the GATS Mode 3 does not foresee additional requirements; in China, it may be necessary to have a Chinese shareholder for 23% of capital; nevertheless, this establishment outside the EU is made at the expense of EU jobs and it may well be beyond the reach of SMEs.
- **Pursue a corporate strategy of differentiation or specialisation** to become a competitive monopolist, in particular by selling products protected through patents. As analysed in annex 5, this may well be the case of pharmaceutical products (but not for generic products) and special-purpose machinery like airport and postal sorting equipment, provided of course IP rights are properly protected and enforced. However, this is far more difficult in low-tech or medium-tech sectors like construction, urban buses, street lighting, port equipment

Methodological box 6 - Estimating the de facto openness of public procurement in the world

To circumvent the statistical difficulties of measuring public procurement opened *de facto* but closed *de jure* internationally, an alternative measurement is proposed on the basis of the information collected in Table 5. The scores of *de facto* "openness" were established for each sector (cf. explanations of Table 4 and Table 5) and were multiplied by the dependency score (Table 1). The final score was then brought to a scale of openness between 0% (China, with a score of -35; the negative score is highly negative because of the high degree of dependency on public procurement in China) and 100% (score of 20 - i.e. 20 sectors with a mark of 1, the score is modestly positive because countries that are more open like Mexico have a greater presence of the private sector).

Based on the analysis of sectors performed in Annex 5, we have also systematically considered that the pharmaceutical and airport-postal sorting machineries were open de facto. Also, we have **assumed** that a 100% closed market like China, had a 10% starting degree of openness (in case restrictions were not applied). All the details are provided in Annex 3 (methodological notes).

It is important to underline that this **methodology is an attempt to re-correct a vision derived strictly from de jure openness**. Still, it treats all sectors equally, while some of them like infrastructure weigh considerably more. As construction is generally closed in all the selected countries, it is a pessimistic estimator. No other way has been found to proceed to this measurement.

Data is provided in Tables 7. Compared to the *de jure* estimation, the situation obviously worsens in Israel (offsets), but improves in Japan and Canada. Among GPA/FTA countries, India's ambiguity and Australia federal procurement openness are rewarded with a 70% score, Russia's openness to concessions and service obtains a 56% - Brazil who has only opened its concessions obtains an 38% score. China's full closure leads to a 0%

Table 7-Reviewed estimation of openness (after GPA negotiations of 2011)

	De facto	De jure
US	47%	32%
JP	72%	28%
CA	40%	16%
KR	80%	65%
IL	75%	75%
MX	92%	75%*
CN	24%	0%
RU	56%	0%
IN	70%	0%
BR	38%	0%
TR	25%	0%
AU	63%	0%

Methodological box 7 - Bypassing restrictions by establishing of a subsidiary

To measure the feasibility of the setting up of a subsidiary to bypass local establishment requirements in the area of services, the time to set up a company and its cost was compared to the time limits of GPA procedures (40 days for the open procedure and 25 days for the restricted procedure) and the threshold values. The World Bank provides data on time and cost to set up a company. The comparison is provided in Tables 8a and 8b.

This analysis suggests that the US, Canadian and Australian procurement markets are relatively open. However, the creation of subsidiaries is difficult for many small and medium enterprises.

Table 8a - Time to set up a company and procurement procedures

	Days to set up a subsidiary	Remaining days (open)	Remaining days (selective)
USA	6	34	19
Japan	23	17	2
Canada	5	35	20
Korea	17	23	8
Mexico	28	12	-3
Israel	34	6	-9
Taiwan	42	-2	-17
China	40	0	-15
Russia	30	10	-5
India	30	10	-5
Brazil	152	-112	-127
Ukraine	27	13	-2
Turkey	6	34	19
Australia	2	38	23

Table 8b - Cost to set up a company and thresholds

	Start up cost	% threshold services & supplies central	%threshold works
USA	22 071	17%	0,4%
Japan	196 224	151%	3,9%
Canada	15 330	12%	0,3%
Korea	4 072 430	3128%	81,5%
Mexico	163 541	126%	3,3%
Israel	82 762	64%	1,7%
Taiwan	2 105 153	1617%	42,1%
China	370 378	284%	7,4%
Russia	44 262	34%	0,9%
India	214 755	165%	4,3%
Brazil	45 797	35%	0,9%
Ukraine	476 755	366%	9,5%
Turkey	174 457	134%	3,5%
Australia	25 780	20%	0,5%

Interestingly, 86% of the selected public procurement markets where trade partners have national champions or offensive interests (table 9a) are fully or partially CLOSED de facto (Table 9b). The analysis of offensive interests is provided in Annex 9 ("Industrial analysis").

Table 9a - Identified national champions and offensive interests

	US	JP	CA	KR	IL	MX	TW	CN	RU	IN	BR	TR	UA	AU
Defence	O								O				O	
Aerospace	O	O		O				O	O	O			O	
Post & Apt sorting														
Firefight & Sea Rescue			O						O					
Construction & Dredging		O		O				O			O	O		
Constr. Equipment		O		O		O		O						
Railway equipment		O		O				O						
Urban buses											O			
Power generation	O	O		O				O		O				
Water & Sewage														
Waste mgmt & env														
Pharmaceuticals	O				O					O				
Medical equipment	O	O			O									
Specialised textiles														
Business services	O									O				
Financial services	O	O	O											
Oil, Gas & Mining equipmt														
Fixed telecom eq.		O						O						
Computer & IT serv	O							O		O				
Street lighting														
Broadcasting equip														
Port equipment		O		O				O	O					

Table 9b - Are national champions protected?

How far is there a coincidence between public procurement markets closed de facto and national champions?

	US	JP	CA	KR	IL	MX	TW	CN	RU	IN	BR	TR	UA	AU
Defence	PI								PI				PI	
Aerospace	PI	PI		PI				PI	PI	PI			PI	
Post & Apt sorting														
Firefight & Sea Rescue			PI						PI					
Construction & Dredging		PI		PI				PI			PI	PI		
Constr. Equipment		PI						PI						
Railway equipment		PI		PI				PI						
Urban buses											PI			
Power generation	PI	PI		PI				PI		PI				
Water & Sewage														
Waste mgmt & env														
Pharmaceuticals					PI					PI				
Medical equipment		PI			PI									
Specialised textiles														
Business services	PI									PI				
Financial services	PI	PI	PI											

Oil, Gas & Mining equipmt															
Fixed telecom eq.								PI							
Computer & IT serv	PI							PI		PI					
Street lighting															
Broadcasting equip															
Port equipment								PI	PI						

Problems affecting EU industries

(a) Industries fully dependent on public procurement

Defence - EU companies have been able to export to US, India, Brazil and Japan, in spite of restrictions, yet exports to countries like China are restricted by the EU itself and overall access is most likely conditioned by military geostrategic considerations. On the other hand, a UK defence company obtained 7 billion USD of contracts from the US DoD, EADS has participated in the USAF tankers procurement, but at the same time, Turkey took measures specifically against French defence material exports.

Aerospace - As far as space is concerned Companies from 3rd countries (US, Russia, China, Japan, Ukraine) appear to benefit from state aid in their home market to put abnormally low tenders in this very tight market (the number of launchings is very small). American and Russian companies have submitted tenders for Galileo and it would seem that the Russian bid was abnormally low On the other hand, the aerospace industry which benefits from high skills and high quality products could be candidate to bypass existing barriers. However, this industry is entangled with security matters and local content requirements in the defence, so that it needs to set up manufactures outside the EU (cf. Annex 5)

Railways - The UNIFE reports that its members represent 50% of world sales of rolling stock materials. Yet, because of the several procurement restrictions applying, international trade only represents 10% of the whole sector sales (and 43% of all worldwide railways equipment exports are from the EU). As a result, public procurement restrictions have educed the EU railway industry to open factories outside the EU. The EU (and Asian) railway industry has to off shore to the US because of the local content requirements in the Buy America. On the other hand, Japanese and Korean companies have started to participate in the EU public procurement market (UK intercity Express and Athens metro).

Postal and airport machinery - This market is made of high-skilled suppliers and high-quality products. The Italian and German companies active in this sector can bypass existing barriers. For instance, an Italian firm delivered the sorting system of the Russian post.

(b) Industries highly dependent on public procurement

Construction - EU top construction companies have been able to set up subsidiaries in the US to circumvent US infrastructure procurement restrictions and participate in the Latin American and Russian concessions markets , but they have not been able to enter Japanese, Chinese and Korean infrastructure procurements markets. Still, existing restrictions are a deterrent for SMEs, that represent more than 90% of all firms in this sector.

Urban buses - this is also a medium-tech industry where it is difficult to bypass protectionist barriers. Interestingly, Turkey and Brazil are important players in this sector.

(c) Industries partially dependent on public procurement

Pharmaceutical products and medical equipment This sector has clearly no problems to bypass existing barriers (except maybe in the generic sector). It is facing a growing league of competitors in particular in Israel and India (generic drugs). The EU remains in any case, the largest exporter of pharmaceutical products.

Fixed telecom EU fixed telecom industry is dependent on public procurement in Japan and in emerging economies. Restrictive measures have been implemented in India and in Brazil (a Swedish telecom equipment company has been discriminated vis-à-vis a Brazilian company). It appears nevertheless that measures in these countries were aimed as much against EU as Chinese companies.

Oil extraction: EU oil infrastructure equipment industry is mostly affected in oil-rich national monopolies. In Brazil, Petrobras has a 65% local content requirement. Gazprom and Pemex as much as the main state-owned oil companies of emerging economies maintain such programmes.

Power generation- National programmes to foster “green technologies” have hit the EU power generation industry. The Chinese “indigenous innovation” initiative targets in particular the green economy and aims at technology transfers. In Canada, solar panels need local content requirements (Ontario). Korea and Taiwan maintain restrictions on specific supplies. At the same time, Indian and Chinese companies have been supplying EU utilities.

Public procurement in the EU is (almost) de facto open

The EU public procurement directives do not contain mandatory restrictions against non-EU goods/services/companies, but provide for the right to deny access to goods from third countries to the utilities in case of lack of reciprocity. The use of the so-called Article 58 is optional and appears to be rare (cf. methodological box 8).

Nine Member States have taken measures to regulate the access of their public procurement market. Except for Spain, none of the Member States appears to have applied a systematic policy of discrimination. Still, at any moment, EU Member States could take measures to systematically discriminate on the basis of reciprocity.

Methodological box 8 - De facto openness of EU public procurement market

Article 58 of Directive 2004/17/EC:

The EU public procurement directives do not oblige contracting entities to apply restrictions against non-EU goods/services/companies. The only optional *de jure* restriction is Article 58 of Directive 2004/17, which applies to goods from third countries purchased by utilities (which we estimate to represent some 3 billion EUR or 12% of their 25 billion EUR of procured goods).

Article 58 gives a right to discriminate against third country goods that do not provide for a "reciprocal market access". Yet, article 58 doesn't provide any further clarification of the meaning of "reciprocal market access". In Germany, for instance, the legislation foresees that the list of countries with such a lack of reciprocal access would be published in the *Tagesanzeiger* - yet, there has never been such a publication. Article 58 has been transposed in all Member States, but Belgium, Estonia and Portugal.

The use of Article 58 appears to have been limited to some Member States. Cyprus and Italy have reported use of Article 58, but only Cyprus appears to systematically apply Article 58..

National provisions:

In addition to Article 58 a number of Member States have adopted provisions that regulate the access of of third country companies to their public procurement market. In Italy, Spain, Belgium¹⁴ and Cyprus these restrictions are mandatory, whereas they are optional in Austria, Estonia, Hungary and the UK. It is noted that in the UK remedies are *de jure* only accessible in front of the national courts if the economic operator is from a GPA country and for a contract covered by GPA.

There is limited information available on the exact use of these provisions in the relevant Member States. Reciprocity provisions appear to have been used in at least four Member States.

In **Austria**, equal treatment is only conferred on the basis of international agreements and contracting authorities have posed questions to the *Bundeskanzleramt* to ask about the eligibility of Turkish, Indian, Chinese, Ukrainian, and Byelorussian firms, which may have discriminated against them.

In **Italy**, it appears that courts have ruled against the participation of Chinese and Australian firms until an international agreement would exist between the EU and China/Australia in the area of public procurement.

In **Spain**, Commission services have noted the requested of certificates of reciprocity in at least one instance.

¹⁴ In Belgium the relevant provision has not entered into force yet.

Cases of remedies denial exists in the **UK** vis-à-vis bidders from third countries with no procurement agreement with the EU. Yet, remedies are seldom used in the UK anyway (cf. impact assessment remedies) and the UK is one of the Member States where the share of contracts awarded to non-EU firms in uncovered procurement is highest (28% - while EU average is 10%), making it an unlikely de facto restrictive Member State.

Table 10a - Public procurement markets in Member States that only apply Art. 58*

	US	JP	CA	KR	IL	MX	TW	CN	RU	IN	BR	TR	UA	AU	
Defence	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Aerospace	0	1	0	0	1			-1	-1	-1	-1	-1	-1	-1	Art 58
Post & Apt sorting	-1	0	-1	-1	0	0		-1	-1	-1	-1	-1	-1	-1	Art 58
Firefight & Sea Rescue	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Construction & Dredg	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Constr. Equipment	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Railway equipment	-1	-1	-1	-1	0	-1		-1	-1	-1	-1	-1	-1	-1	Art 58
Urban buses	-1	-1	-1	-1	-1	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Power generation	1	-1	-1	0	0	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Water & Sewage	-1	1	-1	1	1	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Waste mgmt & env	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Pharmaceuticals	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Medical equipment	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Specialised textiles	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Business services	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Financial services	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Oil, Gas Min equipmt	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Fixed telecom eq.	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Computer & IT serv	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Street lighting	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Broadcasting equip	1	1	1	1	1	1	1	1	1	1	1	1	1	1	
Port equipment	1	1	-1	1	1	1		-1	-1	-1	-1	-1	-1	-1	Art 58

Table 10b - Public procurement markets in Member States that apply Art. 58* and national measures based on reciprocity through international agreements

	US	JP	CA	KR	IL	MX	TW	CN	RU	IN	BR	TR	UA	AU	
Defence	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	
Aerospace	0	1	0	0	1			-1	-1	-1	-1	-1	-1	-1	Art 58
Post & Apt sorting	-1	0	-1	-1	0	0		-1	-1	-1	-1	-1	-1	-1	
Firefight & Sea Rescue	1	1	0	1	1	0		-1	-1	-1	-1	-1	-1	-1	
Construction Dredging	0	1	0	1	1	0		-1	-1	-1	-1	-1	-1	-1	
Constr. Equipment	1	1	0	1	1	0		-1	-1	-1	-1	-1	-1	-1	
Railway equipment	-1	-1	-1	-1	0	-1		-1	-1	-1	-1	-1	-1	-1	Art 58
Urban buses	-1	-1	-1	-1	-1	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Power generation	1	-1	-1	0	0	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Water & Sewage	-1	1	-1	1	1	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Waste mgmt & env	1	1	0	1	1	0		-1	-1	-1	-1	-1	-1	-1	
Pharmaceuticals	1	1	0	1	1	0	1	-1	-1	-1	-1	-1	-1	-1	
Medical equipment	1	1	0	1	1	0	1	-1	-1	-1	-1	-1	-1	-1	
Specialised textiles	1	1	0	1	1	0	1	-1	-1	-1	-1	-1	-1	-1	
Business services	0	0	0	0		-1		-1	-1	-1	-1	-1	-1	-1	
Financial services	-1	-1	0	0	-1	-1		-1	-1	-1	-1	-1	-1	-1	
Oil, Gas Min equipmt															
Fixed telecom eq.															
Computer & IT serv	0	0	0	1	1	0		-1	-1	-1	-1	-1	-1	-1	
Street lighting	1	1	1	1	1	0	1	-1	-1	-1	-1	-1	-1	-1	
Broadcasting equip	1	1	1	1	1	0	1	-1	-1	-1	-1	-1	-1	-1	
Port equipment	1	1	-1	1	1	1		-1	-1	-1	-1	-1	-1	-1	Art 58

Overall, beyond the *de facto* openness of the EU public procurement regime in **22 Member States**¹⁵, representing 90% of the EU public procurement market, contracting authorities have been also *de facto* awarding uncovered contracts to firms from third countries.

More contracts were actually awarded to firms established outside the EU in uncovered procurement (direct cross-border). Out of the 10,7 billion EUR of contracts awarded to non-EU/EEFTA firms (including their subsidiaries) in EU27, one-third (3,5 billion EUR) was in uncovered procurement (Chinese and Indian companies were awarded 400 million EUR of contracts in 2007). It is interesting also to note that the conditions of competition did not differ between contracts awarded to EU firms and to non-EU firms in terms of bidders - therefore EU contracting authorities are not buying specific goods or services which they would not find anyway in the EU.

¹⁵ UK has been included in the group of *de facto* open Member States.

The legal problems

Breaching the Treaty

The absence of a EU regulatory framework relating to the access of third countries to the EU public procurement markets going beyond the optional restriction of article 58 implies that Member States cannot act individually to restrict the access of companies from third countries to actually create this "equal level playing field", necessary to potentially defend the competitiveness of those industries which depend on public procurement for their exports. Those that actually legislate are in breach of the Treaty since this is an exclusive competence of the EU ("common commercial policy"). This applies both for areas covered by the GPA or FTA or in uncovered procurement.

The problems of 'strict reciprocity

Hopefully so far Article 58 and/or the national reciprocity measures have not been applied on a systematic basis, as they could potentially lead to infringement of the EU's international obligations if no additional clarifications are provided to EU contracting authorities.

There are two diverging interpretations of reciprocity that could lead to problems in specific public procurement markets: an interpretation based on strict reciprocity and one based on international commitments; the former could clearly lead the EU to infringe on its international commitments.

This results from a simple problem: results of international negotiations are not necessarily symmetrical.

For instance, an electricity operator may decide to reject offers with US goods on the basis of Article 58 because the US public procurement market of electricity operators does not grant a similar level of access. Such an operator could expose the EU to a panel in the WTO as the EU has committed vis-à-vis the USA the public procurement of its electricity operators (cf. table 11).

A broader problem of the kind may appear on the basis of horizontal reciprocity measures taken by countries like Belgium, Spain and Italy, which appear to have opted for strict reciprocity (UK, Austria and Hungary have opted for reciprocity implemented through international agreements). Table 12 illustrates the problems of this approach.

Table 11 - Diverging scopes of Article 58

Open de jure (EU level) - general notes & art.58

	US	JP	CA	KR	IL	MX	TW	CN	RU	IN	BR	TR	UA	AU	
Post & Apt sorting	-1	0	-1	-1	0	0		-1	-1	-1	-1	-1	-1	-1	Art 58
Railway equipment	-1	-1	-1	-1	0	-1		-1	-1	-1	-1	-1	-1	-1	Art 58
Urban buses	-1	-1	-1	-1	-1	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Power generation	1	-1	-1	0	0	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Water & Sewage	-1	1	-1	1	1	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Port equipment	1	1	-1	1	1	1		-1	-1	-1	-1	-1	-1	-1	Art 58

Open de jure (EU level) - strict reciprocity & art.58

	US	JP	CA	KR	IL	MX	TW	CN	RU	IN	BR	TR	UA	AU	
Post & Apt sorting	-1	1	0	0	1	1		-1	-1	-1	-1	-1	-1	-1	Art 58
Railway equipment	-1	-1	-1	-1	0	-1		-1	-1	-1	-1	-1	-1	-1	Art 58
Urban buses	-1	-1	-1	0	-1	-1		-1	-1	-1		-1	-1	-1	Art 58
Power generation	0		-1	-1	-1	1		-1	-1	-1	-1	-1	-1		Art 58
Water & Sewage	-1	0	-1	0	0	1		-1	-1	-1	-1	-1	-1	-1	Art 58

Table 12 - Potential areas of problems for national measures based on strict reciprocity

	US	JP	CA	KR	IL	MX	TW	CN	RU	IN	BR	TR	UA	AU
Defence	OK	OK	OK	OK	OK	OK		OK						
Aerospace	OK	PB	OK	PB	PB	OK		OK						
Post & Apt sorting	OK	OK	OK	OK	OK	OK		OK						
Firefight & Sea Rescue	PB	PB	PB	PB	PB	PB		OK						
Construction Dredging	OK	PB	PB	PB	PB	OK		OK						
Constr. Equipment	PB	PB	OK	OK	PB	OK		OK						
Railway equipment	OK	OK	OK	OK	OK	OK		OK						
Urban buses	OK	OK	OK	OK	OK	PB		OK						
Power generation	PB	OK	OK	PB	PB	OK		OK						
Water & Sewage	OK	PB	OK	PB	PB	OK		OK						
Waste mgmt & env	PB	PB	PB	PB	PB	OK		OK						
Pharmaceuticals	OK	PB	PB	PB	PB	OK		OK						
Medical equipment	OK	PB	PB	PB	PB	OK		OK						
Specialised textiles	PB	PB	OK	PB	PB	OK		OK						
Business services	OK	OK	OK	OK	PB	OK		OK						
Financial services	OK	OK	OK	OK	OK	OK		OK						
Oil, Gas Min equipmt														
Fixed telecom eq.														
Computer & IT serv	OK	OK	OK	OK	OK	OK		OK						
Street lighting	PB	OK	PB	OK	PB	OK		OK						
Broadcasting equip	PB	OK	OK	PB	OK	OK		OK						
Port equipment	PB	OK	OK	OK	OK	PB		OK						

Furthermore, there is evidence that, **given the complexity of international commitments, there is a high risk of inconsistent application of international agreements.** 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). Several contracting authorities that participated to the consultation consider that the GPA applies to all the purchases covered by the directives and 95% indicated that they never used rules of origin.

Yet, this does not translate in outright discrimination. For instance, the rates of error were above average among the contracts awarded to foreign firms¹⁶. In our survey, only 3,8% of contracting authorities actually disregarded a bid because of its origin. Trading partners have never complained of systemic problems in the EU public procurement market. Japanese companies have had problems with delayed payments and standardisation issues. US companies have not been able to contact purchasing officers in Germany and France¹⁷ and Mexico, in spite of its success with cement, has been poised to radically improve access to the EU public procurement market for its SMEs.

Internal Market fragmentation

Member States could, for example, decide to target third countries' goods and services themselves, while others may prefer to restrict access to firms based in a third country, if not the subsidiary of a firm headquartered in a third country or even a company who lacks experience in the EU. Member States could also contemplate to include franchises or to apply restrictions only in those sectors that matter for them (e.g. if dredging is important for Belgium, it may only apply restrictions in that field). Moreover, some Member States could opt for mandatory restrictions and others for case-by-case restrictions left to the discretion of the contracting authority itself (who knows best its needs as the purchaser).

¹⁶ 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

¹⁷ US Int'l Trade Commission (2010): Small and Medium-sized enterprises: U.S. and EU Export Activities, and Barriers and Opportunities Experienced by U.S. Firms and EU
<http://www.usitc.gov/publications/332/pub4169.pdf>

Consequences

In this context, GPA Parties have no incentives to further open up *de jure* their procurement markets for many reasons. Firms, goods, service providers experience in general the public procurement market of 22 Member States as being *de facto* open, leading to few complaints on market access.

As shown in table 13, based on the analysis of the imports of goods in the EU public procurement market (cf. methodological box 8), it is possible to see that most of the exports of the US, Japan, Canada and Korea ("EU imports") affected by public procurement procedures taking place in areas covered by the GPA. However, for the EU, most of the exports (or potential exports) take place in areas not covered by GPA. Up to 80% of US and Japanese goods and services purchased by EU contracting authorities pass through existing commitments¹⁸

Emerging economies similarly have no incentives to open up *de jure*¹⁹ their procurement markets. Computers, which probably represent 53% of all purchases of Chinese products by EU procuring entities, are sold through local intermediaries. India's IT service sales to the EU procuring entities are in broadly in line with the demand from the private sector. Furthermore, for Russia and Brazil, trade interests are in energy and agriculture, which are respectively outside of the scope or of little relevance for of procurement disciplines.

This situation is worsened by the *de facto* openness of the EU and the *de facto* closure of most of other countries procurement markets. Canada, Japan and Korea have been able to meet the interests of their railway equipment industries in spite of GPA restrictions.

This situation has led to concerns of "level playing field" from industries that depend on the openness of public procurement markets to exports. In particular, the railways equipment and construction industries have been very vocal in their demands to level the playing field when important contracts were awarded to non-EU companies (a Japanese rolling stock producer has been awarded a 5 billion EUR contracts for high-speed trains in the UK and a Chinese construction company has been selected to built an important Polish motorway).

The legal problem

The absence of a EU regulatory framework relating to the access of third countries to the EU public procurement markets going beyond the optional restriction of article 58 implies that Member States cannot act individually to restrict the access of companies from third countries to actually create this "equal level playing field", necessary to potentially defend the competitiveness of those industries which depend on public procurement for their exports. Those that actually legislate are in breach of the Treaty since this is an exclusive competence of the EU ("common commercial policy"). This applies both for areas covered by the GPA or FTA or in uncovered procurement.

¹⁸ For instance, the US, which is an important exporter of pharmaceuticals and medical equipment, has secured access to ministries of health and public hospitals (which are mostly bodies governed by public law).

¹⁹ And consequently, *de facto*.

This situation has several unintended consequences:

First and foremost, **where Member States have taken measures against third countries, companies are being illegally discriminated under EU law.** If Member States establish different criteria to determine the nature of a "third country" company, a "EU company" may be ultimately discriminated in those countries where restrictive measures are being implemented. Moreover, it is to be clarified whether restrictions can be designed vis-à-vis companies or vis-à-vis services/goods.

Secondly, **divergent national rules could lead to market fragmentation.**

The EU continues to suffer from a lack of leverage in international negotiations.

Consequences for innovation, competitiveness and employment in the EU

This situation is resulting in *status quo* of *de jure* opening of public procurement in the world, which is detrimental for the **internationalisation of EU SMEs**, as well as for jobs, competitiveness and innovation in the EU. It is also fragmenting the internal market.

SMEs have major difficulties to overcome local establishment and national content requirement barriers. They have *de facto* mostly never access to the procurement of procurement that has not been opened *de jure*. As proximity and a common language plays an important role in cross-border procurement participation, the large closure of US and Canadian markets denies UK²⁰, French, Irish and Belgian SMEs precious opportunities. Similarly, the closure of the Brazilian, Turkish and Russian procurement markets is detrimental to Portuguese, Greek, Bulgarian, Polish and Baltic SMEs. As a result, public procurement is not playing its role in the internationalisation of EU SMEs.

The mix of local establishment and national content requirements in US, Brazil and China has pushed industries to artificially **relocate jobs overseas** without intrinsic economic rationale – depriving the EU job market to benefit from the high growth of these countries. The EU railway industry has indeed been able to sell trains in those countries without necessarily creating the same jobs in EU. The EU exports of trains to the US have amounted to 0,4 billion EUR, hence 1% of the US railway equipment market (UNIFE report), although the EU railway industry has been the main seller of trains in the US. In China, the EU railway industry has had to set up joint ventures.

The competition distortions created by discriminatory practices in procurement throughout the world affect the **competitiveness** of specific sectors, like railway and utilities equipment and infrastructure construction, where the traditional leadership of the EU firms is being contested by companies who rely on *de facto* protection in their home market. The EU construction industry share of worldwide infrastructure construction remained stable at 8%, whereas the share of the Chinese construction industry tripled to 6%. As a result, the Chinese construction industry controls today a similar share of all construction exports as the EU construction industry (around 20%, whereas in 2003 the EU construction industry

²⁰ Interestingly, UK firms obtained 60% of all contracts awarded to EU firms in the US federal procurement

controlled 26% of all exports). This jump is largely attributable to the privileged access of the Chinese construction industry to infrastructure works in China.

In varying degrees, by their very nature, each of the discriminatory practices are *de facto* implicitly a form of government support to national or local businesses, creating similar distortions as those of subsidies or state aid (access to lower cost of capital for beneficiaries than under market conditions).

Finally, there are also repercussions for innovation. Measures such as “indigenous innovation” aim to ensure to transfer intellectual property rights of EU firms in the area of innovation, in sectors ranging from railway equipment to the domain of “green energy”. Foreign companies are given the possibility to participate to the EU standardisation works whereas EU companies cannot influence the standardisation work elsewhere.