

The access of third countries to the European Union's public procurement market

State Aid & Public Procurement in the European Union

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Abstract

In this paper we will examine to what extent third countries can access the EU's public procurement market. For this purpose, it will first provide a brief introduction to the Union's public procurement law. This includes an overview of the fundamental principles of public procurement law in the EU as well as the public procurement directives. Second, the different agreements that provide for third country access to the Union's procurement market will be discussed. In this regard special attention will be given to the WTO's Government Procurement Agreement. Third, a comparison between the United States and the EU's procurement systems will be given. Due the importance of the US public tendering market for European economies, it is necessary to examine how these two public procurement markets differ. Finally, it will be seen how third country access to the Union's procurement market will be regulated in the future. The focus will be on the proposed Regulation on the access of third-country goods and services to the Union's internal market in public procurement.

Keywords: Public procurement; European Union (EU); third countries; United States (US); European Union Law; Agreement on Government Procurement (GPA).

I. Introduction

Public procurement is about how governments use money. The total value of public procurement in the European Union is approximately 16% of its gross domestic product. It also affects a significant share of global trade flows, amounting to 1000

billion Euros each year¹. Opening up the procurement markets allows an increase in competition between undertakings, which again leads to reduced prices and better quality of services for citizens. In order to facilitate this opening up of markets, the Union has introduced comprehensive legislative provisions which improve and assist the award of public contracts. However, the Union is not only regulating public procurement within the EU, it is also working for a more open international public procurement market. The result of a more open international market is that economic operators located in countries outside the Union will have access to the EU market.

II. Public Procurement Law in the European Union: Effectiveness, simplicity and modernity

With the introduction of the new Directives 2004/18/EC on general procurement procedures and 2004/17/EC on public utilities procurement and the amendments and changes introduced by the Directive 2009/81/EC on defence procurement, the EU public procurement framework experienced a considerable development. Consequently, the new legislation improved the effectiveness of the common rules for all the EU's procurement market, mainly through simplification and modernisation. The Directives on public procurement have created a set of comprehensive legal instruments which have bolstered the demands of the internal market for more openness of national markets, both for interstate commerce as for foreign trade with third countries. So far the success of the Directives is evident. The Directives have unified the once fragmented pieces of national legislation, creating a common framework of principles, rules and procedures for all the EU Member States.

1. Principles of EU Public Procurement Law

1.1. Non-discrimination

One of the leading principles of European Union public procurement law is non-discrimination. Contracting authorities must treat all candidates in the same manner.² Furthermore, entities are explicitly required to comply with the principle of non-discrimination on the basis of nationality.³ This can be traced back to the laws covering the internal market, where non-discrimination is one of the most fundamental principles.

¹ See <<http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/>> (last visited 30.05.2013).

² Directive 2004/18, [2004] O.J. L134/114 (hereafter the Public Sector Directive), Article 2.

³ *Ibid.*, Article 3

As will be seen later, the EU has also actively worked to combat discriminatory behaviour on the international procurement market.

1.2. Transparency

Another primary principle of EU public procurement law is transparency. The primary aim of the principle is to introduce openness in the Member States public purchasing. This is related to the principle of non-discrimination, as more openness will reduce discriminatory behaviour. It also ensures a higher level of accountability.⁴ Transparency in public procurement shall be achieved through Union-wide advertisement and publicity of all procurement contracts which fulfil the requirements of the public procurement directives.⁵ Furthermore, contracting authorities have to inform candidates when they reach a decision. Unsuccessful candidates may also request information on the reason for rejection of their application.⁶

The effect of transparency is a higher level of competition. As the contracting authorities must make their determination to procure publicly known more suppliers will be aware. Furthermore, suppliers are also aware that their possible rivals have access to the same information. They will therefore have to come up with a proposal which is competitively superior to that of their opponents.⁷ This ensures that the contracting authority can pick the best possible proposal.

2. The Public Sector Directive

The Public Sector Directive applies to public contracts concluded between contracting authorities and economic operators. The term economic operator covers undertakings that are contractors, suppliers and service providers. It includes both natural and legal persons. The terms «contracting authority» and «public contract» will be explained below.

2.1. Contracting authority

The Directive is structured to embrace the procuring activities of all entities which are closely linked to the state. These entities will be regarded as contracting authorities. The directive defines contracting authority as the state, which covers central, regional, municipal and local governments departments and bodies that are governed by

⁴ C. H. Bovis, *EU Public Procurement Law* (2nd edition, Elgar European Law, 2012), p. 250.

⁵ However, contracts which come outside the scope of the public procurement directives will still have to respect the principle of transparency, as this is a fundamental principle of EU law.

⁶ Public Sector Directive, Article 41.

⁷ Bovis, *EU Public Procurement Law* (2012), p. 251.

public law.⁸ Bodies governed by public law can in certain situations be hard to identify.⁹ The Directive sets out three cumulative criteria that must be met in order for an entity to be classified as such a body. It must be established for the purpose of meeting needs in the interest of the public, it must have legal personality and it must be financed, for the most, by the state, be subject to management supervision by the state or have an administrative, managerial or supervisory board with more than half of the members appointed by the state.¹⁰ The first two criteria are rather straight forward, while the third is more complicated. What it essentially seeks to determine is whether the entity is under the control of the state.

2.2. Public Contract

Three different types of public contracts are covered by the Directive. These are public work contracts, public supply contracts and public service contracts^{11 12}. Public work contracts have as their objective either the execution, or both the design and execution, of work equivalent to the requirements indicated by the contracting authority. A work is defined as «the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function»¹³. Public supply contracts are contracts which have as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.

Public service contracts are contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II. The Annex sets out a list of different types of services. It is divided into two parts, namely A and B. If the contract has as its objective one of the services listed in Annex II B, a more lenient procedure will be applied. Furthermore, the contracts must have a value which exceeds the pre-established thresholds; they will be recalculated every two years. The thresholds differ according to the object of the contract.¹⁴

3. The Utilities Directive

⁸ Public Sector Directive, Article 1.9.

⁹ Vid. cases C-107/98, C-380/98, C-480/09, C-159/11, C-182/11, C-183/11 and C-526/11.

¹⁰ The state also includes regional or local authorities and other bodies governed by public law.

¹¹ The frequent confusion between service concessions and services contracts has been addressed in cases C-274/09 and C-348/10. Moreover, the problems of interpretation arisen with the distinction between public works contracts and public works concessions have been dealt in cases C-351/08 and C-576/10.

¹² Public Sector Directive, Article 1.2.

¹³ *Ibid.*, Article 1.2.(b).

¹⁴ For the case law on the aggregate value of multi annual contracts, see case C-574/19.

The Utilities Directive is applicable when a procuring entity comes within the classification of a utility as defined in that Directive, and then only when the utility carries out an activity which is covered by the Directive, relating to contracts of a defined type.¹⁵ Furthermore, the value of the contract must exceed the relevant threshold. In this respect the Utilities Directive cover activities within the following areas: the energy sector, the water sector, transport services and postal services.¹⁶

The Directive sets out a special rule which applies to contracts that cover products originating in third countries with which the EU has not concluded, either multilaterally or bilaterally, an agreement allowing similar and effective access for Union undertakings to the markets of those third countries. Any tender which submits for the award of a supply contract may be rejected where the proportion of the products originating in third countries exceeds 50 per cent of the total value of the products constituting the tender.¹⁷ Furthermore, Member States shall notify the Commission of any complications, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries. In such situations the Commission may approach the third country in question and ask them to remedy the situation.¹⁸

4. The Defence Directive

The Defence Directive sets out a special regime which applies for procurement of arms, ammunition and war material for defence purposes.¹⁹ Moreover, this also covers procurement of sensitive supplies, works and services for security purposes. These are matters that concern the Member States national security. It is therefore important to have separate rules for this. The Public Sector Directive and the Utilities Directive will in principle apply to defence contracts which are not covered by the Defence Directive. Article 346 of the Treaty on the Functioning of the European Union offers guidance on the extent to which Member States can exempt defence contracts from the Directive. This may be done where it is necessary for the protection of essential security interests.

¹⁵ Directive 2004/17/EC, [2004] O.J. L134/1.

¹⁶ *Ibid.*, Articles 3 to 6.

¹⁷ *Ibid.*, Article 58.2..

¹⁸ *Ibid.*, Article 59.

¹⁹ Directive 2009/81/EC, [2009] O.J. L216/76.

III. Third Country Access to the EU's Public Procurement Market: Not a perfect symmetry

The EU is not only regulating public procurement within the Union market, it is also working for a more open international public procurement market. The result of a more open international market is that economic operators located in countries outside the Union (third countries) will have access to the EU market. From an EU perspective the objective behind is to promote transparency and non-discrimination in international public procurement.²⁰ These objectives can easily be identified in the agreements through which the Union has tried to open procurement markets with third countries. In this regard, the WTO Agreement on Government Procurement (henceforth the GPA) is perhaps the most significant tool that both the EU and the third countries have at hand for tearing down trade barriers. Additionally, through FTAs and the EEA Agreement more countries have gained access to the EU's procurement market. The importance of the GPA can also be seen in the FTAs, as it has been used as the starting point when dealing with public procurement in these agreements. Briefly, the different tools which the EU has developed for opening gradually the procurement market differ considerably in between, thus constituting a network of asymmetric international agreements. Asymmetries have shaped the commercial relationships between the EU and its economic partners creating a procurement policy which relies on the variable geometry of the obligations established between the parties.

1. Free Trade Agreements

The EU has concluded Free Trade Agreements (FTAs) with a number of third countries. Several of these agreements include provisions on public procurement. As there is no 'model FTA' to form the basis of the negotiations, the content of the agreements will vary. So will also the provisions covering public procurement. While certain FTAs contain detailed rules on public procurement, others are rather vague. In this section examples will be given on how such provisions may look like and what effect they can have on the opening up of the Union's procurement market to third countries. This will be done by studying three of the FTAs the EU has concluded with third countries.

1.1. Mexico

²⁰ S. Woolcock, 'European Union Policy Towards Free Trade Agreements', European Centre For International Political Economy Working Paper, No. 03, (2007), p. 8.

The EU and Mexico concluded an Economic Partnership, Political Coordination and Cooperation Agreement in 1997.²¹ This is also referred to as the “Global Agreement”. This also includes a comprehensive FTA which contains trade provisions. The part of the FTA that relates to trade in goods entered into force in 2000.²² Title III of that part is dedicated to government procurement. The title includes important provisions on national-treatment and non-discrimination.²³ This ensures that products, services and suppliers of the other party shall be treated in the same manner as domestic products, services and suppliers. Furthermore, Mexican operators will have to be treated in the same manner as parties to the WTO Government Procurement Agreement (GPA).²⁴ This ensures that Mexican operators will be able to access the EU procurement market according to very beneficial conditions. Market access under the GPA will be discussed in more detail below.

1.2. Chile

In 2002 the EU and Chile concluded an association agreement, which includes a FTA that entered into force in 2003.²⁵ The FTA has a separate title devoted to government procurement. According to article 136 of the agreement the objective is that ‘the Parties shall ensure the effective and reciprocal opening of their government procurement markets.’ The rest of the title sets out the substantive rules on how this shall be achieved. The agreement requires the EU to offer Chile the same market access as it would if Chile was a signatory to the 1994 GPA. Chile currently has observer status under the GPA. Hence, it is not bound by its rules. The agreement with Chile ensures that Chilean operators will be allowed access to the EU’s procurement market, according to the same terms and conditions as the parties to the GPA. This resembles the approach taken under the EU-Mexico FTA.

1.3. South-Korea

²¹ Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other Part, [2000], O.J. L276/45.

²² Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000 - Joint Declarations, [2000], O.J. L157.

²³ *Ibid.*, Article 27.

²⁴ M. Busse, M. Huth and G. Koopman, *Preferential Trade Agreements: The Case of EU-Mexico*, Hamburg Institute of International Economics Discussion Paper, 103, (2000).

²⁵ Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, [2002].

The FTA with South Korea²⁶, which entered into force in July 2011, also has a separate chapter covering public procurement. Likewise as the FTAs with Chile and Mexico this agreement also refers to the GPA. But unlike Chile and Mexico, South Korea is a party to the GPA. Article 9.1.4 of the agreement state that: ‘for all procurement covered by this chapter the parties shall apply the provisionally agreed revised GPA text’. However, this agreement also goes a bit further than the GPA. The FTA and the GPA are therefore complementing each other

Interestingly enough it can again be seen that yet another EU FTA refers to the terms and conditions of the GPA. Rather than agreeing on separate regimes with the third countries they are just adopting the regime of the GPA. This is understandable as it would be complicated if each agreement had its own provisions on government procurement. As this has been done in all of the three FTAs that have been examined here it must be concluded that the Union seems to be satisfied with the GPA.

2. Economic Partnership Agreements with ACP countries

The African, Caribbean and Pacific (ACP) countries group themselves into seven regions; five in Africa, one in the Caribbean and one in the Pacific. Among the countries we find 39 of the world’s 49 least developed countries.²⁷ Negotiations to conclude Economic Partnership Agreements (EPAs) have taken place with all seven regions. Some EPAs have already been signed, while more are currently still in the negotiation phase.

One of the agreements that have been signed is the CARIFORUM-EU EPA.²⁸ This agreement contains substantial rules on public procurement. This includes some basic principles and minimum transparency rules, which must be respected by procuring entities.²⁹ In particular the EPA aims to facilitate the gradual establishing of a regional procurement framework in the Caribbean region. However, the agreement does contain any provisions on market access. It does therefore not provide for a right of access to public tenders. Hence, when a public entity in an EU Member State wants to tender a

²⁶ Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2010] O.J. L127/1.

²⁷ <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/africa-caribbean-pacific/>> (last visited 26.05.2013).

²⁸ Economic Partnership Agreement, between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, [2008] O.J. L289/1/3.

²⁹ *Ibid.*, Articles 167 and 168.

public contract, operators established in a CARIFORUM country cannot claim a right to take part in that procurement on the basis of the EPA.

From the basis of the EU-CARIFORUM Agreement it can be assumed that the ACP EPAs will not contain provisions granting market access. This is, however, rather logical. It is not very likely that states with an underdeveloped economy, such as the APC countries, will have many operators that are able to compete on the EU procurement market. In general these operators will not have the financial and technical resources that are required in order to carry out complicated contracts. Furthermore, it is unlikely that they will compete for contracts which are regarded as being of low value. This is due to the geographical location of the countries. Neither is it likely that these countries will have well-functioning procurement systems. The primary aims of the EPAs will therefore rather be to establish this. As was seen in the CARIFORUM-EU EPA the provisions covering public procurement seeks to establish fair and satisfactory practices in public tendering. This will be done by guaranteeing that the transparency obligations are convenient and in line with CARIFORUM's development constraints.

The CARIFORUM-EU EPA is the only agreement that has been concluded between the EU and an entire ACP region. As mentioned above negotiations are ongoing to reach agreements with the six other regions. However, EPAs have been concluded with certain other ACP countries as well. From the basis of the CARIFORUM agreement it seems rather doubtful that the other regional agreements will have provisions dealing with market access. It is unlikely that these countries have well-functioning procurement systems in place. The priority should therefore first be to establish this. Neither will they have many operators that are technically and financially capable of competing on the EU market. It therefore seems rather pointless to include provisions on market access. Such provisions would most likely be more beneficial for the EU, who would be granted access to new markets in the ACP countries, than the other way around.

3. The European Economic Area

The European Economic Area (EEA) consists of the 27 EU Member States along with Iceland, Liechtenstein and Norway.³⁰ The articles of the EEA Agreement are

³⁰ Agreement on the European Economic Area, [1994] O.J. L1/3 (the EEA Agreement), as amended by Agreement between the European Union, Iceland, Liechtenstein and Norway on an EEA Financial Mechanism for the period 2009 – 2014, [2010] O.J. L291/9.

for the most a reflection of the articles of the TFEU that deal with the internal market. The aim of the Agreement is the promotion and strengthening of trade and economic relations between its members. This is something that is stated in its first Article. The main parts of the Agreement cover free movement of goods, services, persons and capital³¹. In this way the three non-EU members of the EEA can participate on the internal market without being members of the Union. Hence, they can enjoy free trade with the EU. They will thereby be bound by and have to adopt EU legislation concerning these matters.

Article 65 of the Agreement sets out: ‘Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.’ This article read together with Annex XVI requires Iceland, Liechtenstein and Norway to apply EU’s public procurement regime. Hence, the three countries will be bound by the Public Procurement Directives and decisions of the Court concerning their application. This allows operators located in the EEA countries to participate on the EU’s public procurement market according to the same terms and conditions as operators located in one of the Union Member States. This is rather logical as these three countries are located in Europe and already have a close relationship with the Union and its Member States. It will therefore be beneficial for all parties to open up their markets and allow for more competition.

4. The WTO Agreement on Government Procurement

The EU has a central role in the development of international procurement law. The reasons for this is that there is a lack of other regulatory systems within this field, and because the Union can establish a consensus with the US before forming international rules. They can therefore promote its already well-functioning system on the international scene.³² It is therefore no surprise that the EU was one of the leading forces behind the negotiation and eventually adoption of the WTO Agreement on Government Procurement. Neither is it a surprise that the principles of transparency and non-discrimination have a central place in the Agreement. Between the parties to the agreement the principles of Most Favoured Nation (MFN) treatment and national treatment apply.

³¹ *Ibid.*, Article 1(2).

³² M. Blauburger and R. U. Krämer, ‘European Competition vs. Global Competitiveness Transferring EU Rules on State Aid and Public Procurement Beyond Europe’, *Journal of Industry Competition and Trade* vol. 13, issue 1, (2013), p. 184.

The GPA aims to extend the principles of openness, transparency and non-discrimination to public procurement markets. Reached during the Uruguay Round of the General Agreement of Tariffs and Trade in 1994, the Agreement is a plurilateral instrument which only applies between those parties that have signed it. The first version of the Agreement entered into force in January 1996. The Agreement currently has 42 parties, among these are the EU, and therefore also its 27 member states, the US, Japan and South Korea.³³ Mutual for the great majority of the signatories are that they have a developed economy.

Several more countries have observer status; this also includes quite a few developing nations, like, for instance, Argentina, India, Malaysia, Turkey or Viet Nam. It can be assumed that some of these countries will become full members of the Agreement in the future. This will, however, be subject to extensive negotiations.³⁴

4.1. Revision

In late 2011 an agreement was reached on the content of a re-negotiated version of the GPA. The revised version is built on the same principles and contains the same elements as the previous Agreement. However, several significant improvements have been made. This has simplified the structure of the Agreement, modernized its text and improved the quality of the drafting. The overall result is a more user-friendly Agreement.³⁵

As it was seen above developing countries have been reluctant to join the GPA. In order to make it more attractive for such countries the article on special and differential treatment is improved.³⁶ Under the new article transitional measures are to be designed in order to meet the specific needs of each accession candidate. This is subject to the current parties' Agreement, and may be complemented by shared derogations from the current parties' coverage in order to uphold a suitable balance of opportunities under the Agreement. This means that new signatories to the Agreement can get access to foreign markets while they still have protectionist measures in force, at least for a limited period. It is clear that this represents an advantage for developing countries that desire to join the agreement. They can carry out bilateral negotiations

³³ For a list of all signatories to the GPA see:

<http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties> (last visited 18.05.13).

³⁴ So far, Albania, the People's Republic of China, Georgia, Jordan, the Kyrgyz Republic, Moldova, New Zealand, Oman, Panama and Ukraine have started negotiations for future accession to the GPA.

³⁵ de Lima and Silva, 'The Revision of the WTO Agreement on Government Procurement: to what Extent Might it Contribute to the Expansion of Current Membership?' *Public Procurement Law Review* Issue 2, (2008), p. 81.

³⁶ GPA, Article V: Special and Differential Treatment for Developing Countries.

with the other parties to the Agreement and therefore acquire benefits which they otherwise would not obtain.³⁷

4.2. Market Access in the Revised Version

A) Principle of Non-Discrimination

One of the core aims behind the revision was to eliminate discriminatory practices and measures in the agreement. This principle of non-discrimination can be found in Article III. In respect of the procurement covered by the GPA, parties are obliged to treat the products, services and suppliers from other parties in a manner that is ‘no less favourable’ than what they give to their domestic products, services and suppliers. Furthermore, discrimination of products, service and suppliers of other members to the agreement is not allowed. Lastly, parties must make sure that its entities do not treat domestic suppliers in a different manner on the basis of a larger or smaller degree of foreign ownership or connection. They must also ensure that their entities do not discriminate against domestic suppliers for the reason that their goods or services originates from another party to the Agreement.

These rules ensure that products, services and suppliers from outside the Union will be treated in the same manner as products, services and suppliers from inside the Union. This is indeed important when the EU is opening up its procurement market to third countries, as it provides for a legal safeguard against discrimination.

However, even though non-discrimination is a core element of the GPA the exclusion from the principles of MFN and national treatment is still allowed in the parties annexes. As the annexes are an integral part of the Agreement everything included here must be complied with.³⁸ In this way parties may exclude certain entities or types of contract from the scope of the GPA.³⁹

B) Public Entities

Article I of the Agreement sets out its scope and coverage. Paragraph 1 of the Article states that it shall apply to ‘any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement’. The scope and coverage is further specified in Appendix I of the Agreement. The Appendix contains annexes for all parties which further identify the public entities that shall procure according to the

³⁷ de Lima and Silva, ‘The Revision of the WTO Agreement on Government Procurement: to what Extent Might it Contribute to the Expansion of Current Membership?’ p. 83.

³⁸ GPA, Article XXIV.

³⁹ Appendix I also includes general notes. These notes contain derogations from the provisions of Article III of Appendix I. The Union’s general note sets out 12 different derogations.

provisions of the Agreement. The GPA does therefore not automatically apply to all government procurement of the parties. Entities which are not mentioned in the Appendix will not have to follow the procedures of the GPA. The parties to the agreement may thereby limit its coverage by not making it applicable to certain entities. This approach has not been taken by the EU.

The EU's Annexes 1, 2 and 3 contain an extensive list of all government entities which shall procure in accordance with the provisions of the GPA. The list includes EU institutions as well as contracting authorities of the 28 EU Member States, both at the national, regional and local level. More precisely, Annex 2 stipulates that contracting authorities of the regional or local public authorities and bodies governed by public law as defined in Directive 93/37 also shall be regarded as entities that must procure in accordance with the provisions of the agreement.⁴⁰ Hence, it follows the approach taken by the Public Sector Directive. All bodies that fulfil the three cumulative requirements set out in that Directive will be regarded as bodies governed by public law.

The third Annex contains all other entities that must procure according to the Agreement. It sets out that public authorities and public undertakings which come under the scope of Article 2 of the former Utilities Directive will be regarded as entities that must procure according to the provisions of the GPA, provided that they have as one of their activities either one of the following: '(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water or the supply of drinking water to such networks; (b) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks; (c) the provision of airport or other terminal facilities to carriers by air; (d) the provision of maritime or inland port or other terminal facilities to carriers by sea or inland waterway; (e) the operation of networks providing a service to the public in the field of urban transport by railway, automated systems, tramway, trolley bus, bus or cable in accordance with Directive 93/38/EEC'.⁴¹

C) Thresholds

Annexes 1, 2, and 3 of Appendix 1 also sets out the thresholds that apply to the different categories of entities. The thresholds are expressed in Special Drawing Rights

⁴⁰ Council Directive 93/37/EEC, [1993], OJ. L199/54. The definition of «bodies governed by public law» is the same in this Directive as it is in the Public Sector Directive.

⁴¹ GPA, Appendix I, European Union Annex 3.

(SDR's). However, all parties are obliged to update information on their coverage thresholds in national currencies on a regular basis. According to the latest update by the EU one SDR equals one Euro⁴². The three Annexes operate with different thresholds. However, for construction services it is always 5 million €. Under Annex I the thresholds are 130,000 € for goods and services other than construction services, under Annex II it is 200,000 € and under Annex III it is 400,000 €.

D) Goods and Services

In principal all goods will be covered by the Agreement⁴³. Services and construction services are on the other hand specified in Annexes 4 and 5. All services that are not listed here will fall outside the scope of the Agreement. In those situations entities will not have to procure according to the provisions of the GPA. Contracting authorities may thereby restrict third country access to the EU market.

IV. Access to government procurement in the United States: a comparison with the EU paradigm

The Gross Domestic Product (GDP) of both the United States of America (US) and the European Union (EU) constitutes about the 40% of the world GDP, and the combined trade of both the US and the EU constitutes the 47% of world trade.⁴⁴ The trade flow between both sides of the Atlantic was around 636 billion USD in 2011.⁴⁵ Access to US public procurement markets is one of the main goals of the ongoing negotiations for a Transatlantic Trade and Investment Partnership, as the European Commission estimates that the companies operating in the field of government procurement represent about a 25% of the EU's GDP and 31 millions jobs.⁴⁶ Given the importance of the American public tendering market for European economies, the logical question to ask is how different is the US public procurement market in comparison with its European counterpart.

⁴² Regulation 251/2011, [2011] O.J L67/24. This is applicable for 2012 and 2013.

⁴³ See <http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm> (last visited 29.05.2013).

⁴⁴ Cooper, 'EU-U.S. Economic Ties: Framework, Scope and Magnitude', *Congressional Research Service* (April 2013), available at <<http://www.fas.org/sgp/crs/row/RL30608.pdf>> (last visited 30.05.2013).

⁴⁵ *Top U.S. Trading Partners: Ranked by 2012 U.S. Total Export Value for Goods (in millions of U.S. dollars)*, available at

<http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf>

⁴⁶ *European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership* (February 2013), available at <[http://europa.eu/rapid/press-release MEMO-13-95_en.htm](http://europa.eu/rapid/press-release_MEMO-13-95_en.htm)> (last visited 30.05.2013).

1. General overview to the US public procurement market: a regulatory labyrinth

As in the case of the EU, the structure of the US public procurement market is characterized by the existence of federal, state and local governments, each one with its own procedure and legislation regarding public tendering. The complexity of the US public procurement model relies on its decentralized model of government procurement; federal legislation regarding public procurement only applies to the federal level, while state and local governments have its own public procurement law. Consequently, on the contrary to the situation in EU public procurement law, in which the Directives 2004/17/EC and 2004/18/EC are the tools for harmonization of European public procurement law, American public procurement law has not been yet harmonized by comprehensive legislation passed by the federal Congress. However, there is still room for harmonization since government contracts are governed by the Uniform Commercial Code. For the Executive branch of the federal government, the main legal instruments regulating the public procurement processes are the Armed Services Procurement Act and the Federal Property and Administrative Services Act of 1949. Additionally, the overall regulations issued by different regulatory executive agencies have been codified in the Federal Acquisitions Regulation.

The structure of the federal tendering system is fragmented regarding the role of the different actors involved in the whole process.⁴⁷ The United States Congress has an important role on the development of public procurement policies, the adoption of regulations on the issue and also constitutes a monitoring power in order to oversee the federal tendering process. The powers given to the Congress, along with the judicial review on the hands of the federal judiciary, are consequent with the idea of limiting the action of the Executive branch of the government. Thus, the Congress has delivered the main supervisory tasks to various committees and to the General Accounting Office, acting as an audit body within the Legislative branch. On the side of the federal Administration, a wide network of independent agencies and boards is responsible for setting the requirements for government procurement, under the assistance of the General Services Administration.

⁴⁷ David Drabkin & Khi V. Thai, "U.S. Federal Government Procurement: Structure, Process and Current Issues", *International Purchasing and Supply Education and Research Association's Comparative Public Procurement Cases Workshop*, Budapest, Hungary (April 10-12, 2003), p.8.

This fragmentation of the US public procurement market is translated into the convergence of numerous federal regulatory and non-regulatory executive agencies into one single procurement project, which in some cases even comprises the participation of state and local authorities. The complexity of the American government procurement market not only rests on the involvement of several governmental agencies and bodies, but also on the willing of policy makers to use public procurement legislation for achieving certain social and economical objectives.⁴⁸ The fragmented nature of the American public tendering market adds more complexity to procurement processes which require a considerable timing, such as, for instance, the construction of an interstate highway.

Time necessity is the main factor which has precipitated some important reforms in the US public procurement system during the 1990s. The lack of time distorts the competition within a public procurement process, as many contractors are unable to meet the time requirements and contracts are awarded at the very end of the fiscal year. To ensure proper competition and effectiveness within public tendering procedures, the federal government has tried to bring together the three independent decisions systems of planning, programming, budgeting and execution into a consistent acquisition management system.⁴⁹ The 1990s also saw the ascent of Internet and the development of E-procurement initiatives which lead to the adoption of the Federal Acquisition Streamlining Act in 1994, triggering the current developments aiming to the simplification and the unification of the government procurement procedures.⁵⁰ Notwithstanding the efforts for harmonization of legislation and unification of procedures, the American public tendering market is still labyrinthine, especially when dealing with public procurement law at the state and local level.

⁴⁸ These social and economical goals are also behind the Green Paper on the modernisation of EU public procurement policy [COM (2011)15 final] released in 2011. With the so called modernisation of the EU public procurement system, the European Commission aims to «to procure goods and services with higher ‘societal’ value in terms of fostering innovation, respecting the environment and fighting climate change, reducing energy consumption, improving employment, public health and social conditions, and promoting equality while improving inclusion of disadvantaged groups» (pp. 33-34). Vid. Fernando Losada Fraga, “The Green Paper on the Modernization of Public Procurement Policy of the EU: Towards a Socially-Concerned Market or Towards a Market-Oriented Society?”, *Oñati Socio-Legal Series*, Vol. 2, No. 4 (February 2012), pp. 73-75.

⁴⁹ David Drabkin & Khi V. Thai, *International Purchasing and Supply Education and Research Association’s Comparative Public Procurement Cases Workshop*, Budapest, Hungary (April 10-12, 2003), p. 10.

⁵⁰ E-procurement initiatives were also one of the outcomes of the modernization of European public procurement law with the implementation of the new Directives 2004/17/EC and 2004/18/EC. Vid. Michael Varney, “E-Procurement—current law and future challenges”, *ERA Forum*, Volume 12, Issue 2 (July 2011), pp. 187-188.

2. Government procurement in the US: between “Buy American” and openness

The US is one of the closest markets to foreign imports in the field of acquisition of goods and services by the public sector. Penetration ratios of public procurement markets show that while the average ratio for the world was 6.3 for the year 2009, the ratio for the US for the same year was 3.7 (the EU-27 ratio was 4.5).⁵¹ In the US public procurement market the biggest contractors of the federal government are companies related to the defence industry. The peculiarity of the US federal tendering system is the enormous weight of the obligations assumed by the Department of Defense, which was calculated to be 359 billion USD for the fiscal year 2012.⁵² The vast majority of the top contractors of the US Department of Defense are American corporations. The dominance of big national military-industrial conglomerates over most of the federal public tendering market has resulted virtually in an oligopoly which prevents the entrance of foreign bidders. For foreign companies willing to offer goods and services in the public procurement market, ‘natural’ barriers such as different language, legal institutions and corporate culture have been exacerbated with measures such as the Berry Amendment or the Buy American Act of 1933, which aims to favour national contractors in public tendering procedures over foreign corporations.⁵³

Nowadays 21 state governments plus the federal government have enacted ‘Buy American’ legislation -not counting the “build in-state” provisions in force in many US states. Such discriminatory measures distort competition and encourage corruption. In order to override the negative effects of ‘Buy American’ regulations, several bilateral and multilateral trade agreements have been signed by the US government, with limited success. This limited success is explained by the fact that the World Trade Organisation (WTO) Agreement on Government Procurement (hereinafter GPA) is not enforceable in all US jurisdictions; therefore sub-national authorities are non-bound by the Agreement unless they comply with it voluntarily. This is due to the fact that the adoption of the GPA does not provide for federal pre-emption of state laws. On this moment, only 37

⁵¹ Messerlin and Miroudot, ‘EU public procurement market: How open are they?’, *Groupe d’Economie Mondiale, Policy Brief* (August 2012), p. 7.

⁵² Jesse Ellman, David Morrow, Gregory Sanders et alii, “U.S. Department of Defense Contract Spending and the Supporting Defense Industrial Base”, *Center for Strategic & International Studies (CSIS)* (September 2012), p.5, available at http://csis.org/files/publication/120914_Berteau_DoDContractSpending_Web2.pdf (last visited 30.05.2013).

⁵³ Kim, ‘Local Politics and International Agreement: The Case of Government Procurement in the U. S. States’, *State Politics & Policy Quarterly*, Vol. 9, No. 1 (Spring, 2009), p. 80.

state governments have signed the GPA.⁵⁴ Among these 37 states complying with the AGP, the share of state procurements covered by the GPA is not uniform. While New Hampshire has subjected almost all its tendering to the GPA, the procurement market of states such as Kansas or Kentucky was only covered by a 70% by the GPA.⁵⁵

In the case of the whole US national market, the GPA took effect on January 1, 1996. The different Annexes of the GPA define the obligations taken by each party; for instance, each party can decide the government entities and the contracts which are under the scope of the AGP, apart from the monetary thresholds which determine the situations that trigger the application of the provisions of the GPA.⁵⁶ Setting aside the study in detail of the Articles of the GPA, the specific commitments for the US are the following.

The US Appendix to the GPA details all the issues related to the obligations assumed by the federal government and its agencies. Annex I deals with the federal executive agencies covered by the GPA, apart from those agencies under the wing of the Judiciary and the Legislature, which are also covered. The sole agencies that remain outside the GPA are the Federal Aviation Administration and the U.S. Agency for International Development, which is under the exception of being subjected to the GPA in case of procurements bound to foreign aid. Annex I establishes the monetary thresholds which provide for the application of the GPA.⁵⁷ Annex I excludes from the scope of application of the GPA some acquisitions of raw materials by the Department of Defense and the Department of Energy. The last disclaimer to the application of the GPA is in compliance with Article XXIII of the same, which provides for the exception of national security.⁵⁸

⁵⁴ See Annex II, U.S. Appendix to the Agreement on Government Procurement, WT/Let/431, 16 October 2012.

⁵⁵ Kim, *State Politics & Policy Quarterly*, Vol. 9, No. 1 (Spring, 2009), p. 82.

⁵⁶ It must be taken into account the Trade Agreements Act of 1979 (TAA) 19 U.S.C. §§ 2501–2581, which provided for the implementation of the Tokyo Round of the General Agreement on Tariffs and Trade. On the one hand, the TAA allows the federal authorities to restrict the acquisition of goods and services for federal contracts. On the other hand, it allows the President of the United States to enact certain waivers to the Buy American Act, specifically when dealing with countries which are part to the WTO AGP.

⁵⁷ The thresholds for the procurement procedures under Annex I for period 2012-2013 are of 202,000 USD for goods and services and of 7,777,000 USD for construction services.

⁵⁸ Article XXIII of the WTO Agreement on Government Procurement: «1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes».

Annex II and Annex III refer respectively to the state agencies and «all other entities» covered by the Agreement with respect to the monetary thresholds.⁵⁹ As noted before, only 37 states are bound by the GPA. The other entities referred in Annex III are Tennessee Valley Authority, the Power Marketing Administrations of the Department of Energy, the Port Authority of New York and New Jersey, the Port of Baltimore, the New York Power Authority, and the Rural Electrification Administration Financing. Annex IV includes a list of services not covered by the GPA, such as transportation and other public utilities, while Annex V provides for coverage of «construction services contracts». Moreover, the General Notes to the US Appendix contain particular restrictions for specific countries, such as Canada, Japan and Korea.⁶⁰

Apart from the GPA, another one of the major international agreement concerning openness of public procurement markets is the North American Free Trade Agreement (NAFTA), which created a trade bloc between the US, Canada and Mexico. Chapter X of NAFTA contains the obligations on public procurement agreed by its parties. Although NAFTA includes the provisions on the field of government procurement adopted within the WTO, it is a very asymmetrical instrument in regard to the relation between the countries involved -US, Canada, Mexico- and the GPA. While the GPA applies to the federal government and to all the provinces of Canada, it is only applied in the US at the federal level and at least in 37 states. Mexico, on the other hand, is not bound by the GPA, but most of its provisions are applied to the procurements in the Mexican market since the NAFTA is in compliance with WTO rules on government procurement. In general terms, the NAFTA not only compiles the GPA provisions, but it expands the coverage of public procurement rules in regard to the principles of non-discrimination and national treatment⁶¹, although maintaining some of the traditional exceptions such as the national security, among others.⁶²

Bilateral agreements between the US and some countries also provide for rules on public procurement. Such is the case of the Free Trade Agreements (FTAs) with Australia, Chile, Colombia (not ratified), Israel, Korea (not ratified), Morocco, Panama, Peru, Singapore and the Dominican Republic-Central America Free Trade Agreement,

⁵⁹ Monetary thresholds for the acquisitions covered in Annex II are of 552,000 USD for goods and services and of 7,777,000 USD for construction services. For the acquisitions under Annex III, monetary thresholds are of 622,000 USD for goods and services and of 7,777,000 USD for construction services.

⁶⁰ U.S. Appendix to the Agreement on Government Procurement, WT/Let/672, 19 March 2010, at Notes 5 to 9.

⁶¹ A. Eliason, R. Howse & M. Trebilcock, *The Regulation of International Trade* (4th edition, Routledge, 2012), p. 298.

⁶² *Vid.* Article 1018 of the North American Free Trade Agreement.

among others. Despite most of the FTAs contain procurement related provisions close to the regulation provided by the GPA, some of them provide for much lower thresholds while others have excluded any sort of national security exceptions.⁶³

V. The modernization of EU public procurement law: the end of naïve openness?

On January 2011, the European Commission issued a *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market* aiming to reform the EU public procurement law through the introduction of socio-economic considerations like, for instance, the promotion of environmentalism and innovation, and the simplification of public tendering, specially for Small and Medium Enterprises (SMEs) and start-ups.⁶⁴ The Green Paper was intended as a public consultation in order to develop further proposals to reform the EU public procurement policy and legislation. On December 2011 the Commission released the new proposals for the *aggiornamento* of the EU procurement law, namely, Directives 2004/17/EC and 2004/18/EC, including a new directive on the award of concession contracts and excluding the overhaul of the Defence and Security Procurement Directive 2009/81/EC.⁶⁵

Aiming to increase competition, the Commission's Proposal to modernize public procurement legislation is aligned with the objectives of the Single Market Act II.⁶⁶ The most significant change that EU public procurement law will experience is the abolitions of the distinction between A and B services in Annex II of the Directive 2004/18/EC, with exceptions for certain "social services".⁶⁷ Probably, at least for the purpose of this paper, the other most striking change that the Commission has released is the Proposal for a Regulation «on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets

⁶³ Tatelman, 'International Government-Procurement Obligations of the United States: An Overview', *Congressional Research Service Reports* (2005), p.15.

⁶⁴ The proposals envisaged in the Green Paper by the Commission aim to orient the EU's public procurement policy to the achievement of the "Europe 2020" strategy. See 'Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market' [COM (2011) 15 final], pp. 33-35.

⁶⁵ Éric Van den Abeele, 'The reform of the EU's public procurement directives: a missed opportunity?', *Working Paper 2012,11, European Trade Union Institute*, p.23.

⁶⁶ Fernando Losada Fraga, *Oñati Socio-Legal Series*, Vol. 2, No. 4 (February 2012), p. 69-71.

⁶⁷ *Vid.* 'Proposal for Directive of the European Parliament and the Council on public procurement' [COM(2011) 896 final], p. 10.

of third countries». Such a proposal shows the willingness of the EU for limiting the conditions of access of foreign bidders to the EU's public procurement market.⁶⁸ For the sake of reciprocity, the Commission argues, the access to public procurement market must be restricted insofar as countries with restricted or virtually closed access for foreign companies do not commit themselves to openness, transparency and non-discrimination principles envisaged in the multilateral rules. Thereby, the Commission pretends to strengthen the position of the EU in the global context in order to gain access to the protected markets of countries such as the Russian Federation, India, the People's Republic of China or Brazil, which have not acceded yet to the GPA.⁶⁹

1. The claims of the Commission: myth or reality?

In matter of public tendering, the arguments of the Commission and some national governments (France, Germany, Italy) is that while the EU is one of the most open markets for government procurement, the US and Japan still maintains barriers to the access of foreign goods and services to the national market of government procurement. The EU is the most liberalized market for public procurement whereas the emerging economies and the majority of nations which are not bound by the GPA constitute a vast set of markets almost closed to foreign access and dominated by protectionism, opacity and corruption.⁷⁰ The claim of the Commission is while at least one 85% of European procurement markets are open for an amount of 352 billion €, only the 32% of the American (178 billion €) and the 28% of Japanese procurement markets are accessible to foreign companies. The Commission also states that «The Chinese public procurement market is potentially open to foreign bidders according to the agreed international thresholds (if they were to sign up to a bilateral agreement or to join the GPA) worth €83 billion (2007 figure) and is growing rapidly. EU companies only manage to access a fraction of that market^{71 72}».

⁶⁸ Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries [COM(2012) 124 final], available at <http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149243.pdf> (last visited 30.05.2013).

⁶⁹ *Ibid*, p. 2-3.

⁷⁰ Vid. Ping Wang, 'China's Accession to the WTO Government Procurement Agreement—Challenges and the way forward', *Journal of International Economic Law* 12(3)(September 2009), p. 671.

⁷¹ 'External public procurement initiative - Frequently Asked Questions', (MEMO/12/201), available at <[http://europa.eu/rapid/press-release MEMO-12-201_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-201_en.htm?locale=en)> (last visited 30.05.2013).

The argument of the openness of the EU's public procurement market as the justification for erecting barriers to foreign acceding business however should be taken with precaution. The data show that the openness ratio in the field of public procurement is lower for both the EU-27 and the US than for other markets integrated in the GPA, as, for instance, the Republic of Korea and the Republic of China (China-Taipei). Even the People's Republic of China has a higher openness ratio than the EU-27.⁷³ Consequently the observation of the empirical data demonstrates that while the EU has an insignificant [con]federal public procurement market, it has 27 small and medium-size public procurement markets, most of them with lower openness ratios than the EU-27⁷⁴ ⁷⁵. Moreover, openness ratio for Germany, France and Italy are lower than for the UK, although the openness ratio by each individual EU country has fallen since 2009 probably due to the stimulus packages granted during the ongoing Eurozone crisis.⁷⁶

Thereby the openness ratios between the Member States of the EU in the procurement markets oscillate considerably. Prior to the adoption of a more restrictive stance on the access of foreign bidders, the debate on openness should be focused over the functioning of the Single Market, in order to achieve reasonable integration between the procurement markets inside the Union. The restriction on foreign access diminishes the incentives for the adoption of further measures aiming to improve the competition within the internal market, despite the *desiderata* of the Single Market Act II. Therefore, the EU procurement market, especially in the national level, must be opened to competition not only for extra-European companies, but also for enterprises incorporated in other Member States. Finally, taking into consideration the comparison between the EU and the rest of the world, the openness ratios of the EU are definitely lower than those of some Asian nations such as the Republic of China-Taiwan or the

⁷² Reuters, 'Europe says China's latest bid to join procurement agreement "highly disappointing"', (6 December 2012), available at <<http://www.reuters.com/article/2012/12/06/us-china-eu-trade-idUSBRE8B50G720121206>> (last visited 30.05.2013).

⁷³ P. A. Messerlin and S. Miroudot, 'Public procurement markets: Where are we?', figure 1, available at <<http://www.voxeu.org/article/public-procurement-markets-where-are-we>> (last visited 30.05.2013).

⁷⁴ We exclude from the EU-27 the Republic of Croatia because the accession of such nation as the 28th Member State of the EU will take effect on July 1, 2013.

⁷⁵ P. A. Messerlin and S. Miroudot, 'EU public procurement markets: How open are they?', *Policy Brief, Groupe d'Economie Mondiale* (August 10, 2012), p.6.

⁷⁶ "All the individual non-EU countries and most EUMS show a marked decline in the openness ratios in 2009. The fall is huge – higher than 10% except for a few cases. This evolution is, at least partly, related to the stimulus packages following the 2007-2008 crisis. Such packages have had a 'domestic bias' either because they have focused on public demand in sectors having relatively low foreign penetration (a mere composition effect) or because they have used procedures discriminating against foreign competitors (a protectionist effect)", P. A. Messerlin and S. Miroudot, *supra*.

Republic of Korea, although some countries such as Russia or Brazil present one of the lowest penetration ratios in procurement markets.⁷⁷

2. Legal aspects: a continental shift from openness to reciprocity

The main objective of the proposed Regulation *on the access of third-country goods and services to the Union's internal market in public procurement* is reducing the openness of the EU's public procurement market and levelling the EU position towards third countries. The suitable tool for achieving these goals is the introduction of a reciprocity condition for companies originating from countries which have barriers in order to hamper the foreign access to their procurement markets. The Utilities Directive, the General Procurement Directive and the Defence Procurement Directive provide for certain restrictions on the access of foreign bidders to the procurement market, although the rules for applying these restrictions for the whole EU law are not clear.^{78 79}

Despite the move forward to reciprocity, the proposed Regulation still maintains a commitment to openness of the EU's procurement market as expressed in the GPA. Restrictiveness takes place if the EU and the third country concerned do not have signed an international agreement intended to open to the same degree the procurement markets of both parties. Thus, the reciprocity approach when restricting the access to the single market should be regarded as an exceptional rule.⁸⁰ In that sense, the text of the Proposal introduces the concept of «substantial reciprocity» which is explained in the Point (16) of the Preamble as the «degree [to what] public procurement laws of the country concerned ensure transparency in line with international standards in the field of public procurement and preclude any discrimination against Union goods, services and economic operators».

Article 1 and Article 2 define the scope of application of the Regulation *ratione materiae et ratione personae*, respectively. Article 1(2) states that the proposed

⁷⁷ P. A. Messerlin & S. Miroudot, *Policy Brief, Groupe d'Economie Mondiale* (August 10, 2012), p. 12-13.

⁷⁸ See Article 58 (2) Directive 2004/17/EC and Recital 19 Directive 2009/81/EC.

⁷⁹ Point (7) of the Preamble to the Proposal for a Regulation [...]: “Directives 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors¹⁰ and 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts¹¹ contain only a few provisions concerning the external dimension of the public procurement policy of the Union, in particular Articles 58 and 59 of Directive 2004/17/EC. These provisions however only have a limited scope and due to a lack of guidance they are not much applied by contracting entities”.

⁸⁰ Point (15) of the Preamble to the Proposal of for a Regulation [...].

Regulation shall apply to all the contracts covered by Directives 2004/17/EC and 2004/18/EC plus the Directive *on the award of concession contracts*.⁸¹ Article 2 provides a list of definitions in relation to the concepts used in the following articles of the Proposal. Article 4 formulates the general rule concerning the access of goods and services from third countries covered by plurilateral or bilateral agreements in which the EU is part; in such case the access of that goods and services shall be based on the principles of non-discrimination and national treatment.⁸² Article 5 establishes the rules of access for goods and services not covered by either plurilateral or bilateral agreements, stating that such goods and services shall be subjected to «restrictive measures» under Articles 6 and 10 if it is to be found a «lack of substantial reciprocity in market opening between the Union and the third country».

Although the general rule continues to be openness in line with the GPA and the bilateral agreements signed by the EU, Article 6 of the Proposal contains the main exception to the general principles as envisaged in Article 4. The exception inserted in Article 6 allows contracting authorities to exclude any bid from a company from a third country not covered by either plurilateral or bilateral agreements. Article 6(1) states that above the threshold of 5 million Euros the contracting authorities may ask the Commission about the convenience of excluding from procedures any foreign bid if «the value of the non-covered goods or services exceeds 50% of the total value of the goods or services constituting the tender, under the following conditions». The following conditions consist of the obligation for contracting authorities to request information from the bidders about «the origin of the goods and/or services contained in the tender, and their value⁸³» and the notification to the Commission by electronic means within the deadline.⁸⁴

Furthermore, Article 6(4) determines the situations in which the Commission can approve an exclusion from the procedures. This number is referred to reservations inserted in an international agreement and to the lack of substantial reciprocity in the national market of the concerned foreign country, when an international agreement has

⁸¹ Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts [COM(2011) 897 final].

⁸² Article 4 of the Proposal for a Regulation [...] reads: “When awarding contracts for the execution of works and/or a work, the supply of goods or the provision of services, contracting authorities/entities shall treat covered goods and services equally to goods and services originating in the European Union. Goods or services originating in least-developed countries listed in Annex I to Regulation (EC) No 732/2008 shall be treated as covered goods and services”.

⁸³ *Ibid.*, Article 6 (2).

⁸⁴ *Ibid.*

not been concluded.⁸⁵ Article 6(6) introduces the right of the bidders concerned to be heard by the Commission prior to the adoption of any restrictive measure.

As a complementary provision to Article 6, Article 7 contains specific rules referred to abnormally low tenders «in which the value of the non-covered goods or services exceeds 50 % of the total value [...] ». In case the contracting authority intends to accept such tender after verifying the explanations of the bidder, the other bidders shall be informed through a writing communication stating «the reasons for the abnormally low character of the price or costs charged»⁸⁶. As a safeguard to the protection of public interest, competition or the interests of the economic operators concerned, this Article allows the contracting authorities to withhold any information release.

The toolbox of the Commission is developed in Articles 8, 9 and 10. These Articles contain all the instruments the Commission can use for levelling the position of the EU in relation to third countries not having substantial reciprocity in their procurement markets. Article 8 allows the Commission to «initiate an external procurement investigation into alleged restrictive procurement measures» under the criteria, such as the substantial reciprocity, indicated in Article 6.⁸⁷ Article 9 is intended to be a tool for pressuring third countries in order to avoid discriminations to European economic operators, goods and services when participating against national competitors. The Commission shall initiate a consultation with the third country to achieve access for European companies in «conditions no less favourable» than those accorded to national tenderers. In case the third country involved has signed a bilateral agreement with the

⁸⁵ *Ibid.*, Article 6(4).: «When adopting implementing acts pursuant to paragraph 3, the Commission shall approve the intended exclusion in the following cases:

(a) if the international agreement concerning market access in the field of public procurement between the Union and the country where the goods and/or services originate contains, for the goods and/or services for which the exclusion is proposed, explicit market access reservations taken by the Union;

(b) where an agreement referred to in point (a) does not exist and the third country maintains restrictive procurement measures leading to a lack of substantial reciprocity in market opening between the Union and the third country concerned.

For the purposes of point (b), a lack of substantial reciprocity is presumed where restrictive procurement measures result in serious and recurring discriminations of Union economic operators, goods and services.

When adopting implementing acts pursuant to paragraph 3, the Commission shall not approve an intended exclusion where it would violate market access commitments entered into by the Union in its international agreements».

⁸⁶ *Ibid.*, Article 12.

⁸⁷ *Ibid.*, Article 8(2).

EU and/or is part of the GPA, the Commission shall use the consultation mechanisms and the dispute settlement procedures set out in the international agreement.⁸⁸

Moreover, Article 10 reads that if both the external procurement investigation of Article 8 and the consultation of Article 9 indicate that the procurement market of a third country has a lack of substantial reciprocity, the Commission is allowed to adopt restrictive measures for the goods and services originating in the concerned country. Article 10 (2) establishes that the measures adopted by the Commission shall consist of «(a) the exclusion of tenders of which more than 50% of the total value is made up of non-covered goods or services originating in the country adopting or maintaining a restrictive procurement practice; and/or (b) a mandatory price penalty on that part of the tender consisting of non-covered goods or services which originate in the country adopting or maintaining a restrictive procurement practice». The scope of such measures could be limited to certain contracting authorities, to certain defined categories of goods and services or to procurement above or within certain defined thresholds.⁸⁹

Nevertheless, these restrictive measures have their limit in the wording of Article 11, which provides for the withdrawal or for the suspension up to one year if the Commission considers that the conditions laid down in Articles 9 and 10 are no longer applicable. In addition, Article 13 provides for exceptions to the restrictive measures envisaged in the preceding Articles in case the contracting authorities and entities consider not to apply the restrictions of the Regulation. The conditions for these exceptions are contained in Article 13(1) and are intended for those situations in which «(a) there are no Union and/or covered goods or services available which meet the requirements of the contracting entity; or (b) application of the measure would lead to a disproportionate increase in the price or costs of the contract».

VI. Conclusions

The Directives 2004/17/EC and 2004/18/EC have modernized the public procurement framework via introducing unified rules for the whole European Union. This new set of rules has achieved greater transparency in the functioning of the procurement markets across the Member States. Uniform procedures and greater openness have added flexibility and have broken down most of the barriers for entering

⁸⁸ *Ibid.*, Article 9(2).

⁸⁹ Article 10(3), *Ibid.*

the EU procurement market. The emphasis put on the competition side of the EU public procurement policies and legislation has been the main driving force of the implementation of the Directives. But this is changing.

For bidders originating from third countries knocking at the gates of the EU's single market in order to participate in the procurement procedures, the state of things in the last years has resulted in their advantage. The spaghetti bowl of Free Trade Agreements, Economic Partnerships, WTO rules *et cetera* has created a worldwide network of obligations for the EU and the Member States which has favoured many foreign countries. But in some cases the trade-off between the EU and third countries has turned in an unfair deal.

The new steps forward for the modernization of the public procurement policy of the EU aims to compensate the competition bias with a new focus on socio-economical goals. In that sense, the proposals for modernization seek the introduction of political objectives related to environmentalism, better access of SMEs or improvements in the field of e-procurement. But the new striking change in the EU policies, at least from the point of view of this paper, is the willingness of the Commission to strengthen the criteria for the access of third countries to the single market.

Inequality in external trade relations is the reason behind the new mood in Brussels regarding the access of third countries to the EU's procurement market. According to the Commission's stance on the issue, the EU needs a toolbox for repairing some breakdowns in the external trade policy. The Union's wrecked economy needs more participation in the share of the big slice of the GDP which constitute procurement markets. This is the main motivation for a change in the policy towards foreign access to the EU's procurement market, from generous openness to strict reciprocity.

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