External public procurement initiative - Frequently Asked Questions

1. What is public procurement?
Public procurement is about how public authorities spend public money when buying goods, works or services on the market. This can range from buying IT equipment, providing water treatment services to building a hospital or a road.
Public procurement rules establish specific procedures to ensure that public purchases are transparent and fair. Solid public procurement rules guarantee sound competition and mean that public authorities get the best value for European taxpayers' money.

2. Why do public procurement rules matter?
Public expenditure makes up a significant part of national economies: 10-25% of GDP. In the EU, the public purchase of goods and services corresponds to 19% of GDP.

The value of tenders advertised across the EU is approximately €420 billion per year (in 2010). This figure represents those purchases which are subject to EU-wide harmonised rules, as they are above the respective thresholds stipulated in the EU public procurement directives. Other contracts are subject to principles of non-discrimination and equal treatment of the EU Treaty.

Public procurement contracts constitute considerable international business opportunities for European companies, in particular in sectors where the EU industry is highly competitive. This stimulates a competitive European industry, creating jobs and sustainable economic growth.

EU companies successfully bid for international procurement contracts in many sectors, including

→ public transport,
→ railway equipment
→ construction services and equipment
→ IT services
→ medical equipment,
→ energy generation
→ water treatment and environment management.
3. What needs to change?
The EU procurement market is one of the most open in the world, but European businesses, while facing competition in the single market, cannot always get equal access to procurement markets outside the EU. Many countries are reluctant to open their procurement markets to international competition. This limits business opportunities for EU companies in these markets.

Furthermore, in the context of the wider economic crisis, some countries have introduced protectionist measures relating to procurement contracts which have hit EU companies. Examples of these measures are Buy America, Buy Brazil, Buy China, domestic preferences in Turkey, Russia, certain States in Australia, etc.

4. What is the European Commission proposing?
The goal of this new policy is to provide the Commission with a tool to engage non-EU countries in negotiations to further open their procurement markets. The policy also responds to European industry's complaints that they face unfair competition from foreign companies in the EU market.

Concretely, the Commission aims to:

- **Set the terms of access to the EU's public procurement market** by companies, goods and services from outside the EU
- **Provide the EU with a tool to increase leverage** when negotiating access to public procurement markets of other trading partners
- **Improve the opportunities for EU businesses to compete** for public procurement contracts outside the European Union;
- **Create a level playing field for public procurement within the European internal market** by ensuring that EU companies and non-EU companies will compete for public contracts on an equal footing.
- **At the same time, the Commission confirms the EU's openness in procurement** and the EU's international commitments under the World Trade Organisation (WTO) Government Procurement Agreement (GPA) and bilateral trade agreements remain unaffected.

**HOW DOES THE EXISTING SITUATION WORK?**

5. What are the existing tools available to the EU to ensure, transparent and non-discriminatory access to procurement abroad?
The EU's efforts to overcome the existing trade barriers are twofold:

- As a party to the WTO Government Procurement Agreement (GPA), the EU actively negotiates with accession candidates, with the view to transforming the GPA into a multilateral Agreement. The political agreement on the revision of the GPA from last December ([IP/11/1556](#)) was indeed a step in right direction.
- Additionally, the EU concludes Free Trade Agreements which include procurement chapters. Such chapters are already included in trade agreements with Mexico, Korea, Switzerland, Colombia, Peru and Chile. The EU is currently negotiating agreements with Canada, Singapore, India, Malaysia and MERCOSUR.

In cases where important trading partners profit from the general openness of the EU but have no intention of offering the same treatment, the EU will - thanks to this initiative - be equipped with a tool to encourage these partners to accede to the GPA or to negotiate a mutually beneficial agreements on procurement.
6. What restrictions can the EU currently impose on bids from third countries?

Currently there are only two specific cases where the EU can be closed to foreign bidders from third countries. They are:

- In the utilities sector (e.g. telecommunications, post, water, energy) - the Utilities Directive (2004/17/EC) contains provisions allowing contracting entities to reject foreign goods, not covered by any EU international commitments from its tender procedures. Additionally, the provisions provide for a preference for European tenders and tenders covered by EU's international obligations, in cases of equivalent offers. In those cases, under existing rules, a tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender. In practice, this possibility has only rarely been used.

- In the area of defence where a recital in the defence procurement directive (2009/81/EC) confirms it is up to Member States to decide whether their contracting authorities can accept bids from third countries or not.

In all other cases, the EU's markets are de facto fully open even when the EU does not have access to a third country's market.

Recently, a number of Member States have started to restrict access to their tenders for procurement not covered by an EU commitment. This is leading to potential fragmentation of the internal market and a potentially legally uncertain situation. It is a further reason why the current situation needs to change.

HOW WILL THE PROPOSAL WORK IN PRACTICE?

7. What is the mechanism to be used?

The proposed instrument will be based on the following elements:

(1) Contracting authorities will be permitted to reject tenders or contracts of an estimated value of €5 million or above and consisting of more than 50% of goods or services not subject to the EU's international procurement commitments. The contracting authorities will need to notify the Commission about their intention to reject them. The Commission will have two months time (which can be prolonged for another two months) to assess the existence of substantial reciprocity in the country in question and whether or not to approve such an exclusion.

Below the threshold, EU markets remain free, and no discrimination against foreign bidders is allowed (de minimis).

(2) In the event of repeated and serious discrimination against European suppliers in other countries, the following mechanism could be used:

At EU level, the Commission will have the power to conduct investigations into possible discriminatory procurement practices in the foreign country concerned and to start consultations with the country concerned to solve those market access problems and to take, if necessary, measures restricting the access to the EU's market. The restrictive measures would be targeted, for example excluding tenders originating in a non-EU country from a particular sector or imposing a price penalty on the non-EU bids.

The combination of the two elements allows us to set conditions for fair competition on the EU procurement market and equips us with a leverage tool for negotiation for more opening of foreign procurement markets.
Additionally, when public authorities intend to accept tenders that are "abnormally low" they should inform the other tenderers of their intention and explain why they accept it, so as to increase the transparency of the procedure. A tender is deemed abnormally low when the price charged to the contracting authorities appears to be too low in relation to the goods or services offered ("an offer that is too good to be true"). If there is full transparency, any abuse of the system is much less likely.

8. How will the Commission decide to exclude certain goods or services from EU procurement bids?

The Commission will base its decision to approve or not the exclusion by a contracting authority/entity of a third country's goods or services or to launch consultations with a third country on the existence of "substantial reciprocity". The Commission would assess this according to the following parameters:

(1) The degree to which 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 EU goods, services and economic operators.

(2) The degree to which public authorities and/or individual procuring entities of the non-EU country maintain or adopt discriminatory practices against EU goods, services and economic operators.

When the assessment shows that EU suppliers, goods or services are subject to serious and persistent discrimination in foreign markets, the Commission will presume that a lack of substantial reciprocity exists in the country concerned.

In practice, not a single good or service can be excluded from procurement without the Commission's approval.

9. How will the nationality of the bidder or the origin of the good/service be determined?

It is only possible to consider excluding third country bidders by the contracting authorities or via the Commission driven mechanism when the treatment of non-EU country goods and services is harmonised throughout the European Union. Common rules will help contracting authorities define whether goods and services from non-EU countries are covered by the international commitments of the EU in the area of public procurement.

For this purpose rules of origin for both goods and services are defined in the draft Regulation as follows:

- **For goods**, their origin will be determined in accordance with the non-preferential rules of the Community Customs Code which lays down legislation applicable for the import and export of goods between the EU and non-EU countries.

- **The origin of services** is based on the origin of service providers, in accordance with the EU Treaties and the WTO General Agreement on Trade in Services that handles the modes of supply for cross-border services: for services provided by a natural person, the origin will be determined by the country of which the person is a national or where the person has a right of permanent residence.

- **For services provided by a legal person** (a company) without a commercial presence within the EU (a branch), the origin will be defined by the country where the legal person is constituted and in the territory in which it is engaged in substantive business operations; for example a service directly offered by a
foreign company (Chinese, American) will be considered foreign (Chinese, American).

- **For services provided by a legal person** with a commercial presence within the EU, the origin will be the Member State where the person is established and in which territory it is engaged in substantive business operations (i.e. it has a direct and effective link with the economy of that Member State). For example: a service offered by an EU subsidiary of a foreign company will be considered as European, as long as the subsidiary has substantive business operations in the EU. This excludes post box companies that would be set up for the purpose of the tender and that otherwise have no business operation in the EU.

**IMPACT OF THE PROPOSAL GLOBALLY**

10. **Is this initiative protectionist?**

No. It is not the EU which has a closed market; it is third countries which have closed markets. The initiative confirms that the EU public procurement market is fundamentally open.

A protectionist approach would suggest the EU was trying to protect its own industries. That is not what we want to do. European companies don’t need protecting but they do need to be able to compete in global markets.

A protectionist policy would also entail closure for closure’s sake. But the new set of measures is designed to help expand business opportunities within the EU and open foreign markets for EU firms. So its ethos is about market opening, not market closing.

11. **Will the EU procurement market now be closed automatically to foreign bidders?**

No. The proposal does not contain any automatic closures of the EU procurement market. The objective of the proposal is not to close down the EU's market to foreign bidders. Any restrictive measure affecting the current openness of the EU's public procurement market will only be adopted, if appropriate, at the last stage of one of the outlined procedures, either at the contracting authority level or following a Commission investigation and consultation with the third country concerned. This means all possible avenues will have been explored to agree mutually beneficial openness with the country in question before any restrictive measure is imposed.

When adopted, restrictive measures will be proportionate to the restrictive procurement practices to which they respond.

They will be targeted vis-à-vis a specific country and could be limited to a particular industrial sector. Restrictions could also consist of, rather than a closure of a part of the EU's procurement market, in subjecting tenders made up of goods or services originating in the country in question to a mandatory price penalty. The price penalty in question would be determined by the Commission.

12. **Is the European Commission targeting any particular country?**

This instrument will create leverage for negotiating further market access and more symmetry and fair treatment for European companies in the EU and third-country public procurement markets. This new policy is therefore aimed at all countries that do not open public procurement markets as much as the EU has to their own suppliers and in which EU companies are regularly subject to serious discriminations.
The answer to question 17 provides facts and figures comparing third-country companies’ access to EU markets with European companies’ access to third-country public procurement markets.

13. Will this initiative affect the EU’s international commitments in the area of procurement?
No. This initiative will have no impact on the procurement that the EU has opened to third-country parties in the framework of the WTO Government Procurement Agreement (GPA) or its bilateral/regional trade agreement. The Commission stands by its international commitments.

On the contrary, GPA or trade agreement partners should be reassured as this legislative initiative will clarify the EU’s international commitments. This will eliminate the risks of misinformation or divergent interpretations by contracting authorities.

14. Will this initiative have an impact on the on-going bilateral negotiations with important trading partners?
No, negotiations to include comprehensive public procurement chapters (both in terms of procedural rules and market access commitments) will continue and will not be impacted by the adoption of this new policy.

15. Is there not a risk that other trading partners will retaliate by adopting similar measures?
This is not a protectionist policy from the EU.

It is compliant with the EU's international procurement commitments and its objective is not to affect the current level of access to the EU's public procurement market by our trading partners. The EU is simply giving itself the possibility of using powers it already has, and which are used already by its main trading partners.

16. Will this initiative have an impact on trade with the least-developed countries (LDCs)?
No. In light of the EU's overall policy with regard to LDCs, the draft Regulation proposes to treat goods and services from these countries as EU goods and services.

COSTS AND BENEFITS OF THIS PROPOSAL

17. What are the costs and benefits of this proposal?

- Procurement markets represent a substantial part of the EU's and other trading partners' economies.
  - In most countries, total government spending accounts for 15-20% of GDP.
  - In the EU, total government spending amounts to around 19% of GDP.
- In theory, European companies could access up to €1,000 billion worldwide procurement per year.
• However - **not all public procurement is open to foreign bidders**: there are agreed international thresholds which determine public procurement which can be opened to foreign competition.

• In line with this, the figure for the public procurement market potentially open to foreign bidders in the **United States is €556.25 billion and in Japan €96.4 billion** (2007 figures).

• For the EU, the equivalent value of tenders advertised across the EU is approximately **€420 billion per year** (2010 figures). This figure represents those purchases which are subject to EU-wide harmonised rules, as they are above the respective thresholds stipulated in the EU public procurement directives, which are the same thresholds as the agreed international thresholds

• Currently, (under the 1994 GPA), **€352 billion of the €420 billion EU public procurement is open to bidders** from member countries of the WTO Agreement on government procurement (GPA) making the EU the most open trading partner in the world. **Nearly 85% of the EU's public procurement market is open.**

• This contrasts with the situation in many third countries who are reluctant to open their procurement markets to international competition or to open those markets further than what they have already done: the value of **US procurement offered to foreign bidders is currently just €178 billion** of the €556.25 billion **(i.e. only 32% of its market is open)** and **€27 billion** of the €96.4 billion **(i.e. only 28% of its market is open)** for Japan.

• The EU’s public procurement market is therefore potentially open.

• China is a different case as it has not signed up to any international agreement. 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.

• Because of the restrictions applied worldwide and the fact that most public procurement still remains national, only **€10 billion of EU exports (0.08% of EU GDP)** currently find their way in global procurement markets, whereas an estimated **€12 billion of further (additional) EU exports remain unrealised due to restrictions.**

• The EU is the biggest exporter in the world and we benefit from free and fair trade around the world. **More than 20 million jobs are dependant on Europe’s exports and trade** is an essential element in the economic recovery.

18. **Will this initiative create red tape?**

No, if a contracting authority wants to use the option of rejecting tenders or contracts from third country suppliers, it can do so only for cases with an estimated value of €5 million or above. The objective of this threshold is to ensure only big projects are captured by these provisions.
Furthermore, contracting authorities who wish to restrict bids which include foreign goods or services will simply need to signal this intention in the contract notice which they must in any case publish, in line with existing EU Public Procurement Directives.

If the contracting authority receives bids that that could be subject to an exclusion, they can then decide to notify the Commission of their intention to exclude a particular tender offer. There is no obligation to go down the exclusion route: it is a decision for the contracting authority.

So that administrative burdens are reduced as much as possible for the contracting authorities if they choose the exclusion route, standard forms will be used for the notifications and all correspondence will be done by electronic means.

19. What happens next?
The proposal for a Regulation will now be passed to the Council and the European Parliament and adopted following the ordinary legislative procedure. It requires qualified majority voting in the Council.

The Commission hopes that the proposal could come into effect in the second half of 2013.

For more information
On trade policy relating to procurement:
http://ec.europa.eu/trade/creating-opportunities/trade-topics/public-procurement/

On internal market policy relating to procurement
http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/international_access/index_en.htm