



## EU - US TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

# Public Procurement

*Initial EU position paper*

*Without Prejudice*

### 1. Preliminary remarks

In this initial process, the EU would like to emphasize the particular weight to be given to the understanding reached in the context of the High Level Working Group on Jobs and Growth with a view to achieving the goal of enhancing business opportunities through substantially improved access to government procurement opportunities at all levels of government on the basis of national treatment.

It is of utmost importance to make sure that both rules and market access issues are thoroughly dealt with in the course of the negotiations, with a view to reach as substantial result bilaterally as possible.

This approach does not preclude that the Parties would discuss issues in the course of the negotiations that prove relevant for the overall objective of further global liberalisation of trade in procurement.

First section: Substantive approach proposed by the EU

### 2. Overall architecture and scope of application of the PP chapter

#### 2.1 Text structure

This negotiation would present an important opportunity for the EU and the U.S. to develop together some useful “**GPA plus**” elements to complement the revised GPA disciplines, with a view **to improve bilaterally the regulatory disciplines**. A model text agreed between the EU and the U.S., being the two largest trading partners in the world, could thus possibly **set a higher standard that could inspire a future GPA revision** and where appropriate serve as a basis for the works conducted under the work program outlined in the WTO GP committee’s decisions adopted on the 31<sup>st</sup> of March 2012. Beside this aspect the main focus of these negotiations will be to ensure better market access terms for EU and U.S. companies.

**Two drafting options** could be considered for the text of the PP Chapter:

- A PP Chapter comprising only “GPA plus” rules but which will incorporate the revised GPA text by reference, or
- A PP Chapter directly taking over the revised GPA text, including the amendments required to achieve the “GPA plus” outcome targeted.

The extent to which improved rules compared to the revised GPA text are required, should be an important factor in deciding whether the second option (improved revised GPA text as a whole) would be necessary to bring sufficient clarity and legal certainty to the agreed provisions of the PP Chapter.

It would be useful if the PP Chapter would also **include rules allowing the Parties to take into account possible changes in the GPA disciplines, including**, if appropriate, the outcome of the works conducted under the Work Program outlined in the WTO GP committee’s decisions adopted on the 31<sup>st</sup> of March 2012.

## 2.2 Scope of application

The EU proposes that, to the extent possible, the improved rules negotiated bilaterally would apply to the entire scope of the GPA commitments undertaken by both Parties, as well as to additional market access commitments undertaken under the bilateral FTA, at federal as well as at state level.

## 3. Improved rules to be developed in the PP Chapter

### 3.1 Remedies to address existing trade barriers linked to the existing domestic regulations or domestic practices at central as well as at sub-central levels

The EU would suggest to include the following topics for negotiations – without prejudice to others that may be deemed relevant to address at a later stage:

- Definitions
- Removal of barriers to cross-border procurement and to procurement via established companies
- Consolidate and further improve the level of access to procurement-related information (transparency)

- Alleviate administrative constraints
- Make sure that the practical application of the e-procurement rules in the EU and the U.S. are not creating additional barriers to trade
- Make sure that the size of procurement contract is not used with a view to circumvent the market access commitments under the Chapter
- Ensure that technical specifications do not constitute an artificial barrier to trade
- Provisions relating to qualitative award criteria, qualification procedures and test reports
- The domestic challenge mechanisms

In addition, in certain other areas such as green procurement, rules could be examined and if need be improved.

## 3.2 Coverage-related disciplines

Besides the removal of the notes describing carve-outs in the Parties’ schedules, we would propose to also make adequate provisions on coverage in the text. The EU would suggest to include the following topics for the negotiations for coverage-related disciplines - without prejudice to other topics that may be deemed relevant to address at a later stage:

- Ensure that rules on off-sets/set asides or domestic preferences such as, but not limited to, Buy America(n) and SME policies, do not restrict procurement opportunities between the EU and the U.S.
- Ensure committed coverage at federal level extends to cover also federal funding spent at the State level.
- Ensure the removal of possible discriminatory elements for example related to procurement by public authorities and public benefit corporations with multi-state mandates, interagency acquisitions, task and delivery order and in the field of taxation.

Moreover, discussions on additional elements of coverage, such as state-owned enterprises, public undertakings and private companies with exclusive rights may require the introduction of additional definitions and related rules.

Provisions should also be made for a mechanism for adjustments related to modifications and rectifications to coverage.

### 3.3 Horizontal disciplines

In the EU's views, the PP Chapter should as noted above under 2.2. also include rules allowing the Parties to take into account possible changes in the GPA disciplines.

## 4. Market Access discussions

### 4.1 Scope of market access discussions

#### *Improvement of GPA market access schedules*

Both Parties have accepted to enter into discussions affecting all the elements of their schedules at central as well as sub-central levels.

This implies that the negotiations should look for an expansion of coverage, to the extent possible, for all these schedules, by the removal of existing carve-out and by the offer of additional commitments.

In concrete terms, Parties should seek to improve access to and/or expand the coverage of:

- Central Government entities
- Sub-central entities
- Other entities with a view to specific sectors\*
- Services
- Construction services
- Information society services, in particular cloud-based services

*\*including market access negotiations on transit/railways, urban railways and urban transport.*

**The EU suggests - without prejudice - that the discussions on coverage would explore possible inclusion of:**

For **Annex 1**, all central government entities and any other central public entities, including subordinated entities of central government.

For **Annex 2**, all sub-central government entities, including those operating at the local, regional or municipal level as well as any other entities

whose procurement policies are substantially controlled by, dependent on, or influenced by sub-central, regional or local government and which are engaged in non-commercial or non-industrial activities.

For **Annex 3**, all entities governed by public law, state owned companies and similar operating in particular in the field of utilities.

The elements required are here presented in the form of positive lists, but for the actual commitment the EU expects this to be done in the form of negative lists. It would also include procurement currently subject to restrictions related to domestic preferences programmes for example linked to federal funding or procurement pursuant to multi-jurisdictional agreement.

**For the US system this would imply:**

#### **Annex 1**

This would include entities not yet covered. It would also cover procurement currently subject to restrictions or domestic preferences related to federal funding as well as procurement regulated by specific policies and rules, such as those related to Buy America(n) provisions as well as those related to SMEs. The coverage would follow the projects funded by FAA even if they were channelled to a sub-federal level for actual spending.

#### **Annex 2**

It would concern all states and would imply a substantial expansion of coverage.

#### **Annex 3**

For example entities not yet covered by neither the GPA nor by our bilateral agreement, such as procurement currently subject to restrictions or domestic preferences related to federal funding.

#### **Annex 4**

All related **goods** not yet covered by the GPA or our bilateral agreement.

#### **Annex 5**

All **services** procured by entities listed in Annexes 1 through 3 in the coming EU/US agreement.

#### **Annex 6**

All **construction services** not yet covered by the GPA or our bilateral agreement, including for example transportation services that are incidental to a procurement contract.