

AmCham EU's position on access of non-EU countries to the EU's public procurement market and increasing EU's negotiating leverage

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Introduction

The American Chamber of Commerce to the European Union (AmCham EU) is comprised of global companies with significant investments and workforces in Europe. AmCham EU has continuously supported efforts by the European Commission (Commission) to further open public procurement markets worldwide beyond existing international commitments. In this regard, AmCham EU welcomes the [Commission's proposal](#) for a regulation on the access of third-country goods and services to the EU in public procurement and procedures supporting negotiations on access of EU goods and services to the public procurement markets of third countries (COM(2012) 124 final).

General comments

In the current economic downturn, AmCham EU has noted with concern the increasing recourse to protectionism. Amongst other protectionist tools, governments around the world increasingly misuse public procurement to promote national industrial policies or impose local sourcing requirements. AmCham EU agrees that there is a need to equip the EU with a new tool to combat this trend and that enables the EU to open markets closed to its manufacturers today. We also agree that this goal is most comprehensively achieved via negotiation of additional disciplines and market access commitments.

As a general remark, AmCham EU would like to highlight that such a new system, provided that it is properly drafted and implemented, could create a level playing field, strengthen the competitiveness of European industry and enhance procurement markets globally. Conversely, any legislative initiative should be neither a tool for economic protectionism nor for sidestepping the WTO dispute settlement process.

As a matter of principle, AmCham EU welcomes any initiative that contributes to opening up procurement markets, allows manufacturers to compete on the merits and for contracting authorities to get best value for money, fight protectionism worldwide and effectively help bring governments back to the negotiating table. Although we see the merits of equipping the EU with a new instrument to promote free trade and open public markets, AmCham EU is very concerned by some aspects of the Commission proposal for a European public procurement instrument. We think that there is a need for additional guarantees or clarifications to make sure that the proposed tool is used in a targeted fashion to open third-country markets and not to serve protectionist goals to the detriment of the European taxpayer and the European economy.

Additional guarantees and clarifications on goal of the proposal

AmCham EU applauds the approach that the Commission has chosen as a starting point of this proposal; namely, to *a priori* keep the EU market open for

all contracts (with an estimated value of less than five million euro) and to possibly limit access to specific markets on a case-by-case basis after due investigation. This is by far the preferred option to an *a priori* closure of the EU market. However, AmCham EU believes that there is a need for additional guarantees or clarifications to ensure that the proposed tool is used to open third-country markets and not to serve protectionist goals.

AmCham EU's concerns relate to the two key aspects of the proposal, namely the specific (case-by-case) exclusion of tenders comprising non-covered goods and services (Article 6) and the general exclusion of non-covered goods and services from the EU public procurement markets (Articles 8 to 11). We deal with each of these two aspects in turn below.

Concerns related to Article 6 exclusions

AmCham EU's concerns related to Article 6 are as follows:

1. Automatic and discriminatory exclusion of certain tenders or suppliers from countries which have negotiated public procurement agreements with the EU;
2. The meaning of 'lack of substantial reciprocity' needs to be clarified;
3. Empowerment of contracting authorities/entities in the absence of clear criteria on when to seek specific exclusions potentially leading to heterogeneous application of the proposed tool; and
4. Additional layer of bureaucracy in an already complex area of law, delaying procurement procedures, creating uncertainty and new legal risks in a litigious field and ultimately increasing bid costs for both the public and private sectors.

Automatic exclusion of certain tenders or suppliers

Under Article 6.4, the Commission 'shall approve' the exclusion of contracts when the goods and services concerned are subject to a market access reservation under the EU international agreements on public procurement. This leads to the automatic *a priori* exclusion of a wide range of contracts in strategic sectors such as water, airports and urban transport without any prior EU enquiry to establish the existence of a lack of reciprocity. If the proposal is adopted in its current form, it would lead to grave consequences.

- This process would amount to clear discrimination against countries (like the US) that have negotiated public procurement agreements with the EU. Countries which have no public procurement agreement with the EU would receive preferential treatment since they would not be subject to automatic exclusion but would benefit from a full enquiry and a proper verification of the existence of a lack of reciprocity.
- The reservations that the EU has proposed are broadly written and absent a clear definition of their scope a major problem of legal uncertainty arises.

As a general principle, the EU must establish first the effective lack of substantial reciprocity before possibly deciding to close its public markets; the fact that the EU has taken a reservation by no means proves that there is in reality a lack of reciprocity affecting EU's business. Accordingly, AmCham EU considers that Article 6.4 should be amended to make it clear that the Commission shall only approve an intended exclusion when there is a substantial lack of reciprocity in market opening between the EU and the third country concerned, by reference to the criteria laid down in Article 6.5 (as suitably developed – see below). Article 6.4 may then indicate that, subject to the assessment to be made under Article 6.5, a lack of substantial reciprocity may be found to exist where (a) an existing international agreement contains explicit market access reservations; and (b) the third country concerned maintains restrictive procurement measures.

The meaning of 'lack of substantial reciprocity' needs to be clarified

The meaning of the key notion of 'lack of substantial reciprocity' is unclear. Article 6 does not lay down a proper definition of this notion. Rather, the proposal deals with the meaning of this notion in two separate ways: (a) the second sub-paragraph of Article 6.4 lays down a situation in which a lack of substantial reciprocity is presumed to exist (where restrictive procurement measures result in serious and recurring discriminations – whatever this may mean); and (b) Article 6.5 lays down criteria for when a lack of substantial reciprocity may be found to exist. The relationship between these two sub-sections of Article 6 is unclear. In particular, when is the Commission required to consider the criteria laid down under Article 6.5? Is this only when there is no presumption by application of the second sub-paragraph of Article 6.4? In that case, the circumstances in which the presumption applies need to be clarified.

AmCham EU considers that there should be no presumption of lack of substantial reciprocity, but rather that all applications made under Article 6 should be assessed in light of identical criteria, as laid down under Article 6.5.

Further, as they stand, the criteria laid down under Article 6.5 clearly leave much discretion to the Commission and create legal uncertainty for companies. They could lead to non-targeted and disproportionate exclusions or countermeasures.

AmCham EU is in favour of targeted measures whereby the Commission would clearly identify any problematic sectors outside of the EU and applies targeted sanctions to encourage these markets to be opened up. Accordingly, the criteria laid down under Article 6.5 should be developed, specified and clarified to ensure that any exclusion adopted under Article 6 is targeted and proportionate. In particular, these criteria should be developed to require a sector-specific assessment of the existence of restrictive measures leading to a sector-specific lack of substantial reciprocity.

Such an approach had been adopted in relation to general exclusions under Article 10.3 and should be extended to the approval of specific exclusions under Article 6.

Finally, Article 6 should make it clear that any decision to approve a specific exclusion should be proportionate to the restrictive measure it is intended to address and the objective of opening up that country's procurement market.

Empowerment of contracting authorities/entities and respect of due process

AmCham EU is concerned with the procedure for contracting authorities/entities, as described in Article 6 of the proposed legislation. This article gives too much power to local contracting authorities/entities, without giving clear criteria on which exclusion and admission of third-country contracts should be decided upon. The absence of clear criteria on when to seek a specific exclusion is also likely to lead to the heterogeneous application of the proposed instrument.

This is especially worrying because of the lack of a filter at the national level. A decision by a local contracting authority/entity on a bid from a third-country contractor could have a severe impact on the international relations between the EU and that country. There is also a serious mismatch between the two month (extendable to four) 'express procedure' triggered by a decision of a local contracting authority/entity and the procedure followed when the EU initiates the case (Article 8), which can take up to a year.

AmCham EU would like to stress that the process to assess whether a contract, as requested by a local contracting authority/entity, should be informed, transparent, subject to judicial review and respectful of due process. The 'express procedure' does not provide enough guarantees in term of due process, and we have strong doubts as to whether the Commission can seriously establish effective lack of reciprocity in fewer than four months.

In general, Article 6 of the proposal could complicate negotiations and force the EU to rush into making premature decisions instead of encouraging third countries to come back to the negotiating table.

Additional layer of red tape

The proposal would add an extra layer of bureaucracy/red tape to procurement, which is likely to delay the procedure and create new risks in an already contentious area:

- The procedure is liable to be delayed by up to 4 months;
- An exclusion decision is liable to be challenged by the tenderer concerned, and the procedure suspended pending the outcome of that challenge, thus delaying the procurement even further; and
- Excluded tenderers may have incurred significant bids costs by the time they are excluded.

One way of mitigating these issues would be for the contracting authority/entity concerned to indicate the countries that it has in mind when declaring, pursuant to Article 6.2, in the contract notice that it intends to request exclusion of tenders comprising non-covered goods or services.

Concerns related to Article 10 exclusions

In so far as the investigation leading to an Article 10 exclusion refers to the notion of lack of substantial reciprocity (as laid down in Article 6), AmCham EU refers to the comments made above in relation to this article and notion.

As mentioned above, AmCham EU is in favour of targeted measures whereby the Commission would clearly identify any problematic sectors and countries and apply targeted sanctions to encourage the opening up of these markets. While Article 10.3 refers to the possibility to limit the scope of restrictive measures adopted pursuant to this Article, AmCham EU considers that any restrictive measures should be proportionate to the lack of reciprocity identified and that Article 10 should state that explicitly.

State-owned enterprises (SOEs)

AmCham EU regrets that the Commission has not included any specific reference to state-owned enterprises (SOEs). It is disappointing that there are no specific rules or additional disciplines to address SOE participation in EU public tenders. We urge the EU to establish additional disciplines to tackle the specific challenges our companies face when they compete in public markets against SOEs.

Conclusion

AmCham EU welcomes, as a matter of principle, any new trade tool that helps fight protectionism worldwide. With regard to the Commission's proposal to level the playing field for European business in international procurement markets, AmCham EU:

- Believes that there is a need for additional guarantees and/or clarifications to ensure that the proposed tool is used to open third-country markets and not to serve protectionist goals.
- Urges the EU not to *a priori* close its public markets in situations where the EU has taken a reservation in its international commitments. The Commission should first establish that, in reality, there is a lack of reciprocity before deciding to close the EU public market. The fact that there is a reservation in an international agreement by no means is a proof of real lack of reciprocity.
- Is worried by the power given to authorities/entities in Article 6, without giving clear criteria on which exclusion and admission of third-country contracts should be decided upon. This could also seriously damage (ongoing and future) international negotiations with our partners.

- Notes that there exists a lack of due process under the procedure initiated by local procuring entities and a serious mismatch between the two months (extendable to four) that the Commission has to establish evidence and the time frame of negotiations with third countries that can take up to one year.
- Thinks that the criteria laid down to determine the existence of a lack of substantial reciprocity are too vague and need to be developed, clarified and specified.
- Calls for additional provisions to be included to clarify that the EU countermeasures shall be targeted and proportional to the situation they aim to address.
- Regrets that the Commission has not included any specific reference to State Owned Enterprises (SOEs).

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totaled \$2.2 trillion in 2010 and directly supports more than 4.2 million jobs in Europe.

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