

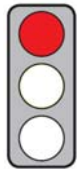
# COMMERCIAL USE OF PUBLIC PROCUREMENT

cep Policy Brief No. 38/2012 of 17 September 2012

## KEY ISSUES

**Objective of the Regulation:** The Commission wishes to improve the access of European providers to public contracts in third countries and therefore extend the right to exclude providers from third countries from public procurement in the EU.

**Parties affected:** Companies, contracting authorities in the EU.



**Pros:** –

**Cons:** (1) Giving contracting authorities the possibility to exclude construction works, goods and services from public procurement is arbitrary and not suitable for improving the negotiating position of the EU.

(2) The risk of giving contracting authorities and the Commission the right to exclude services from third countries is that third countries will respond with protectionist retaliatory measures.

## CONTENT

### Title

**Proposal COM(2012) 124** of 21 March 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 of third countries**

### Brief Summary

#### ► Revision of the public procurement law

In order to revise public procurement, the Commission has proposed three Directives and one Regulation with the following scope:

- COM(2011) 895: Purchase of construction works, goods and services for the water, energy, transport and postal services sectors (Sector Directive; see [CEP Policy Brief](#))
- COM(2011) 896: Other purchase of works, goods and services (general Directive; see [CEP Policy Brief](#))
- COM(2011) 897: Concessions (Concessions Directive)
- COM(2012) 124: Use of public procurement in trade policy (see this CEP Policy Brief)

#### ► Targets

- The Commission wishes to improve the access of European providers to public contracts in third countries. In order to obtain a stronger negotiating position, it should be made possible to restrict access to public contracts in the EU for providers from third countries (Explanation, p. 2, 5 and 6).
- In addition, the Commission wishes to improve the possibilities for contracting authorities from the EU to assess “abnormally” low tenders from third countries (Recital 19).

#### ► Scope

##### – General conditions

- The Regulation applies to the purchase of construction works, goods and services (hereinafter “services”) through “contracting authorities” provided (Art. 1):
  - they are subject to the general Directive [COM(2011) 896], the Sector Directive [COM(2011) 895] or the Concession Directive [COM(2011) 897] and
  - the service is a “non-covered” service from a third country.
- “Contracting authorities” are authorities, public undertakings not having an industrial or commercial character (“bodies governed by public law”) and associations formed by one or more such entities. Public undertakings are undertakings governed by public authorities.

##### – “Covered” and “non-covered” services

- “Covered” services are services from third countries with whom the EU has concluded an agreement regarding the mutual access to public contracts (Art. 2 (1)). They are treated as EU services and are not subject to any access restrictions (Art. 4).

- Covered services means services originating in:
  - Member States from the European Economic Area (EEA, Art. 3 (3)) and
  - a developing country (Art. 4 in conjunction with Annex I of Regulation (EC) No. 732/2008).
- “Non-covered” services are services originating in the remaining third countries (Art. 2 (1) lit. e). They are subject to the Regulation.
- **Third country criteria definition**
  - Construction works or services are deemed originating from a third country if the service provider has its origin in a third country (Art. 3 (2)).
  - A good is deemed originating from a third country if the entire or the last “substantial, economically justified” processing of the good was carried out in a third country (Art. 3 (1) in conjunction with Art. 23 et seqq. Regulation No. 2913/1992).
- ▶ **Exclusion of tenders from third countries upon the request of a contracting authority**
  - A contracting authority may exclude tenders containing non-covered services from third countries from procurement procedures if (Art. 6 (1)):
    - the estimated contract value is at least five million Euros before tax and
    - the value of the non-covered services exceeds 50% of the tender value.
  - The contracting authority must state in its call for tender the intention to exclude such tenders (Art. 6 (2)).
  - Should the contracting authority receive such a tender nevertheless, it must apply to the Commission for exclusion (Art. 6 (2)). The Commission approves the application if (Art. 6 (4) and (5)):
    - it is provided for in an international agreement between the EU and the third country or
    - there is no international agreement between the EU and the third country and providers from the EU have been repeatedly and “seriously” discriminated against in the third country (“lack of substantial reciprocity” in market access).
  - The contracting authority must publish the exclusion of tenders upon awarding the contract (Art. 6 (7)).
  - The Commission may adopt an implementing act that stipulates that services from a certain third country can temporarily not be excluded if that third country is currently negotiating with the EU over easier access to public contracts (Art. 9 (4) in conjunction with Art. 6 (8)).
- ▶ **Exclusion of tenders from a third country on the initiative of the EU Commission, a Member State or an EU provider**
  - The Commission may on its own initiative and on the request of a Member State or an EU provider initiate an investigation if the assumption exists that EU providers are hindered from accessing public contracts in a third country (Art. 8 (1)). Where access restrictions are identified, the Commission may invite the third country to eliminate them and establish the same access conditions for EU providers as for their resident providers (Art. 9 (1)).
  - If this fails (Art. 9 (1)), and if in addition the Commission finds out that the access restrictions are based on a lack of reciprocity, it may “temporarily” impose EU access restrictions on providers from third countries (Art. 10 (1)).
  - In order to restrict access to public contracts in the EU, the Commission may (Art. 10 (2)):
    - exclude tenders if the value of the non-covered services from third countries exceeds 50% of the tender value, or
    - impose a “mandatory price penalty” on that part of the tender consisting of non-covered services from third countries.
  - A contracting authority is not obliged to adhere to an access restriction imposed by the Commission if (Art. 13)
    - there are no other appropriate services or
    - the contract would otherwise be inappropriately expensive.
  - The not taking into account of an access restriction must (Art. 13):
    - be announced before the contract is awarded and the Commission must be notified; and
    - be announced after the contract is awarded and the Commission must be notified.
  - The Commission may end access restrictions by an implementing act or suspend them temporarily if not deemed justified (Art. 11).
- ▶ **Evaluation of abnormally low tenders**
  - An abnormally low tender is [Art. 7 in conjunction with Art. 69 general Directive (s. [CEP Policy Brief](#)) and Art. 79 Sector Directive (s. [CEP Policy Brief](#))] if:
    - the tender is more than 50% lower than the average price of the remaining tenders; and
    - more than 20% lower than the second lowest tender; and
    - at least five tenders have been submitted.
  - A contracting authority may exclude an abnormally low tender – irrespective of whether or not it contains services from third countries – from a procurement procedure if the tenderer cannot prove that the tender is profitable [Art. 69 general Directive, Art. 79 Sector Directive].

- If the contracting authority wishes to approve for public procurement procedure an abnormally low tender that contains non-covered services to the value of more than 50% of the tender value, it must (Art. 7) inform all tenderers why the tender is still profitable for the tenderer. To this end, the tenderer must prove to the contracting authority the profitability of its tender.
- The other tenderers may deliver an opinion as to whether the tenderer concerned will be able to carry out the tender as outlined (Recital 19).

### Key Changes to the Status Quo

- ▶ Rules on the relationships with third countries currently only exist in the existing Sector Directive regarding the covered sectors (Art. 58, 59 Directive 2004/17/EC). The future provisions apply to all sectors of public procurement.
- ▶ New is the possibility of contracting authorities to exclude construction works and services from third countries. The existing Sector Directive only provides for the exclusion of goods.
- ▶ New is the possibility of contracting authorities to exclude a tender only if it exceeds a contract value of 5 million Euros. The provision of the existing Sector Directive did not provide for a threshold.
- ▶ New is the possibility of the Commission to investigate whether access restrictions exist in third countries for EU construction works and goods and, where necessary, impose access restrictions. The existing Sector Directive only provided for such an option in the case of services and single providers.
- ▶ New is the obligation to inform the remaining tenderers where abnormally low tenders are admitted.

### Statement on Subsidiarity by the Commission

Not necessary as the Proposal affects exclusive EU competencies.

### Policy Context

The modernisation of public procurement is one of twelve measures announced in the Single Market Act for promoting growth and confidence [COM(2011) 206]. Following on from a Green Paper [COM(2011) 15; s. [CEP Policy Brief](#)] and a consultation regarding public procurement in commercial policy, the Commission has published the Regulation.

### Legislative Procedure

21 March 2012 Adoption by the Commission

### Options for Influencing the Political Process

Leading Directorate General:	DG Internal Market and Services
Committees of the European:	International Trade (leading), rapporteur N.N.
Committees of the German Bundestag:	Committee for Economy and Technology (leading); Legal Affairs, Committee for economic cooperation and development, Committee for Affairs of the EU
Decision mode in the Council:	Qualified majority (adoption by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

### Formalities

Legal competency:	Art. 207 TFEU (Trading Policy)
Form of legislative competency:	Exclusive competency (Art. 3 (1) lit. e TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

The Commission's aim to improve the access of European providers to public contracts in third countries is focused exclusively on export. However, countries mainly benefit from imports, since import goods are cheaper than their equivalent domestic products and thus there is more pressure on domestic companies to increase efficiency. Therefore, excluding providers from third countries, even if they do not open their markets, generally serves to reduce economic prosperity.

Moreover, it is questionable whether the Commission will actually improve its negotiating position by excluding providers from third countries. Although protectionist measures – despite being economically somewhat doubtful – are a popular means for achieving the opening of other markets, they should only be used, if at all, if a third country adopts new protectionist measures. Using them against long-standing protection is not common practice and therefore threatens to provoke new protectionist retaliatory action by the third country.

**The contracting authority's right to exclude tenders with non-covered services in individual cases** is arbitrary and inaccurate. The announcement is not bound to any approval by the Commission and is possible irrespective of a reciprocity assessment. Therefore, this approach **is not suitable for improving the negotiating position of the Commission. On the contrary, the danger is that the affected third countries respond with new protectionist measures.**

**Particularly problematic is the fact that European contracting authorities can and will misuse an exclusion as a protectionist means** to protect the domestic economy against competition. However, it is the aim of statutory regulation of public procurement to prevent this.

Moreover, such an exclusion can increase the bureaucratic burden for contracting authorities significantly. This holds particularly true where tenders are submitted despite the exclusion announcement so that an application for the exclusion must be made to the Commission, which also has to examine it. Since a contracting authority does not know if it may take into account such a tender until the Commission has approved it, the already long procedure period is further prolonged.

**The Commission's right to exclude services from a single third country from public procurement access in the EU, or to impose a price penalty** if it identifies access restrictions for EU providers in said third country, **is more target-oriented than the wholesale exclusion, which does not differentiate between countries, of all non-covered services through individual contracting authorities. Therefore, it is more suitable for strengthening the Commission's negotiating position. However, here, too, the danger is that instead of removing barriers, a spiral of protectionism is set in motion.**

At least providers from developing countries are treated like those in the EU and therefore cannot be excluded from public procurement. Moreover, all measures proposed by the Commission will make public procurement more expensive, which will lead to higher taxes and less public services: not only could cheaper services from third countries possibly be excluded, but also the already high bureaucratic costs for providers will be further increased. Both will lead to a situation in which less potential providers will submit tenders.

The obligation to inform all other tenderers about the intended approval of an abnormally low tender is not suitable for improving the assessment of economic profitability. It is much more likely that the other tenderers will try to improve the chances of their tender by claiming that the abnormally low tender is related to high risks. Moreover, there is the risk that the business secrets of companies from third countries be disclosed.

## Legal Assessment

### Competency

The rules stipulated under the Regulation are commercial defence measures which are rightly based on Art. 207 TFEU (Common Commercial Policy). In fact, Art. 114 TFEU (Approximation of Laws in the Internal Market) is the legal basis for directives affecting public procurement and therewith the existing rules on relationships with third countries in the Sector Directive 2004/17/EC. However, the Regulation affects only the external dimension of public procurement.

### Subsidiarity

An assessment of subsidiarity is rightly not carried out, as the Regulation is based on an exclusive competency (Art. 5 (3) TEC in conjunction with Art. 3 (1) lit. e TFEU).

### Proportionality

**The contracting authorities right to exclude in individual cases tenders with non-covered services is not suitable for improving the negotiating position of the EU** and is therefore disproportionate, **since the exclusion** is not a targeted response to protectionist measures taken by third countries but **can be initiated arbitrarily.**

The notification of tenderers in the case of abnormally low tenders is not an appropriate means for obtaining a fair evaluation of the profitability of tenders, since tenderers always follow their own interests.

### Compatibility with EU Law

Unproblematic.

### Compatibility with German Law

Unproblematic.

## Conclusion

Giving contracting authorities the possibility to impose in individual cases wholesale exclusion of tenders with non-covered services from public procurement is arbitrary and inappropriate, as it is not suitable for improving the negotiating position of the EU towards third countries. On the contrary, it can even be abused for protectionist purposes. The risk of allowing contracting authorities and the Commission to exclude services from third countries is that third countries will respond with new protectionist retaliatory measures.