

Bruxelles, le 1^{er} août 2011

Answer to the public consultation on an initiative on access of third countries to the EU's public procurement market

Respondent profile

You are (compulsory):

Citizen

Trade union

NGO

Think Thank

Other

Please specify:

Based in Paris and Brussels, *Cercle de l'Industrie* is a forum for dialogue and exchange focused on large industrial companies. It brings together the Chairmen of large businesses in all industrial sectors and policy-makers.

In 2009, member companies of *Cercle de l'Industrie* had a turnover of around 800 billion euros. They employed almost 3 million people.

Cercle de l'Industrie has 30 members : Air France Klm, Air Liquide, Alcatel-Lucent, Alstom, Areva, Arkema, CGG Veritas, Constellium, EADS, EDF, Eramet, France Telecoms, GDF Suez, Lafarge, Legrand, L'Oréal, Michelin, PSA Peugeot Citroën, Publicis Groupe SA, Rhodia, Safran, Saint-Gobain, Sanofi Aventis, SNCF, Technicolor, Total, Valeo, Vallourec, Veolia Environnement, Vivendi.

Your name (or name of the organisation you represent) (compulsory): Cercle de l'Industrie

Your e-mail (compulsory): cercleindustrie@wanadoo.fr

Are you (or your organisation) registered in the Commission's Interest Representative Register? (compulsory)

Yes

No

If yes, please indicate your ID number: 60974102057-03

Your opinion on the initiative

1. Do you agree with the introductory description of the current level of access to the EU public procurement market for goods, services and companies from countries outside the EU?

Yes

No

Don't know

2. Do you agree with the introductory description of the objectives of the initiative?

- clarification of the rules governing access to the EU's public procurement market for goods, services and companies from countries outside the EU,

- strengthening of the position of the EU when negotiating access for EU companies to public procurement markets of countries outside the EU, in order to obtain the (further) opening of our trading partners' public procurement markets). (compulsory)

Yes

No

Don't know

3. Would you support (compulsory):

Option "nothing happens"

Non legislative Option

Legislative option with approach A

Legislative option with approach B

Legislative option with a different approach from A and B

Please give reasons for your choice (optional):

Cercle de l'Industrie considers that a level playing field in public procurement market in third countries is necessary in order to preserve competitiveness and jobs in Europe. For the reasons detailed below (see answer to question 5), the current EU legal framework (Articles 57, 58 and 59 of Directive 2004/17) is not sufficient. Furthermore, *Cercle de l'Industrie* regrets that the EU has not implemented the provisions of the General Procurement Agreement (GPA), including its General Notes and Derogations. There is currently no genuine instrument that requires reciprocity from third countries that impose broad exceptions or discriminatory provisions in their public procurement system.

It appears that a legislative instrument would be the only satisfactory option for *Cercle de l'Industrie* as it will be credible and efficient. This instrument must allow for real restriction of access to EU public procurement markets. It should aim at encouraging third countries to negotiate, with the EU, agreements regarding access to public procurement markets. It should apply not only to the countries that signed the GPA but also to third countries that have not signed any bilateral agreement with the EU. *Cercle de l'Industrie* urges the Commission to guarantee that this legislative instrument will be easily enforceable and uniform across the EU.

Cercle de l'Industrie considers that Approach A (with *ex ante* notification to request a waiver) is the most efficient and effective solution.

4. Are there any other issues affecting the conditions of access to the EU public procurement market for goods, services and companies from countries outside the EU that have not been described and may need to be addressed by this initiative ? (compulsory)

(at most 1 answer)

Yes

No

Don't know

Please indicate the issues (compulsory):

Cercle de l'Industrie highlights the fact that the European Commission's initiative does not consider the issue of state owned enterprises and state aid. The EU state aid policy should fully apply to foreign companies operating in the EU and benefiting from subsidies in their home country.

To *Cercle de l'Industrie*'s opinion, this initiative should also address the issue of abnormally low bids: the case of foreign companies that benefit from protected domestic markets or public subsidies, and that bid with abnormally low costs when exporting, while they impose higher costs on their own domestic markets. The EU should tackle such abnormally low bids, especially by setting clear thresholds.

Cercle de l'Industrie points out to the fact that foreign companies can establish a subsidiary in Europe without any/or very small local production and thus become "European". In order to avoid this situation and even worse the case of "letterbox companies" (with no real activities in the EU), a clear definition of the expected local EU content should be clearly stated. New definitions could include R&D long term presence and "EU added value" such as minimum content thresholds.

5. Do you know the applicable conditions by which companies, goods and services from countries outside the EU can participate in public procurement procedures in the EU? (compulsory) (at most 1 answer).

YES, and I find them clear

YES, but I don't find them clear

NO

If you know them, but do not find them clear, please explain the reasons for this (compulsory):

Cercle de l'Industrie regrets that the legal framework of the Directive 2004/17 is unclear (especially Articles 57, 58 and 59) and that its scope is limited to goods. In addition, *Cercle de l'Industrie* regrets that the provisions are barely used by contracting authorities and that procedural constraint is too cumbersome.

In addition, *Cercle de l'Industrie* insists on the lack of legal clarity on EU's international commitments in terms of public procurement.

Firstly, as the EU has not implemented in domestic law the reciprocity clause of the GPA (stating public procurements in the EU are open to third countries companies insofar as those

countries offer equivalent openness to EU companies), there is no certainty on the possibility for the EU to rely on its General Notes and derogations to the GPA.

Secondly, there is no clear answer to the question as whether companies, goods and services which are from a country not bound by any agreement with the EU, can be excluded from EU public procurement markets.

This situation results in a lack of uniform implementation of the GPA among Member states.

6. Do you think that the rules governing the access to the EU's public procurement market for companies, goods and services originating outside the EU should be modified? (compulsory) (at most 1 answer)

Yes

No

Don't know

If YES, please indicate why you think they should be modified and which direction such a modification should take (compulsory):

See above the reasons to back a legislative instrument with approach A

Cercle de l'Industrie believes that the rules governing access to the EU public procurement are not clear enough. European companies have to meet higher constraints to access certain third country markets, whereas companies from these countries have no similar constraints to meet. The EU has never implemented its General Notes and Derogations of the GPA, with the exceptions taken by GPA's parties. Third countries that have not taken any international commitments are not bound by any obligations. They can therefore limit the access to their public procurement markets, while being able to operate freely in the EU market. Third countries have no interest in giving more access to their public procurement markets, considering that the EU market remains open whatever is the access of EU companies to their domestic market.

Cercle de l'Industrie believes that it is crucial to get a legal instrument with Approach A that is easy, uniform and rapid to put in place. Such instrument could be based partly on existing EU international commitments and it should perfectly reflect the opening of public procurement markets in third countries. For the interest of EU companies, and in order to maintain an EU level playing field for public procurement markets, this instrument has to be European and not national. It will also ensure a European consistency in the bilateral and international negotiations.

Do you agree with the following statements?

7. The openness of the EU's public procurement market supports the procurement of sustainable goods and services (compulsory):

Fully disagree

Disagree

Agree

Fully agree

Don't know

8. *The openness of the EU's public procurement market increases the quality of the tenders (compulsory):*

Fully disagree
Disagree
Agree
Fully agree
Don't know

9. *The openness of the EU's public procurement market decreases the prices in the market (compulsory):*

Fully disagree
Disagree
Agree
Fully agree
Don't know

10. *The openness of the EU's economy in general and its public procurement market in particular helps you doing business in third countries (compulsory):*

Fully disagree
Disagree
Agree
Fully agree
Don't know

11. *The openness of the EU's economy in general and its public procurement market in particular increases competitive pressure and thus promotes greater productivity and innovation (compulsory):*

Fully disagree
Disagree
Agree
Fully agree
Don't know

Do you agree with the following statements?

12. *Competition from third countries in public procurement procedures leads to job losses in your sector (compulsory):*

Fully disagree
Disagree
Agree
Fully agree
Don't know

13. Competition from third countries in public procurement procedures leads to deterioration of social conditions in your sector (compulsory):

Fully disagree
Disagree
Agree
Fully agree
Don't know

14. Competition from third countries in public procurement procedures leads to deterioration of environmental standards in your sector (compulsory):

Fully disagree
Disagree
Agree
Fully agree
Don't know

15. Competition from third countries in public procurement procedures provides useful savings for taxpayers (compulsory):

Fully disagree
Disagree
Agree
Fully agree
Don't know

16. Competition from third countries in EU public procurement procedures undermines the capacity of EU firms to be competitive in terms of price (compulsory):

Fully disagree
Disagree
Agree
Fully agree
Don't know

17. Competition from third countries in EU public procurement procedures undermines the capacity of EU firms to invest in innovation (compulsory):

Fully disagree
Disagree
Agree
Fully agree
Don't know

18. Competition from third countries in public procurement procedures helps to increase the productivity of European firms (optional):

Fully disagree
Disagree
Agree
Fully agree
Don't know

19. Competition from third countries in public procurement procedures is an incentive to increase your R&D budget (compulsory):

Fully disagree

Disagree

Agree

Fully agree

Don't know

20. Should the initiative address any further issues which are of specific importance or concern for SMEs ? (compulsory) (at most 1 answer)

Yes

No

Don't know

If YES, please indicate which issues should be addressed (compulsory):

21. Companies, goods and services from countries outside the EU (choose one option) (compulsory):

Should only have access to the EU public procurement market in so far as European firms, goods and services have an equivalent level of access to the public procurement markets of these third countries.

Should only have access to the EU public procurement markets if this has been agreed in an international agreement concluded by the EU

Should always have access to the public procurement markets in the EU

Don't know

Please give the reasons for your choice keeping in mind the potential advantages and drawbacks of the option selected on the quality of the goods and services provided, the chain of supply, competition in the relevant market; productivity, the environment, employment, labour standards, social protection, public health and safety, investment and overall business strategy, research and development, market structure, the citizen/consumer and administrative burden (compulsory):

Cercle de l'Industrie considers that the current situation - without any reciprocal access - is not economically sustainable for EU companies that bid on third country public procurement markets.

Cercle de l'Industrie notes that there are substantial growth and job potentials in foreign procurement markets for EU companies. It believes that the EU should give incentives to its trading partners to open their public procurement markets to European companies.

22. Companies, goods and services should always have access to the whole of the EU public procurement market if they originate in least developed countries (compulsory)

Yes

No

Don't know

23. If a new EU policy governing access to the EU public procurement market of goods, services and companies from countries outside the EU is introduced, possible restrictions on access should (choose one option):
(compulsory) (at most 1 answer)

- Have a general character and apply to all countries outside the EU and all market sectors which are not covered by international commitments,

- Be imposed only in case of market access problems in specific countries,
- Target only specific market sectors
- Target specific market sectors in case of market access problems in specific countries
- Don't know

Please give the reasons for your choice (compulsory):

See above the reasons to back a legislative instrument with approach A and *ex ante* notification for waivers.

Countries and sectors “not covered by international commitments” mean companies, goods and services originating from a third country that has not signed any agreement with the EU.

24. If a new EU policy governing access to the EU public procurement market of goods, services and companies from countries outside the EU is introduced, possible restrictions on access should take the following form :
(compulsory) (at most 1 answer)

-an exclusion of companies, goods and services originating in countries outside the EU from public contract award procedures,

- the imposition of price penalties,
- other differential treatment for companies, goods or services from countries outside the EU,
- Don't know

Please give the reasons for your choice (compulsory):

No information to provide.

25. If a new EU policy governing access to the EU public procurement market of goods, services and companies from countries outside the EU is introduced, possible restrictions on access should (compulsory) (at most 1 answer):

-be decided at EU level

- be decided by Member States
- be decided by individual contracting entities
- be decided by individual contracting entities on the basis of uniform, EU-wide principles
- be decided by individual contracting entities that have to notify the European Commission
- Don't know

Please give the reasons for your choice (compulsory):

See above the reasons to back a legislative instrument with Approach A and *ex-ante* notification for waivers.

Cercle de l'Industrie believes that the decision to restrict access to EU public procurement markets should be taken at EU level. Every EU procuring entity would then have to abide by it and exclude third countries goods, services and companies not covered by any international commitment. EU legal order would therefore be compulsory and uniformly applied, which should ensure the efficiency and credibility of the instrument. On the contrary, with Approach B, the initiative to exclude third country goods, services and companies would depend, as an option, on procuring entities. This would not be satisfactory as it would lead to different or unbalanced situations throughout the EU.

26. *Should individual contracting entities, when deciding on restrictions of access to the EU public procurement market, be obliged to notify the European Commission before the goods, services and companies are excluded (ex ante notification) so that the Commission can ensure a uniform application throughout the EU? (compulsory) (at most 1 answer):*

Yes

No

Don't know

Please give the reasons for your choice (compulsory):

Cercle de l'Industrie notes that Approach A, with its *ex ante* notification for waivers, is the only way to ensure coherence and flexibility: EU procuring entities would not have to decide on whether to exclude foreign bidders or not, they would only have to comply with EU law. *Ex ante* notification to the Commission would only be made when a procuring entity wants to invite a foreign company to bid (excluded in principle, with possible exceptions under specific circumstances).

27. *Should individual contracting entities, when deciding on restrictions of access to the EU public procurement market, be obliged to notify the European Commission after the award of the procurement contract (ex post notification) so that the Commission can ensure the conformity/legality of the decision taken with international commitments? (compulsory) (at most 1 answer):*

Yes

No

Don't know

Please give the reasons for your choice (compulsory):

Cercle de l'Industrie believes that individual procuring entities should not be in charge of deciding on restricting access to EU public procurement markets. They should abide by what has been decided at EU level regarding what is opened/closed according to EU international commitments. Only an *ex ante* notification would ensure a uniform application of the instrument. *Ex post* notification could lead to uncomfortable situations with third countries.

28. Should the notification procedure reflect that in some situations the EU has established restrictions in current GPA/FTA agreements and that in other situations there is no agreement between the EU and the third country in force? (compulsory) (at most 1 answer):

Yes

No

Don't know

Please give the reasons for your choice (compulsory):

Ex ante notification should only be used when a waiver is requested by a procuring entity to select a bidder from a country which is not covered by any international commitment.

29. Would a lack of substantial reciprocity in the country and sector concerned or an effective restriction under the GPA/FTA between the EU and the third country in question be a valid reason for the Commission to agree to a proposed exclusion under approach B? (compulsory) (at most 1 answer):

Yes

No

Don't know

Please give the reasons for your choice (compulsory):

Cercle de l'Industrie believes that restrictions should be based on whether third country goods, services and companies are covered by international commitments of the EU, or not. Such restrictions should be applied according to Approach A, as explained above, uniformly throughout the EU. Approach B appears as a long term process, difficult to implement. Moreover, it would put the EU in an uncomfortable situation, as the EU would have to assess on a case by case basis the openness of third countries' public procurement markets. On the contrary, Approach A would be a general and effective solution that does not target specifically any country.

30. Should a lack of substantial reciprocity in the country and sector concerned or an effective restriction under the GPA/FTA between the EU and the third country in question be taken into account where the Commission proposes restrictive measures at EU level under approach B? (compulsory) (at most 1 answer):

Yes

No

Don't know

Please give the reasons for your choice (compulsory):

See answer to question 29.

31. In your opinion, should exemptions from possible restrictions on access to the EU public procurement market of goods, services and companies from countries outside the EU be provided for in the legislation? (you can select more than one option) (compulsory)

-in the case of unavailability of the goods or services concerned in the EU

-in case of emergency

-in case of disproportionate costs of EU goods and services

-for companies, goods and services from least developed countries

-other

-Don't know

Other :please specify (optional)

32. With regard to the possible application of market access restrictions, is it relevant to make a distinction between SMEs and other companies? (compulsory) (at most 1 answer):

Yes

No

Don't know

If yes, please explain (optional)

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