

# **Access of non-EU countries to the EU's public procurement market & increasing EU's negotiating leverage**

**Proposed Regulation, adopted by the European Commission (21 March 2012)**

# Economic context

- **Economic and budgetary crisis**
- **The EU's public procurement market is open to third countries (up to 85% in the GPA, in practice even more).** More competition allows us to purchase for the best price.
- But in return, there is a **lack of market access in non-EU countries for EU companies**, goods and services and a **lack of fair competition** in the Internal Market
- Our trading partners do not commit to open their own markets to the same extent and/or **apply restrictive measures** to their public procurement. Emerging economies, with rapidly increasing procurement markets, are also moving towards strong restrictive industrial policies

# (Maximum) openness of public procurement in the world in the GPA 2012: South Korea, Canada, Japan, United-States

South Korea: 65%

Canada: 16%

Japan: 28%

United States: 32%

**European Union: 90%**

# Political and legal context

- Given the EU's de facto openness, **lack of leverage** in international negotiations on procurement
- The **EU legal framework** setting the terms of access for foreign goods and services **is not complete**:
  - Only legal provisions: Article 58 Utilities directive (2004/17/EC): Contracting entities may reject tenders that contain more than 50% foreign (non-covered) goods and Recital 19 in Defence Procurement Directive (2009/81/EC)
  - For the general procurement Directive (2004/18/EC) that stands for over 80% of non-defense related procurement there is no clarification on the regime to be applied
    - For example: Although the EU negotiated internationally numerous reservations (examples : Railway/Japan; Air traffic control equipment/US...) there is no legal possibility to act upon them to gain leverage (not to use the threat of using them)
- In the absence of a comprehensive EU policy, several **Member States** have decided to take **action** themselves

# Objectives of the proposal.

- **Opening of the public procurement market in the world...but also in the EU**
- **Securing additional business opportunities**
- **Ensuring leverage for our negotiations**
- **Creating a "level playing field" in the EU**
- **An instrument for growth and employment**

# 1st tool: article 6

- **General rule: openness**
- **Exception: Possibility for contracting authorities to exclude foreign (non-covered) bids**

**Above the threshold of 5 million Euro**, contracting authorities may ask the Commission for authorisation to exclude a foreign (non-covered by EU international commitments) bid if there is a lack of substantial reciprocity or if we have negotiated reservations;

## 2nd tool: article 8-10

- **Investigations by the Commission** of repeated discriminatory policies in non-EU countries against EU suppliers, goods or services
- **Consultation and negotiation with non-EU countries with a view to solve concerns and open their markets**
- Possibility for the Commission, if all attempts to open their market have failed, **to adopt proportional restrictive measures against the concerned non-EU country (market access restrictions, price penalties)**

# Additional tool: abnormally low tenders

- Commission proposal for modernisation Directives: **Articles 69/79**
- In case of abnormally low tender: **obligation to ask explanation** (e.g. state-aid, compliance with social/environmental legislation)
- If, for tenders with more than 50% non-covered goods/services the contracting authority **intends to accept the justifications provided, the contacting authority should inform the other tenderers**, including the reasons for the abnormally low character of the price



# Conclusion

- **Now:** Absence of a comprehensive EU external public procurement policy. Lack of leverage in international procurement negotiations. A fragmented internal market. Enlarged risk of protectionism.
- **After:** A real comprehensive EU external public procurement policy, with a key role for the Commission. Increased leverage to further negotiate market opening. More « fair play » within the EU.