

TTIP & Public Procurement

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In the opinion of the EU, the US has not sufficiently liberalised its procurement market. The procurement market in the US is divided between a procurement market regulated at a Federal level and a State level procurement market, which according to the Constitution remains a competence of the States. Thus such procurement markets cannot be opened by a decision at Federal level. The US will involve the States so that they can agree to open up their procurement. The US had already involved the States in the [Agreement on Government Procurement](#) (GPA). Of the 50 US States, 37 have agreed to comply with the GPA (refer to [annex 2 of the US appendix to the GPA](#)). In addition, [the Buy-American Act](#) (Federal level only) is usually waived for GPA and FTA partners.

According to its [Initial EU position paper](#) of July 2014, the European Commission (EC) expresses hope for a further development of 'GPA plus' elements, that could serve as model for other trading partners and set higher standards. The EC also aims to extend possibilities for European companies to participate in public tenders at all US government levels, including those States that do not comply with the GPA, without being discriminated against.

The draft [recommendations adopted](#) in the European Parliament International Trade Committee reaffirm the desire for an opening of US procurement markets.

Overviews

[TTIP: Opportunities and Challenges in the Area of Public Procurement](#) / Stephen Woolcock & Roberto Bendini, Directorate-General for External Policies of the Union, Policy Department In-Depth Analysis, 15 June 2015

In TTIP the EU has offensive interests in greater coverage of public procurement markets in the USA. Consumers stand to gain from lower prices and better use of public funds. There is an opportunity to negotiate better access for EU suppliers. EU smaller or medium sized suppliers would especially benefit from more transparent US state and city public procurement procedures.

[Public procurement in TTIP](#) / DG Trade, Jan 2015

EU goals

- agree on rules which will ensure that EU or US companies are not discriminated against when tendering for public contracts on each other's market
- agree on rules to maximise transparency in tendering for public contracts to ensure EU and US firms are aware of opportunities across the Atlantic
- maximise the opportunities for EU and US firms to participate in public tenders at all government levels, whether central/subcentral, federal or sub-federal, without being discriminated against.

[Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations](#) / Steve Woolcock and Jean Heilman Grier, Paper No. 2 in the CEPS-CTR project "TTIP in the Balance" and CEPS Special Report No. 100, February 2015

p. 10-11: EU and US coverage under [GPA](#) and relevance to TTIP : issues in TTIP

Sub-central government Goods and services Thresholds: EU is seeking reduction EU seeks expanded coverage of states, including the 13 states not covered by the GPA and greater access to the procurement of the 37-covered states.

Services: EU uses positive list & US uses negative list

p.16:Table 5. Restrictions on market access in the US

p. 17: Barriers to market access in the EU

[TPP and TTIP Government Procurement Negotiations](#) / by Jean Heilman Grier, Americas Trade Policy, September 16, 2014

The TTIP negotiations build on the existing commitments of the U.S. and EU under the GPA and a . The more difficult issues involve coverage of states and other entities. In the TTIP, the EU is seeking broader coverage of U.S. states, including the 13 states not covered by the GPA and broader coverage by the 37 GPA-covered states

[Tightening the Common External Trade Policy on "Uncovered Procurement": A Populist Move or Well-Thought-Out Measure?](#) / Jędrzej Gorski, European Procurement & Public Private Partnership Law, 9 EPPPL 104 & Melbourne Law School, Global Economic Law Network Presentation Series, April 2014

Driven by the severe concerns about the lack of reciprocity in mutual procurement market access between Member States and third countries, the Commission has taken legislative steps to tighten the common external trade policy of the EU on "uncovered procurement." So far, Member States have enjoyed a wide autonomy in dealing with contractors /goods/services from third countries

Analysis

In the EPRS [Detailed Appraisal of the European Commission's Impact Assessment on EU-US Transatlantic Trade and Investment Partnership](#) ,, on pp. 16-18 "The role of employment and public procurement in the CGE modelling"

[Public procurement in TTIP as compared to CETA](#) / March 30, 2015 - by Dr. Valerie D'Erman, University of Victoria
The end result, according to the EU's trade website, is that "both countries will gain from increased access to the respective public procurement markets. All sub-federal levels of government in Canada will be open to European companies to engage in tenders." [2] Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the U.S. are likely to take on public procurement in the same fashion, but with potentially greater conflicts
The Use of Federal Grant-Making Power to Expand State and Local Procurement Coverage Under the Transatlantic Trade and Investment Partnership / Kevin McNiff, Public Contract Law Journal, Vol. 44, Issue 2 (Winter 2015), pp. 327-348

[Government procurement in US trade agreements](#) / Gary Hufbauer, Tyler Moran, EUI RSCAS PP; 2015/09
'The United States has played an essential role in driving the agenda for the world trading system since the Second World War. An important component of that agenda has been the liberalization of government procurement, with the first plurilateral agreement signed in 1979 as part of the Tokyo Round. Since then, procurement has become a staple of other trade agreements, both in the WTO and in bilateral and regional pacts. This paper briefly outlines the government procurement commitments the United States has sought from its trading partners and the commitments which the US made in return, with a particular focus on how these positions have evolved over time.'

EU-US Transatlantic Trade and Investment Partnership Agreement: the European Commission's negotiating position on public procurement / Richard Craven, University of Northumbria at Newcastle, Public Procurement Law Review, P.P.L.R. 2014, 3, NA65-NA76 [abstract](#) (full text in Westlaw)

[Impact of the Transatlantic Trade and Investment Partnership \(TTIP\) on the Legal Framework for Public Services in Europe](#) / Markus Krajewski and Britta Kynast, Friedrich-Alexander University Erlangen-Nürnberg, 1 October 2014
Public procurement and competition policy (p. 12) -- Regulatory issues, public procurement and investment protection (p. 16) -- Procurement, competition and energy (p. 31)

[Perspectives: "Buy America" and the Future of TTIP](#) / by Henrik Fogh Rasmussen and Jesper Packert Pedersen, Rasmussen Public Affairs, European Institute

Government procurement: pp. 16-17 & Table 3 comparing US-EU HLWG, Korea-US FTA and Korea-EU FTA (p. 6)

In: [Crafting a Transatlantic Trade and Investment Partnership: What Can Be Done](#) / Jeffrey J. Schott, Cathleen Cimino, Peterson Institute for International Economics, Policy Brief 2013:13, March 2013

[U.S. and E.U. SME subcontracting policy and practice trends : towards a transatlantic accountability consensus](#) / Max Kidalov, Journal of Public Procurement. Spring2013, Vol. 13 Issue 1, p39-71

U.S. and E.U. public and defense procurement rules require large prime contractors to promote subcontracts to small businesses, a.k.a, small and medium enterprises (SMEs). Under the U.S. Small Business Act, large firms encourage subcontracting through publicity, subcontracting plans, and "good faith" efforts to achieve subcontracting goals. However, process-oriented measures failed to guarantee definitive results. In contrast, E.U. and member governments can hold large firms accountable to stricter subcontracting standards (often sweetened by incentives).

[Government procurement](#)

In: Canada-European Union: Comprehensive Economic and Trade Agreement (CETA): Technical Summary of the Final Negotiated Outcomes (October 2013)

Government procurement. pp. 697-738

In: [World trade law : text, materials and commentary](#) / Simon Nicholas Lester, Bryan Mercurio, Hart, 2012

Stakeholder views

EU views

[OPINION on the recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership \(TTIP\)](#) / Committee on the Internal Market and Consumer Protection, 25-03-2015

The European Committee of the Regions (CoR) has expressed its opinion on the [local and regional impact of the Transatlantic Trade and Investment Partnership \(TTIP\)](#) presented in an opinion drafted by Markus Töns (DE/PES). para: 20-25, 29-33

US views

There is a chapter on Government Procurement in the European Union, including some member states on pp. 144-146 in the 2015 [National Trade Estimate Report on Foreign Trade Barriers](#) from the Office of the United States Trade Representative

[Breaking the Impasse in the Transatlantic Trade and Investment Partnership \(TTIP\) Negotiations: Rethinking Priorities in Procurement](#) / Christopher R. Yukins & Hans-Joachim Priess, The Government Contractor, Vol. 56, No. 27, July 23, 2014

This paper suggests that instead of pressing to open sub-central procurement markets directly, the EU might seek to leverage existing U.S. law to gain better access to procurements carried out, at sub-central levels, using federal grant dollars. And instead of pressing to remove explicit federal "Buy American" preferences, the Europeans might be better served to use TTIP to erect a permanent cooperative structure with the United States, to resolve regulatory anomalies that themselves create burdensome -- and often unnecessary -- barriers to procurement markets.

On April 25, 2012, Mr John R. Luckey, researcher in the Congressional Research Service published a study on. "[Domestic Content Legislation: The Buy American Act and Complementary Little Buy American Provisions](#)" (among them The Buy America Act and the Berry Amendment. Even though this is an in-depth analysis, there is a short summary a concise description and explanations to the differences between these acts.

Rep. Jan Schakowsky and Rep. Dan Lipinski released the following [statement](#) after sending a [letter](#) to President Obama outlining several significant concerns about the Transatlantic Trade and Investment Partnership (TTIP).

'TTIP could jeopardize Buy American laws and further erode the ability of local, state and federal governments to make decisions on how U.S. tax dollars are spent in public procurement'

Five Democrat Senators urge USTR Michael Froman to [defend Buy American policies](#) , 21 September 2015

The Canadian International Trade secretariat has a page explaining the differences between [The Buy American Act and Buy America Provisions](#)

[The United States and European Union Are the Two Largest Markets Covered by Key Procurement-Related Agreements](#) / GAO, 29 July 2015

From 2008 through 2012 these countries together spent on average about \$4.4 trillion annually to procure goods and services and to fund capital projects. This represented about a quarter of their total general government expenditures, and includes spending at the central, state, and local levels. As shown in the figure below, the United States (\$1.7 trillion) and European Union (\$1.6 trillion) have the largest government procurement markets of countries covered by the World Trade Organization (WTO) Agreement on Government Procurement (GPA), existing U.S. free trade agreements (FTA), the Trans-Pacific Partnership (TPP) negotiations, or the Transatlantic Trade and Investment Partnership (T-TIP) negotiations.

Congressional Research Service has written an overview: [Domestic Content Restrictions : The Buy American Act and Complementary Provisions of Federal Law](#) in January 2014

[The United States and European Union Are the Two Largest Markets Covered by Key Procurement-Related Agreements](#) / US Government Accountability Office, GAO-15-717, 29 July 2015

'The United States is a party to, or is currently negotiating, international agreements covering government procurement with 60 countries. From 2008 through 2012 these countries together spent on average about \$4.4 trillion annually to procure goods and services and to fund capital projects. This represented about a quarter of their total general government expenditures, and includes spending at the central, state, and local levels. As shown in the figure below, the United States (\$1.7 trillion) and European Union (\$1.6 trillion) have the largest government procurement markets of countries covered by the World Trade Organization (WTO) Agreement on Government Procurement (GPA), existing U.S. free trade agreements (FTA), the Trans-Pacific Partnership (TPP) negotiations, or the Transatlantic Trade and Investment Partnership (T-TIP) negotiations.'

Civil Society's views

[Transatlantic Trade and Investment Partnership](#) / NHS Confederation, 13 / 3 / 2015

Which elements of TTIP potentially pose a threat?

ISDS

The TTIP negotiations include provision for an Investor-to-State Dispute Settlement (ISDS) mechanism, a highly contentious arbitration settlement system that would allow corporations who consider their interests have been unfairly damaged to take governments before arbitration panels to settle disputes, instead of filing claims before regular courts. The panel's decisions are usually binding and cannot be challenged in court, and can result in millions of pounds' worth of compensation for businesses who successfully claim that national or local laws damage their profits.

The transatlantic trade deal does not have to include ISDS, and there are calls from various quarters for ISDS to be excluded from TTIP. The umbrella organisation representing local authorities across Europe, the Council of European Municipalities and Regions, has stated publicly that they consider the ISDS system is unnecessary, as such disputes can be resolved using existing legal systems.

[Transatlantic Trade and Investment Partnership](#) / Public and Commercial Services Union 2015

TTIP is designed to:

Harmonise rules on trade, business and environmental standards.

Open markets in the service sector - including public services - to delivery from outside.

Open up access to government procurement markets and eliminate preferential treatment to local suppliers.

TTIP threatens to restrict the ability of local authorities and other public bodies to source and employ locally. This undermines their ability to use public money to achieve social and environmental outcomes through their supply chain and employment practices.

[Local Economies on the Table TTIP Procurement Update](#) / By Karen Hansen-Kuhn, Institute for Agriculture and Trade Policy, November 2014

In a move that could undermine those important initiatives, the European Union has made the opening of U.S. procurement programs to bids by European firms one of its priority goals for the Transatlantic Trade and Investment Partnership (TTIP)

Producers' views

[Procurement](#) / The Business Coalition for Transatlantic Trade (BCTT)

The United States and the European Union are each members of the WTO Government Procurement Agreement (GPA). As a result, substantial parts of each other's government procurement markets are open to the bidders of the other, although there remain significant restrictions in areas that are not covered by the GPA.

Background information on International Trade and Public Procurement

[Multilateralising Regionalism on Government Procurement](#) / OECD Trade Policy Paper, May 2013, 69 p.

The potential multilateralisation of government procurement commitments in regional trade agreements (RTAs) presents many issues and challenges. To what extent do RTAs go beyond the 2012 revised Agreement on Government Procurement (GPA), and how do they differ among trading partners? This report surveys 47 RTAs in force with government procurement provisions where an OECD member is a party.

[EU international public procurement policy](#) / EPRS Briefing by Christopher Needham posted on 09 May 2012

For the first time, the European Commission has proposed a draft Regulation covering international public-procurement policy. It is considered controversial. The Commission (EC) proposes that it would be able to investigate whether countries discriminate against the EU in public procurement tenders, or it would act when Member State (MS) contracting authorities propose to reject international tenders.

[The WTO regime on government procurement : challenge and reform](#) / Sue Arrowsmith, Robert Anderson, Cambridge University Press, 2011

The WTO regime on government procurement: past, present and future -- Expanding the Scope of the Agreement on Government Procurement: Accession and Coverage -- Forging a more global procurement market: issues concerning accessions to the agreement on government procurement -- Government procurement provisions in regional trade agreements: a stepping stone to GPA accession?

[Public procurement and international trade policy briefing](#) / Roberto Bendini, European Parliament Policy Department External Policies, 2010

Public procurement accounts in developed countries for 15 to 20% of their GDP. Unlike other international trade sectors, procurement has been often seen as a "reserve" for Governments and other public entities which used it for securing domestic but also external economic and political objectives. The most important agreement internationally governing public procurement is the WTO government procurement agreement or GPA. Unlike other WTO deals, GPA is a plurilateral agreement which only binds those countries which have signed it. Its scope, although extended over the last few years, is still not complete and subject to negotiation between the contracting parties

United States / by Joshua Schwartz, pp. 613-655

In: [Droit comparé des contrats publics = Comparative law on public contracts](#) / Noguellou, Rozen ; Stelkens, Ulrich ; Schröder, Hanna, Bruxelles: Bruylant, 2010

US federal government procurement : structure, process and current issues / Khi V. Tahi and David A. Drabkin, pp. 89-103

In: [Public procurement : international cases and commentary](#) / Louise Knight, Routledge, 2007

Statistics

Changes in value of total exports (in per cent and million euros), extra-EU exports / imports in case of the EU, 2027 benchmark, 20 per cent direct spill-overs tables 20 & 21 on pp. 51 & 52 in the EC Commission impact assessment "[Reducing Transatlantic Barriers to Trade and Investment : an Economic Assessment : Final Project Report](#) / Centre for Economic Policy Research, March 2013

[Final report in Cross-border procurement above EU thresholds](#) / European Commission, DG Internal Market and Services, March 2011, pp. 11-12

Of all direct cross-border procurement by Member States' contracting authorities, 88% is awarded to economic operators in another Member State. Of the remaining 12% to countries outside the EU, Switzerland accounts for the highest share (4%). The share of EU candidate countries, i.e. Turkey, Croatia and Macedonia, is only 1% each – the same as for Canada, China, and the US.

Of all indirect cross-border procurement through affiliates from Member States' contracting authorities, 60% is awarded to economic operators in another Member State. Of the remaining 40% that goes to countries outside the EU, the United States account for the highest share (24%). SMEs have won 47% of direct cross-border procurement contracts. Indirect cross-border procurement through affiliates is dominated by large enterprises.

More information

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