

Cross-border public procurement

– an EU perspective



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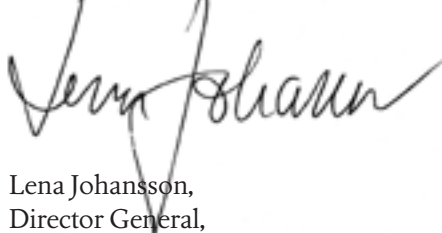
Foreword

Public procurement makes up to roughly one fifth of the European Union's GDP. As such, public procurement is essential to the EU economy. The European market for public procurement is quite open. The same does not apply for many of the EU's trading partners. In the European Commission's strategy for trade and growth, ensuring open third-country markets for public procurement constitutes a key component. Therefore, the Commission proposes a legislative instrument to achieve symmetry in access to public procurement markets.

This study intends to take a look at cross-border procurement from an EU perspective; it contains a description of the nature, structure and economic importance of public procurement, inter alia on the basis of two concrete case studies. We also discuss the proposed EU instrument for achieving market symmetry; its rationale and objective as well as the potential problems it may create.

This study was prepared by Lina Kamara and Carl Johan von Seth. We wish to extend a special thanks to the helpful staff at the thoracic clinic at Uppsala University Hospital and MTR Stockholm for giving us the opportunity to carry out the case studies.

Stockholm, November 2011

A handwritten signature in black ink, appearing to read 'Lena Johansson', written over a faint, light-colored rectangular stamp or watermark.

Lena Johansson,
Director General,
National Board of Trade

Executive Summary

Goods and services procured by and supplied to the public sector are vital to economies. In OECD countries, consumption through public procurement makes up to roughly one fifth of gross domestic product. With increasing economic globalisation, greater internationalisation among firms and increased international trade, international aspects of public procurement are becoming more important. EU rules on public procurement make it possible for contracting bodies, taxpayers and users of public services to reap the benefits not only from the internal market, but also from the global market for goods and services.

Compared with international trade in general, cross-border public procurement is not easily understood through regular statistics. Usually, one differentiates between four channels of cross-border procurement: foreign firms, foreign products, foreign subsidiaries and international consortia, which in turn can coincide. In other words, *cross-border public procurement* denotes virtually all transnational economic activity that takes place in connection with the delivery of products to the public sector. Cross-border procurement is in this sense a catch-all term for economic internationalisation in connection with public services providing. The general knowledge of its significance and patterns is therefore, to some extent, limited.

However, the present state of knowledge points to the fact that cross-border activity in public procurement is less significant than in other areas of the economy. The low rate of trade in the public sector in the EU market is, to a large extent, explained by the type of products that are demanded; the products demanded in the public sector are generally less traded also in the private economy. Still, when differences in the structure of demand are accounted for, a significant gap remains between the actual level of trade and the expected level of trade in the public sector. Consequently, cross-border procurement is of great economic significance – yet, there is room to reap greater benefits from its virtues.

We attempt to illustrate cross-border procurement with two case studies. Both cases – in health care and public transportation – are examples of how important transnational economic activity can be to public services. Even though it may seem contradictory, the highly internationalised firms involved in producing these public services create jobs and growth in the local economy. In some instances, the complex and fragmented way firms are organised obscure this fact.

The EU's procurement market is significantly more open than that of many of its trading partners. Despite efforts to regulate procurement internationally and to improve market access, trade-restrictive practices in public procurement in third-country markets remain a tough nut to crack in the EU's external commercial relations. In its Trade, Growth and World Affairs communication of 2010, the EU Commission presented a course of action that aims to put pressure on trading partners by (more or less) closing the EU procurement market in order to redeem the lack of market access. It is however uncertain whether such an initiative will eventually provide enhanced market access for EU businesses and products originating in the EU. As a trade policy instrument, it is an untried approach that risks backfiring on EU businesses and affect the European economy. Moreover, an exaggerated focus on procurement policies in third-countries risks spilling over into the EU's internal reform process (outlined in the Single Market Act), which aims to carry out more efficient public procurement.

There are more than 250,000 contracting bodies in the EU procuring goods and services in widely differing areas of the public sector. Their discretion is surrounded by EU and national rules designed to improve efficiency in public spending. The paper discusses reasons as to why a trade policy instrument limiting cross-border public procurement will be at odds with this objective, restrain competition, and hit users and taxpayers at a time when public finances are in distress.

Index

Foreword..... 1

Executive summary..... 2

Part I: Cross-border public procurement: rules, figures and reality

Introduction..... 5

1. Cross-border public procurement 6

 1.1. International disciplines..... 7

 1.1.1. The plurilateral level – the GPA..... 8

 1.1.2. The bilateral level – FTAs 8

 1.2. Openness of the EU procurement market compared with other trading partners..... 9

 1.2.1. Openness of GPA parties 9

 1.2.2. Prevalence of cross-border procurement on the EU market..... 10

2. Reality check – two cases of public procurement 11

 2.1. Case 1: At the public hospital – a surgery *Made in Sweden?*..... 11

 2.2. Case 2: At the Stockholm underground – a commute *Made in Hong Kong?* 14

Conclusions 15

Part II: The European Commission’s approach to securing symmetry in access to public procurement markets – a critical view

Introduction..... 17

1. Reciprocity in international trade 18

2. The proposed instrument – what is at stake? 20

 2.1. Objectives and rationales..... 20

 2.2. Will it effectively address unfair practices on the internal market?..... 20

 2.3. What are the risks? 20

 2.4. Will it enable improved market access for EU business? 21

Conclusions 22

Bibliography 23

Endnotes..... 24

Part I:
Cross-border public procurement rules:
figures and reality

Introduction

Public procurement attracts a growing interest in international trade policy. While ordinary trade in goods and services has been liberalised, public procurement remains off the map in many aspects. For several reasons, public procurement rules and practices are hard to bring to the negotiating table. Still, great gains in terms of taxpayers' value for money are reaped from the global marketplace. And greater gains may be reaped from more openness in public procurement – gains that are, of course, equally interesting for businesses.

Cross-border procurement is, in essence, international business transactions involved in the supply of public services and, as such, an extension of the internationalisation of business and economic globalisation. This is tangible for those who procure

and for users of public services. Yet, for regulators and policymakers, cross-border procurement remains an abstract concept.

The purpose of this study is to provide an overview of the current state of the regulatory and economic development in cross-border procurement. The nature of cross-border procurement is illustrated with two examples from public services: the first from a hospital and the second from an underground system. For this purpose, the first section elaborates on the concept of cross-border procurement, outlines the international disciplines on public procurement and studies some of the existing literature on the economic significance of cross-border procurement. The second section contains our two case studies.



1. Cross-border public procurement

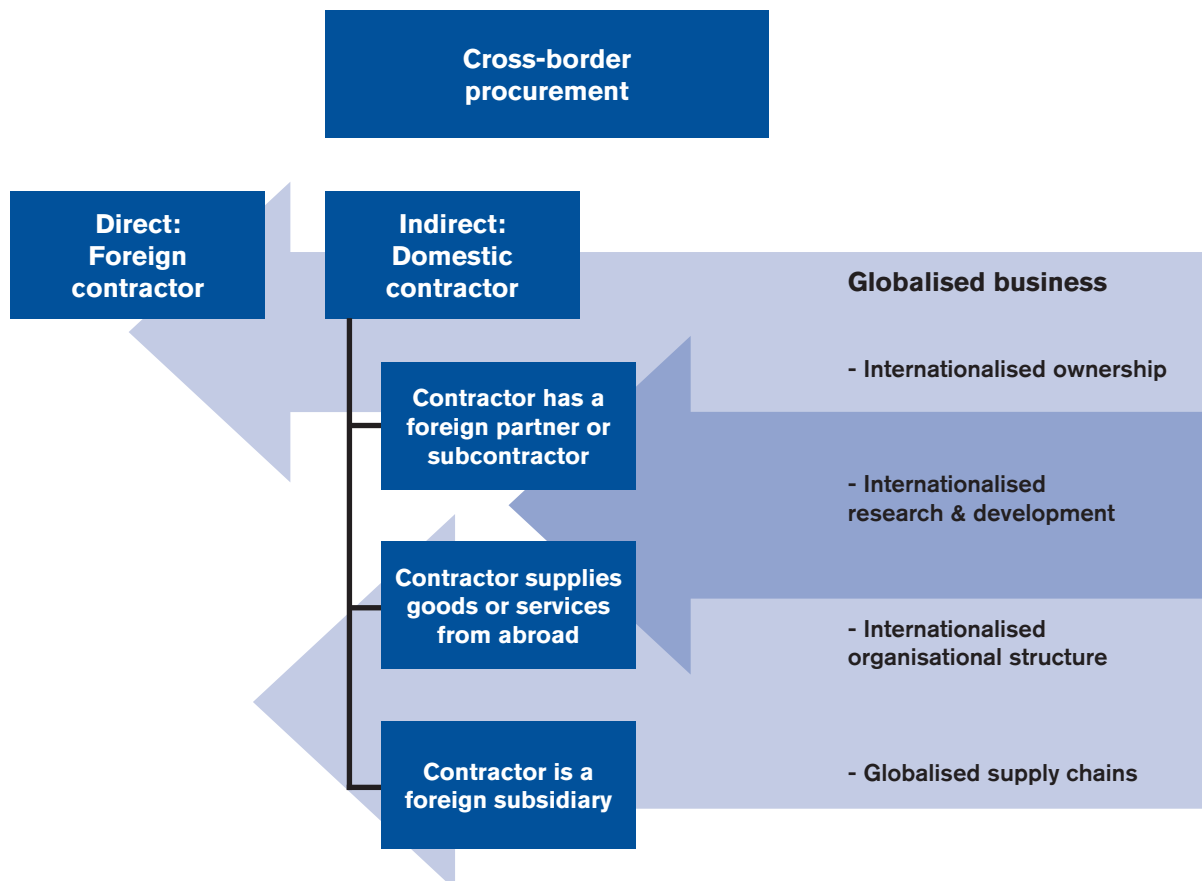
In 1998, the total value of world public procurement was estimated to correspond to 82.3 per cent of global international trade in goods and commercial services.¹ The OECD has estimated that its member countries' procurement amounts to 19.96 per cent of their national GDP, while public procurement in developing countries amounts to 14.48 per cent of their GDP. The size of public procurement varies across countries, depending, among other things, on the size of the public sector as a whole and the extent to which privatisation of state-owned enterprises have taken place (particularly in the utilities sectors).

Public procurement often involves cross-border activities in different forms. The nationality of *firms* and the origin of *products* are the issues of concern in public procurement rules. In the case of cross-border procurement via foreign firms, geographical residence of the company, its affiliations and owner-

ship are usually considered. The distinction between "local" and cross-border procurement via goods or services considers the location of the finishing manufacturing or the manufacturing of some substantial intermediate products.

As vertical specialisation increases, organisational structures become less geographically concentrated, supply chains and capital more internationalised – few firms qualify as genuinely local. Therefore, the concept of "buying local" is a question of degree of "localness" – particularly for small countries with a high degree of integration with other economies. The same goes for contracts that appear to be international, as manufacturing and services may be executed locally. Drawing on these general aspects of international business, an illustrative outline of the possible forms of cross-border procurement is shown in Figure 1.²

Figure 1. Aspects and possible ways of cross-border procurement





The most straightforward form of cross-border procurement is *direct* cross-border procurement, which occurs when a foreign contractor (not established in the domestic market) is awarded a public contract. *Indirect* forms of cross-border procurement are those that occur where the contractor is:

- A locally established subsidiary of a foreign firm (the parent company/headquarters are located abroad, i.e. a foreign firm has submitted a bid through its subsidiary established in the market of the contracting body).
- A domestic firm (prime contractor) having a foreign subcontractor during performance of the contract.
- A domestic firm having a foreign consortium partner.
- A domestic firm importing products to perform the contract (e.g. wholesaler).

1.1. International disciplines

National rules on public procurement aim to ensure efficiency in public spending. Unlike private operators, which are assumed to pursue rational procurement governed by profit maximising incentives, government actors do not necessarily have incentives to ensure best value for money. In order to avoid unfounded discrimination and other biases in public purchases, transparency and open competition between tenderers, regardless of nationality, are important. Imposing disciplines on contracting bodies should enable and ensure optimal use of public resources. Public procurement rules therefore aim to force contracting bodies to treat tenderers and products in a non-discriminatory manner and provide for transparent and formalised tendering procedures.

International disciplines on public procurement impose further limitations in politicians' and administrations' discretion to use public procurement as a policy instrument for political objectives. Countries have been reluctant to subjecting their national procurement regimes to international disciplines. As a matter of fact, the General Agreement on Tariffs and Trade from 1947, contains a specific exemption from the national treatment obligation with regard to public procurement.³ This left the GATT parties/World Trade Organization (WTO) members free to favour local firms and products. Even so, since the 1980s, some discipline has evolved in this area. One step was the Tokyo Round Agreement on Government Procurement (entry into force in 1981), which was further developed and enhanced in the WTO Government Procurement Agreement, which entered into force 15 years later (1996). Another step was the inclusion of public procurement in free trade agreements (FTAs). The major liberalisation of public procurement markets is the one that has taken place to achieve the European single market.

Despite the benefits of regulated tendering procedures, public procurement is often used as a policy tool to target various political objectives, such as promoting small to medium-sized enterprises (SMEs), local innovation, regional development or employment. As these objectives tend to have a national or even local foundation, foreign suppliers and products tend to be discriminated against. With regard to international trade policy, the objective can even be purely protectionist, to shield an un-competitive import-competing industry from foreign competition. The general *value-for-money* objective in procurement many times stands back for such national policy objectives (or protectionism). This particular feature of public procurement, i.e. popular use as a policy instrument, partly

explains the lack of multilateral disciplines on public procurement on the one hand and the low level of direct cross-border procurement on the other.

1.1.1. The plurilateral level – the GPA

The WTO agreement on government procurement, the GPA, is a plurilateral agreement. Only the EU, its Member States and 14 other WTO members are parties to the agreement.⁴ Briefly, the agreement, which is currently being revised, provides for transparent tendering procedures, domestic review procedures and, like other WTO agreements, non-discrimination. The non-discrimination obligation not only applies to imports from the GPA parties, but also to locally established suppliers on the basis of foreign affiliation, ownership and the country of production. As a result of the non-discrimination obligation, the agreement, in principle, prohibits local-content requirements, price preferences, offsets and similar discriminatory policies. However, the rules apply only to *covered procurement*. Market access is specified individually for each party in appendices to the agreement. First, only purchases exceeding certain thresholds specified in Special Drawing Rights are covered. Second, only purchases by specified entities are covered. Third, although all goods are, in principle, covered by the agreement, only the services listed (positive list) are covered. Fourth, parties have excluded some purchases (e.g. defence procurement) from coverage and made other general exceptions from coverage (e.g. with regard to SMEs or country-specific derogations). As a result, a substantial share of the GPA parties' procurement still lies outside the scope of the agreement. For instance, procurement by 13 US states is, at present, not covered by the agreement. This is significant, as procurement by sub-central governments is much larger than procurement by central governments.⁵ Like the GATT, the GPA provides for further and periodical negotiations on increased coverage on the basis of mutual reciprocity (cf. Article XXIV (7) (b)) and coverage, i.e. market access, negotiations are ongoing.

As a result of periodic negotiations, coverage of the GPA has increased over time. Services have been included (which was not the case with the Tokyo Round Agreement on Government Procurement), more contracting bodies have been added and thresholds have been lowered. Also, increased membership, mainly through the EU enlargement, has resulted in expanded coverage. There are cur-

rently nine WTO members, one of which is China, negotiating accession (although not all actively).

The GPA contains a reporting mechanism. Parties are obliged to report annually on covered procurement in terms of type of contracting body, numbers and value of procurement. If available, parties will also provide statistics on the country of origin of purchased goods and services (Article XIX: 5). The statistics would serve as a useful basis for coverage negotiations. Unfortunately, parties do not report regularly or in a similar and comprehensive manner, and there has been little empirical research using the data that has been provided.⁶

Studies on the effects of the GPA (looking at cross-border procurement) are inconclusive. Data for the period between 1983 and 1992 suggests that smaller GPA parties made less nationalistic purchasing decisions over time. It also showed that smaller countries purchased more from foreign firms on average than large countries. Moreover, foreign firms' share of above threshold procurement by covered entities remained virtually unchanged. Two country-specific empirical studies have shown that the GPA did nothing to increase market access for foreign firms in Japan and Korea in the 1990s.⁷ Although the findings above are interesting, it should be noted that they mostly relate to the operation of the Tokyo Round Agreement on Government Procurement, whose coverage was considerably less comprehensive than that of the current GPA. There is definitely a need for more up-to-date and comprehensive empirical research on the operation and impact of the GPA, not least in view of the aim to expand the agreement's coverage.

1.1.2. The bilateral level – FTAs

In addition to the plurilateral GPA, there are bilateral and regional disciplines on public procurement. Through such rules, FTA partners open up their procurement markets to each other's firms and products. The US' FTAs/Trade Promotion Agreements (TPAs) with some Latin and Southern American countries and some Middle East countries constitute examples of FTAs comprising rules on public procurement.⁸ EU firms have also gained access to third-country procurement markets. At present, public procurement is regulated in the EU's agreements with Chile, Switzerland, Mexico, Korea and the CARIFORUM countries. Public procurement is also part of the ongoing negotiations with India, Canada and Mercosur.⁹



1.2. Openness of the EU procurement market compared with other trading partners

As a step towards the realisation of a European internal market where goods, services, capital and people can move freely, the rules on public procurement have been harmonised through EU directives to enable open competition for public contracts. The directives regulate the publication of tenders, tendering procedures and lay down the principle of non-discrimination. Notices and information about tenders across Europe are published in the Tenders Electronic Daily (TED, an online supplement to the *Official Journal of the European Union*), which provides a useful source for procurement statistics in Europe. There are different rules governing the public sector (public works, public supply and public service contracts) and the utilities sector (procurement in the water, energy, transport and postal sectors) and the tendering procedures in the utilities sectors allow for more flexibility. The directives are applicable to contracts with an expected value above the established thresholds (the same as those applicable under the Government Procurement Agreement, GPA).¹⁰ As for contracts below thresholds, Member States have national rules which must respect EU principles. The directives in force date back to 2004. The EU procurement regime is currently under review and a legislative proposal is expected in the course of 2011.

Total EU procurement in 2009 amounted to roughly 2,288 billion euros which is equivalent to 19 per cent of EU GDP.¹¹ The EU is the largest public procurement market in absolute terms among the GPA parties. Procurement worth 420 billion euros

(approximately one fifth of the total procurement) was published in the TED database and there were, on average, five bids on each tender. According to a recent estimate (Monti, *A New Strategy for the Single Market, 2010*), savings from the internal market on public procurement amount to between 5 and 8 per cent of the value of procurement.¹² Moreover, cost savings up to 25 billion euros per year have been attributed to increased competition and transparency prompted by the EU procurement directives by 2002.¹³ Notably, these figures relate to the single market, i.e. not to third-country access to the EU procurement market.

1.2.1. Openness of GPA parties

There is no consensus among the GPA parties on the level of openness of procurement markets towards foreign (or third-country) firms and products. According to the EU Commission, Liechtenstein, Norway and Switzerland, along with the EU, have made the most far-reaching legal commitments under the GPA.

Yet, there is merit to the view that the EU market is relatively open. According to the European Commission (*Trade as a driver of prosperity, 2010*), 17.5 per cent of EU procurement (or 370 billion euros) was above GPA thresholds in 2007. Taking account of the exemptions and derogations made by the EU, procurement worth 312 billion euros (roughly 2.5 per cent of EU GDP) is open (contestable) to GPA parties. Furthermore, 15 per cent of total EU procurement and 84 per cent of above threshold procurement is contestable to firms from GPA parties.¹⁴

In comparison, 3.2 per cent of total US procurement and 12 per cent of US above threshold procurement is contestable to GPA party firms. In a

similar way, 4 per cent of Japan's total procurement and 23 per cent of above threshold procurement is contestable to bidders from GPA parties. An even smaller share of Canadian procurement is, at present, contestable to GPA party firms (*Trade as a driver of prosperity*, 2010). Clearly, these figures indicate that the EU offers significantly more market access than it gets in return from the US, Canada and Japan.¹⁵

As for public procurement markets in emerging economies such as India, Brazil, China and Argentina, there is a lack of data, but the size of these markets is expected to increase. Certainly, these markets represent considerable future business opportunities, and in the absence of legal commitments they are free to discriminate against foreign bidders and products. One recent study has estimated that China's accession to the GPA alone will yield market access gains in the range of 81 and 208 billion euros.¹⁶

1.2.2. Prevalence of cross-border procurement on the EU market

Several studies have been carried out to measure the somewhat elusive concept of cross-border procurement. Results indicate that direct cross-border procurement seems, in general, to account for a relatively small share of total procurement. For instance, EU tenders awarded to firms from other GPA parties in 2007 can be estimated to account for roughly 3–4 per cent of the *value* of total above threshold procurement under the GPA.¹⁷

Another example is that *direct* above threshold cross-border procurement has recently been estimated to less than 2 per cent of the winning tenders on the EU market. The figure is somewhat striking, as it relates to the internal market and covers both intra- and extra-EU direct cross-border procurement in 2007 to 2009.¹⁸

Indirect cross-border procurement is more common. In 2007, around 14 per cent of all tenders published in the TED database were awarded to non-EU firms (including subsidiaries of foreign

firms).¹⁹ From a legal point of view, these subsidiaries are considered to be EU firms and, consequently, they currently do not face any legal restrictions in participating in EU procurement.²⁰

The significance of cross-border procurement varies greatly between EU Member States. As an example, 44 per cent of the aggregated contract value in Swedish procurement was awarded to foreign subsidiaries, 6.7 per cent of total contract value was awarded to foreign firms. In the Netherlands, 13 per cent of the total contract value was awarded either to foreign firms or foreign subsidiaries.²¹ These figures cover both intra- and extra-EU cross-border procurement.

The import penetration in the public sector is a complementary indicator of indirect cross-border procurement, measuring the degree of international trade in the public sector. Estimates suggest that the total import penetration in the EU Member States' public sector was 7.5 per cent of total public demand of goods and services in 2005. This is significantly lower than the import penetration in the private sector, which corresponds to 19.1 per cent. The discrepancy in private and public sectors appears to be partly explained by variations in the goods and services demanded. The public sector consumes a higher share of administration and other services that are partly non-tradable and other products that are also less traded in the private sector. One study suggests that, when differences in demand are accounted for, the gap between import penetration in the private and public sectors is 0.9 per cent. Nevertheless, this figure corresponds to approximately 24 billion euros (unexplained) less trade in public consumption in the EU. Naturally, import penetration, too, varies between sectors and countries. As an example, the import penetration in the Swedish public sector in 2005 was 5.7 per cent. In the private sector, the import penetration was 19.2 per cent. In the Netherlands, corresponding figures were 6.8 and 27.9 per cent.²² Generally, the public sector import penetration in EU Member States is similar to that of non-EU countries.

2. Reality check – two cases of public procurement

To illustrate cross-border procurement in practice, we examine two cases of public procurement with an emphasis on transnational activities. The first one is in health care, where the starting point is at a thoracic clinic. We take a closer look at the procurement and examine the inventories and supplies needed for surgery. The second case focuses on public transportation, examining the content of a big procurement of public transportation in Stockholm. Health care and public transportation represent significant public expenditures and are administered by regional authorities in Sweden.

One study suggests that the EU market for medical instruments amounted to 200 billion euros per year in 2005, of which roughly one fifth can be characterised as pure public demand.²³ This fraction varies across countries, as health policies put a different emphasis on private funding and private providers of health care. As an example, Swedish authorities purchase wound products and sutures worth approximately 30 million euros every year. In the EU, import penetration in medical instruments has been estimated to be approximately 47 per cent – making this one of the most traded sectors in public procurement. As a result, the internal EU trade of medical instruments, apparatus, implants and supplies amounted to approximately 40 billion euros in 2010. Extra-EU imports amounted to some 28 billion euros of the same category of goods.²⁴

During the period 2007–2009, EU Member States awarded over 7,000 contracts in the field of public transportation. Cross-border activities were, however, relatively modest: around 17 per cent of contracts were awarded across-borders.²⁵

2.1. Case 1: At the public hospital – a surgery *Made in Sweden?*

Figure 3 depicts an aortic valve replacement at Uppsala University Hospital, a relatively large hospital in which over 300 such operations are performed every year. In the operating rooms and at this clinic, hundreds of different medical appliances, tools, supplies and pharmaceuticals, of which a majority are purchased through public procurement, are used. For the purpose of this study, a brief overview of the procurement organisation is here followed by an examination of the inventories

in the operating room. To limit the scope of the investigation, the most essential equipment and supplies were selected.

Four levels of contracting bodies contribute to the equipment and supplies found in the operating room. First, the county authority forms, together with neighboring county councils, a joint procurement body, which procures large quantities of consumables for health-care providers. The joint procurement body contracts suppliers either for framework agreements or purchases goods directly for stockholding. Health-care providers benefit from the general agreements by ordering supplies from (procured) stockholding firms or from the joint procurement body itself. Second, most of the medical equipment and non-consumables are procured by the county council procurement department. Third, some categories of appliances are procured by the hospital. Fourth, the clinic staff purchases some of the specialised equipment and implants that are needed in surgery – usually in cooperation with the hospital or county procurement department. For some items at the thoracic clinic, this is done together with a thoracic clinic at a neighbouring hospital. This particular arrangement is similar to many public hospitals in Sweden, although the division of functions varies between hospitals and counties.



Figure 2. Items in the operating room²⁶



Out of the 40 items surveyed in the operating room, a major proportion of the procurement involved more than one type of cross-border activity. In cardiopulmonary equipment and supplies, out of 23 items, 20 were purchased via foreign subsidiaries acting mostly as sales agents. Most of this equipment was developed and manufactured in the same country. Looking at the surgical and other items in the operating room, goods and firms originate from a host of regions in the world, of which virtually two were “genuinely” Swedish. However,

it is worth elaborating on the cross-border integration among the foreign firms. As an example, the acetated ringer (no. 11 above) (a solution for intravenous administration) was procured from the German medical company Fresenius. Fresenius’ infusion therapy and clinical nutrition division, Fresenius-Kabi, locates its manufacturing and development of acetated ringers in Halden, Norway. A major part of its clinical nutrition (used pre- and post-operation) division is, however, located in Uppsala, Sweden, a few kilometres from the hospital. The facility in Uppsala supplies the world market with products for clinical nutrition, employs over 900 people and contributes to the biomedical cluster in the region. This illustrates how a public service – and the associated procurement – can be a local story and, at the same time, a highly global experience.

Findings

- Only two (2) items did not require cross-border procurement in any form.
- No (0) items were procured *directly* across borders.
- In fact, as many as 26 items required procurement across EU borders (extra-EU) either due to imports of goods or transactions via non-EU subsidiaries.
- Twelve (12) items required procurement across borders within the internal market.

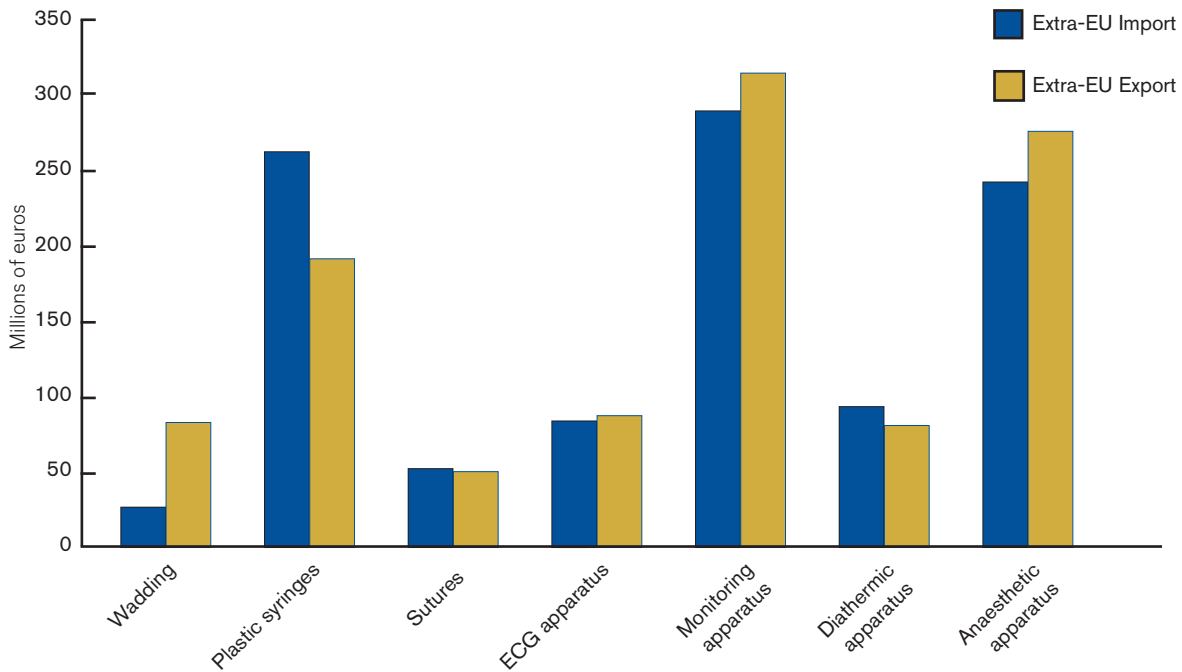


Table 1. Supplies and their supply chain

Anaesthesia and cardiopulmonary equipment	Name of contractor, headquarters' location	Origin	Cross-border activities
1. ECMO set	Maquet (A), Germany	Germany	Foreign subsidiary, imports of goods
2. ECMO supplies	Maquet (A), Germany	Turkey	Foreign subsidiary, imports of goods
3. Blood parameter monitoring system	Terumo (A), Michigan, United States	United States	Foreign subsidiary, imports of goods
4. Saturation monitoring system	Medtronic (A), United States	United States	Foreign subsidiary, imports of goods
5. Blood cardioplegia set	Medtronic (A), United States	United States	Foreign subsidiary, imports of goods
6. Heart-lung machine supplies	Medtronic (A), United States	United States	Foreign subsidiary, imports of goods
7. Pressure management set	Edwards Lifesciences (A), United States	United States	Foreign subsidiary, imports of goods
8. Heart-lung machine	Sorin (A), Italy	Germany	Foreign subsidiary, imports of goods
9. Blood heater and cooler system	Sorin (A), Italy	Germany	Foreign subsidiary, imports of goods
10. Retrograde cannulae	Edwards Lifesciences (A), United States	United States	Foreign subsidiary, imports of goods
11. Acetated ringer	Fresenius-Kabi (A), Germany	Norway	Foreign subsidiary, imports of goods
12. Anaesthesia, Isoflurane	Baxter Medical (A), United States	Puerto Rico, United States	Foreign subsidiary, imports of goods
13. Electrosurgical generator, diathermia	Covidien (A), United States	United States	Foreign subsidiary, imports of goods
14. Anaesthetic work station	Dräger (A), Germany	Germany	Foreign subsidiary, imports of goods
15. ECG electrodes	3M (A), United States	Canada	Foreign subsidiary, imports of goods
16. Anaesthetesia, Sevoflurane	Baxter Medical (A), United States	Puerto Rico, United States	Foreign subsidiary, imports of goods
17. Anaesthetesia, Ultiva	GlaxoSmithKline (A), United States	Puerto Rico, United States	Foreign subsidiary, imports of goods
18. Artery catheterisation set	Vingmed (C), Sweden	United States	Imports of goods
19. Thermodilution catheter	Edwards lifesciences (A), United States	United States	Foreign subsidiary, imports of goods
20. Dressings	3M (A), United states	United States	Foreign subsidiary, imports of goods
21. Injection	Medioplast (B), Sweden	Taiwan	Imports of goods
22. Drainage catheter	Medioplast (B), Sweden	Italy	Imports of goods
23. Cardiology ultrasound	Philips (A), Netherlands	United States	Foreign subsidiary, imports of goods
Surgical (and other) equipment and supplies			
24. Heart valve implant	Edwards Lifesciences (A), United States	United States and Switzerland	Foreign subsidiary, Imports of goods
25. Scalpel	Instrumenta (C), Sweden	Germany	Imports of goods
26. Forceps	Instrumenta (C), Sweden	Germany	Imports of goods
27. Scissors	Instrumenta (C), Sweden	Pakistan	Imports of goods
28. Needle holder	Instrumenta (C), Sweden	Germany	Imports of goods
29. Disecting forceps	Instrumenta (C), Sweden	Germany	Imports of goods
30. Scissors	Stille (D), Sweden	Sweden	No evident cross-border activities
31. Sterile linen	Medline (B), Sweden	China	Imports of goods
32. Surgical gloves	Medline (B), Sweden	Thailand	Imports of goods
33. Sterile gowns	Berendsen (B), Sweden	Japan and Poland	Imports of goods
34. Monitor set	Multi-Q (B), Sweden	Taiwan	Imports of goods
35. Operating table	Stille (D), Sweden	Sweden	No evident cross-border activity
36. Surgical towel	Mölnlycke Health Care (B), Sweden	Czech Republic	Imports of goods
37. Wound products	Mölnlycke Health Care (B), Sweden	Finland and the UK	Imports of goods
38. Wound dressings	3M (A), United States	United States	Foreign subsidiary, imports of goods
39. Clips	Johnson & Johnson/Ethicon (A), United States	Puerto Rico, United States	Foreign subsidiary, imports of goods
40. Sutures	Johnson & Johnson/Ethicon (A), United States,	Puerto Rico, United States	Foreign subsidiary, imports of goods

Contractors are divided into the following categories: **A**: the contractor is a foreign subsidiary, **B**: the contractor is a Swedish firm with offshore manufacturing, **C**: the contractor is a Swedish firm acting as a sales agent for foreign manufacturers and **D**: the contractor is a Swedish firm with substantial manufacturing in Sweden.

Figure 3. External EU trade in some of the goods found in the operating room



2.2. Case 2: At the Stockholm underground – a commute *Made in Hong Kong?*

In 2008, the regional public transportation corporation in Stockholm, SL, issued a tender for a contract covering operations in connection with the underground traffic system. The contract was awarded to the Hong Kong-based company MTR Corporation Limited. Prior to that, the company had established a local affiliate MTR Stockholm (a subsidiary of MTR Europe involved in the London Overground

system). MTR Corporation Limited did not offer the lowest price. The contract was awarded on the basis of the most economically advantageous tender from SL's point of view. The contract value, approximately 3 billion euros, made it the single largest civil procurement worldwide in 2009.

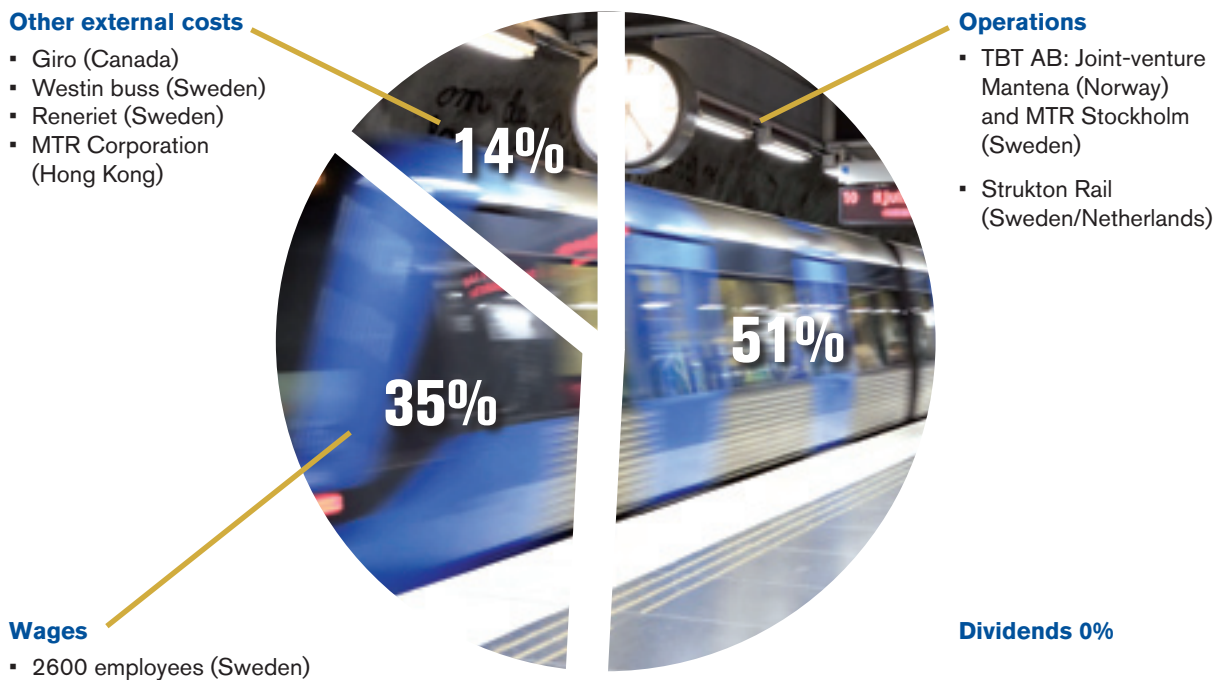
A 30.000-page contract lays out the exact details of the contractor's assignment. Among other things, the contract specifies benchmarks in punctuality, safety and customer satisfaction. In order to enforce the eight-year, plus additional six-year, contract, deterrents and incentives, in the form of fines and bonuses, can be given based on performance.

In November 2009, MTR Stockholm took over the maintenance and operation of the trains, underground traffic control and station services. When operations were handed over from the French-owned operator Veolia, personnel, equipment and premises were transferred into the hands of MTR. Members of staff from MTR Corporation Limited (the contractor and parent company), and MTR Europe, its European subsidiary, were temporarily transferred to MTR Stockholm to implement new management, control systems and quality assurance and processes. Individuals from Stockholm were also transferred to Hong Kong.

Of the approximately 295 million euros assigned from SL to MTR in 2010, 150 million is allocated to different operations and maintenance, 105 million to wages and 40 million to external costs.



Figure 4. Economic value of the underground operations 2010



- The subcontractor responsible for train maintenance (approximately 54 million euros) is a joint venture between MTR and the Norway-based company Mantena.
- The rail service subcontractor is the Dutch company Strukton Rail.
- The main IT-solution provider is the Canada-based company GIRO.
- The stand-by transportation subcontractor is the Swedish company Westin buss.
- The sanitation subcontractor is Swedish-based Reneriet.

MTR Stockholm, responsible for the running, planning and maintenance of the system, is a subsidiary of MTR Europe and part of Hong Kong-based MTR Corporation Limited. It has European as well as overseas subcontractors and employs 2,600 people in Sweden, of which 200 are white-collar workers. Apart from some staff mobility (during the takeover), the predominant contribution from Hong Kong is the know-how, business plan and concepts which have been “exported” to the Stockholm underground system. The know-how acquired from operating public transportation during more than three decades in Hong Kong will add value to the Stockholm underground. Yet, personnel and subcontractors remain, to a surprising extent non-Hong Kong and predominantly local.

Conclusions

In this section, we described the international legal framework regulating public procurement and provided figures on cross-border procurement and market access. Also, we intended to dissect the patterns of cross-border procurement via two hands-on examples. The two cases illustrate what cross-border procurement, in essence, is: Every activity across borders that takes place in connection with the production of a public service.

Open borders appear as important for quality and efficiency of many public services as in any other field in the economy. Although it may seem contradictory, internationalised firms involved in producing public services create jobs and growth where they operate. The complex and fragmented way firms organise and source in today’s global economy may obscure this fact. Nevertheless, borders that are open to competition in procurement spur competition in markets where few firms are active, improve the quality of health care and public transportation, and help authorities ensure that taxpayers’ money is spent in the most efficient way. This is fundamental for good governance as well as prosperity. In the EU, patients, commuters and businesses alike benefit from greater openness and less discrimination in public procurement.

Part II:
**The European Commission's approach
to securing symmetry in access to public
procurement markets – a critical view**

Introduction

The EU common disciplines on public procurement seek to enable free movement and ensure that firms from across the EU can compete for public contracts. The current reform agenda aims at deepening the single market to reap the full benefits of cross-border trade and competition for public contracts.

In addition, and pursuant to international commitments, the EU provides substantial market access to third countries. Therefore, EU firms and products face competitors not only from other Member States of the Union, but also from third countries. The figures provided in Part I indicate that several major EU trading partners do not offer the same level of access to their respective procure-

ment markets. In view of this asymmetry, the European Commission has launched an initiative to regulate third-country access to the European procurement market.

We present a critical view of the legislative initiative, in essence a proposed reciprocity approach aimed to increase symmetry and to tackle the alleged unfair situation for the EU industry in the area of public procurement.

The first section describes reciprocity as a concept and its role in international trade policy. The second section outlines the rationales behind the envisaged approach and looks into the risks and implications linked to it.



1. Reciprocity in international trade

In international relations and trade policy, the exchange of pledges plays a central role in implementing policy reform. The multilateral trading system is in fact founded on principles of “reciprocity and mutual benefits”, in the wording in the preamble of the Marrakesh Agreement establishing the WTO. Reciprocity as a principle stipulates that any favour or benefit granted by one party shall be returned in kind.²⁷ The principle is inherent in most areas of international trade policy, as a standard method of conducting negotiations.²⁸

In the multilateral context, conducting negotiations on a reciprocal basis limits the scope for free-riding and may minimise political and economic cost for reform. The concept can apply on a product-by-product basis or on a sector-by-sector basis.²⁹ It, too, applies when countries seek to become members of the WTO.³⁰ Through membership, countries benefit from the result of all multilateral trade negotiations, i.e. the trade liberalisation that has occurred in the WTO prior to their membership. In return, elder WTO members require reciprocal (subject to development considerations) access to the acceding country’s market, i.e. that trade barriers are lowered as a condition for membership.

Closely related to the principle of reciprocity in trade relations is the concept of “retaliation”, embodied in the dispute settlement procedure in the WTO, which contains a legal regime for retaliatory measures. Pursuant to a WTO panel or Appellate Body decision, a complainant (the aggrieved country) may suspend concessions and, for example, raise tariffs towards the country that has breached a commitment. In trade negotiations, reciprocity would be seen as a remedy when a trading partner does not meet expectations on market access. While invoking reciprocity in negotiations, a country can “retaliate” by withdrawing a generous offer on market access or even raise barriers to trade.³¹

Economic theory provides a case in favour of the instrumental role of reciprocity in trade agreements, when used as a means to avoid short-term costs from deteriorating terms of trade. Analyses based on game theory can illustrate how reciprocal commitments and enforcement in international trade relations play an important role in remedying inefficiencies in trade policy, when the terms of trade dimension is present (which is not always the case).

Advantages from reciprocity can also be sought in terms of political perception and political economy. When political dealmakers return to their constituents with negotiated bids and agreements, the deal’s degree of reciprocity can contribute to the perception of it being “fair” – even though a non-reciprocal outcome would have been mutually beneficial as well. Having determined a clear path of political change together with other countries, an international agreement may create room for the necessary reform at home. This phenomenon, called “synergistic linkages”, is potentially a powerful aspect in political action. In some areas, a higher degree of reciprocity may ease the pain of impact for minority interests that may stand to lose from an international agreement, as they gain foreign market access or, at least, avoid some disadvantages on the world market.

In reality, there has been a divergence from strictly applying the principle of reciprocity as a basis for trade negotiations. As development considerations gained weight in the 1960s, the GATT parties saw a need to move away from strictly reciprocal commitments.³² Furthermore, the prospect of increased market access through reciprocal commitments does not always triumph over protectionist interests.³³ Despite the straightforward appeal of the reciprocity approach, unilateral and non-reciprocal trade liberalisation has been used, to a great extent, and proven to be an effective means of increasing openness to trade. In effect, since the establishment of the WTO, the bulk of tariff cuts stem from unilateral liberalisation.

In fact, a too dogged focus on reciprocity in trade relations has proven detrimental to desired policy reform. One example studied by policy scholars is the agricultural negotiations in the Uruguay Round.³⁴ In both the US and the EU, the early phase of negotiations coincided with political and budgetary pressures to dismantle some of the agricultural subsidies (that later led to the MacSharry reforms and the 1995–1996 reforms in the US). In a study of the development of the farm sectors and agricultural policy during the Uruguay Round, it is argued that the internationalisation of policy reform partly delayed the liberalisation process. In the US, the negotiating rhetoric, dressed in a somewhat different vocabulary, nurtured an environment where lobbyists learned to take advantage of the reciprocal approach and ask for *more* benefits –



as these benefits would only strengthen the hand of GATT negotiators. “Arming to disarm” became an illustrative military metaphor for this strategy and led to increased farm subsidies during a period when spending would otherwise have decreased. In achieving improved foreign market access for US farmers, this was most likely not a successful avenue. Therefore, the standard reciprocal approach of negotiations presents the following drawbacks, according to Paarlberg:

Three risks stand out: unilateral national reforms in one country will be unnecessarily delayed if linked to the slow-moving pace of reform commitments in other countries; national reforms will be slowed down by rent seekers who will be able, in the context of an international negotiation, to recast needed domestic reforms as “concessions” to foreigners; and the use of a multisector negotiation to speed gains in one sector will block or delay gains in other sectors.³⁵

Going back to public procurement and reciprocity, the recent US–Canada Agreement on Government Procurement (2010) constitutes a special and interesting case for our analysis of reciprocity. The trade-restrictive measures taken by the US prior to the agreement were certainly not intended to provide leverage, but they turned out to provide effective leverage for market openings. In short, the background of the US–Canada Agreement is as follows.³⁶ As part of the economic recovery package of 2009, only US-produced iron, steel and manufactured goods were allowed in construction projects and public works funded by the package (“Buy national/American”). The new requirement became a major irritant in US–Canada relations.³⁷ It caused disruption in existing supply chains as Canadian goods were being torn out of construction projects funded by the stimulus package. Fifty-five per cent of manufactured goods produced in Canada were

exported to the US. The US–Canada asymmetry pertaining to market access at the sub-national level made US trade officials unresponsive to Canadian complaints. However, Canada sought a reciprocal agreement with the US at the sub-national level. This made it politically possible for the US to make the “Buy American” requirements inapplicable with regard to Canadian goods. Pursuant to the subsequent agreement, Canadian firms can compete on an equal footing with US firms for projects funded by the stimulus package. Furthermore, the agreement provides for reciprocal access to both countries’ procurements at the sub-national level on a permanent basis under the GPA. It also provided for temporary and reciprocal access to construction services purchased by sub-national entities.

For the first time ever Canada covered its provinces under the GPA. This was done after having felt the effects of US trade-restrictive procurement measures. From a US perspective, Buy American proved to create a level playing field and leverage which enabled increased market access for US firms. To conclude, although negotiating leverage was not the aim of Buy American, it turned out to be a trigger for the US–Canada Agreement.

2. The proposed instrument – what is at stake?

Reciprocity, with regard to public procurement, has been conceptualised in key European Commission documents on how to boost the European economy, both from a trade policy perspective and from an internal market perspective.³⁸ As such, the initiative regarding international market access for procurement, is a joint initiative from the commissioners on trade and internal markets:

*In 2011 we will: make a legislative proposal for an EU instrument to help secure and increase symmetry in access to public procurement markets in developed countries and large emerging market economies.*³⁹

*In order to ensure that [the process of opening up public procurement] takes place in a spirit of reciprocity and mutual benefit (offering European and foreign businesses equal opportunities and guaranteeing fair competition), European legislation on the access of third-country businesses to European public procurement procedures must also be introduced.*⁴⁰

2.1. Objectives and rationales

The asymmetry in market access is not only a result of international commitments on market access but also of unilateral market opening.⁴¹ International commitments are primarily intended to be reciprocal. To some extent however, the EU has unilaterally and de facto opened up its procurement market for third countries. The Commission is concerned that the EU's international market access commitments are not being implemented in a uniform manner across the EU.⁴²

Apart from claims that the asymmetry creates unequal competition between European and third-country business, advocates of the initiative claim that third-country competition distorts the European procurement market with unfair practices.

Moreover, the asymmetric market access situation puts the EU at a disadvantage in the context of international negotiations on market access. Trading partners see no need to open their procurement markets when they already have, de facto, access to the EU procurement market.

These elements (unfair competition, incoherent implementation of international commitments/unilateral market openings, lack of leverage) together underpin and form the policy context for claims for regulating third-country business' access to the EU procurement market.

The European Commission has embarked on a legislative initiative (international procurement instrument) which will target trading partners who do not offer the same level of openness to the EU in public procurement as the EU does, by the means of closing the EU procurement market for third-country firms, goods and services. Therefore, the Commission seeks to regulate direct as well as indirect cross-border procurement involving third countries.⁴³ The Commission is set to present its legislative proposal in the course of 2011. Below, we analyse the implications of this initiative.⁴⁴

2.2. Will it effectively address unfair practices on the internal market?

From an internal market perspective, advocates of the initiative have underlined that such measures may also address alleged problems with unfair (i.e. extraordinarily low) bidding practices on the part of third-country tenderers. It is indeed true that non-EU firms sometimes win tenders based on bids they cannot honour and are therefore forced to renegotiate or cancel their contract at a later stage. Such malpractice has been described as unwelcome disruption, and to some extent, free-riding, on the EU internal market.

However, there seems to exist no ground for the assumption that third-country tenderers more often than others prove to be unable to honour their bids. Indeed, dishonouring of original bids seems to be more common for certain types of tenders. As such, unrealistic and dishonest bidding ought to be addressed on an internal-market level, rather than by trade policy

2.3. What are the risks?

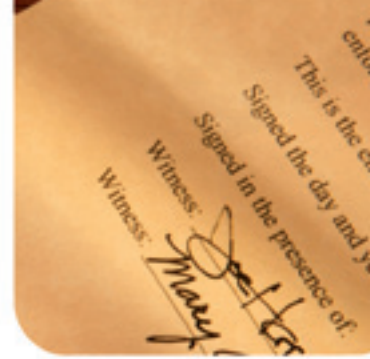
An important aspect of cross-border procurement is the distinction between the *nationality of the contractor and the origin of the products supplied to the public sector*. The figures of cross-border procurement shown in Part I mainly refer to the nationality of the contractor, i.e. the tenderer, as opposed to the origin of the products that the contractor supplies.⁴⁵ As a matter of fact, contemporary global supply chains make product origin quite detached from the nationality of the firm selling the end product.⁴⁶ Put differently,

the products supplied to the public sector are often of foreign origin (according to the applicable rules of origin), while the contractor is national. These observations on cross-border procurement are fundamental when assessing the implications of the legislative initiative aimed to target third-country access to the EU procurement market.

While the objective of the common EU disciplines on public procurement is to create a single European procurement market enabling EU-wide competition for tenders, it also sets the scene for European contracting bodies to achieve best value for taxpayers' money. The overarching goal is to attain value for money, in terms of price and quality. In this context, and when elementary public services, such as health care and public transportation, are being put out to tender, the patients and the commuters are to gain from cross-border competition. From a value-for-money perspective, it does not matter where the tenderer has its manufacturing facilities or where the business group, to which the tenderer belongs, has its headquarters. These are irrelevant facts as long as the supplies meet the public need. Rational purchasing decisions cannot be based on elusive aspects of cross-border activities of a given tenderer.

The case study on the public hospital, in Part I, illustrated that even when the public contract, at a first glance, seems national or even local, it can also be highly global. On the contrary, the case study on the Stockholm underground system tender shows us that the contents of the services supplied can be predominantly local even though the contractor is a foreign firm, namely MTR Corporation Limited, which is based in Hong Kong. Efficiency in public spending calls for non-discrimination in EU tendering procedures.

The initiative seeks to target only third-country business (firms as well as goods and services). From a practical point of view, the internationalisation of business makes it difficult to target exclusively third-country business. EU business locating, e.g. manufacturing to a targeted country, risks being struck by the instrument. Today, being competitive on the world market virtually requires cross-border involvement (subcontracting, foreign ownership, fragmented production).⁴⁷ These business characteristics put a heavy burden on contracting bodies if they are to analyse tenders on the basis of internationalisation (third-country involvement and/or



rules of origin). There are over 250,000 contracting bodies in Europe, "a large and heterogeneous population of public authorities [...] managing procurement budgets of different sizes and possessing very different administrative capacities."⁴⁸ This diversity of contracting bodies is illustrated by the hospital case study in Part I.⁴⁹ In this regard, a parallel can be drawn between the administrative burden intrinsic in the envisaged international procurement instrument and the "Buy American" requirements of the stimulus bill of 2009. The latter have reportedly both delayed procurements and constituted an important hurdle to tackle both for business and US contracting bodies.⁵⁰ Furthermore, imposing additional constraints on contracting bodies counters the objective to simplify European procurement procedures (cf. *inter alia* Single Market Act).

2.4. Will it enable improved market access for EU business?

The envisaged instrument has an important trade policy dimension. It seeks to provide leverage to market access negotiations with third countries. Eventually, it is said, this should give EU business improved access to third-country procurement markets.

This arming-to-disarm assumption is highly questionable. As described in Part I, public procurement is often, and traditionally, used as a policy instrument to pursue other than purely rational economic objectives (as opposed to the value-for-money objective). Many governments attach great value to keeping public procurement within the national realm, since this enables the favouring of national firms and products. Using public procurement to

pursue national policy objectives is facilitated if foreign access to the same is restricted. This potentially outweighs the prospect of increased or re-gained export opportunities to the European procurement market. Trading partners may not be ready to open up, even under the threat that their access to the European public procurement market is restricted.

Advocates of the instrument might however look at the 2010 US-Canada agreement on public procurement in search of a successful precedent. Certainly, the EU's situation of asymmetric market access is, to some extent, analogous to the US' situation with regards to Canada prior to the agreement. Yet, in addition to the strong trade ties, the geographical, historical and cultural ties between the two nations suggest that it is a unique case where a trade-restrictive measure turned out to be instrumental in triggering policy change in another country (although this was not the aim of the initial measure). Therefore, the US-Canada precedent might not be as appealing to advocates of the EU Commission's envisaged international procurement instrument as it first looked.

Rather than enabling improved market access for EU business, there are several, potentially important, drawbacks of the proposed approach.

First, following the adoption of the new "Buy American" requirements in 2009, several major trading partners responded by maintaining or introducing similar "buy national" schemes.⁵¹ Against this background, an international procurement instrument risks bringing about new, protectionist, measures from the targeted countries and not necessarily in the field of public procurement (counter-measuring/retaliation). Therefore, the initiative can lead to an escalation of protectionist measures, raising barriers to trade for EU business. Furthermore, from a systemic point of view, an international procurement instrument would weaken the multilateral trading system further if major trading partners were to escalate their barriers to trade, be it that the measures lie outside the scope of international commitments.

Second and considering the critical stage of the Doha Round and despite public procurement not being part of the Round, the proposed approach would send a negative signal to the negotiating partners at a sensitive point in time.

Third, an international procurement instrument entrenching increased discrimination on the EU

procurement market is diametrically opposed to and particularly untimely with the EU's efforts to facilitate China's early accession to the GPA and to conclude the renegotiation of the GPA at the Eight WTO Ministerial Conference in December 2011.

Fourth, introducing an international procurement instrument risks putting the reform path of the EU at stake. If the future of the single market and the efficiency of public procurement in the EU is to be linked to other countries' slow-moving reform pace in these areas, it will inevitably stand in the way of the goals set out in the EU2020 strategy. What is more, experience from previous episodes of escalating "reciprocity" rhetoric suggests that such strategies tend to create a hotbed for protectionism and third-country counter-measures.

Conclusions

Regulating third-country access to procurement market hinges on efficient means of capturing businesses' cross-border activities. Considering the complex structure of procurement in public services and the concept of cross-border procurement itself, the enactment of the envisaged international procurement instrument will have to overcome substantial difficulties in implementation. It will inevitably lead to considerable red tapes and increasing costs to the 250,000 contracting bodies in the EU.

In effect, an increasing emphasis on reciprocity risks standing in the way of reform towards deepening of the single market and achieving more efficient public procurement at a time of constrained public spending.

To conclude, the proposed "reciprocity approach" is, in the short term, attached with substantial costs to taxpayers and drawbacks for users of public services – and even greater risks for the EU in the medium term. The potential gains, in terms of third-country market access, from the proposed approach are, at present, very vague. As the initiative risks being the starting point for further calls for reciprocity in international trade policy in general, it has important ramifications, not least in view of the state of multilateral trade negotiations.

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Endnotes

- 1 OECD (2002) p. 151.
- 2 This figure draws from the classification of procurement in the *Final Report Cross-Border Procurement Above EU Thresholds*, European Commission (2011b), p. 10.
- 3 Cf. GATT Article III:8 and GATS Article XII, which does the same for services.
- 4 Other parties are Canada; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Netherlands, with respect to Aruba; Norway; Singapore; Switzerland; Chinese Taipei and the US.
- 5 In fact, the margin has been estimated to two to three times larger. OECD (2002), p. 151.
- 6 For example, the latest statistics provided by the EU relate to procurement in 2007, GPA/94/Add.4.
- 7 Hoekman, B and Kostecki, M (2009) pp 521-522. These countries were selected due to their regular reporting.
- 8 Chile, Panama, Peru, Oman and Bahrain.
- 9 There are many more bilateral agreements containing provisions on public procurement but many of them do not provide for market access ("coverage"), cf. for instance Japan-India FTA.
- 10 The thresholds established in 2010 are
 - 125,000/193,000 euros for service and supplies contracts under the classical directive awarded by central government authorities/other contracting authorities.
 - 387,000 euros for service and supplies contracts under the utilities directive (water, energy, transport and postal services sectors).
 - 4,845,000 euros for works contracts.
- 11 European Commission (2011b), p. 15.
- 12 Monti, M (2010), p. 76. The thresholds are detailed in footnote 10.
- 13 Europe Economics (2006), table 7.16.
- 14 Figures refer to 2007 and do not take account of country-specific derogations. European Commission (2010c), pp. 53–55.
- 15 As mentioned above, GPA parties are subjected to an annual reporting mechanism which has not resulted in comprehensive and comparative data. Nevertheless, the available data can indicate the level of openness of the EU's public procurement market compared with other large procurement markets.
- 16 WTO (2011). p. 14.
- 17 GPA/94/Add.4. Total above threshold procurement does not cover warlike material, fuel for utilities and services not listed in the EU's annex 4 to the GPA.
- 18 European Commission (2011b), p. 10.
- 19 European Commission (2010c), pp. 55-56.
- 20 Indeed, in many countries, public procurement discriminates against firms on the basis of foreign affiliation.
- 21 European Commission (2011b), p. 41.
- 22 Ibid, pp. 24-25.
- 23 European Commission (2011b), p. 20.
- 24 Source: Eurostat 2011. This includes some of the subheadings in "Pharmaceutical products" and "Medical and surgical instruments and apparatus" in the combined nomenclature, excluding items such as pharmaceuticals, instruments for dental care, goods primarily used for education purposes etc.
- 25 European Commission (2011b), p. 72.
- 26 Data has been provided by the contractor.
- 27 Keohane, R.
- 28 Ibid.
- 29 Cf. GATT preamble and Article XVIII *bis* (1) and the preamble of the Agreement Establishing the WTO.
- 30 Hoekman, B and Kostecki, M, p. 40.
- 31 This has occurred on several occasions, e.g. in 2007 in the coverage negotiations under the GPA.
- 32 Cf. GATT Part IV on trade and development which was added in the 1960s and the mandate of the Doha Development Agenda. GATT Article XXXVI.8 states:

"The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*"

Also, from a political economy perspective, import-competing industry's interest of protection can outweigh the support for further trade liberalisation which renders reciprocity insufficient as a basis for mutual trade openings.
- 33 For a study on trade protectionism from 1995 to 2007, cf. *Open Trade or Protectionism? Developments in Trade Policy Since 1995*, National Board of Trade (2009).
- 34 Paarlberg, R.
- 35 Ibid, p. 422.
- 36 For a further expose of the context of the US-Canada Agreement on Government Procurement, see Hale, G.
- 37 It should be mentioned that the US already had other procurement programmes targeting and favouring different groups of firms and products in place, e.g. small businesses and minority businesses. New this time was that the legislation was linked to a vast programme of almost \$800 billion.
- 38 Trade policy and the deepening of the single market should contribute to the EU 2020 strategy, which has objectives that are smart, sustainable and inclusive of growth. European Commission (2010a).
- 39 European Commission (2010d).

- 40 European Commission (2011c).
- 41 Some Member States, like Sweden for instance, grant foreign bidders national treatment regardless of international commitments. Therefore, a bidder from Argentina would not be banned from a tender or discriminated against, even though this would be legally possible (from an international law perspective) in the absence of any market access commitments towards Argentina. Consequently, Sweden goes beyond the EU's international obligations and there are other Member States treating third-country tenderers in the same way.
- 42 European Commission (2010b).
- 43 Cf. Figure 1 in Part I where the various forms of cross-border procurement are described.
- 44 Several avenues have been presented, ranging from a discretionary power for contracting bodies to a ban on third-country tenderers, goods and services, to mandatory closure of the EU market for third-country business and a centralised procedure at EU level. As the concrete legislative proposal is yet to be tabled, the following analysis takes, as a starting point, the general notion of closure of the EU procurement market and does not look further into the forthcoming instrument's details.
- 45 The statistics reporting mechanism of the GPA ignores the origin of products. Article IV of the GPA (in force) states that the parties shall apply their normal rules of origin ("applied in the normal course of trade") in the context of public procurement.
- 46 Fragmentation of production to different countries is analysed in *Made in Sweden? A New Perspective on the Relationship between Sweden's Exports and Imports*, National Board of Trade (2010).
- 47 For a detailed analysis of global supply chains, cf. *Made in Sweden A New Perspective on the Relationship between Sweden's Exports and Imports*, National Board of Trade (2010).
- 48 European Commission (2011a), p. iii.
- 49 This diversity of contracting bodies is illustrated by the case study on the hospital in Part I. Bodies as diverse as the county councils' joint procurement body and the hospital clinic itself purchases items to equip the operating room.
- 50 United States Government Accountability Office (2010).
- 51 For example, China and Brazil. Furthermore, Argentina, Indonesia and Ukraine are considering trade-related restrictions on public procurement.



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