

Opinion of the European Economic and Social Committee on 'Third country state-owned enterprises in EU public procurement markets' (own-initiative opinion)

(2011/C 218/06)

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On 16 September 2010 the European Economic and Social Committee, acting under Rule 29(2) of its Rules of Procedure, decided to draw up an own-initiative opinion on

Third country state-owned enterprises in EU public procurement markets.

The Consultative Commission on Industrial Change, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 4 April 2011.

At its 471st plenary session, held on 4 and 5 May 2011 (meeting of 4 May), the European Economic and Social Committee adopted the following opinion by 152 votes to 4 with 9 abstentions.

1. Conclusions and recommendations

1.1 The EESC believes that opening-up of the public procurement systems of all countries to international trade under the Agreement on Government Procurement (WTO GPA) is a winning card: it ensures reciprocity and symmetrical regulations and implementation thereof, making it possible to counter protectionist measures and unfair competition practices, notwithstanding specific agreements with emerging countries, in line with relevant primary and secondary EU legislation and European Court of Justice judgments.

1.2 The EESC believes that the EU must increase negotiating power to improve access to third countries' public markets, in line with its primary and secondary legislation, given that the EU has opened up over 80 % of its public markets while the other major developed economies have only opened up 20 % of theirs.

1.3 The EESC strongly urges the European Parliament, the Council and the Commission to ensure more effective, strategic defence of the EU's interests in the area of access to public markets both internally and internationally, strengthening its global credibility but also increasing the shelf-life and development of the European economic and social model.

1.4 The EESC believes that there should be a level playing field for contracting enterprises, based on reciprocity with third country enterprises that respect the key principles of international public procurement, particularly as regards prohibited direct or indirect state aid, price calculation methods and precautionary consideration of costs and risks.

1.5 The EESC recommends that EU internal market legislators and EU international negotiators in the area of international public procurement, be consistent and aware of the potential reciprocal effects of their activities, promoting equal treatment, non-discrimination, mutual recognition, proportionality, transparency, fighting corruption, respect for social and environmental standards and respect for fundamental rights.

1.6 The EESC feels it is essential to set in motion systematic monitoring of the consistency between the results of bilateral and multilateral negotiations carried out by the Commission with authorisation from the Member States and the ensuing full, genuine implementation by the Member States of the measures adopted.

1.7 The EESC advocates converting the GPA from a plurilateral to a multilateral agreement, with more countries signing up to it and transitional measures in terms of offsets, price preferences, introduction of bodies or sectors and new thresholds; and energetically reviving the idea of excluding for the time being public contracts financed with European funds from the GPA in respect of enterprises from countries still implementing national protection measures.

1.8 The EESC calls for swift adoption of the announced Market Access Scheme for Procurement – MASP, with clear, transparent, tried and tested mechanisms for reciprocal opening-up of markets to ensure symmetrical access to public markets, adapting the 2004 public procurement package accordingly.

1.9 The EESC calls for the approach based on prevention and an 'early warning' system for projects and/or new third country regulations which are restrictive in the area of procurement to be beefed up, with a view to identifying potential barriers and condemning them internationally right from the start, fine-tuning the Commission's market access database to provide reliable, rapidly-accessible information on calls for tender and the technical details and formalities of technical specifications, particularly for EU SMEs, along with statistical data and indicators showing the impact of distorting factors.

1.10 The EESC recommends introducing measures to streamline and simplify procedures, gearing them to the EU's new challenges in order to ensure that internal and international contracting authorities fully exploit the economic and innovation potential of SMEs, including through training, provision of information and assistance for contractors and participants in international calls for tender and on third markets, particularly for their middle and senior management.

2. Introduction

2.1 In the EU total annual public procurement for goods and services amounts to around 17 % of GDP – around EUR 2 100 billion, of which approximately 3 % is above the GPA (WTO Agreement on Government Procurement) threshold ⁽¹⁾. The world public procurement market is estimated at between 10 and 20 % of GDP – no comparable data exists for countries which are not GPA members: world public procurement amounts to well over 10 % of world GDP.

2.2 European companies, from the large global enterprises to the most enterprising SMEs, are fighting to establish themselves on world markets but encountering growing difficulties in accessing the public procurement market. This is not so much owing to obstacles at borders as to obstacles 'beyond the border', which are more complex, technically more problematic and take longer to be identified, analysed and removed, and rules and practices that are restrictive and in danger of preventing EU companies from bidding effectively for public contracts in third countries.

2.3 This own-initiative opinion concerns a specific aspect of the public procurement market, as can be seen from the title: exploring and specifying – as regards bidding by third country state-owned enterprises for public contracts on EU markets – how the EU can:

- ensure that its internal market functions properly where public procurement is concerned;
- guarantee that third country state-owned enterprises are authorised to operate on the European market in compliance with the same admission criteria and conditions as all other enterprises;

- likewise, guarantee that European enterprises benefit from reciprocity and symmetrical access on third country markets.

Other public procurement issues are, or will in the future, be addressed by EESC opinions.

2.4 The link between opening-up of foreign trade and internal market reform is two-way: while in both cases the aim is to reduce the cost of unnecessary regulatory barriers preventing trade in goods, services and investments, the growing interdependence of the internal and international markets demands that legislators regulating the EU's internal market and EU negotiators in the area of international trade and international public procurement be aware of potential reciprocal effects of their activities and implement a consistent policy which is based on promoting the principles of EU primary and secondary legislation as upheld by the Court of Justice and the Charter of Fundamental rights:

- respect for human rights;
- fighting corruption;
- respect for social and environmental standards;
- transparency;
- proportionality;
- equal treatment;
- non-discrimination;
- mutual recognition.

2.5 With regard to standards and regulations, services, investment and public procurement, as well as intellectual property rights and certification procedures, burdensome procedures, lack of transparency and industrial policy measures aiming at forced import substitution, forced transfers of technology and granting local producers preferential access to raw materials often persist among a number of our trade partners.

2.6 While EU companies are subject to increasing competition on their internal market, which has prioritised transparent openness and worked hard to create a European internal market without barriers, it has now become apparent that this openness leaves the internal market absolutely defenceless against third-country market players, who have not committed themselves to practising the same openness on their own markets.

⁽¹⁾ Source: European Commission estimates in COM(2010) 612 final.

2.7 The EU has strict rules on these issues in order to guarantee fair competition on a level playing field, but experience suggests that none of these rules applies to third-country public enterprises, particularly when they bid for public contracts. This contravenes the very ideas underpinning the internal market and is highly detrimental to European industry and the European economy.

2.8 The EESC deems it necessary to study how the EU can ensure the smooth operation of the internal market, including in cases where third-country state-owned enterprises are allowed onto the internal market, while assiduously fighting protectionism and opposing all forms of social and environmental dumping ⁽²⁾, lack of transparency in the area of costs, prices and state subsidies, and failure to respect budgetary and free market rules, in the interests of European consumers, companies and taxpayers.

2.9 The General Agreement on Tariffs and Trade specifically excluded public contracts from the basic obligation on national treatment and from the commitments set out in the General Agreement on Trade in Services; however, it should be borne in mind ⁽³⁾ that by 2015 90 % of world growth will be generated outside Europe, with a third from China alone: in the years to come, we need to seize the opportunity provided by higher levels of growth in third countries, especially in East and South Asia.

2.10 While our market is already largely open, those of our major trading partners are much less so, especially at regional and local level. A few examples in various continents suffice:

2.10.1 In **CHINA**, markets are still far less open than they could be. With GDP of EUR 3 573,8 billion in 2009, China exported EUR 227 billion of goods and services to the EU and imported EUR 99,7 billion of the same from the EU in that year. The 'buy local' clauses have existed since 2003 under Article 10 of the GPL (Government Procurement Law), while in 2007 the 'buy Chinese' policy was reinforced by two decrees limiting the possibility of awarding contracts for foreign supplies to instances where indigenous products are 'unreasonably' more expensive and of lower quality. In 2009 this rule was interpreted strictly, removing any remaining possibility, particularly for hi-tech and innovative products, while rigorous monitoring was laid down for public construction contracts in the 2008 and 2009 domestic stimulus packages. In November 2009 China introduced an indigenous innovation product accreditation list, while in 2010 the State Council proposed

changes regarding state-controlled companies in order to induce these companies to operate solely on the domestic market. At the same time, however, it granted state aid to the Chinese hi-tech industry to make it more competitive on foreign markets ⁽⁴⁾.

2.10.1.1 In the field of works contracts, China abandoned a licence system for project management, construction management and other construction services for a new WFOCE (wholly foreign-owned construction enterprise) and JV (joint venture) system, in which foreign companies are in practice excluded from projects covered by national competitive bidding (NCB), while they are only admitted to the rare international competitive bidding (ICB) for domestic projects: both systems – WFOCE and JV – must satisfy the Chinese qualification system, which requires nominal capital of at least five times the value of the project, key staff including least 300 members resident in China for at least a year, references for previous work carried out in China and, for JVs, taking on the partner with the lowest qualification grade ⁽⁵⁾.

2.10.1.2 The current Chinese bid in the WTO negotiations on the Agreement on Government Procurement (GPA) does not include the vast majority of construction works likely to be of interest to European enterprises, as regards either the activity or the contracting authorities.

2.10.1.3 In **RUSSIA** – which is not a signatory to the WTO GPA – a decree of the Ministry of Economic Development adopted in December 2008 lays down restrictions on access to government and municipal contracts, giving preference to national products and services, which can be priced up to 15 % above the contract price, and in 2009 'buy Russian' measures were adopted to counter the crisis.

2.10.2 In **BRAZIL** the law on public procurement was amended in July 2010 to enable the contracting authorities to reserve a 25 % margin for products and services produced or supplied wholly or partially in Brazil. In 2009 Brazil recorded GDP of EUR 1,128.5 billion ⁽⁶⁾.

⁽²⁾ See COM(2010) 612/1 final.

⁽³⁾ See COM(2010) 612/4 final.

⁽⁴⁾ A key concern with regard to public procurement as well as intellectual property is the 'indigenous innovation' policy aimed at supporting Chinese firms moving up the value chain. The indigenous innovation scheme, first announced in November 2009, severely hampers access to the Chinese procurement market in a wide number of innovative sectors from green technology to telecommunication. See SEC(2011) 298 final.

⁽⁵⁾ See Communication from the European Communities, WTO DOCUMENT No. S/C/W/286, para. 15-19; in addition, where a foreign company acquires a Chinese company the qualifications gained by the Chinese company are annulled and it has to start again from zero.

⁽⁶⁾ 2010/7 Amendments to the Brazilian law on public procurement introducing a 'Buy Brazilian' clause on a 'temporary' basis.

2.10.3 In the **USA**, Congress stepped up the 'buy American' requirements of the American Recovery and Reinvestment Act (ARRA) (7). US GDP in 2009 amounted to EUR 10,122.6 billion, and the USA exported around EUR 286,8 billion of goods and services to the EU and imported around EUR 323,8 billion from the EU in that year (8).

2.10.4 In **JAPAN**, the seventh largest market for EU exports, with EUR 36 billion of exports as against EUR 56,7 of imports in 2009 – EU companies have difficulty gaining access to public contracts, despite the fact that Japan is a signatory to the WTO GPA: only 4 % of all public contracts were opened to EU companies, worth EUR 22 billion (2007), that is less than 0,7 % of Japanese GDP, while Japan had access to the EU public market to the tune of EUR 312 billion, i.e. 2,5 % of EU GDP (9).

2.10.5 In **VIETNAM**, a directive was issued in April 2010 on the use of domestic products and materials and on public contracts for these products, financed with state funds. Vietnam achieved GDP in 2009 of EUR 66.8 billion, exporting EUR 7,8 billion of goods to the EU and importing EUR 3,8 billion from the EU.

2.10.6 In **AUSTRALIA**, in 2009 two states adopted rules on public contracts deemed to be significant – over AUD 250 million – which are subject to requirements of 40 % of local (Australian or New Zealand) products in the state of Victoria, while in New South Wales a 20 % price preference has been established, to which additional 2,5-5 % preferences are added depending on the case. Australia recorded GDP of EUR 712,8 billion in 2009, exporting EUR 14,4 billion of goods and service to the EU and importing EUR 34,1 billion.

2.11 On the other hand, there are cases such as **TURKEY**, where the public procurement system improved following the adoption of Law No 5812 in 2008, which brought internal provisions into line with Community rules: contracts for the supply of goods, works and services are based on open competition mechanisms, although there is room for improvement in the transposition of the EU directives relating

(7) The legislation includes two new 'Buy America(n)' provisions that: - 'prohibit funds appropriated by this Act to be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel and manufactured goods used in the project are produced in the United States'; and - 'prohibit funds appropriated by this Act to be used for the procurement by the Department of Homeland Security of a detailed list of textiles items unless the item is grown, processed in the United States'.

(8) A further example is the prohibition of US government purchases from so-called inverted companies, which are originally US companies that have changed tax jurisdiction and inverted to another country's tax system with serious concerns as to its compatibility with the WTO GPA. The result is then that an EU company established in the EU cannot sell to the US government, even though it should be protected by the GPA coverage.

(9) See SEC(2011) 298.

to appeal systems (10). Contracts above the EU threshold in 2008 were worth EUR 7 703 million in the area of works; EUR 8 459 in the area of services and EUR 8 042 in the area of goods.

3. The current legislative framework

3.1 The current legislative framework regulating the public procurement market for European companies is as follows:

- the basic Community framework is made up of the 2004 Public Procurement Directives – Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, along with Directive 2007/66/EC on review of the procedures for the award of public contracts and the Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts (11), and Directives 89/665/EEC and 92/13/EEC;

- the Treaty, which included in primary EU law recognition of the right to regional and local autonomy, with the possibility for public authorities to use their own instruments to discharge their public service responsibilities, such as various forms of public-private partnership;

- numerous European Court of Justice judgments on public procurement;

- the principal instrument for opening-up of international public procurement is the WTO Plurilateral Agreement on Government Procurement – GPA, currently being revised, while the WTO General Agreement on Trade in Services (GATS) excludes government procurement from the GATS' main market access provisions, without prejudice to the multilateral negotiating mandate on services procurement, where the Community is a driving force for commitments in the area of market access and non-discrimination on services procurement and has put forward common procedural rules for covered procurement;

- 'procurement' clauses in Free Trade Agreements (FTAs), Association Agreements (AAs) Partnership and Cooperation Agreements (PCAs), Stabilisation and Association Agreements (SAAs), Economic Partnership Agreements (EPAs), Interim Agreement on Trade and Trade-related matters (IAs) and Trade and Economic Cooperation Agreements;

(10) **TURKEY Public Procurement Assessment 2009 - SIGMA Support for Improvement in Governance and Management.** A joint initiative of the OECD and the EU.

(11) Commission Staff Working Document SEC(2008) 2193.

— application of Community law on public procurement and concessions to institutionalised public-private partnerships.

4. Comments

The EESC believes that opening-up of the public procurement systems of all countries to international trade under the Agreement on Government Procurement (WTO GPA) is a winning card, as it ensures reciprocity and symmetrical regulations and implementation thereof, making it possible to counter protectionist measures and unfair competition practices, notwithstanding specific agreements with emerging countries.

4.1 The EESC would highlight the data revealed from the Commission's recent indication that 'by 2015, 90 % of world growth will be generated outside Europe, with a third from China alone' ⁽¹²⁾.

4.2 The EESC agrees with the principle that, in order to build on its own competitive advantages, the EU must ensure more effective, strategic defence of its interests, strengthening its global credibility but also increasing the shelf-life and development of the European economic and social model. In order to be more credible, Europe must increase negotiating power to improve access to third countries' public markets, given that the EU has opened up over 80 % of its public markets while the other major developed economies have only opened up 20 % of theirs ⁽¹³⁾.

4.3 The EESC considers that the current Community regulatory framework for public procurement is in principle adequate and sufficient to regulate the economic, social and environmental aspects of the European market. Unfortunately, some Member States are failing to fully exploit the opportunities to ensure fair competition provided by this regulatory framework, and are risk of opening their markets, non-reciprocally, to third country state-owned enterprises that do not respect the key principles of international public procurement; however, it is essential that these rules are rigorously respected, along with the fundamental principles of the Treaties and the Charter of Fundamental Rights (CFR).

4.4 The EESC believes that public-public cooperation must not create parallel markets which evade public procurement rules and exclude private operators.

4.5 The EU is intended to be an open economy which encourages free trade, providing legally-certain, non-discriminatory access to a wide number of public contracts; at the same time, confidentiality and transparency must be ensured

to promote innovation and a sustainable public procurement market which:

— gives preference to tenders offering the best value for money in comparison with the lowest price;

— caters for the entire life cycle of the work.

4.6 The EESC believes that there should be a level playing field for all contracting enterprises: in this regard the EESC raises doubts regarding the conditions for participation of third country 'state-owned enterprises', particularly in terms of prohibited direct or indirect state aid, price calculation method, and precautionary consideration of costs and risks. In fact, the European market guarantees access without sufficient guarantees against unfair competition, entailing a real danger of social and environmental dumping and non-compliance on the part of these state-owned 'enterprises' with the body of ethics laid down in the Treaties and the CFR.

4.7 The EESC believes the following are necessary:

4.7.1 To stress in international negotiations and negotiations with third countries that the EU's fundamental values, rights and principles, as enshrined in primary EU legislation on the basis of the Treaties and the CFR, must be respected and are non-negotiable.

4.7.2 To speak together with a single, strong, consistent voice in international negotiations, avoiding individual national measures that could jeopardise the joint negotiating stance and systematically comparing actual opening-up of national markets against the terms and conditions of agreements at European level.

4.7.3 To ensure greater coordination between the Commission departments dealing with the various aspects of trade, industrial and cooperation negotiations in line with the multilateral provisions on government procurement laid down by the 1994 GPA Agreement, the new generation FTAs, the Partnership and Cooperation Agreements (PCAs) or Association Agreements (AAs) in the framework of the Euro-Mediterranean Partnership, with approaches more targeted at non-tariff barriers and pressure to open up public procurement to EU companies.

4.7.4 To convert the GPA Agreement from a plurilateral to a multilateral agreement, with more countries signing up and transitional measures in terms of offsets, price preferences, introduction of bodies or sectors, and higher thresholds.

⁽¹²⁾ COM(2010) 612, pt 1.

⁽¹³⁾ Joint declaration, 9.2.11, by **France, Germany, Spain, Portugal, Italy and Poland in favour of greater reciprocity between the EU and its trade partners.**

4.7.5 To exclude for the time being public contracts financed with European funds from the GPA, concerning enterprises from countries still implementing national protection measures, as already argued by the EESC in several earlier opinions ⁽¹⁴⁾.

4.7.6 To meticulously implement the principles of reciprocity and proportionality for certain sectors, in the *General Notes and Derogations from the Provisions of Article III of Appendix I of the EC of the GPA*.

4.7.7 To oblige third country enterprises to comply with the same conditions placed on European companies on their markets: the EU cannot continue to base negotiations on formal reciprocity rather than genuine economic reciprocity; a safeguard clause suspending the agreement in the event of imbalance should be provided for.

4.7.8 Where major trade partners benefit from the general opening-up of the EU without reciprocity, the EU must consider introducing targeted restrictions on access to the EU's public procurement sectors, with the aim of prompting these partners to propose reciprocal opening-up of the market.

4.7.9 To adopt, as soon as possible, the Market Access Scheme for Procurement – MASP, with clear, transparent, tried and tested mechanisms for reciprocal opening-up of markets to ensure symmetrical access to public markets in the developed economies and the major emerging economies in the sectors covered by Directive 2004/17/EC ⁽¹⁵⁾ and the 2011 Work Programme ⁽¹⁶⁾.

4.7.10 To ensure greater technical cooperation between representatives of the Member States and the Commission on market access, and more frequent consultation with industry representatives.

4.7.11 To introduce strict monitoring, along with measures to ensure its effective implementation, of the absence of direct or indirect state aid – considered to be prohibited in the EU – particularly for Community calls for tender receiving financing from the Community, the EIB, the Structural Funds or for TENs, accompanied by full compliance with guarantees for Community social and environmental standards.

4.7.12 To fine-tune the Commission's market access database, providing reliable, rapidly-accessible information on calls for tender and the technical details and formalities of technical specifications which in effect prevent bidding in third countries, providing statistical data and indicators showing the impact of distorting factors.

4.7.13 To beef up the approach based on prevention and an 'early warning' system for projects and/or new third country regulations which are restrictive in the area of procurement, to enable potential barriers to be identified and condemned internationally right from the start, tackling them at source with the systematic use of notification procedures under the Agreement on Technical Barriers to Trade.

4.7.14 To introduce EU-level measures for SMEs in order to ensure that internal and international contracting authorities fully exploit the economic and innovation potential of SMEs.

4.7.15 Training, provision of information and assistance for participants in international calls for tender and on third markets, particularly for middle and senior management, acknowledging the crucial size-related issues they face in terms of trade protection, market access and access to information.

4.7.16 To amend Article 55(3) of Directive 2004/18/EC and Article 57(3) of Directive 2004/17/EC on abnormally low tenders, by making it impossible to accept bids submitted by state-owned enterprises that fail to prove that their bid has not received direct or indirect state aid that is prohibited by the Community rules: an example to this effect of 'state aid tests' can be found in the Millennium Challenge Corporation's Annex 4.

4.7.17 To add infringement of intellectual property rights involving the use of fraudulently acquired patents or technical data as grounds for compulsory exclusion under Article 45 ⁽¹⁷⁾ of Directive 2004/18/EC and Article 54 ⁽¹⁸⁾ of Directive 2004/17/EC.

4.7.18 To ensure that the future European legal instruments on the free movement of third country workers do not provide an incentive for third country state-owned enterprises that receive prohibited state aid.

4.7.19 To ensure swift, detailed publication in a centralised EU database of restrictive rules and practices in the area of public procurement which prevent EU companies from bidding effectively for contracts in third countries, such as 'buy local' legislative acts or acts providing for increasing percentages of 'local content' or 'stimulus packages' for local innovations and technologies or for national 'economic recovery', which give preference to local operators and make market access more difficult for companies from other countries.

⁽¹⁴⁾ EESC opinion on *International public procurement*, OJ C 224, 30.8.2008, p. 32.

⁽¹⁵⁾ COM(2009) 592 final.

⁽¹⁶⁾ COM(2010) 612/4 and COM(2010) 623/2, Annex I, point 36.

⁽¹⁷⁾ Article 45 *Personal situation of the candidate or tenderer*.

⁽¹⁸⁾ Article 54 *Criteria for qualitative selection*.

4.7.20 To further strengthen consistency and complementarity between internal policies and the EU external policy, in response to the call by the September 2010 European Council 'to review the interface between industrial policy and competition policy in the light of globalisation and to promote a level playing field' ⁽¹⁹⁾.

Brussels, 4 May 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON

⁽¹⁹⁾ See Competition Council of 10.12.2010 – *Council Conclusions on an integrated industrial policy for the globalisation era: Putting competitiveness and sustainability at centre stage*, point 15.