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from: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 26 March 2012

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European  
Union

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No Cion doc.: SWD(2012) 57 final - Annex - Part 2/11

Subject: Commission staff working document  
Impact assessment  
*Accompanying the* proposal for a Regulation of the European Parliament and of  
the Council on the access of third-country goods and services to the Union's  
internal market in public procurement and procedures supporting negotiations  
on access of Union goods and services to the public procurement markets of  
third countries  
Annex

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Delegations will find attached Commission document SWD(2012) 57 final - Annex - Part 2/11.

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Encl.: SWD(2012) 57 final - Annex - Part 2/11



EUROPEAN COMMISSION

Brussels, 21.3.2012  
SWD(2012) 57 final

Annex - Part 2/11

**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE  
COUNCIL**

**establishing rules on the access of third country goods and services to the European  
Union's internal market in public procurement and procedures supporting negotiations  
on access of European Union goods and services to the public procurement markets of  
third countries**

**Annex**

{COM(2012) 124 final}  
{SWD(2012) 58 final}

## ANNEX 2

### **Summary of the contributions to the public consultation Access of third countries to the EU's public procurement market**

#### **1. BACKGROUND**

Public procurement rules define how public authorities spend public money when buying goods, works or services on the open market. Solid public procurement rules prevent governments from favouring a specific economic operator and guarantee sound competition between market players, which helps governments to find best value for taxpayers' money.

Public procurement represents a substantial part of the EU's and other trading partners' economies. In the EU, it corresponds to 17% of GDP. Through international commitments, such as the WTO Government Procurement Agreement (GPA) and trade agreements concluded with third countries or regions, the EU has shown strong advocacy for an ambitious opening of international public procurement markets. It has committed itself to granting market access to a large part of its public procurement market for most foreign goods, services and companies.

In contrast to the EU's policy favouring greater openness, many third countries are reluctant to (further) open their procurement markets to international competition. Certain trading partners have also maintained or introduced protectionist measures hitting, among others, EU companies. This clearly limits business opportunities for EU companies in these markets.

The European Commission announced in its Communications "Towards a Single Market Act"<sup>1</sup> and "Trade, Growth and World's Affairs"<sup>2</sup> its intention to present in 2011 a policy proposal with the aim to clarify the rules governing access to the EU's public procurement market of goods, services and companies from outside the EU. Moreover, this initiative should ensure a level playing field on the EU's public procurement market and strengthen the position of the EU when negotiating further access for EU companies to public procurement markets of countries outside the EU.

In the framework of the impact assessment conducted for this initiative, the Commission launched on 7 June 2011 an on-line consultation. The consultation period ended on the 2<sup>nd</sup> of August 2011, but the replies received until 15 September were taken into account.

The consultation consisted of three questionnaires that were targeted to different groups of stakeholders. One questionnaire was specifically designed for businesses and trade associations representing businesses, one other for contracting authorities/governments and the third questionnaire for other interested stakeholders (i.e. citizens, NGOs, trade Unions, think tanks, etc). The questions on the initiative itself were common in the three questionnaires, the differences in the questionnaires pertaining to the type of information asked on the stakeholders.

This document contains a brief and non-exhaustive summary of the replies that have been given to the consultation. The individual contributions that have been authorised for

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<sup>1</sup> COM(2010)608

<sup>2</sup> COM(2010)612

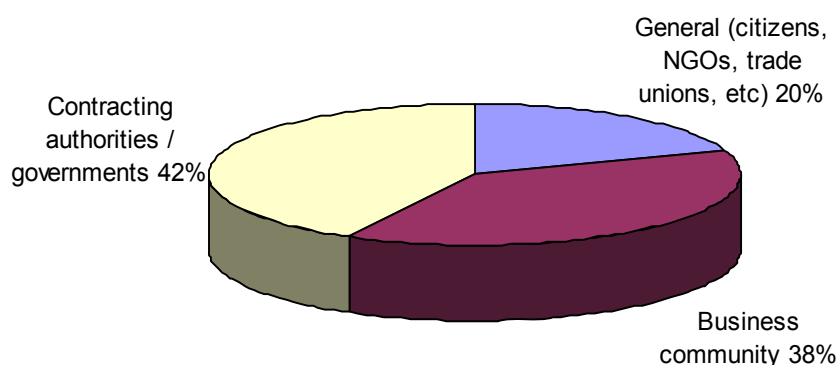
publication are published on the website of the Directorate-general Internal Market and Services and Directorate-general Trade.<sup>3</sup>

## 2. CONTRIBUTING STAKEHOLDERS

### a. General overview

The Commission received in total 215 contributions of Member States, public authorities, contracting authorities and contracting entities, regional and local authorities, companies, trade unions, trade associations, NGOs and citizens, all based in the European Union. Furthermore, the Commission also received contributions from stakeholders outside the EU, including from third country governments, businesses or trade organisations. Contributions were received directly through the on-line questionnaire or in written form (ie. position papers, formal letters, etc).

#### Replies per interest group



### b. Contracting authorities/government

During the consultation in total 90 contracting authorities and governments (hereafter "contracting authorities") have replied to the consultation. An important majority (73%) of the replies of contracting authorities/governments to the consultation came from Germany, while there were also a number of contributions from Austria, Estonia, Latvia, the United Kingdom, and one from Belgium, Czech Republic, Denmark, France, Hungary, Italy, the Netherlands, Sweden. While there were quite a number of contributions by national/federal ministries, almost half of the contributions came from municipalities and regional authorities. Some replies came from universities, central purchasing bodies and utilities operators in the water,

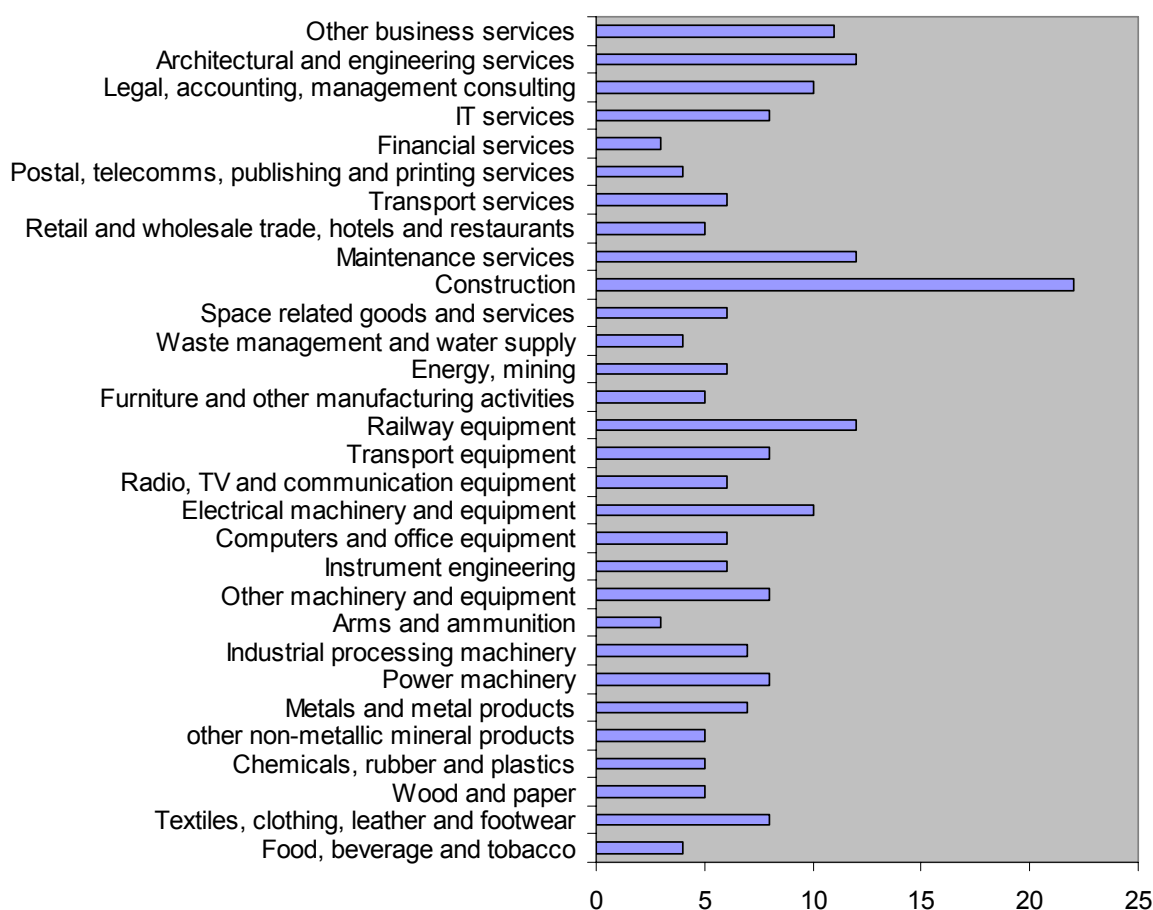
<sup>3</sup> See the following link: [http://ec.europa.eu/internal\\_market/consultations/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/index_en.htm) and <http://trade.ec.europa.eu/consultations/>

railway or urban transport sectors. In addition, some replies were received from foreign governments (Australia, Japan, New Zealand).

### c. Businesses and trade organisation representing businesses

The "business" questionnaire was addressed to stakeholders representing the business community whether as an individual company or an association representing businesses. There were 82 responses to this specific questionnaire. Both types of respondents were largely represented in the consultation responses, with a slight majority some (52%) of individual businesses. There was an equivalent representation of SMEs and large companies (over 250 employees). Responses were received from businesses or their representatives located in 18 Member States, with the most significant number of responses (either in number or by representativeness) received from France and Germany, followed by the United Kingdom, Spain and Belgium (where a large number of business trade representatives are located). It is worth noting that contributions were also received from businesses and/or their associations from the United States, Switzerland and Japan. Responses were received from all sectors of economic activity listed in the consultation document, in particular from sectors such as construction, power machinery, electrical machinery and equipment, transport equipment, railway equipment, IT services, architectural and engineering services, consulting services or maintenance services.

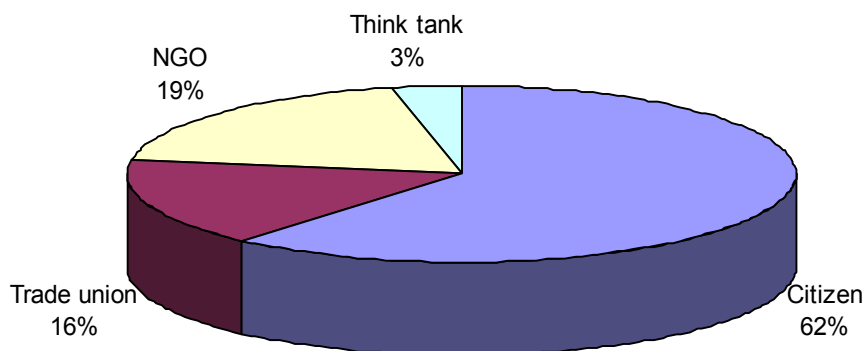
**Replies per sector of activity**



## Other interested stakeholders

The general questionnaire was addressed to any stakeholder who did not consider itself a representative of the business community or a contracting authority/government but was nevertheless interested in this initiative. There were 42 replies to this questionnaire, mostly from individual citizens although responses were also received from trade unions, NGOs, think tanks and other stakeholders such as museums, educational and professional institutions, etc.

Distribution of replies in general questionnaire



### 3. SUMMARY OF THE MAIN VIEWS OF STAKEHOLDERS ON THE INITIATIVE<sup>4</sup>

#### 3.1 Problem definition

Respondents generally welcomed the initiative from the European Commission. A large majority emerged among all types of respondents in agreement with the consultation's introductory description of the current level of access to the EU public procurement market for goods, services and companies from outside the EU.

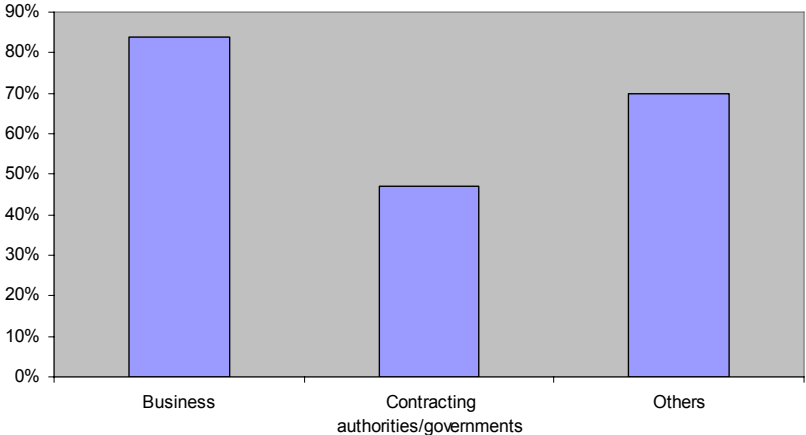
It is worth noting that a number of replies identified additional issues which respondents believe the Commission should take into account in its description of the current level of access and that are believed may impact their procuring activities both within and outside the

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<sup>4</sup> Unless specified, in this overview of the view of stakeholders the wording is standardised. The indications used in the text refer to the following spread: "Very small percentage": below 10%; "Small percentage": between 10 and 20%; "Important minority": between 30 and 40%; "Big minority": between 40 and 50%; "Slight majority": between 50 and 55%; "Majority": between 55 and 65%; "Important majority": between 65 and 75%; "Very large majority": between 75 and 85%; "Overwhelming majority": more than 85%.

European Union. Some of the issues raised concerned abnormally low tenders, different social and environmental standards, insufficient protection of intellectual property rights, access to finance by state-owned enterprises, etc.

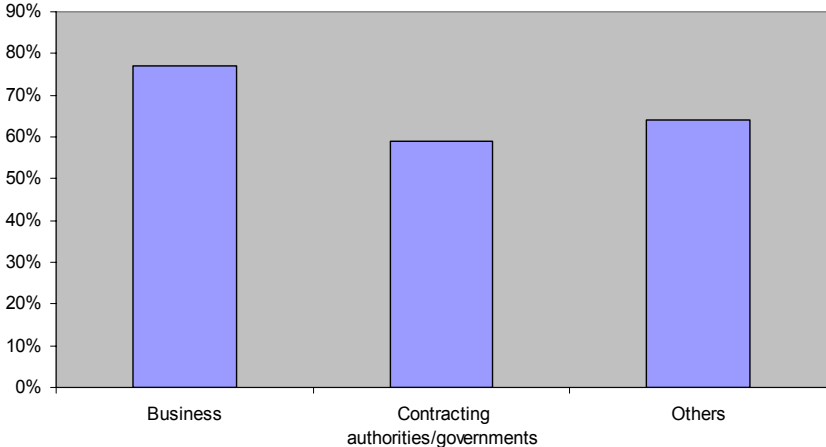
**Replies in agreement with problem definition**



### 3.2 Objectives

All types of stakeholders also supported in their majority the identified objectives of the initiative.

**Replies in support of proposed objectives**



### 3.3 Policy Options

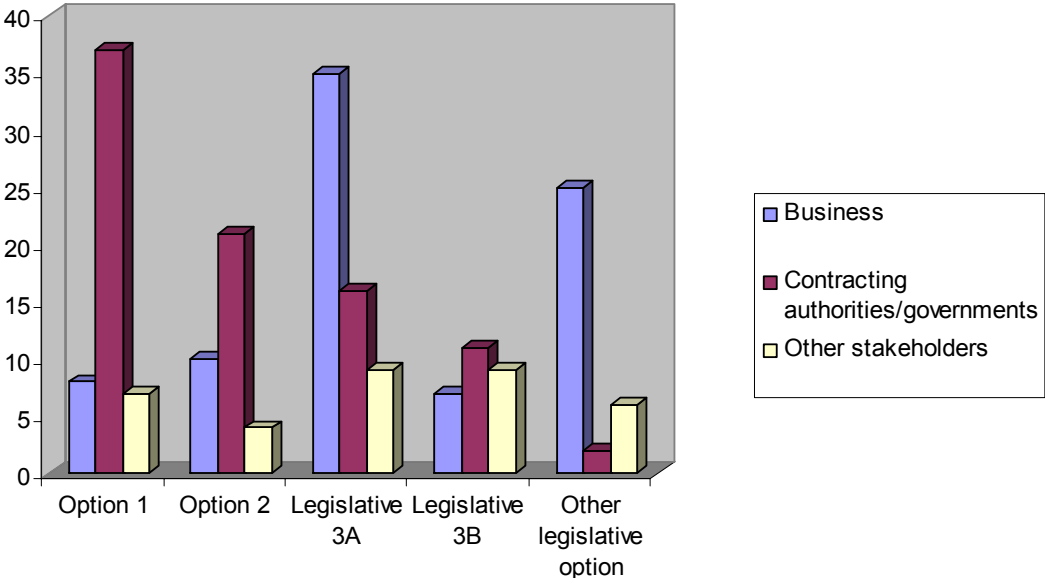
As regards which policy option would be preferable the views are divergent and vary depending on the group of respondents. Overall, the least preferred option among all stakeholders seems to be the "non-legislative" option entailing the adoption of soft-law or an increased use of available dispute mechanisms.



An important majority of stakeholders appear to support a legislative initiative; while an important minority prefer the option 'nothing happens' (mostly contracting authorities - cf. graph hereunder). The different groups of stakeholders have rather divergent views of the option that would have to be preferred. Among contracting entities and government authorities for example there is a clear majority in favour of the option 'nothing happens' or the non-legislative option, while for businesses and other stakeholders there is an important majority in favour of a legislative initiative. Among those stakeholders in favour of a legislative initiative there are also divergent opinions as to what that legislative option should be. Although there is large support for the legislative option with approach A, there are a significant number of respondents in favour of an alternative approach to A or B. It is worth noting that, although being the least preferred approach by those supporting a legislative option, approach B also received the support from a considerable number of respondents.

The main reasons put forward by stakeholders in favour or against one or the other policy option included the importance of best value for money and competitiveness and productivity that could be hindered by some of the policy options, the risk of retaliation by the EU's trading partners, the administrative burden that could be attached to such an initiative and the fact that the initiative could endanger the status of the EU as an adherent of open markets. Some of the third country governments and non-EU business representatives that replied underlined that they have open public procurement markets and would be concerned that the new EU policy would have an adverse effect on the access of their companies, goods and services to the EU's public procurement market.

**Preferred policy options per type of respondent**



Among respondents, there is strong support for the application of conditions to the access to the EU's public procurement market by companies, goods and services from third countries. Indeed there is limited support for a policy that would give these companies, goods and services always access to the EU's public procurement market, except in the case of least developed countries where there is a large majority of respondents that favour that policy (although it is worth noting that contracting authorities are the least supportive of the latter).

As regards the particular conditions of access to the EU's public procurement market, a large majority of stakeholders (some 65%) is of the opinion that access to the EU's public procurement market should only be given to third country goods, services and companies in so far as EU firms, goods and services have an equivalent level of access to the public procurement markets of these third countries. An important number of respondents (some 30%) is of the opinion that companies, goods and services from countries outside the EU should only have access to the EU public procurement market if this has been agreed in an international agreement concluded by the EU.

If the new EU policy in this area would be introduced allowing the adoption of restrictions on access to the EU's public procurement market an important majority some (60%) of respondents believe these restrictions should have a general character and apply to all countries outside the EU and all market sectors which are not covered by international commitments. Although a significant number of respondents (more than 60%) do not have an opinion on the form those restrictions should take, those responding largely believe they should consist in an exclusion of the companies, goods and services of third countries (rather than price penalties or other differential treatment). As regards possible restrictions, it is interesting to note that in general all types of respondents believe that it is not relevant to make a distinction between SMEs and other companies.

Finally, larger majorities (some 60%) emerge supporting the view that should any restrictions be introduced on the access to the EU's public procurement markets these should be decided at EU level rather by Member States or contracting entities. Notwithstanding this, stakeholders not directly involved in procurement activities (i.e. citizens, NGOs) are among those that expressed larger support to decisions at a lower administrative level than the EU.

#### **4. DETAILED OVERVIEW OF VIEWS EXPRESSED BY STAKEHOLDERS<sup>5</sup>**

##### *a. Contracting authorities*

##### **1. Contracting authorities and globalisation**

The experience of the responding contracting authorities with third country companies, goods and services in the framework of EU public procurement procedures seems fairly limited. Only a quarter of these authorities have ever received a tender submitted by a company from outside the EU or has ever awarded a contract to such a company. More or less the same percentage of the contributing contracting authorities indicated having received a bid offering goods/services from third countries. Finally, less than 5% of contracting authorities has ever disregarded a bid from a company from outside the EU or goods or services from outside the EU on the basis of their origin.

A very limited percentage (some 5%) of contracting authorities have ever used the Community customs code to identify the origin of the goods. Almost all contracting authorities estimate that the tenders they receive are made up for between 0 and 5% of

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<sup>5</sup> Respondents that replied "Don't know" to a question are not taken into account in the calculation of the majority. Furthermore, it is noted that the Commission also received contributions from stakeholders in other formats than the on-line questionnaire. These replies have been taken into account in the calculations of the views of the different groups of stakeholders, where it was possible to deduct a specific reply to specific questions of the consultation.

goods/services from countries outside the EU or made by companies from countries outside the EU. Slightly less than 10% of contracting authorities indicate that they procure goods and services from outside the EU because these are not available in the EU.

## **2. Perceived impacts of third country access to the EU's public procurement market**

The impact of participation of companies outside the EU on their own procuring activities was, in general, considered to be slightly negative by the contributing contracting authorities. While a majority (some 60%) considers that the participation of companies outside the EU has no impact on the quality of tenders, nor on their ability to procure sustainable goods and services, more than a quarter of respondents feels that the participation of companies from outside the EU third country has negative effects on the quality of tenders and its ability to procure sustainable goods and services. The impact on prices is perceived a bit differently. According to almost half of the respondents the participation of third country companies does not have any impact on prices in the market. A big minority. Approximately 45% however estimates that prices decrease as a consequence of the participation of third countries companies. Finally, a small percentage is of the view that prices increase due to third country company's participation.

Regarding the consequences of the openness of the EU's public procurement market and the EU's economy in general contracting authorities have rather mixed opinions. The openness of the EU's economy in general and its public procurement market in particular is not generally considered by contracting authorities to help EU companies doing business in third countries (60% of respondents). On the quality of the tenders, an important majority of contracting authorities considers that the openness of the EU's public procurement market does not increase their quality.

On the other hand, a very large majority is of the opinion that the openness of the EU's public procurement market decreases prices in the market. In line with this opinion also a very large majority of stakeholders feels that competition from third countries in EU public procurement procedures undermines the capacity of EU firms to be competitive in terms of price. Moreover, a slight majority (some 52%) of the contributing contracting authorities considers that the openness of the EU economy in general and its public procurement market increases competitive pressure and thus promote greater productivity and innovation. In line with this opinion a majority (some 60%) of contracting authorities also disagree with the statement that competition from third countries undermines the capacities of EU firms to invest in innovation. Furthermore, a majority of contracting authorities is of the opinion that third country competition helps to increase the productivity of EU firms. Finally, it is worth noting that some 60% of contracting authorities disagreed with the statement that competition from third countries provides useful savings for taxpayers. It is not entirely clear how that relates to the point of view of a considerable majority that is of the opinion that the openness of the EU's public procurement market decreases prices in the market.

The social and environmental impacts of competition from third countries in public procurement procedures were considered to be rather negative. Although a majority (some 60%) of contracting authorities disagreed with the statement that the openness of the EU's public procurement market does support the procurement of sustainable goods and services, an important minority supported it. As to the statements that competition from third countries leads to deterioration of social conditions in their sector or leads to job losses in your sector a significant respectively some 60% disagreed with them. However, important minorities agreed to the statements, meaning that in their view competition from third countries leads to job losses and deterioration of social conditions in their sector. Concerning the statement that competition of third countries in public procurement procedures leads to deterioration of

environmental standards in the sector there were as many contracting authorities that agreed as ones that disagreed.

### **3. Views on the preferred policy options**

Although almost all contracting authorities appear to find reciprocity important they have quite different opinions on what policy option would be preferable. Most contracting authorities (a big minority of them) prefer the option "nothing happens" (some 42%) and almost a quarter of them prefers the non-legislative option, which would mean that the EU would use soft law (publish guidance on how applying existing tools) and would make more active use of existing tools such as WTO/FTA dispute settlement mechanisms. An important minority (some 31%) is in favor of a legislative approach. More than half of these authorities prefer "approach A" under which EU procuring entities would in principle be required to exclude third country goods, services and companies not covered by international commitments of the EU. A little less than half of these preferred "approach B" which would give EU procuring entities the possibility to decide to exclude third country goods, services and companies not covered by international commitments of the EU, subject to notification to the Commission. Only one contracting authority proposed a different legislative option in order to guarantee conformity assessment, quality of conformance and safety for people's health and for environment.

### **4. Views on the substance of a new policy**

Two-thirds of the responding contracting authorities state that they do not know the conditions under which companies, goods and services from countries outside the EU can currently participate in public procurement procedures in the EU. A bit more than a quarter of them indicated that they know the conditions and find them clear, while a small percentage stated that they do know these conditions, but do not find them clear. The question on whether the rules governing the access to the EU's public procurement market of companies, goods and services originating outside the EU should be modified was replied to in a varied manner. Two-thirds replied "don't know"; some 30% replied negative to this question, while only a very small percentage replied that these rules should be changed.

Contracting authorities generally consider that reciprocity is important in public procurement. Almost half of the contracting authorities are of the opinion that access to the EU's public procurement market should only be given to third country goods, services and companies in so far as EU firms, goods and services have an equivalent level of access to the public procurement markets of these third countries. More than a quarter considers that companies, goods and services from countries outside the EU should only have access to the EU public procurement market if this has been agreed in an international agreement concluded by the EU. A small percentage (some 15%) of the contracting authorities are of the opinion that companies, goods and services from countries outside the EU should always have access to the EU public procurement market. Finally, a majority is of the opinion that companies, goods and services should always have access to the EU's public procurement market if they come from the least developed countries.

The possible restrictive measures should have, in the view a majority of contracting authorities, a general character and apply to all countries outside the EU and all market sectors, which are not covered by the EU's international commitments. There was much less

support for the idea to have these measures imposed only in case of market access problems in specific countries, to target only specific market sectors or to target specific market sectors in case of market access problems in specific countries. The preferred form of the restrictive measures is for 42% of the responding contracting authorities an exclusion of companies, goods and services originating in countries outside the EU from public contract award procedures. Almost a quarter of contracting authorities prefers the imposition of price penalties, while an important minority prefers other differential treatment, such as leaving it fully open to contracting authorities. But, most of contracting authorities responded 'Don't know'

Contracting authorities shared the Commission's view that exemptions to the possible restrictions should be foreseen in the legislation. A very large majority agreed to the need of such an exemption in case of unavailability of the goods or services concerned in the EU and a majority in case of emergency or disproportionate costs of EU goods and services. Only somewhat more than a quarter of the responding contracting authorities agreed that an exemption should be foreseen for companies, goods and services from least developed countries.

On the level of administration where decisions should be taken on possible restrictions a slight majority some 55% of contracting authorities is of the opinion that decisions should be taken at EU level. A rather small percentage some 20%) supports decisions by Member States, by individual contracting authorities or by individual contracting authorities on the basis of uniform, EU wide principles. There is little support for decisions by individual contracting authorities that have to notify the European Commission.

In the consultation the Commission also posed some question on a possible notification by contracting authorities of their intention and/or decision to restrict the access of certain third country companies, goods or services. This notification could then ensure uniform application throughout the EU. Both with respect to the ex ante notification and the ex post notification there was a very slight majority against an obligation to notify, either ex ante or ex post.

With regard to the notification procedure a very large majority of the contracting authorities are of the opinion that this procedure should reflect that in some situations the EU has included in current GPA/FTA agreements restrictions to market access and that in other situation there is no agreement between the EU and the relevant third country. A majority of the contracting authorities also feels that it would be a valid reason for the Commission to agree to a proposed exclusion if there is a lack of substantial reciprocity in the country and sector concerned or an effective restriction under the GPA/FTA between the EU and the third country. The same majority is of the opinion that a lack of substantial reciprocity in the country and sector concerned or an effective restriction under the GPA/FTA between the EU and the third country should be taken into account where the Commission proposes restrictive measures at EU level under approach B.

The administrative burden flowing from the notification obligations are estimated by contracting authorities to be relatively low. The time required to draft and send a one page notification by electronic means (containing the type and amount of procurement concerned as well as the country(-ies) targeted by the envisaged access restrictions) would costs according to almost half of the authorities 1 to 4 man-hour and according to a big minority between 4 man-hour to 1 man-day. Only some contracting authorities estimate that this would cost more man-day. On the other hand the duration of the notification procedure until the

moment of a possible decision of the Commission (6-8 weeks) is seen by a very large majority to be burdensome for all types of purchases. Close to a quarter of the contracting authorities see this as acceptable for all types of purchases or acceptable in some cases, depending on the type of purchase. Lastly, a very large majority of contracting authorities is of the opinion that (very) significant administrative burdens would result from having to identify the origin of the goods, services or companies in case restrictive measures have to be applied.

*b. Businesses and/or their representatives*

**1. Procurement profile**

For almost all respondents, public procurement is an important part of their business activities. Within this context, an overwhelming majority of (some 85%) respondents note that they supply goods and services to both the private and public sectors. On the latter, respondents supply to all types of public sector organisations, in particular to central governments and regional or local authorities. It must be highlighted that a large number of respondents supply also to the utilities sectors, in particular to the railway and urban transport operators.

As regards their procurement activities, a majority of respondents note that they are regularly bidding for contracts outside the EU. A large majority of those bidding outside the EU do so by tendering directly. The analysis of the responses indicates as well that EU businesses also opt for a combination of the latter with local agents and locally established partners.

Respondents put forward a wide range of reasons that would prevent them from bidding in public procedures outside the EU. While all the possible reasons listed by the consultation document were highlighted by respondents, the existence of administrative obstacles, the belief that domestic bidders would be favoured and unfair competition were amongst the reasons most chosen.

Opinion is divided on the specific knowledge or experience of respondents with limitations put on the participation of foreign suppliers in tendering procedures outside the EU. Again, the complete exclusion of foreign suppliers from bidding, the requirements to be locally established or to set up a joint venture with a local company and the burdensome or additional administrative, technical requirements for foreign bidders are identified as important measures limiting access on EU businesses' participation in bids outside the EU.

**2. Perceived effects of third country access to the EU's public procurement market**

An important majority of respondents note that the level of competition in the EU from companies from outside the EU is significant in all the key sectors of the EU's economy, in particular in the sectors of construction, machinery, transport (railway) equipment and services. As regards competition in tendering procedures, while an important number of respondents do not know whether they were tendering against companies originating outside the EU, a slight majority believes it was (some 52%).

The consultation also tried to assess the views of stakeholders on the impact of competition from third countries in EU public procurement procedures. The responses from the business community show an overall negative opinion on the impact of third countries' competition on the activities of EU companies in the EU's procurement market. An important majority of respondents agree or fully agree with statements such as that competition from third countries in EU public procurement procedures undermines the capacity of EU firms to be price competitive, leads to the deterioration of environmental and social conditions in their respective sectors, leads to job losses or undermines the capacity of EU firms to invest in innovation. Respondents also largely disagree (some 55%) with statements such as that competition from third countries provide useful savings for taxpayers, helps to increase the productivity of EU firms or is an incentive to increase R&D budgets.

Opinions were also requested on the potential advantages or disadvantages of the "openness" of the EU's public procurement market. Businesses seem to be divided on their assessment of that openness as regards, for example whether it can support the procurement of sustainable goods or services. Larger majorities emerge in disagreement with statements suggesting that this openness would increase the quality of the tenders (some 53%), help EU companies do business in third countries (some 44%) or on that the competitive pressure that results from that openness promotes greater productivity and innovation (some 49%). Businesses' however largely agree that an open EU's public procurement market contributes to decreasing market prices (some 60%).

The consultation document aimed also to gather the opinion of business stakeholders as regards the potential benefits of securing greater access to public procurement in non-EU markets. Overall, respondents view greater access to non-EU procurement markets as very beneficial. A large majority of stakeholders believe this greater access could lead to greater economies of scale (some 75%), increase investment opportunities abroad, reduce fixed costs to penetrate those foreign markets (some 75%), improve their knowledge about processes and products and contribute to getting the references needed to win other purchasing orders (some 80%).

### **3. Views on the preferred policy options**

Opinions vary as regards the businesses views on what policy option they would prefer the Commission to pursue. A very large majority of respondents are in favour of the adoption of legislative action, opinions diverge on what that action should be. Within those favouring a legislative option, opinions are mostly divided among those supporting approach A and those supporting a different approach from option A or B (described below), the outlined approach B being the least preferred legislation option.

Those having provided specific reasons for their stated policy preferences note that while approach A would better ensure coherence of treatment of foreign suppliers and a level playing field across the EU, this approach could have negative impacts on the possibility for contracting entities to apply the "best value for money" principle (due to less choice for contracting authorities). Respondents in favour of approach B believe it would be the most appropriate tool to gain leverage vis-à-vis third countries but highlight that it could result in imbalances as regards treatment of foreign suppliers in different Member States.



Some of the proponents of a different legislative solution than the proposed approach A or B have suggested their alternative proposals, in particular a variation of approach A but with a mandatory ex-ante notification to the European Commission when need for a waiver complemented with the Commission being given a right to supervision and intervention to investigate cases of potential abnormally low offers. Other responses also suggest as an alternative policy option the adoption of a "buy Europe" policy across the board, except when international commitments exist, or to provide the Commission with a tool to guard the implementation of international agreements and be able to take restrictive actions in cases of lack of comparable and effective market access or significant trade imbalances. It is also worth noting that a significant number of respondents note that a legislative option should not preclude the recurring to measures outlined in the non-legislative options (i.e. guidance on existing rules, recourse to dispute settlement mechanisms, etc).

It should also be highlighted that some respondents in favour of taking no action or non-legislative measures provided specific arguments in favour of their position. Among the elements underlined, it is believed by these respondents that restrictive measures could be seen as "protectionist" by key trading partners and could result in retaliation by those third countries and trade disputes that could affect negatively EU businesses operations outside the EU. Also, some respondents believe that restrictions would affect negatively the global supply chains and decrease EU's firms' competitiveness (i.e. due to impacts on sub-contracting, joint ventures or delays in supply).

#### **4. Views on the substance of a new policy**

A slight majority of respondents believe that other issues to the ones listed in the consultation document are also affecting the conditions of access to the EU public procurement market for goods, services and companies from countries outside the EU and that these would need to be described and addressed in the future initiative. These respondents mention issues such as abnormally low tenders, state aid, insufficient protection of intellectual property rights or "financial dumping" by which state-owned enterprises have access to very low credit lines from their national banks. It is worth noting that almost the same number of respondents replied "do not know" to this question.

To the question whether businesses' know the applicable conditions by which companies, goods and services from countries outside the EU can participate in the public procurement procedures in the EU stakeholders are divided between those who know the rules and those that do not know them. Among the former, a majority do not find those rules clear enough. A large majority of respondents believe that these rules should be modified.

Stakeholders were also asked to give their opinion on a number of elements which could help the Commission build, if considered appropriate, an instrument to set the terms of access of companies, goods and services of third countries to the EU's public procurement market.

An overwhelming majority of respondents (some 92%) believe that companies, goods and services from countries outside the EU should only have access to the EU's public procurement market under certain conditions, either access to the EU's public procurement market should only be granted in so far as European firms, goods and services have an equivalent level of access to the public procurement market of those third countries or only if access has been given by means of an international agreement the EU has concluded.

If the new EU policy in this area would be introduced allowing for the adoption of restrictions on access to the EU's public procurement market an important majority of respondents believe these restrictions should have a general character and apply to all countries outside the EU and all market sectors which are not covered by international commitments. As regards possible restrictions, in the stakeholders' views it is not relevant to make a distinction between SMEs and other companies.

Although a significant number of respondents do not have an opinion on the form those restrictions should take, of those responding to the question, an important majority believe they should consist in an exclusion of the companies, goods and services of third countries (rather than price penalties or other differential treatment). A large majority also believe any restrictions should be decided at EU level rather than by Member States or contracting entities.

If individual contracting entities were allowed to take restrictions, an important majority (some 70%) of respondents believes they should be subject to an ex ante notification to the European Commission. No majority could be derived as regards a potential ex post notification, where opinions were extremely divided.

It is worth noting that while a majority of stakeholders responded positively to the questions regarding the application of the "substantial reciprocity" criteria for the adoption of exclusions or restrictive measures under approach B, a large number of respondents opted for the "do not know" option on those detailed questions.

The vast majority of stakeholders agreed with the proposed exemptions to possible restrictions on access to the EU public procurement (unavailability of goods and services concerned in EU, emergency, goods and services from least-developed countries and disproportionate costs). It appears the exemption "in case of disproportionate costs of EU goods and services" is considered less important by business stakeholders.

Overall, a big minority (some 40%) of business stakeholders believe their sector would be disproportionately affected in a positive manner by the application of market access restrictions against foreign companies, goods or services. A large number of respondents nevertheless did not know this would affect them (some 31%).

Finally, opinion is largely divided as to whether companies, goods and services originating in least developed countries should always have access to the EU's procurement market, although most businesses think they should always have access. It is worth noting that around one third of respondents did not give an opinion on this matter.

### *c. Other stakeholders*

#### **1. Perceived effects of third country access to the EU's public procurement market**

The consultation document aimed to gather the opinion of stakeholders as regards the impact of the "openness" of the EU's public procurement market. The contribution of trade unions and NGOs is specifically detailed hereafter (point 4).

The responses gathered show that it is difficult to clear state that openness of the EU's public procurement market positively or negatively impacts tendering activities in the EU. The impact is considered positive on aspects such as the procurement of sustainable goods and services and on the decrease of market prices while considered negative on other elements such as the quality of tenders or the ability to tender in third countries.

More specifically, over half of the respondents agreed with the statement that the openness of the EU's procurement market supports the procurement of sustainable goods and services. On the contrary, the majority of respondents note their disagreement with the statement that the openness of the EU's procurement market increases the quality of tenders. The majority of respondents also agree with the statement that openness decreases the prices in the market. The vast majority of stakeholders fully disagreed or disagreed with the statement indicating that openness of the EU's procurement market helps them doing businesses in third countries. Finally, the opinion was divided on whether that openness increases competitive pressure and thus promotes greater productivity and innovation.

The consultation also tried to assess the views of stakeholders on the impact of competition from third countries in public procurement procedures. Again, opinion seems to be divided in a number of elements although it appears that there is an overall negative opinion on the impact of third countries' competition on the activities of EU companies in the EU's procurement market. An important majority of respondents agree that competition from third countries leads to deterioration of social conditions, undermines the capacity of EU firms to be competitive in terms of price and to invest in innovation. There is also a majority of other stakeholders in disagreement with the statement that competition helps to increase European firms' productivity. Opinion is shared on whether competition from third countries leads to job losses, although a slight majority of the respondents agree with that statement. Also, opinion is divided on whether competition is an incentive to increase R&D budgets and on whether it leads to the deterioration of environmental standards (although in the latter there is a majority of "do not know" responses).

## **2. Views on the preferred policy options**

The situation is different as regards the opinions expressed by these stakeholders on what policy option they would prefer the Commission to take forward. Overall, there seems to be a majority of respondents in favour of a legislative option, but within this opinions also diverge as regards which legislative approach should be preferred and no particular option seems to emerge. Of all the choices that respondents had to respond to this particular consultation question, the least preferred option is the so-called "non legislative" option, where the EU would use soft law and would make more active use of existing tools such as WTO/FTA dispute settlement mechanisms.

## **3. Views on the substance of a new policy**

A slight majority of respondents believe that other issues to the ones listed in the consultation document are also affecting the conditions of access to the EU public procurement market for goods, services and companies from countries outside the EU and that these would need to be described and addressed in the future initiative. A number of respondents provided further details of what issues should also be addressed. The case of foreign bidders that benefit from

protected domestic markets or public subsidies and that bid with abnormally low prices, the difference in labour costs and rights in third countries, the protection of domestic SMEs, were among the other issues raised by respondents. It is worth noting that an important number of respondents (around 30%) replied "do not know" to this question.

To the question whether stakeholders know the applicable conditions by which companies, goods and services from countries outside the EU can participate in the public procurement procedures in the EU over half of the responses were positive, but opinions were shared as to whether these rules are clear or unclear. Opinions were shared as well to the question on whether those rules should be modified, with a slight majority in favour of modifying them. In addition, some respondents indicated that social and environmental considerations should also be taken into account when considering an amendment to those rules.

Stakeholders were also asked to give their opinion on a number of elements which could help the Commission build, if considered appropriate, a tool to set the terms of access of companies, goods and services of third countries to the EU's public procurement market.

A majority of respondents believe that access to the EU's public procurement market should only be granted in so far as European firms, goods and services have an equivalent level of access to the public procurement market of those third countries. If the new EU policy on this area would be introduced allowing for the adoption of restrictions on access to the EU's public procurement market an important majority of respondents believe these restrictions should have a general character and apply to all countries outside the EU and all market sectors which are not covered by international commitments. As regards possible restrictions, in the stakeholders' views it is not relevant to make a distinction between SMEs and other companies. Although a majority do not have an opinion on the form those restrictions should take, of those responding to the question, a majority believes they should consist in an exclusion of the companies, goods and services of third countries (rather than price penalties or other differential treatment). Opinion is shared as to whether restrictions should be decided at EU or Member State level. If individual contracting entities were allowed to take restrictions, the majority of respondents believes they should not be subject to any notification obligations to the European Commission, whether ex-ante or ex-post to the actual exclusion. It is worth noting that a majority of stakeholders opted for the "do not know" option on detailed questions regarding the application of "substantial reciprocity".

The vast majority of stakeholders agreed with the proposed exemptions to possible restrictions on access to the EU public procurement. It appears the exemption "in case of disproportionate costs of EU goods and services" is considered less important.

A majority of stakeholders also believes that companies, goods and services originating in least developed countries should always have access to the EU's procurement market.

#### **4. Specific views of trade unions and NGOs**

**Trade unions:** All the contributions take the view that government purchases should promote in the first place good quality employment and sustainable goods and services, as a matter of policy choice or example. They are divided on the question of openness of public procurement markets, either to developed countries or emerging economies, which ultimately appears often as a secondary issue compared to the inclusion of social and environmental criteria in the modernisation of public procurement legislation (e.g. inclusion of criteria such

as ILO labour convention ratification as a condition of opening public procurement and/or production processes (e.g. prohibition of child labour) as selection or awarding criteria).

**NGOs: most of the contributions received were from fair trade organisations.** These were concerned with the impact that a closure of the EU public procurement could have on developing countries, in particular in the context of fair trade. The NGOs called rather to the inclusion of sustainable development considerations in public procurement.