



TTIP's impact on the TTIP

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Introduction

Public procurement has long been an offensive interest in EU Trade Policy and is given a strong profile in the Commission's Trade for All strategy which states that *'public procurement spending ... accounts for 15% to 20% of GDP worldwide.'*¹ The DG Trade website states that the objectives of negotiations in EU trade agreements are:

- to set modern and international standard procurement principles which seek to ensure that public money is spent in a transparent, efficient and non-discriminatory way.
- provide a level playing field for EU suppliers when tendering abroad.

The relationship between the EU and the US in the area of procurement goes back to the post-GATT years when the US, having previously not requested the support for the setting of procurement rules from the EU, started to work more closely with them to shape procurement in the WTO's General Procurement Agreement (GPA).² The US and the EU thus jointly developed rules in OECD that were applied in the GPA and in free trade agreements of the parties with third countries. In the 1980s the EU created the single market agreement and worked with the USA in OECD leading up to the 1994 Uruguay round which created the 1994 GPA. Revised in 2014 mainly to update the agreement to include electronic procurement tools, the basis of the agreement is to ensure *'guarantees of national treatment and non-discrimination for the suppliers of parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each party's schedules.'*³ The GPA negotiations concluded with the US only offering partial access to sub-federal level procurement in 37 States and some bilateral agreements with States and cities.⁴ The EU responded by withholding binding commitments on coverage of some EU procurement from suppliers in the US.

There is a sense of frustration within the European Commission about the uneven status quo with regards to procurement on a global level which the proposed International Procurement Instrument (IPI) intended to address in 2012. The Commission recently sent an amended proposal⁵ to the European Parliament which describes how *'only EUR10 billion of EU exports (0.08% of EU GDP) currently find their way in global procurement markets, whereas an estimated EUR12 billion of further EU exports remains unrealised due to restrictions.'* The proposal explicitly states that the adoption of the IPI would give additional leverage to current free trade negotiations with the US (TTIP) and Japan and future negotiations with China a much needed boost. How this instrument

¹ Trade for All, Towards a more Responsible Trade and Investment Policy, European Union, 2015

² TTIP : Opportunities and Challenges in the area of Public Procurement, Policy Department A, Directorate-General for Internal Policies, In-depth Analysis for IMCO, European Parliament 2015.

³ WTO Agreement on Public Procurement, https://www.wto.org/english/tratop_e/gproc_e/gpa_1994_e.htm

⁴ TTIP Negotiations: US-EU Procurement Commitments, <http://trade.djaghe.com/?p=57>

⁵ European Commission, Brussels, 29.1.2016, COM(2016) 34 final, Amended 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

would interact with current trade agreements such as EU-Peru or Columbia for example could do with further investigation, but the fact that it has been proposed for a second time at the EP could indicate some urgency on the part of the Commission to boost procurement market opening because the traditional trade agreements are not achieving their goals in this area.

While the EU procurement market is larger and governed by one set of rules (the 2014/24/EU Procurement Directive), in the US procurement is governed at the state level meaning 50 different sets of rules for companies to follow, and many states are firm protectors of the Buy America⁶ programme aimed at supporting their local economies. It should be noted that in the sectors where there are no commitments under GPA in the EU and the US, it is still possible for companies to bid for services although they will not be covered under the rules of transparency and national treatment. Foreign companies may also access national markets through subsidiaries.

In this context, the TTIP negotiations started in 2013 with the intention of expanding commitments established in the current GPA, or in other words, entering a GPA-Plus environment with specific European Union interest for state-level procurement.⁷ Without access to the negotiating texts it is impossible to know exactly what is being discussed, however placing the TTIP in the historical context of procurement negotiations and from gleaning information from DG Trade's factsheets, it is safe to surmise that the EU has a more offensive interest in this sector than the US. The even more secretive Trade in Services (TISA) negotiations also covers government procurement and will have implications for how government procurement is negotiated under TTIP.

Given the traditionally reciprocal nature of procurement negotiations, it is inevitable that the United States will be looking to the EU to offer something in return. The comprehensive coverage of the EU regime means that it could potentially offer more coverage for the US in previously uncovered areas such as sub-central procurement in services and EU utilities.⁸ There is a chance however that the bargaining could lead across different chapters where the US has more offensive interests such as investment protection.

This article aims to investigate what this could mean for procurement in the health and social care sectors in the EU and the US. We will cover a summary of the EU procurement directive and an analysis of what is known from public official and leaked documents to draw our conclusions about the potential impact of the TTIP on public procurement in the European Union. Without full transparency in the negotiations, it is impossible to state with certainty what will be the eventual outcomes, in order to achieve this, the negotiating and consolidated texts need to be released into the public sphere without delay. The chief concerns regarding health and social care relate to the weakness of public services carve-outs in both the services chapter and a lack of clarity about whether they will be excluded from the procurement chapter too. Inclusion of both in the investment protection chapter currently places all public procurement processes at risk from

⁶ TTIP : Opportunities and Challenges in the area of Public Procurement, Policy Department A, Directorate-General for Internal Policies, In-depth Analysis for IMCO, European Parliament 2015.

⁷ IBID

⁸ IBID

international arbitration and creates unfair competition against national companies and SMEs that the EU Procurement Directive sets out to protect.

Procurement in the EU

EU public procurement Directive 2014/24/EU replaced Directive 2004/18/EC and is aimed at *'achieving more flexibility with the rules, facilitating access to contracts for small and medium-sized enterprises (SMEs), supporting strategy use of public procurement for environmental and social policy goals and providing more legal clarity on the application of rules.'*⁹ A full regulatory regime is required for medical equipment, furniture, uniforms, building works and other goods and services. The Directive outlines a light touch regime for procurement in clinical, social educational and other categories of services based on a threshold of 750,000 euros i.e. health service contracts below this value are considered to have no cross-border interest and as such will not be covered by the EU directive. All light touch sectors still have to follow the EU obligations of transparency, equal treatment, non-discrimination and proportionality.

In order to minimise corruption in *de facto* procedures, the Directive includes Compliance Rules designed to give aggrieved tenderers, the ability to challenge illegal contract award procedures via administrative or legal reviews. The Directive also outlines a number of derogations from the rules for forms of cooperation between public bodies.

Procurement in the TTIP: what has been published? What is being said?

Given the sensitive nature of widening procurement commitments beyond the GPA, it is quite possible that DG Trade is reluctant to proffer much official information about their intentions regarding procurement in the TTIP. The best reference for the EU intentions on government procurement is the mandate for negotiations, where guidance on government procurement states that¹⁰:

"The Agreement shall aim for the maximum ambition, complementing the outcome of the negotiations of the revised Government Procurement Agreement in terms of coverage (procurement entities, sectors, thresholds and services contracts, including in particular public construction). The Agreement will aim at enhanced mutual access to public procurement markets at all administrative levels (national, regional and local), and in the fields of public utilities, covering relevant operations of undertakings operating in this field and ensuring treatment no less favourable than that accorded to locally established suppliers. The Agreement shall also include rules and disciplines to address barriers having a negative impact on each other's public procurement markets, including local content or local production requirements, in particular Buy America(n) provisions, and those applying to tendering procedures, technical specifications, remedy procedures and existing carve-outs, including for small and medium-sized enterprises, with a view to increasing market access, and where appropriate, streamlining, simplifying and increasing transparency of procedures."

⁹ New EU Directive on public procurement, Implications for NHS Commissioners and providers, Briefing September 2013 Issue 14, NHS Europe Office

¹⁰ Council of the European Union. Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America. 17 June 2013, declassified 9 October 2014.

While all the public facing focus of DG Trade is on the US markets, the reciprocity of procurement negotiations mentioned above is of grave concern to service providers, unions and health and social care advocates in the European Union. If the TTIP pursues a negative list approach, it will be possible for Member States to Annex publicly funded health and social care services in Annex II of the Services chapter, whether this also stands for the Procurement Chapter remains to be seen.

Indeed, there is a risk that government procurement provisions could be of more importance than government procurement obligations, making it impossible to exclude them in an annex. Government procurement and emphasis on precedence of government procurement over and above services have been discussed under TiSA and are likely to be on the table with respect to the TTIP. Furthermore, the new government procurement directive will form problems in terms of competence as the competence for government procurement provisions remains in the hands of the European Commission. This could potentially override restrictions made by Member States under sectoral Annexes if inclusion of sectors in government procurement is made on the basis of the new government procurement directive. Member States could thus have all kinds of exclusions for public services, yet in practice, real negotiations would take place elsewhere.

We do not know whether government procurement obligations are to cover all service sectors or some and whether this also includes new service provision types. What is considered as government procurement changes and an increasing amount of services are now contracted out in different forms. Furthermore, even simple building contracts can have substantial implications to the sustainability of health care financing as the debacle concerning private finance initiatives and UK NHS has shown us¹¹. As TTIP requirements with respect to government procurement could apply to public-private-partnerships, private finance arrangements and build-operate-transfer (BOT) operations, these may have much broader impact on sustainability of financing of health and social security systems than has been anticipated before.

Negotiation of trade agreements build on earlier negotiations and thus what is negotiated in the context of the European Union- Canada Agreement (CETA) and Trade in Services Agreement (TiSA) may form the base-line for liberalisation under TTIP. This is, however, a political choice and push from trade negotiators, rather than an unavoidable destiny. The joint proposal by US and EU for TiSA government procurement annex which was leaked to wikileaks, for example, emphasises that¹²:

“Each Party shall ensure that the government procurement of services is conducted in a transparent and impartial manner that:

(a) ensures that the service market is opened up to competition;

(b) avoids conflicts of interest; and

¹¹ There is a broad academic and media attention to problematic aspects of PFIs in the context of NHS. The latest Guardian analysis of contracts has estimated the cost of PFIs to 300 bn:

<http://www.theguardian.com/politics/2012/jul/05/pfi-cost-300bn>

¹² See: <https://wikileaks.org/tisa/procurement/>



(c) prevents corruptive practices.”

While this wording might seem innocent if not slightly progressive, it would be important to know what impartial would indicate in practice, how broadly conflicts of interests are defined and what is implied for measures which prevent corruptive practices. As government procurement obligations have become increasingly applied as general, rather than more defined obligations, reference to opening services to competition could be a concern with respect to health, social and educational services.

The negotiation mandate of the TTIP uses GATS Article 1.3. terminology as reference for public services exclusion. This is known to be a narrow interpretation which requires these as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers”. This is thus not really an exclusion of publicly funded services for TTIP¹³. While publicly funded health, social and education services may be excluded in Annexes, these are included under operational obligations concerning investment liberalisation and fully with respect to investment protection. We also do not know what other negotiated chapters imply for health, social and education services or how the inclusion of privately funded services under services obligations can affect the position and role of public services for example, with respect to competition requirements.

TTIP and government procurement as means to enhance public policy aims

The establishment of the new procurement directive and the negotiations on government procurement do leave open a number of questions about the relationship between the TTIP and the transposition of the EU Procurement Directive, not only in terms of scope negotiations, prioritisation in negotiations or competence, but as well in terms of the extent to which governments could lose crucial policy space to tackle social, environmental and broader public policy aims as part of public procurement policies and flexibility still available under European Union government procurement requirements.

For example, in some countries, such as the Netherlands, social and sustainability requirements have been addressed as part of procurement policies. While social or human rights criterion may not have been always used by governments to the full potential of these requirements¹⁴, there is a risk that international trade negotiations may further close the scope for inclusion of criteria either directly or indirectly on the basis of such requirements, which make use of this type of criterion impossible or very difficult. Furthermore, there is a risk that where governments have not as yet included this type of requirements to their procurement policies, this could become more difficult.

Further importance can be drawn to the ways in which local producers, production or employment can be supported as part of government procurement policies as well as whether service providers can be required to be established within the country. This is of importance with respect to digitalisation of services. In the context of health and social services this will have implications also

¹³ This has been discussed more broadly in Krajewski, M. (ed): Services of General Interest Beyond Single Market. Springer, 2015.

¹⁴ See e.g. SOMO analysis of Netherlands policies, available:



for data protection requirements as well as transfer of data across countries as government procurement may well include patient data systems and support services¹⁵.

Government procurement can be seen as a means for enhancing particular policy aims ranging from priorities related to employment of local unemployed, support to local production, sustainability or support to human rights and fair trading practices. Questions can be raised to what extent local governments can set conditions and use the flexibilities they have fought in the context of European government procurement policies and how government procurement obligations can become affected by other chapters of TTIP. If government procurement measures are required to comply in ways to which they are obliged in order not to impose unnecessary restrictions to international trade, this does affect the scope to enhance other aims within society.

Public policies can be geared in support to cooperatives, mutualities or non-profit organisations and restrict tax profits or excessive profiteering without embracing further political aims. It is likely that people are less keen on accepting profiteering in social and health services than in other areas, such as banking or retail. However, these decisions may not be solely a matter of governments and local governments when obligations from other chapters of trade agreements may apply. While the EU government procurement directive gives some leeway to consideration of local providers, this may well become lost or undermined by requirements of government procurement under international trade negotiations. Continuity of service provision is highly appreciated in government procurement circles, yet it can be crucial for social, health and education services.

While corruption remains a matter of concern with respect to government procurement, it is important that obligations for objectivity and transparency do not push government procurement into such contractual arrangements which effectively favour large multinational actors. It is anticipated that this will be addressed as part of TTIP negotiations on public procurement. If negotiations proceed, it will be important to ensure that requirements for impartiality do not exclude such service providers or producers, which have public funding. Furthermore, conflict of interest requirements under government procurement policies could become very restrictive for non-governmental organizations, if these become interpreted broadly as nongovernmental organisations, which may have roles both in service provision and lobbying (e.g. shelter services and campaigning on reduction of homelessness).

Government procurement and other chapters in TTIP

Government procurement used to be clearly divided in terms of services to which it was applied and where it was not necessary to apply government procurement requirements. This has slowly changed as part of European Union internal policies where government procurement has become expanded as reflected in the “light touch” government procurement obligations. However, while the light touch approach might not appear as a major concern, it does set further questions in terms of competence and negotiation of trade agreements.

¹⁵ For example, in Finland, patient data system services have become a highly controversial and costly contracts with US and Canadian providers: <http://www.helsinkitimes.fi/finland/finland-news/domestic/12026-apotti-a-patient-data-system-that-costs-more-than-a-children-s-hospital.html>

It is reasonable to ask to what extent this would expand European Commission competence to negotiate government procurement obligations also with respect to services, which are formally under Member State governance. While European procurement directive may give governments' policy space, this may be lost as part of trade negotiations and realised only when this becomes challenged. We may thus not assume that government procurement obligations would be limited to construction services only as it is likely that also European Union offensive interests in opening US procurement markets are wider.

The exclusion of public services and government procurement from other parts of trade and investment agreements is not explicit. This is due to changing nature of service provision with increasing role of contracts, public-private partnerships and new types of financing arrangements. Furthermore, while publicly funded hospitals may be excluded from services obligations, procurement for the hospital may not necessarily be considered as such. The TTIP investment liberalisation section states that:

Article 2-1

*Government procurement shall be dealt with by Chapter [X (on public procurement).] Nothing in this Section shall be **construed to limit the obligations** of the Parties under Chapter X on public procurement or **to impose any additional obligation with respect to government procurement.***

The same wording is used for cross-border trade in services. While this would seem to imply that a quick reading this implies that government procurement as such would be excluded, it is not fully clear as a further exclusion is made for government procurement with respect to the article on performance measures in the same section. However, the main issue in here may not be whether the services chapter will impose any obligation, but rather that the exclusions of services does not imply that these are excluded from obligations under government procurement. Furthermore, there are no exclusions for investment protection with specific linkages to government procurement contracts.

The fact that investment protection section has no exclusion for government procurement, implies that new agreements, which include investment protection, also initiate unanticipated implications to government procurement practices through empowering foreign investors in comparison to governments and domestic investors. While EU has successfully taken out state aid from requirements of investment protection, this is not the case with respect to obligations under so called umbrella clause, which in TTIP remains under Article 7 on "Observance of written commitments", which sets obligations for the Party with respect to *any contractual written commitment with investors or the other party*¹⁶. Umbrella clauses have caused substantial concern due to their broad implications¹⁷ and this definition used in TTIP could have very broad implications.

The point is, that even if government procurement rules may not have changed as result of investment protection requirements, some participants to government procurement markets will have a stronger position and if problems emerge, the right to claim compensation from international arbitration. The change in power position is likely to affect in particular regional and local actors,

¹⁶ See Commission draft text TTIP-Investment

¹⁷ Yannaca-Small, K. (2006), "Interpretation of the Umbrella Clause in Investment Agreements", OECD Working Papers on International Investment, 2006/03, OECD Publishing. <http://dx.doi.org/10.1787/415453814578>

which may have not assumed that TTIP could have had any impact otherwise and are vulnerable to intimidation and threats of compensation claims¹⁸.

Another area of negotiations, which comes close to public services, government procurement and governance is the role of state-owned-enterprises (SOE) and competition under TTIP negotiations. These chapters set obligations to governments with respect to competition and how publicly funded organisations can operate in commercial markets. In terms of public policies key questions relate to how these obligations relate to the role of publicly funded organisations and oversight. Through defining how publicly funded organisations can operate within a market, publicly funded organisations may become pushed further into a residual position and role, where they do not interfere with market forces and international trade.

Offensive desires of the EC: What the TTIP could mean for US procurement

A series of trade agreements including the GPA, Korea-US and EU-Peru have been instigated by the United States Trade Representative (USTR) with varying degrees of successes and failed attempts to widely open up state level procurement to overseas companies. Public procurement in the US remains a deeply sensitive issue as shown when the USTR tried to recruit state governors to sign up to the GPA with very little public consultation on the potential impacts¹⁹. Indeed, since then the USTR has solicited voluntary commitments from state governments, without much success leading it to declare that even the ambitious Transpacific Partnership (TPP) would not cover any state or local government procurement²⁰. This is key to the TTIP negotiations as it is often stated that the TPP sets the framework of US negotiator's aspirations in the TTIP in the same way that CETA does for TTIP. It is worth noting here that in the CETA, the EU was successful in cracking open new market access in regional and state level procurement markets.

It has been argued that the back door route to circumvent Buy America and access some of the US procurement market would for *'the TTIP's procurement commitments in the US to cover all projects funded to a significant degree by federal programmes, even when the funds are delegated to a sub-federal government.'*²¹ The same CATO article suggests that another offensive request of the EC could be to request that state and local governments use price preferences rather than minimum content requirements where offers that contain a threshold level of foreign value would be awarded the contract only if the bid was a certain percentage lower than the lowest offer from a domestic producer.²² This emphasis on price however and the positive discrimination towards foreign bidders inherent in the proposal would undermine contractual content requirements aimed at supporting local economies, protecting the environment and choosing bidders on the grounds of sustainability over profit.

¹⁸ See e.g. van Harten and Scott: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2700238

¹⁹ Local Economies on the Table, TTIP Procurement Update, Karen Hansen-Kuhn, November 2014

²⁰ <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/july/facts-about-government-procurement-and-tpp-tpp-promotes-buying>

²¹ What can TTIP accomplish to liberalised government procurement ? Gary Hufbauer and Tyler Moran, CATO online forum, September 2015

²² IBID

Conclusions

The negotiation of government procurement as part of TTIP is an important offensive aim for the European Commission. It is not, however, without problems, the extent of which are dependent not only on how broadly services are to be included as part of TTIP but whether exclusions made by countries in the services section will apply to government procurement. This does not seem likely. In contrast, it seems more probable that government procurement is considered as a priority. Clarification of the extent to which government procurement obligations cover health, social and education services is thus required. As is clarity over the level of competence to negotiate for procurement provisions between the EU and the Member States.

The same applies to investment protection. Neither healthcare or social services nor procurement have any exclusions from the investment protection chapter which opens the possibility for international companies to initiate investor state cases against national governments for reasons relating to healthcare and social services or procurement in either sector. National companies that do not have access to international arbitration will only be able to use the Compliance Rules provided in the EU Procurement Directive. This does not provide a level playing field for EU companies and empowers those participants in government procurement markets, who are able to utilise investment arbitration.

Government procurement negotiations may not only apply to market access, but to changes in requirements as well. There is a risk that international negotiations will narrow down and limit existing policy space for governments to address other policy aims through government procurement such as local employment, social and sustainable development.

Government procurement negotiations will apply to new forms of services as well as concessions and public-private partnerships. There is a danger that these new types of contracts become included under government procurement in ways which decreases their flexibility and scope for re-negotiation of bad deals. Experiences from NHS in UK suggest that PFIs can form a major threat to the sustainability of health care financing.

Health and social services provision and financing in countries is based on a variety of actors, including non-profit organisations, social enterprises, mutualities and cooperatives. Their position in comparison to large corporations may become weakened.

Public procurement obligations can and needs to be seen also in how these may define or restrict which organisations can take part with a risk of excluding “public” and “non/governmental” providers from the markets of publicly funded services or requiring a level playing field defined on the basis of operations and requirements of commercial enterprises and operators.

Finally, given the history of state level resistance to opening up public procurement in the United States to foreign companies through trade agreements, one has to ask what kinds of concessions the EU is prepared to offer in order to gain more access to US procurement markets. If the negotiations result in more restrictions in procurement criteria in order to attract international tenders: what will be the future for criteria designed to maximise sustainability on both sides of the Atlantic? There is also the possibility that the EU may offer cross-chapter concessions such as giving way on the inclusion of investment protection thus putting European legislative decisions at risk in return for greater access to US procurement markets.



More transparency in the negotiations is needed from both Parties to allow local and regional authorities to be able to take informed decisions about whether they can support the TTIP, or not, given what the freedom they may lose to negotiate their own procurement mechanisms.