

## What Will Be The Impact of The Transatlantic Trade Agreements (CETA and TTIP) On Public Procurement?

- *The Comprehensive Economic and Trade Agreement, or CETA, between the EU and Canada was concluded in September 2014, amended in February 2016 and is currently going through the ratification process. It could come into force in 2017.*

- *The Transatlantic Trade and Investment Partnership (known as TTIP or TAFTA) between the EU and the United States is still being negotiated.*

*The scope of these transatlantic agreements is unprecedented in the history of European trade. These are the first agreements negotiated by the EU with partners from among the world's leading economic powers; and the range of issues covered by the proposed agreements is unique. In addition to customs duties and the opening up of markets, these trade discussions are now also focusing on non-tariff barriers, i.e. on the protection standards that apply in Europe and the other side of the Atlantic.*

**Public procurement markets account for 17% of Europe's GDP<sup>1</sup> and represent a strategic lever that supports jobs, local economies and ecological transition. Social, environmental and fiscal policy goals, and geographical, quality or sustainability preferences can all trigger the use of public funds for the relocation of certain activities or to encourage companies to adopt responsible practices. But the current European trade policy promotes a completely different approach because it views support for local economies through public procurement as a trade barrier. If the current versions of the CETA and TTIP agreements were to be adopted, they could have a major impact on the existing and future rules governing public procurement.**

**Size of Public Procurement Markets:** On average they account for 13% of GDP in OECD countries

- **EU:** 17% of GDP

Breakdown: 1/3 central government; 1/3 sub-central governmental entities; 1/3 quasi-governmental agencies

Uniform set of rules determined at European level for all European public procurement above a certain threshold

Signatory to the WTO's Government Procurement Agreement (GPA)

- **US:** 13% of GDP

65% at sub-federal level (i.e. at state and city level)<sup>2</sup>

Uniform set of rules exist at federal level only

Signatory to the WTO's Government Procurement Agreement (GPA); but applies to only 37 American federal states; plus one partial application<sup>3</sup>.

- **Canada**

Signatory to the WTO's Government Procurement Agreement (GPA), but covers only the federal government (not the provinces, territories or state enterprises).

### What is the Current Situation?

#### **Asymmetric Opening Up Of The Market**

The EU believes that preferential support for local suppliers represents a barrier to trade and distorts competition. Consequently, the EU has opened its public procurement markets unilaterally and without reciprocal moves from its trading partners. There is some disagreement about the actual figures, but the EU claims it has opened up 95% of its public procurement to competition, compared to a figure of 32% in the case of the United States<sup>4</sup>. Certain exemptions are currently imposed on the United States and Canada while Europe waits for greater reciprocity on their part<sup>5</sup>.

1 OECD figure published in 2013 cf. [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/542226/IPOL\\_IDA%282015%29542226\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/542226/IPOL_IDA%282015%29542226_EN.pdf)

2 In the USA, there are only a handful of parastatal purchasing entities (port authorities; power utility)

3 In 1995 the markets in two additional states (West Virginia and North Dakota) and in several cities (including Boston, Chicago and Detroit) were opened up to the EU. Agreement, in the form of an exchange of letters, between the European Community and the United States of America with regard to government procurement, Official Journal of the European Communities: n° L 136/36, 20/06/1995. European suppliers now treated in the same way as suppliers from other American states.

4 TTIP: Public Procurement, DG for Internal Policies, in-depth analysis for the IMCO Committee, European Parliament, 2015

5 Amended general notes and amended derogations to Article III of Appendix I of the European Community (OJEU: n° L 136/36, 20/06/1995)

### **The USA and Canada Maintain Many ‘Local Content’ Rules**

In the United States there are many rules – such as “Buy America(n)” and “Buy Local” – designed to ensure that certain public procurement contracts are restricted to American companies, American products or small local companies.

Canada also has ‘local content’ rules; rules to support SMEs; and rules to support companies run by minority groups.

As part of the trade negotiations, the European Union is demanding that these arrangements be dropped. But various private-sector stakeholders and civil society groups in Canada and the United States ardently support these rules and are bringing pressure to bear on their respective governments to keep them in place. When questioned about the American policy and the possibility of drafting similar pro-SME rules in Europe, the President of the European Commission showed little or no pragmatism. He dismissed the idea as a “protectionist and self-indulgent reflex (...) On this point,” he said, “Europe is right and the United States are wrong”<sup>6</sup>.

#### **American Rules that Give Local Providers an Advantage**

Buy American Act (1933): is a comprehensive framework of preference rules for American suppliers

Buy America Act (1983): stipulates that the steel and manufactured goods used in public transport systems part financed by the US Department of Transportation must be American

Berry Amendment (1941, made permanent in 1994): requires that the US Department of Defense purchase all its non-lethal equipment from American suppliers

Reinforcement of the Buy American Act in the Defence Sector (1960)

American Recovery and Reinvestment Act (2009): ‘Buy American’ clauses were introduced as part of the recovery plan that was launched to tackle the financial crisis. Under pressure from Europe, these measures have been phased out in exchange for the USA signing up to the WTO Government Procurement Agreement (GPA)

Small Business Act (1953): reserves part of the public procurement market (23% to 40%) for American SMEs.

#### **Ontario Penalised by the WTO for its Renewable Energies Programme**

Ontario Province’s Green Energy and Green Economy Act stipulated that the regional public electricity provider would pay a higher price for renewable energy produced with locally manufactured equipment – the idea being to encourage investment and the production of renewable energy, and to support growth in local jobs. In September 2010 the Japanese government lodged a complaint against this Act with the WTO; a similar complaint was then submitted by the EU. The verdict, delivered in 2013, condemned the Act and forced the Province of Ontario to amend it, or face penalties if it failed to do so.

### **Complex Social and Environmental Rules in the European Union**

The EU permits the inclusion of qualitative, social and environmental criteria linked to the subject-matter of the public contract in question. This means the quality of a tender can be taken into account, not just its price or cost<sup>7</sup>. Geographical preference, however, cannot be one of the criteria used.

In practice, choosing a local, high-quality caterer, for example, can turn out to be complicated. A guide published by the French Ministry of Agriculture recommends: keeping to low quantities; and exploiting the technical, social and quality specifications and the contractual implementation conditions in order to achieve this legitimate public policy objective<sup>8</sup>.

The transatlantic trade agreements that are currently being drafted could considerably reduce the existing room for manoeuvre and prevent any public procurement reform designed to encourage local businesses. The European Commission – citing existing trade agreements – has already rejected proposals of this nature, presented by local communities: it refused to include them in the revised version of the 2014 European Directive on Public Procurement. In a [position paper](#) on TTIP the Council of European Municipalities and Regions (CEMR) calls on the negotiators to be pragmatic on this matter: “Opening up markets, reciprocity and the removal of trade barriers are not an end in themselves and must not entail a deregulation which would harm local and regional authorities (LRAs), small and medium-sized enterprises (SMEs) and citizens.”

<sup>6</sup> Interview with Jean Claude Juncker on the *Les Matins* programme, France Culture radio, 13 June 2015

<sup>7</sup> Article 67 of the European Directive on the Awarding of Public Contracts, 2014/24

<sup>8</sup> i) ‘TTIP, CETA and Public Procurement: A Poisoned Chalice for Local Communities and SMEs’, March 2016, AITEC.

ii) ‘A Practical Guide to Promote Local, High-Quality Providers of Catering Services’ Ministry of Agriculture, Agri-Food and Forestry, Nov. 2014

## What Do the Negotiations Deal With?

The chapter in the trade agreements on public procurement deals with the following issues:

- thresholds above which markets have to be opened up; and type of contracts covered
- list of bodies covered
- transparency rules (procedures, criteria, publication of calls for tender)
- clauses covering means of redress for companies wishing to contest the procedures regarding the awarding of contracts

## What Might Change as a Result of CETA?

According to the European authorities, the opening up of the Canadian public procurement market – both at federal and sub-federal level – to European competition represents one of the most significant achievements of the CETA negotiations. Markets in the Canadian provinces and territories and markets operated by state enterprises will be opened up. There will continue to be some exclusions, notably where public service energy suppliers are concerned, or in relation to local content rules governing public transport both in Ontario and Quebec. The agreement also provides for the introduction of one, centralised website that will publish all calls for tender (to be in place within a maximum of five years).

In exchange for this enhanced market opening, the EU has agreed to a further opening up of its public procurement market by removing exclusions that it had imposed on Canadian suppliers in relation to:

- public procurement covering certain government entities (such as the National Assembly (French parliament), the Presidency of the Republic of France, administrative courts, judicial courts and tribunals, etc.)<sup>9</sup>;
  - public procurement covering sub-central government entities (such as local communities, chambers of commerce, schools and colleges, and public hospitals); and
  - public procurement covering other bodies such as public service suppliers of water, electricity and urban transport<sup>10</sup>.
- Therefore, French suppliers to these markets will inevitably face new competition from Canadian suppliers.

Furthermore, in reference to public procurement the draft agreement explicitly prohibits *“any condition that encourages local development (...) such as the use of locally sourced elements”*<sup>11</sup>.

As for other criteria, while the text may mention the environmental dimension in the awarding of tenders, it completely fails to mention the social dimension<sup>12</sup>. This could lead to an over-evaluation of the price criterion when it comes to deciding on a bid. This could thus allow Canadian companies to contest the awarding of a contract in cases where the public authorities give significant weight to the social criteria.

The room for manoeuvre in the system for selecting caterers could also be similarly reduced due to the strict rules governing separate lot procurement.

For its part, Canada has abandoned rights which permit the limiting of specific markets to small enterprises.

## What Might Change as a Result of TTIP?

In a similar vein, here too the EU is trying to dismantle American rules that give preference to American products and companies. This is in fact one of the most contentious issues between the two economic blocs. Thus the negotiating mandate given to the Commission stipulates the following: *“The Agreement shall include (...) rules and disciplines to address barriers having a negative impact on each others’ public procurement markets, including local content or local production requirements, in particular Buy America(n) provisions”*. These provisions refer in particular to the “Buy American Act” and to the “Small Business Act” which give preference to goods produced in the United States and restrict 20% of the public procurement market to SMEs.<sup>13</sup>

The game is far from over because in the US these rules are being defended by companies, unions and environmental NGOs; and in June 2014 Congress adopted an amendment designed to stop them being watered down. Furthermore, as things stand, European negotiators cannot make commitments where the sub-federal (i.e. state) level is concerned. And unlike with the Canada negotiations, there is no intention for state-level representatives to become involved – the negotiations are at federal level only.

9 Annex 1 of the WTO Government Procurement Agreement, [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm)

10 Exchange of Letters (1995) between the United States and the European Union, <http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=OJ:L:1995:134:FULL&from=FR>

11 Article 19.4.6 (Public Procurement chapter): commitment not to impose offsets

12 “CETA and TTIP: Potential Impacts on Health and Social Services” - working paper commissioned by EPSU, April 2016

13 Article 24 of the EU’s TTIP Negotiating Mandate, adopted on 17 June 2013

In the end, if the European Union's demands are met, then for its part, and by way of reciprocity, the EU will be obliged to open up its public procurement markets further and to lift the exclusions that it has, until now, imposed on American suppliers. These exclusions are very similar to those that it had imposed on Canada<sup>14</sup>.

In addition to being part of the public procurement chapter, the rules governing local content are also dealt with in other chapters of these trade agreements. In order to promote investment, Canada and the EU have undertaken to ban the setting of performance requirements - such as requirements to achieve a minimum percentage of elements of domestic content; or requirements to provide local goods and services in return for the right to invest, or to receive an advantage<sup>15</sup>.

#### **What Might Be the Impact on European SMEs?**

##### **→ Better access to public procurement contracts in the USA for a very small number of SMEs**

In practice the results of the opening up of the public procurement markets several years ago have resulted in greater indirect imports and the awarding of public procurement contracts to local affiliates of foreign companies. The latter is not likely to have an impact on very many SMEs.

Furthermore, the three priority sectors on which the EU focused during the 11<sup>th</sup> Round of negotiations – namely transport, energy and environmental services – tend to be sectors where the key players are Europe's larger companies.

##### **→ Greater competition on the national and European public procurement markets given the greater access accorded to the competition; and the lifting of exemptions currently imposed on American and Canadian suppliers**

##### **→ Reduced ability of public authorities to include social and environmental criteria in calls for tender which can result in local suppliers winning contracts**

##### **→ A commitment by the EU and member states, in future, not to include local content requirements in public procurement or to enact a European Small Business Act**

The Veblen Institute strives for a sustainable society in which respect for our planet's physical limits goes hand in hand with well-being, social solidarity and an economy built upon more democratic rules than at present. In France the Institute is leading the campaign for responsibility in trade agreements. The campaign aims to analyse the effects that these agreements - currently being negotiated – could have on SMEs and local economies.

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14. In the case of the United States, these exclusions covered certain governmental entities; the procurement markets for services to sub-governmental entities; procurement markets for other entities that are covered by public procurement, namely public service water suppliers, airports and urban transport systems.
15. Article 8.5 of the CETA Agreement: Performance Requirements: 1. A Party shall not impose, or enforce the following requirements, or enforce a commitment or undertaking, in connection with the establishment, acquisition, expansion, conduct, operation, and management of any investments in its territory to: (...) (b) achieve a given level or percentage of domestic content; (c) purchase, use or accord a preference to a good produced or service provided in its territory, or to purchase a good or service from natural persons or enterprises in its territory; (...) 2. A Party shall not condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct or operation of any investments in its territory, on compliance with any of the following requirements: (a) to achieve a given level or percentage of domestic content; (b) to purchase, use or accord a preference to a good produced in its territory, or to purchase a good from a producer in its territory