

NATIONAL FOREIGN TRADE COUNCIL, INC.

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Director General Jonathan Faull
Internal Market and Services Directorate-General
European Commission
SPA2 – Pavillon
Rue de Spa/Spastraat, 2
B-1000 Bruxelles/Brussel
Belgium

Dear Director General Faull,

I am writing to comment on the European Commission's proposed options for revising its policies on government procurement from third countries. The Commission suggested three different responses to what it considers unequally open procurement processes. It is the third option, a new legislative initiative, that most worries the National Foreign Trade Council.

The National Foreign Trade Council (NFTC) is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies that supported an open world trading system, the NFTC and its affiliates now serve more than 300 member companies through offices in Washington and New York.

The NFTC supports the European Union's past support for free trade and an ambitious opening of international public procurement markets. The EU's embrace of open procurement has led to lower costs and higher quality services for European citizens and helped to foster a liberalizing attitude toward trade generally. However, the Commission's proposal to drastically reduce this open market through one of two possible new pieces of legislation would have significant negative effects for EU member states, their citizens, and United States businesses.

The most stringent legislation proposed by the Commission—approach A—would dramatically curtail public procurement opportunities for third countries to only those explicitly agreed upon in the Agreement on Government Procurement (GPA) or other bi- and multilateral free trade agreements. This would have a particularly negative effect on trade in services at the sub-national level as well as bids in the urban transport, water infrastructure, and airport sectors.

Although the NFTC would oppose any move by the EU to restrict the free flow of trade, the Commission's approach B would—if enacted carefully and with surgical precision—reduce the negative consequences of approach A. If the Commission decides to move in that direction, however, the NFTC believes it important that it do so consistent with the following principles in order to avoid protectionist outcomes: The FP-TDI's objective should be to improve procurement markets globally, not to isolate EU domestic markets.

- The scope of the instrument would need to be clearly defined. The reference in the consultation to “third countries goods, services and companies that are not covered by the EU’s international commitments” is not clear. It is very important that the Commission rigorously defines the situations where the instrument could apply; knowing in advance the applicable law will be a key factor to be taken into account by participants in future European public tenders.
- The process should be informed; transparent; subject to judicial review and should ensure that due process is respected.
- The process should ensure coherence amongst member states and provide legal predictability. It is important that the Commission, under the control of the EU judicial bodies, be the only institution in charge of granting the ex-ante authorization to apply restrictive measures.
- In order to be WTO-compliant, the FP-TDI restrictive measure should be limited in scope, providing only for measures that restrict access to the procurement market in the EU.
- The conditions for imposing restrictive measures (in particular the concept of lack of “sufficient access to public procurement markets” of foreign countries), and the practices prompting the measures, should be clearly defined in the EU legislation; this will not only facilitate the operation of the FP-TDI, but also will send a clear message to third countries in terms of the procurement practices that the EU may target.
- FP-TDI measures should target the discriminatory practices in the target country, as the purpose of the measure is to open the procurement market of the targeted country and not to protect EU or third-country companies in the EU procurement market.
- Restrictive measures should not disrupt existing supply chains and therefore should not exclude from tenders products that merely incorporate components from the targeted country. Clear rules of origin s will need to be established.
- Finally, once the Commission has reached a preliminary conclusion that the conditions for the imposition of measures are satisfied, it should issue a warning to the third country involved and indicate what companies, sectors, goods, or services the FP-TDI may target. This “yellow card,” which should be published in the Official Journal, would (1) increase the political pressure on the target country, potentially leading to a resolution of the issue prior to the imposition of measures; and (2) allow companies that may be affected by the measures to exercise their rights of defense.

It is our hope that these principles will assist the Commission in its consideration of international procurement practices so as to ensure that there is no dramatic reversal in the liberalization of trade in the government procurement sector.

Sincerely,



William A. Reinsch
President