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**REPORT FROM THE COMMISSION**

**Concerning negotiations regarding access of Community undertakings to the markets of third countries in fields covered by the Directive 2004/17/EC**

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## Concerning negotiations regarding access of Community undertakings to the markets of third countries in fields covered by the Directive 2004/17/EC

Text with EEA relevance

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## 1. INTRODUCTION

The present report takes account of the situation concerning access of Community suppliers to the procurement markets of third countries in the fields covered by Directive 2004/17/EC<sup>1</sup> and on the opening up of service contracts in third countries as it stands on 1 August 2009. This report is presented in accordance with Articles 58 and 59 of Directive 2004/17/EC.

The purchases of entities operating in the utilities sector in the European Union amount to € 450 billion<sup>2</sup>. These entities published calls for competition for the procurement above the Directive's thresholds for some €80 billion in the Official Journal<sup>3</sup>. The EU can therefore offer access to a large market when negotiating opening of third countries procurement markets.

At the same time, the concept of utilities procurement in the EU; in the fact that private undertakings with special and exclusive rights<sup>4</sup> are also subject to the procurement rules, is not shared worldwide. As a result, access to purchases of private companies active in the field of utilities cannot always be negotiated.

## 2. SUMMARY

Because of its political sensitivity, government procurement has not become a domain with multilateral obligations within the WTO.

The plurilateral WTO Government Procurement Agreement (GPA), which is currently undergoing a review, remains the crucial instrument for opening up international procurement markets. While an agreement on the new text (procedural rules for tendering) was reached in December 2006, market access negotiations have met with a diverging level of ambition among the GPA Parties and are still on going. The European Community, represented by the Commission, advocates for an ambitious the opening of international procurement markets and accordingly made in 2005 a comprehensive offer for the opening of EU procurement markets, including the utilities sector. However, in light of the reluctance of other GPA Parties to further open their procurement markets to international competition, the Commission, at the request of the Council<sup>5</sup>, submitted a revised - more limited - offer in February 2008. Nevertheless, the EC offer remains to be the most comprehensive, in comparison with the other GPA parties.

The EC belongs to the GPA Parties that strongly support accession of new members to the GPA with long-term strategy to turn the GPA into a multilateral Agreement. Recently, the accession process has been completed for Chinese Taipei. Negotiations with China, Jordan and the Republic of Moldova are on-going.

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<sup>1</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating procurement procedures of entities operating in water, energy, transport and postal services sectors

<sup>2</sup> Data for the EU 25 in 2006, source: Eurostat

<sup>3</sup> Data for the EU 27 in 2007, source: Tenders Electronic Daily

<sup>4</sup> Directive 2004/17/EC

<sup>5</sup> 2780th EXTERNAL RELATIONS Council meeting, Brussels 12 February 2007, Nr 6039/07, p.6

Within the WTO framework, the EC continues also to promote an agreement on government procurement under the GATS.

The enlargements of the EU in 2004 and 2007 added some € 55 billion<sup>6</sup> in additional procurement opportunities, out of which some €10 billion<sup>7</sup> represent purchases in the utilities domain. Following the EU enlargements, the corresponding European Economic Area enlargement Agreements have been signed. The utilities procurement market within the EEA amounts to €460 billion, out of which about €81 billion represent procurement above the thresholds, governed by identical procurement rules (the directives).

Another tool for the opening up of procurement markets are the bilateral negotiations with third countries. The European Union has concluded Free Trade Agreements with substantial procurement chapters with Mexico and Chile, an Economic Partnership Agreement with CARIFORUM<sup>8</sup> and a bilateral Agreement on procurement with Switzerland. Numerous bilateral negotiations are on-going or the negotiations are about to start. The current EU approach towards the negotiations of Free Trade Agreements (FTAs) is to conclude so-called new generation FTAs, which include detailed and comprehensive procurement chapters, including market access to utilities procurement.

The EU conducts Stabilisation and Associations Agreements (SAA) with Western Balkan countries, wishing to join the EU. With regard to procurement, the SAAs guarantee mutual national treatment and non-discrimination of suppliers and asymmetric market access. The SAAs also cover utilities procurement.

### **3. PLURILATERAL AND MULTILATERAL NEGOTIATIONS**

#### **3.1. WTO Government Procurement Agreement**

##### **3.1.1. Introduction**

The Agreement on Government Procurement (GPA) is to date the only legally binding agreement in the WTO focusing on government procurement. The current GPA, adopted in 1994, entered into force on 1 January 1996. It is a plurilateral treaty administered by a Committee on Government Procurement, which includes the WTO Members that are Parties to the GPA<sup>9</sup>. The GPA has been concluded by the European Community (EC) on behalf of its Member States, by decision of the Council<sup>10</sup>.

##### **3.1.2. Current GPA coverage**

The GPA does not automatically apply to all government procurement of the Parties. Rather, the coverage of the GPA is determined with regard to each Party in the GPA Annexes, which

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<sup>6</sup> Source: Commission's Estimate

<sup>7</sup> Source: Commission's Estimate

<sup>8</sup> CARIFORUM comprises Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Surinam, Trinidad and Tobago.

<sup>9</sup> Canada, European Communities, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States.

<sup>10</sup> Council Decision 94/800 from 22. December 1994, OJ L 336 of 23.12.1994, pg.1.

specify central and sub-central government entities as well as public utilities, which each Party has committed to complying with the GPA. Apart from the EFTA<sup>11</sup> countries, whose final offers corresponded to that of the EC, no other Party was able to meet the EC request for coverage. Thus, the Community had to adjust its final offer to the degree of market opening of the other Parties. Nevertheless, the EC commitments are the most comprehensive in terms of procuring entities and their procurement as they cover procurement opportunities on both central and sub-central levels, including the procurement of these entities and of public undertakings active in the domain of utilities.

All GPA Parties, except Canada, offer some access to their utilities procurement. However, the coverage is not uniform and the degree of opening of the utilities procurement to foreign competition varies from country to country and the coverage is plagued with derogations, either specific or across the board.

### ***3.1.3. Accession of new members***

GPA members, in particular the EC, seek to transform the GPA from a plurilateral into a multilateral Agreement and thus support new accessions to the GPA. The GPA Parties have agreed that the new (provisionally agreed) text of the future GPA should be used as the basis for accession negotiations with candidate countries. This new text expands and clarifies the transitional measures (offsets, price preferences, phasing in of entities or sectors, higher thresholds), and tailors them to the needs of developing economies. Albania, Georgia, Jordan, the Kyrgyz Republic, Republic of Moldova, Oman, Panama and China have taken commitments to join the GPA while acceding to WTO.

#### ***3.1.3.1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)***

Chinese Taipei applied for GPA accession in March 1995 and the decision of the GPA Committee providing for its accession was adopted in December 2008. Chinese Taipei deposited the instrument of accession on 15 June 2009 and following a decision of the GPA committee, Chinese Taipei became a member of the GPA on 15 July 2009. The accession of Chinese Taipei is currently going through the national ratification process. It is expected that Chinese Taipei shall become a Party to the GPA in the first half of 2009.

The Commitments of Chinese Taipei include procurement in the domain of utilities. The thresholds have been set to 400.000,- SDR for goods, 400.000,- SDR for services and 15.000.000,- SDR for construction services.

#### ***3.1.3.2. Jordan***

Jordan applied for GPA accession in 2000, submitted its initial offer in February 2003 and, following the negotiations with the GPA Parties, an updated third revised offer in September 2008. Jordan is currently updating its legislative framework and procurement systems to the GPA requirements. The conclusion of Jordan's accession is a significant priority for the GPA Committee in 2009.

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<sup>11</sup> Norway, Liechtenstein, Iceland

### *3.1.3.3. China*

China applied for accession to the GPA in December 2007 and its initial offer was circulated to Parties in January 2008. In addition, China submitted its replies to the Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement in September 2008. The ongoing negotiations focus on the verification of the compatibility of the Chinese procurement legislation with the GPA and on market access. The EC provided China with a formal request for improvement of the initial offer (including utilities sector).

### *3.1.3.4. Republic of Moldova*

In November 2008, Republic of Moldova tabled an initial offer, notified its procurement legislation and started negotiations for its accession. Republic of Moldova approached the negotiations with high ambition and its entry could be completed in 2010.

### *3.1.3.5. Other Accessions*

Regarding other pending accessions to the GPA which had been inactive for some time (Albania, Georgia, the Kyrgyz Republic, Oman and Panama) and accession commitments that had not yet been acted upon (Armenia, Croatia, the Former Yugoslav Republic of Macedonia, Mongolia, Saudi Arabia and the Ukraine), the GPA Parties had asked in December 2008 that these be kept under review and requested the Chairman of the GPA Committee continue to follow up as needed.

## **3.1.4. Revision of the GPA**

A commitment to further negotiations was "built into" the current GPA<sup>12</sup>. The purpose of these negotiations is three-fold: (i) to improve and update the Agreement in the light of developments in information technology and procurement methods; (ii) to extend the coverage of the Agreement; and (iii) to eliminate remaining discriminatory measures. The negotiations are also intended to facilitate accession to the GPA by new Parties, notably developing countries. The negotiations under the GPA are not part of the Doha Round of negotiations in the WTO.

### *3.1.4.1. The Provisionally Agreed Text*

In December 2006, negotiators reached an understanding on a significant revision of the text of the GPA to make it more user friendly. The provisions have also been updated to take into account new developments, including the role of electronic tools. Additional flexibility has been built in, e.g. shorter time-periods for procuring goods and services of a type available on the commercial market place. Special and differential treatment for developing countries has been more clearly spelt out, in a manner that, it is hoped, will facilitate future accessions by these countries. Domestic review procedures for challenges by suppliers and the rules for modification of the lists of Parties' coverage have also been a point of focus. On this last matter, it has been agreed to develop arbitration procedures for resolving differences.

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<sup>12</sup> Article XXIV:7(b) and (c)

The agreement of the negotiators is provisional, i.e. it is subject to legal verification and a mutually satisfactory outcome notably on the expansion of coverage of the new GPA (i.e. the lists of government entities whose procurement is opened up).

Agreement was also reached on a process to conclude the coverage negotiations. These negotiations will be conducted on the basis of the revised text.

The GPA Parties have agreed that the new text should be used as the basis for accession negotiations with countries wanting to join the GPA.

#### *3.1.4.2. Overview of the market access negotiations*

The GPA Parties started market access negotiations by submitting their initial requests, followed by the tabling of initial offers. In the course of 2007 and 2008 the initial offers were submitted by all but two Parties – Hong Kong, China and Liechtenstein<sup>13</sup>. Following negotiations, revised offers were submitted by the United States, Jordan, Japan, Korea, the European Community, Norway, Singapore and Switzerland.

The EC tabled a very comprehensive initial offer in 2005, offering the great majority of Community procurement, including the utilities. In light of the reluctance of some GPA Parties to reciprocate, the Council requested the Commission to *rebalance the Agreement*<sup>14</sup>. The EC thus submitted to the GPA partners a revised offer in February 2008, which takes account of the possibilities of the other GPA Parties regarding the reciprocal opening of the procurement markets.

The offer of the EC, nonetheless, remains very comprehensive, offering about 85% of the above threshold procurement of the EU. For the utilities domain it represents procurement opportunities worth almost €50 billion. Restrictions for access to the EC procurement market are limited, based on reciprocity principle and target the corresponding restrictions of the other GPA Parties.

The opening up of procurement in the domain of utilities remains one of the main offensive interests of the EC in the market negotiations. The EC strategy to achieve this goal is composed of three main elements:

To obtain greater coverage of procurement entities at sub-central level. It is at this level at which utilities are organised in certain GPA Parties (USA, Canada and Japan) and for which some GPA Parties do not offer a substantial coverage.

The elimination of discriminatory measures, in particular those that withdraw GPA Parties' coverage across the board for all procurement, such as the set asides for national SMEs currently maintained by the USA, Japan and Korea.

The elimination of specific exceptions maintained by certain GPA Parties, which render the procurement committed by those Parties inaccessible in practice. An example in the domain

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<sup>13</sup> Jordan and Chinese Taipei confirmed that the offers that they had circulated in the course of their negotiations on accession to the current Agreement should also be considered as their offers in the coverage negotiations.

<sup>14</sup> 2780th EXTERNAL RELATIONS Council meeting, Brussels 12 February 2007, Nr 6039/07, p.6.

of utilities is the operational safety clause whose extensive use precludes access to the Japanese railway procurement market.

### **3.2. WTO General Agreement on Trade in Services (GATS)**

Article XIII:1 of the General Agreement on Trade in Services (GATS) excludes government procurement from the GATS' main market access provisions. However, Article XIII:2 of GATS establishes a multilateral negotiating mandate on services procurement. The negotiations under Article XIII:2 of GATS take place in the multilateral Working Party on GATS Rules (WPGR), established by the Council for Trade in Services in 1995.

The negotiations on the multilateral opening of services procurement are on-going, with the EC being the driving force. The EC tabled five communications in the WPGR, the latest of which, issued in 2006, puts forward a framework for WTO Members to undertake commitments in market access and non-discrimination on services procurement and a set of common procedural rules for covered procurement.

## **4. THE EUROPEAN ECONOMIC AREA**

### **4.1. Introduction**

The EEA Agreement provides in its Article 65 and Annex XVI that the provisions of the Utilities Directive apply in the EFTA countries. As a result, Norway, Liechtenstein and Iceland now provide access to their utilities procurement for Community undertakings, offering a coverage, which matches the scope of the Utilities Directive 2004/17/EC.

### **4.2. The Enlargement of the EU**

Under the EEA Agreement, joining EU members are to apply to become party to the EEA Agreement (Article 128), under terms and conditions subject to agreement.

The enlargement of the EEA to include the ten countries that joined the EU in 2004<sup>15</sup> entered into force on 1 May 2004<sup>16</sup>. The latest enlargement of the EU took place on 1 January 2007 when Bulgaria and Romania joined the EU. The EEA Enlargement Agreement was signed on 25 July 2007<sup>17</sup>.

The enlargement of the EU in 2004 and 2007 added some €5 billion in additional procurement opportunities, out of which some €10 billion represent purchases in the utilities domain. The utilities procurement market within the EEA amounts to €460 billion, of which about € 81 billion represent the above threshold procurement, governed by identical procurement rules (directives).

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<sup>15</sup> Enlargement of CZ, EE, CY, LV, LT, HU, MT, PL, SI, SK on 1 May 2004

<sup>16</sup> Agreement on the participation of CZ, EE, CY, LV, LT, HU, MT, PL, SI, SK in the European Economic Area of 14 October 2003 (OJ N° L 130 of 29.4.2004, p. 11; EEA Supplement N° 23, 29.4.2004, p.1).

<sup>17</sup> OJ L 221 of 25.08.2007

## 5. BILATERAL NEGOTIATIONS

### 5.1. Concluded Agreements with Procurement Chapters

#### 5.1.1. *Switzerland*

In 1999 the EC concluded a separate package of trade agreements with Switzerland, the so-called Bilateral I package<sup>18</sup>. The Agreement on certain aspects of government procurement entered into force on 1 June 2002<sup>19</sup>.

The agreement complements the commitments of Switzerland and the EC under the GPA. The EC and Switzerland mutually grant access to procurement of goods, works and services by both public entities and private entities enjoying special and exclusive rights and operating in the fields of railway, gas, heat, oil, coal and other solid fuels. In addition, procurement of goods, works and services by private entities enjoying special and exclusive rights and operating in the fields of electricity, drinking water, maritime or inland ports, airports and urban transports are covered by the Agreement. As a result, the Agreement extends these commitments to the level covered by the EC procurement directives.

The Agreement establishes a Joint Committee to ensure its effective implementation and operation. Meetings of the Joint Committee have regularly taken place since the entry into force of the Agreement.

#### 5.1.2. *Mexico*

The **Economic Partnership, Political Coordination and Cooperation Agreement (EPA)** with Mexico entered into force in November 2000<sup>20</sup>.

The agreement provides for the parties' commitment to the gradual and mutual opening of government procurement markets. It also specifies the creation of a Joint Council with members from both parties.

Pending the ratification of the EPA, an **Interim Agreement of Trade and Trade-related matters (IA)** was approved by the Council in June 1998<sup>21</sup>. The IA, which entered into force on 1 July 1998, also provides for procurement provisions and establishes the above mentioned Joint Council for the monitoring of the Agreement.

Regarding procedural procurement rules<sup>22</sup>, Mexico shall apply relevant provision from the NAFTA Agreement<sup>23</sup>, whereas the EU shall apply the provision of the 1994 GPA.

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<sup>18</sup> This package includes negotiations for agreements in seven sectors (Free Movement of Persons, Trade in Agricultural Products, Public Procurement, Conformity Assessments, Air Transport, Transport by Road and Rail, Swiss Participation in the 5th Framework Programme for Research). These agreements are linked by a termination clause, which means that all agreements came into force together and will also come to an end together if any one of them is terminated.

<sup>19</sup> OJ L 114 of 30.4.2002, p. 430.

<sup>20</sup> Council Decision 2000/658/EC, OJ L 276 of 28.10.2000; This Decision was amended with the Council Decision 2005/202 of 31 January 2005 to take into account the accession of new Member States in 2004, OJ L 66 of 12.3.2005

<sup>21</sup> OJ L 226 of 13.8.1998

<sup>22</sup> Annex XII Decision 2/2000

<sup>23</sup> NAFTA – North American Free Trade Agreement

In the field of utilities, Mexico opens up procurement of government enterprises in the field of railways, telecoms and energy (petrol and gas), whereas the EU's coverage includes procurement by public authorities and public undertakings in the field of electricity, drinking water, urban transport, airports, and maritime or inland ports.

The Joint Committee on procurement issues meets regularly since the entry into force of the Interim Agreement. It also addressed the issue of possible expansion of coverage.

### **5.1.3. Chile**

The EU-Chile Association Agreement was signed on 18 November 2002<sup>24</sup>. The entry into force of the entire Agreement is pending, though most of its provisions, including those on procurement, came into force provisionally on 1 February 2003<sup>25</sup>.

An Association Council is set up to supervise implementation of the AA and is assisted by an Association Committee.

As far as utilities are concerned, the EU and Chile mutually open up procurement by public entities operating in the fields of ports and airports. The applicable thresholds are set at the same value for both the EU and Chile and correspond to those applicable in the utilities directive.

### **5.1.4. CARIFORUM**

In October 2008 the EU signed an Economic Partnership Agreement (EPA) with 13 CARIFORUM countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Christopher and Nevis, Suriname, Trinidad and Tobago and Guyana. The Agreement is provisionally applied as of 29 December 2008. The EU pledged to work with the Haitian government and other Caribbean partners to ensure that the conditions for Haiti to join the EPA are in place soon.

The CARIFORUM EPA commits its signatories to a very complete set of rules on transparency in government procurement but does not include any provisions on market access. The EU and CARIFORUM have agreed to rules that would ensure that relevant information is freely disclosed in order to facilitate fair and acceptable processes in public tendering.

## **5.2. Procurement Chapters in the Stabilisation and Association Agreements/Interim Agreements**

### **5.2.1. Introduction**

In talks with Western Balkan countries who have expressed the wish to join the EU, the EU concludes Stabilisation and Association Agreements (SAA) in exchange for commitments to political, economic, trade, or human rights reforms in a country. The country may be offered tariff-free access to some or all EU markets and financial and/or technical assistance.

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<sup>24</sup> OJ L 352 of 30.12.2002

<sup>25</sup> Council Decision 2002/979/EC, OJ L 352 of 30.12.2002, amended with Council Decision 2005/106/EC of 22.11.2004 to take account the accession of new Member States of 2004, OJ L 38 of 10.02.2005

SAA are part of the EU Stabilisation and Association Process (SAP). The SAA are similar in principle to the Europe Agreements signed with the Central and Eastern European countries in the 1990s and to the Ankara Association Agreement with Turkey<sup>26</sup>.

The SAAs must be ratified by the associating state and all EU Member States. Pending the ratification of a SAA, the Commission concludes an Interim Agreement (IA) to allow the trade and trade-related provisions of the SAA to enter into force as soon as possible.

Since the aim of the SAAs is to help the countries concerned to build their capacity for the adoption and implementation of EU law, the reciprocal commitments are usually construed on an asymmetrical basis. This is also the case for the relevant procurement provisions. The economic operators of the signatory country, whether established or not in the EC, are granted access to contract award procedures in the EC pursuant to the EU public procurement rules as of the entry into force of the SAA, or of the IA in cases where the latter makes such a provision. This rule applies also to contracts in the utilities sector once the signatory country has adopted the legislation introducing the EC rules in this area.

EU companies established in the signatory country are granted access to contract award procedures in the said country under treatment no less favourable than that granted to national companies from the entry into force of the Agreement.

For their part, EU economic operators not established in the signatory country are granted access to contract award procedures in the said country under treatment no less favourable than that granted to national companies only after a given number of years following the entry into force of the Agreement<sup>27</sup>.

## **5.2.2. Agreements per country**

### *5.2.2.1. Albania*

The EU and Albania signed a SAA on 12 June 2006 which entered into force on 1 April 2009.

Market access will be granted at the latest four years after the date of entry into force of the IA.

### *5.2.2.2. Former Yugoslav Republic of Macedonia*

The SAA with the Former Yugoslav Republic of Macedonia was signed on 9 April 2001 and entered into force on 1 April 2004<sup>28</sup>. There was no public procurement provision in the IA that entered into force in June 2001<sup>29</sup>.

Market access was granted as of 1 April 2009.

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<sup>26</sup> It shall be noted that there aren't any public procurement provisions in the Ankara AA. A negotiation for the extension of the Customs Union to the access to procurement markets has been foreseen by the Decision 1/95 (Article 48) of the EC-Turkey Association Council, however, this has not been acted upon so far.

<sup>27</sup> The exception out of this rule is Montenegro, which grants access to its procurement market to Community undertakings irrespective of the place of their establishment as from the entry into force of the Interim Agreement

<sup>28</sup> OJ L 84 of 20.3.2004

<sup>29</sup> OJ L 124 of 04.5.2001

### 5.2.2.3. Montenegro

On 15th October 2007 Montenegro signed the SAA and an Interim agreement on trade and trade-related matters. The latter entered into force on 1 January 2008<sup>30</sup> while the SAA will enter into force once its ratification process is completed.

Market access was granted as from the entry into force of the IA.

### 5.2.2.4. Croatia<sup>31</sup>

The SAA with the Republic of Croatia entered into force on 1<sup>st</sup> February 2005<sup>32</sup>.

Market access was granted as from 1<sup>st</sup> of February 2008.

### 5.2.2.5. Serbia

The SAA and the IA on trade were signed on 29 April 2008. The Council, however, decided that the implementation of the IA and the ratification of the SAA should be subject to unanimous recognition by the Council that Serbia was cooperating fully with the International Criminal Tribunal for the former Yugoslavia. The Serbian Parliament ratified the agreements on 9 September 2008.

Market access will be granted at the latest 5 years after the entry into force of this Agreement.

Upon the entry into force of this Agreement, Serbia shall convert any existing preference for domestic economic operators to a price preference. The price preference provisions shall be gradually reduced within a period of 5 years.

### 5.2.2.6. Bosnia and Herzegovina

A SAA with Bosnia and Herzegovina and an IA on trade and trade-related matters were signed on 16 June 2008<sup>33</sup>. The IA<sup>34</sup> entered into force on 1 July 2008 while the SAA will enter into force once its ratification process has been completed.

Market access will be granted at the latest 5 years after the entry into force of this Agreement.

Upon the entry into force of this Agreement, Bosnia and Herzegovina shall convert any existing preference for domestic economic operators to a price preference. The price preference provisions shall be gradually reduced within a period of 5 years.

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<sup>30</sup> Signed on 15.10.2007, OJ L 345 of 28.12.2007

<sup>31</sup> Croatia is a candidate country for the accession to the EU; the accession negotiations are currently on-going. Negotiations on public procurement (Chapter 5) began on 16<sup>th</sup> December 2008. Three closing benchmarks, related to legislative alignment, implementation and administrative capacity building have been adopted by the Council. These benchmarks must be fulfilled for the successful closure of the negotiations in this Chapter.

<sup>32</sup> OJ L 26 of 28.1.2005

<sup>33</sup> Council Regulation 594/2008 and Council Decision 2008/474/EC, OJ L 169 of 30.6.2008

<sup>34</sup> OJ L 169/13 of 30.6.2008

### 5.3. Procurement Chapters in Agreements conducted within the Neighbourhood Policy

#### 5.3.1. Introduction

The European Neighbourhood Policy (ENP) was developed in 2004, with the objective of avoiding the emergence of new dividing lines between the EU and its immediate neighbours by land or sea<sup>35</sup> – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Republic of Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine.

The EU offers to its neighbours a privileged relationship, building upon a mutual commitment to common values (democracy and human rights, rule of law, good governance, market economy principles and sustainable development). The level of ambition of the relationship will depend on the extent to which these values are shared<sup>36</sup>.

The ENP builds upon Partnership and Cooperation Agreements (PCAs) with the former Soviet republics, or Association Agreements (AAs) in the framework of the Euro-Mediterranean Partnership<sup>37</sup>), the ENP is not yet ‘activated’ for Belarus, Libya or Syria since no such Agreements are yet in force.

PCAs and AAs<sup>38</sup> foresee co-operation in the field of public procurement, to develop conditions for open and competitive award of public contracts.

The central elements of the ENP are the bilateral ENP Action Plans. These set out an agenda of political and economic reforms with short and medium-term priorities. Implementation of the ENP Action Plans is underway; it is jointly promoted and monitored through sub-Committees.

On the basis of ENP in order to enhance and deepen relations with Ukraine, Belarus, Republic of Moldova, Armenia, Georgia and Azerbaijan, the Council adopted the Eastern partnership initiative on 20<sup>th</sup> March, 2009<sup>39</sup>.

The Eastern Partnership implies also negotiations of new enhanced (association) agreements (including deep and comprehensive free trade agreements which combine rules on market access with regulatory approximation to the *acquis*) with those countries which are willing and able to enter into a deeper engagement.

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<sup>35</sup> Although Russia is also a neighbour of the EU, our relations are instead developed through a Strategic Partnership covering four "common spaces".

<sup>36</sup> The ENP remains distinct from the process of enlargement although it does not prejudice, for European neighbours, how their relationship with the EU may develop in the future, in accordance with Treaty provisions.

<sup>37</sup> The legal basis for the EU's relations with the Palestinian Authority is the Interim Association Agreement on Trade and Cooperation signed with the Palestinian Liberation Organization (PLO) on behalf of the Palestinian Authority.

<sup>38</sup> With Armenia: art. 48; with Azerbaijan, art. 49; with Egypt: art. 38; with Georgia: art. 50; with Israel: arts. 1 and 35 (precising the aim of a mutual opening of the procurement markets of undertakings operating in the utilities sectors); with Jordan: art. 58; with Lebanon: art. 39; with Republic of Moldova: art. 54; with Morocco: art. 41; with the Occupied Palestinian Territories: art. 34; with Tunisia: art. 41; with Ukraine: art. 55.

<sup>39</sup> Communication from the Commission to the European Parliament and the Council – Eastern Partnership {SEC (2008) 2974}

### **5.3.2. ENP – Negotiations of Comprehensive Procurement Chapters per Country (Eastern countries)**

#### **5.3.2.1. Ukraine**

Negotiations on a new enhanced agreement with Ukraine officially started on 5 March 2007. The negotiations of the deep and comprehensive FTA, as an integral part of the AA, started in February 2008.

Negotiations are still ongoing and aim at the gradual and reciprocal opening of procurement markets in all areas (including utilities and concessions) on the basis of progressive legislative approximation with the EC Directives, accompanied with institutional reform in Ukraine. The extent of market access is linked to the level of regulatory and administrative reform achieved.

#### **5.3.2.2. Georgia, Armenia**

Fact finding missions (to Georgia in October 2008 and to Armenia in February 2009) marked the start of the preparatory process for negotiations of the deep and comprehensive FTAs. The assessment of Georgia's and Armenia's preparedness to start the negotiations is under way.

### **5.3.3. ENP – Negotiations of Comprehensive Procurement Chapters (Euro-Mediterranean area)**

#### **5.3.3.1. Syria**

The AA has not yet entered into force, though its text was finalised in 2004. As a difference from the other AAs, it entails detailed procedural procurement rules and also a comprehensive mutual market access, including utilities procurement. The EU continues the talks with Syria towards the signature of the Agreement.

#### **5.3.3.2. Libya**

The EU-Libya FTA negotiations started in September 2008. Both parties ambition public procurement provisions that go beyond the WTO GPA text as the EU suggests gradual and mutual access to the works concessions and the use of the larger Community definition of the utilities sector. Negotiations are on-going.

## **5.4. Ongoing and Future Bilateral Negotiations**

In October 2006 the European Commission issued the "*Global Europe: Competing in the World*"<sup>40</sup> Communication, which spells out the EU's external agenda for improving its competitiveness in the global economy. As a central part of this new trade policy framework, a new generation of FTAs aims to complement the EU's strong commitment to the multilateral trading system by focusing on areas not currently covered by multilateral WTO rules, public procurement is among them. The key economic criteria for the new generation of FTAs are market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non tariff barriers). The EU also takes account of potential partners' negotiations with EU competitors and the likely impact of this on EU markets and

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<sup>40</sup> Global Europe: Competing in the World (COM(2006) 567 final)

economies. In terms of content these new generation FTAs seek to be comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalisation while strengthening sustainable development and taking into the development needs of our trading partners.

#### **5.4.1. *Central America***

At the EU-Latin America and Caribbean summit in 2004, the EU and the Central American region agreed to negotiate a new AA, and these negotiations were launched in 2007. The trade part of the agreement contains a chapter on public procurement with provisions on rules, in particular concerning transparency, and market access. The utilities' procurement is included. The latest round of the negotiations was completed in Brussels, in June 2009, but following the uncertain political situation in Honduras, the negotiation has been suspended.

#### **5.4.2. *Andean Community***

Following a failure of the region-to-region negotiations of a comprehensive AA (including political dialogue, cooperation and trade) between the EU and Andean Community, trade negotiations in view of concluding a multi-party trade agreement started in February 2009 with Colombia, Ecuador and Peru. This agreement shall contain a chapter on public procurement with provisions on rules, in particular concerning transparency, and market access, the utilities' procurement is included. The fourth round was completed in Bogota in June.

#### **5.4.3. *African, Caribbean and Pacific Countries***

Regional negotiations with the six regions (West Africa, Central Africa, Eastern and Southern Africa, the Southern African Development Community, Caribbean, Pacific) were launched in October 2003 with a view to establish EPAs. EPAs are intended to be WTO-compatible trading arrangements consolidating regional integration initiatives within the ACP and fostering the gradual integration of the ACP into the global economy on the basis of an open, transparent and predictable framework for goods and services.

#### **5.4.4. *Iraq***

Negotiations between the EU and Iraq, in view of the adoption of a Trade and Cooperation Agreement, were initiated in November 2006. The EU and Iraq seek to establish a WTO-compatible regime which will also encourage trade with and investment in Iraq. The TCA shall contain also a very comprehensive public procurement chapter based on the GPA rules, which shall lead to substantial mutual opening of EU and Iraq's procurement markets, including in the utilities' procurement.

#### **5.4.5. *South Korea***

The FTA with South Korea is the first of the new generation of Global Europe agreements that the EU started to negotiate in May 2007. Regarding procurement, the FTA shall add to the mutual commitments, which the EC and Korea have within the framework of the GPA.

Therefore the procurement chapter focuses on opening market access to the works concessions<sup>41</sup> which are not covered by the GPA.

#### **5.4.6. Canada**

The EU and Canada formally launched the negotiations for a Comprehensive Economic and Trade Agreement (CETA) on 6 May 2009.

The scoping exercise conducted early 2009 highlighted that any agreement should aim at achieving full coverage of central and sub-central government procurement in all sectors, including utilities, to ensure treatment no less favourable than that accorded to locally-established suppliers. Language on transparency should be added in order to provide insight into laws, regulations, procedures and practices, in such a way as to provide business communities with easily accessible information on public procurement. It was agreed that the starting point on procedural commitments should be the text of the WTO GPA. The first round of negotiations will take place in October 2009.

#### **5.4.7. China**

In accordance with the conclusions of the December 2005 meeting of the General Affairs and External Relations Council, the EU is negotiating a partnership and cooperation Agreement (PCA) with China in order to further improve the framework for bilateral trade and investment relations, including the area of government procurement, and to upgrade the 1985 EC-China Trade and Economic Cooperation Agreement.

## **6. THE WAY FORWARD FOR OPENING PROCUREMENT OPPORTUNITIES**

The EU has always supported the trend towards global free trade and it has recognised the increasing economic interdependence of markets across borders. If properly addressed, these developments have the potential to increase the wealth of the global economy. Globalisation clearly puts pressure on Europe to reform its economy and become more competitive. Europe needs to respond to this pressure internally but it also must pay growing attention to its external front. The Internal Market can only deliver fully on its key internal priorities if these priorities are adequately addressed on the world scene.

The EU has been traditionally an open economy and an advocate of free trade. For procurement, this premise translates in a low degree of protectionism. The EU's approach is not entirely shared worldwide. Public Procurement has traditionally been a domain subject to political pressure consisting of preference for domestic suppliers over their foreign competitors. Thus, within the WTO, government procurement has not become a domain with multilateral obligations. Most of the EU's major trading partners operate restrictive public procurement practices which discriminate against EU suppliers. The current economic crisis increased the use of such practices.

Public procurement is an area of significant untapped potential for EU exporters. EU companies are world leaders in areas such as transport equipment, public works and utilities. But they face discriminatory practices in almost all our trading partners, which effectively close off exporting opportunities.

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<sup>41</sup> BOT (Build-Operate-Transfer) concessions for Korea.

The EU's efforts to overcome the existing trade barriers are twofold. The EU tries to conclude FTAs with comprehensive procurement chapters, based on procurement rules similar to those of the EU (new generation FTAs). Further, as a party to the GPA, the EC actively negotiates with accessions candidates, with the view to transforming the GPA into a multilateral Agreement.

During the negotiations of procurement chapters, the EU offers a legally certain, non discriminatory access to a large procurement market, which indeed positively contributes to the leverage the EU has in the negotiations. At the same time, the leverage is somewhat offset by the general openness of the EU, since the other parties are aware that even the procurement opportunities which are not offered as a part of the finally negotiated deal will not be sheltered with a wall, which would be impossible to penetrate.

The EU has always based its negotiations on formal reciprocity. In situations, where certain parties could not meet our expectations regarding market access, the notion of reciprocity has had to be interpreted more strictly. This is the case of the on-going GPA negotiations, where the EC had to revise its offer to reflect the willingness and possibilities of the other parties to open up their procurement to foreign competition.

The reflection on economic reciprocity (assessing the actual value of the third party's procurement market) should continue as part of the reflection on strengthening the EU's negotiation position.

Further, in cases where important trading partners profit from the general openness of the EU, but have no intention to move towards reciprocity, the EU could reflect on introducing carefully targeted restrictions on access to parts of the EU procurement market, to encourage these partners to offer reciprocal market opening<sup>42</sup>.

The reasonable and appropriate use by individual European contracting authorities of measures already available to them in EU procurement legislation, specifically for utilities' procurement, would also strengthen the EU's negotiating position.

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<sup>42</sup> This approach would not be considered for poorer developing countries.