Public procurement in TTIP and CETA: a poisoned gift to local authorities and SMEs

Since July 2013, the US and the European Union have been negotiating one of the biggest free trade agreements ever: the Transatlantic Trade and Investment Partnership (TTIP) in an opaque manner. This agreement will lay the foundations of a new step in trade and public service liberalisation. For this reason it already gives rise to many concerns and mobilisations on both sides of the Atlantic. Regulatory cooperation and Investor-State Dispute Settlement (ISDS) mechanisms are indicative of a significant power granted to global corporations at the expense of democracy. The watering down of social and environmental standards is a major risk for environment, public health and workers’ rights.

If this agreement is adopted, it will have a huge impact at the local level. Indeed, one of the major issues in the current negotiations is the liberalisation of public procurement at all governmental levels.

TTIP threatens democracy, local development, local authorities activities, SMEs… this document aims to shed light on the risks posed by TTIP and invite local public stakeholders and citizens to act collectively to stop the TTIP negotiations.

Simultaneously with the TTIP negotiation, the European Union is also engaged in another free trade agreement project with Canada: CETA (Comprehensive Economic Trade Agreement). Its ratification process in the European institution is about to start. Even though CETA is much less known than TTIP, it is certainly no less toxic. It contains the same principles and is just a first step, if not a preparation test, for TTIP’s adoption.

The analysis developed below is about both TTIP and CETA, and why they must be denied. They are trampling European, Canadian and US societies’ democratic rights and also posing massive threats to our economies and environment.
Public procurements in Europe and in the USA

An uneven public procurements’ liberalisation between the United States and the European Union

One of the key issues in the TTIP negotiations is to increase the international competition on public procurement markets. However, this fits into different perspectives for American and European stakeholders. The European public procurement status of liberalisation is much more important due to the fact that the EU will widely open its internal market and institute a maximal free competition policy. Thus, member state enterprises can access the 27 States public procurements.

The European Union’s public procurement opening rate is about 90% (in volume). European and non-European suppliers can both compete in an overwhelming majority of the EU member states’ public procurements. This rate is only about 32% in the US (28% in Japan, 16% in Canada). The US public procurement’s protection is notably ensured by the “Buy American Act” (voted in 1933) and by the “Small Business Act” (voted in 1953).

United States: protecting SMEs and local production

So, in the US the public procurement opening rate is only at 32%. Moreover, 13 states in the US (as well as many US local authorities and state agencies) have never signed the WTO Agreement on Government Procurement (GPA). The US regulations on public procurement is meant to defend the national industry and SMEs in order to protect employment and the national economy. The Buy American Act, for instance, aims to prioritise US made goods for public use. This law applies to the federal American administration and has also been adopted by some States and city councils. In 2009, the US government strengthened this law to face the economic crisis. For example: “The iron, steel and materials used in any public project of building, renovation, maintenance or repair works for public buildings or public work subsidised by the public transport federal administration have to be 100% made in the US”.

As for the Small Business Act, it aims to give SMEs (meaning no more than 1,000 people employed in several sectors in the USA, whereas a European SME can employ no more than 250 employees) privileged access to US public procurements. Because of this, about 20% of all the public procurements are reserved for SMEs (this rate can change according to the various administrations3). Moreover, in 1994, specific measures were implemented to support SME CEOs coming from underprivileged areas or discriminated communities, granting them a privileged access to about 3% of public procurement.

The European Union: liberalising access to public procurement and implementing social and environmental standards

Through the GPA (Government Procurement Agreement), the EU decided to widely open its public procurement markets to foreign suppliers. This opening had few consequences since the amount of public procurements assigned to foreign enterprises (including enterprises coming from European countries) is only at 3.6%. Nevertheless, this rate rises to 13.9% when accounting for foreign enterprise subsidiaries. Due to the same wish to open European public procurements to competition, the local content requirement has been prohibited under the principle of equal access to public procurements.
In trying to reach the objective of creating an EU single market, the EU largely liberalised access to public procurements. The desire to open public procurements to European and non-European competitors seems to be more about ideology than economic reality. In fact, the EU opened its public procurement to States whether they ratified the GPA or not, without requiring any kind of counterpart. The EU’s incapacity to implement reciprocity mechanisms within States holding public procurement policies reveals how the European Commission and the European Council are getting nowhere. A large proportion of the governments in the European Council now veto any policy going against the free competition markets.

Nevertheless the EU has developed a relatively ambitious policy regarding social and environmental standards to be followed when contracting public procurements.

Thus, article 18 of the European directive 2014/55 produced by the European Council and the European Parliament in February, 26th of 2016, sets new standards to follow when bidding for tenders. In this way, member States “shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions”. This article also applies to subcontractor enterprises.

This directive therefore opens new environmental standard perspectives for local authorities. The establishment of the “life cycle cost” approach allows greenhouse gas emission to be taken into account in order to evaluate the most beneficial offer on services and building provisions. This gives a balance to the offers’ selection by weighing the price criteria against the delivery’s technical quality. The 69th article of the directive, relating to the abnormally low price offers, also allows local authorities to rule out offers presenting low prices due to unfulfilled environmental standards or social dumping.

In order to promote competition for public procurements, the directive now includes some aspects in social standards and labour rights. In this way economic operators must respect collective agreements, EU regulations, national laws and international rules (relating to job rights and social and environmental standards). If these operators do not comply with said obligations, they can be shut out of the public procurement awarding procedure. Conversely, the USA has not signed the Kyoto protocol, nor 6 of the 8 fundamental conventions of the International Labour Organisation. In addition, due the US federal constitution, social and environmental standards for public procurements are not equivalent throughout the whole territory and may vary significantly from one state to another. Taking this fact into account, we can fear that the harmonisation of standards across the EU and the US is to be based on the lowest protection possible.

What consequences can TTIP have on public procurements?

The EU negotiating mandate on public procurements

We reproduce here the 24th article of the negotiation mandate of June, 17th 2013, expressed by the EU on the public procurement issue:

The Agreement shall aim for the maximum ambition, completing the outcome of the negotiations of the revised Government Procurement Agreement in terms of coverage (procurement entities, sectors, thresholds and services contracts, including particularly public construction).

The Agreement will aim at enhancing mutual access to public procurement markets at all administrative levels (national, regional and local) in the field of public utilities, covering relevant operations of companies operating in this sector and ensuring treatment no less favourable than that granted to locally established suppliers.

The Agreement shall also 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, 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 if necessary, streamlining, simplifying and increasing transparency of procedures.

The European negotiation mandate sets two main objectives for the public procurement liberalisation: On one hand to promote their opening at each level (national, regional, local) on both sides of the Atlantic, and on the other hand to dismantle the “barriers having a negative impact on each others’ public procurement markets”: rules, procedures and technical specifications promoting local content and environmental standards, and favouring SMEs, etc.

CEMR – the Council of European Municipalities and Regions, the European branch of the United Cities and Local Governments (UCLG) -has developed a vigilant position as regards to the European negotiators proposals about TTIP. It has especially declared that “Opening up markets, reciprocity and the removal of trade barriers is not an end in itself and must not entail a deregulation which would harm LRAs, SMEs and citizens”. Moreover, CEMR has also asked for the possibility “to derogate from the EU internal market and competition rules for reasons of general public interest”. The detailed CEMR position paper is available online.

Open the US public procurement markets to European competition

The will to increase American public procurements’ openness to European enterprises is a strategic issue for the EU. As indicated in the introduction, European public procurement is already widely opened to foreign enterprises whereas the situation is completely different on the other side of the Atlantic. So, TTIP will not increase the volume of European public procurement opened to international competition, as it is already considerably high. However, opening the US public procurements to European enterprises is of offensive interest to European negotiators and global corporations. Public purchase accounts for about 17% of the European GDP ($2,300 billions) and for these reasons European transnational corporations are eager to access American public procurements. So the aim is to allow enterprises to apply to all levels of public procurement, including those from which they were excluded from until now (State agencies, municipalities, federal States, etc.). It also concerns removing all kinds of national or local content requirements, as well as the SMEs reserved quotas consistent with the Buy America and the Small Business acts.

The TTIP negotiations are quite unbalanced due to the fact that the EU has little to offer as its public procurement is already widely opened to competition and local content is already prohibited on behalf of the non-discrimination principle. Thus, it may be impossible to open the American public procurement without any concessions from the European side. European agriculture is at stake. US ambition is aimed to allow easier access to low cost beef (produced under very low social and environmental standards) in the European markets, thus weakening the European farmers who are already encountered difficulties due to the disappearance of European market regulation tools.
The European TTIP’s negotiation mandate lists some elements considered as “barriers having a negative impact on each others’ public procurement market”. Besides the local content and production issue (already mentioned), the mandate also specifically addresses the “tendering procedures, technical specifications, remedy procedures and existing carve-Outs, including for small and medium-sized enterprises”.

Do European negotiators consider social and environmental standards included in the 2014’ European directive on public procurement as barriers to public procurement’s better use? We can assume so. Most of the progressive aspects of this directive are directly challenged by the negotiation mandate. European negotiators clearly favour the interests of specific actors who consider social and environmental standards as ‘costs to cut’. In fact, the standards that aim to protect social rights, public health, people’s quality of life, etc. will be lowered to “adapt to the US standards” and to reduce the costs for transnational corporations who are not asking for that much.

It should be mentioned that the US never signed 175 of the 189 International Labour Organisation’s conventions, nor many international conventions on environmental protection. Getting rid of non-tariffs barriers will lead to a weakening of EU social and environmental standards.

For instance, the development of short distribution channels and organic agriculture products for school canteens will be impeded. The February 2014 European directive on public procurement already prohibited to mention short distribution channels in bid for tenders owing to their discriminatory nature.

However, many local councillors have found ways to get around the law and to resort to short distribution channels. One of the tricks they use is the allotment of small quantities. This process uses the small suppliers or producers’ application. Another way can also be the use of the “agricultural goods’ direct supplying performance criteria”. States, encourage mayors to develop short distribution channels by making light of European laws, for example, a “public purchasing guide to favour local and quality supply in collective catering” has been published by the French ministry of Agriculture.

Nonetheless, local representatives, through the French mayors association, try to obtain concrete guarantees to develop local supplying by asking the French State to open a debate on this topic at the European level. Until now, the government has always refused to do so.

So, the EU has widely opened its public procurement to international competition, but subsisting leeways allow local authorities to support local suppliers. The European straight jacket is not unmoveable. The current negotiations held by the British government on a potential “Brexit” show that member States are able to obtain exceptions on some national policies.

If TTIP passes there is a risk that it will highly limit the European States and local authority’s leeway on public procurements. The capacity to negotiate exceptions at the European level are already very low for many Member States, thus they’ll be undermined by the agreement with the US which could be much more difficult to bypass.

To sum up, when TTIP is implemented, local authorities will still be allowed to mention the presence of organic products without mentioning their origin. This will favour the development of...
industrial organic agriculture and weaken local producers. Moreover, the consequences on the environment will also increase due to the expansion of freight transport. The States’ capacities to make changes in the European legislation will be much weaker than they already are.

**TTIP and SMEs: for better or for worse?**

TTIP supporters argue that this deal will benefit European SMEs. Opening the public procurement markets to more competition aims to support the SMEs’ development by offering new capacities that facilitate bidding for government contracts. Beyond these discourses, what can we really expect?

By reading the employer organisations’ official communications, we learn that they call for “new exportation opportunities” for SMEs. However, they are not so confident with the potential impacts of TTIP on these enterprises. During a meeting between MEDEF (French member of Business Europe) and Cecilia Malmström’s office on March 26th of 2016, the French employers organisation underlined the huge gaps in the definition of SMEs’ on either sides of the Atlantic (250 employees in Europe and up to 1,000 employees in the US). Furthermore, the organisation recalled that “19 million of European SMEs which don’t export [...] will face an intensified competition” particularly in contracting public procurement (as a reminder, there are 20 million SMEs in the EU). European public procurements represent an important part in the creation of wealth. The OECD assessed that public procurements account for 17% of the GDP in the EU. Two thirds of these procurements are won by SMEs, but they represent less than 40% of the markets’ total volume because the biggest public procurements are out of the reach for such actors.

One of the important issues is the evolution of the public procurement’s approval as it can positively or negatively impact the SME sector that is particularly strategic for employment and local economic development. The current negotiations give cause for concern. TTIP will introduce changes in the public procurement’s approval procedures. They will lead to over-rate of the price criteria as higher than any other technical criteria (specifically in terms of environmental organic agriculture and weaken local producers. Moreover, the consequences on the environment will also increase due to the expansion of freight transport. The States’ capacities to make changes in the European legislation will be much weaker than they already are.

**Which consequences can we expect with the implementation of a dispute settlement mechanism?**

CETA and TTIP will implement Investor-State Dispute Settlement (ISDS) mechanisms. On public procurement aspect, CETA only provides a State to State dispute settlement mechanism. Thus, private enterprises will not be able to sue states for their public procurement policies, nor for the local authority’s policies on it. Only the States will be allowed to sue other States (traditionally they hardly ever use this right).

However, there is no guarantee that TTIP will follow the CETA track on the dispute settlement mechanism for public procurements. Private enterprises could sue States for policies implemented by local authorities. In addition, in the public procurement area, there is quite a weak private arbitration practice. The concepts, obligations and liabilities are not clearly delineated. Thus, we are facing a high level of uncertainty with regard to the potential consequences of creating a private arbitration court on public procurements, especially with this kind of agreement among huge economic and political powers.

**A “progress” for SMEs... or for transnational corporations?**

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The adoption of TTIP will directly threaten employment as SMEs represent around 80% of the employment in France. The impact assessment published by the Tufts University in Massachusetts estimates that far from creating jobs, ‘TTIP would lead to job losses’; approximately 600,000 jobs would be lost in the EU. Northern European countries would be the most affected (~223,000 jobs), followed by Germany (~134,000 jobs), France (~130,000 jobs) and Southern European countries (~90,000). SMEs are the first source of employment, so we can estimate that most of the job losses will come from this sector.

European SMEs don’t export to the US and vice versa

Furthermore, looking at the alleged positive effects of TTIP on exports, we finally discover that ‘TTIP would lead to job losses’; approximately 600,000 jobs would be lost in the EU. Northern European countries would be the most affected (~223,000 jobs), followed by Germany (~134,000 jobs), France (~130,000 jobs) and Southern European countries (~90,000). SMEs are the first source of employment, so we can estimate that most of the job losses will come from this sector.

The European commission has specifically targeted three key sectors to open in the US public procurements: transport, energy and environmental services. It should be mentioned that the ‘environmental services’ refers ‘not only to the supply of ‘utilities’ that might enhance the environment quality,” but also to “the mining and energy prospection and extraction, the selling of nuclear components and services, hydraulic, wind-powered and solar mega-projects...”. These three strategic sectors concentrate firstly on the biggest economic groups, the so called ‘national champions’, (such as Veolia, EDF, Engie, Keolis, Transdev), far more than the SMEs.

What if we would favour local economies?

While France has just hosted the COP21, where she declared herself ready to concretely act against climate disruption, one may wonder why the European institutions deny local purchase and short distribution channels policies which are implemented by the US administration in its public procurement policy. There is no doubt regarding the positive effects created by local economy on employment, on environmental impact reduction, on the quality of supplied goods and services (especially as regards food)... For instance, in the case of collective catering, for school canteens local purchasing creates a virtuous cycle. Local farmers are supported in their production process; the short transport reduces the environmental footprint and ensures a higher quality of the products, all of it ensuring a better diet to children attending the local schools (with a positive long term im-
Challenging the Buy American Act and the Small Business act policies (that the president of the European Commission considers as a “navel-gazing and protective instinct”) can only have bad effects on the US sustainable development. Positive impacts of TTIP on employment and SME development have never been proved by objective studies. In this context, why does the European Union desperately want to cause the demise of policies supporting local economies through public procurement? Probably because the EU’s real aim is different from the one it declares, and the big European corporations’ interests also weighs heavier than common good interests.

Rather than lobbying for the end of the Buy American Act and the Small Business Act, couldn’t the EU promote this kind of policies at the European level?

Indeed the local economy directly benefits to the national economy, allowing States to fund public policies, as well as ensuring local governments the capacity to introduce social choices and common welfare in economic policies.

European leaders promote free trade as the “solution” to the European society’s economic hardships. However their policies, far from providing solutions to the difficulties already occurring in huge parts of our economies (such as farming, industry, or low budgets for public services), oppose the big corporations’ interests to the rest of the actors. The “standards”, “barriers”, “obstacles” that too many leaders consider an impediment to competition are, in fact, protections for public services, environment, social peace. They also allow many small scale economic actors to maintain the territories employment and development. Isn’t it time to turn around the way we approach these problems and to ask which policies we should promote to create useful employment? Isn’t it time to think about our economies’ reconversion to limit climate disruption? Isn’t it time to support the local actors, producers and merchants who are disappearing from our cities, rather than to open widely the doors to transnational groups?

CETA, a brief taste of TTIP

The CETA text, which is finally public, provides in chapter 19 related to public procurements- a large opening of Canadian public procurement to European enterprises. The policies favouring “local content” and local production (considered as discriminatory for foreign suppliers), will now be prohibited. Moreover, the agreement also opens the European enterprises public procurement markets (including: county governments, districts, municipalities, and their agencies including schools, universities, social services) that they were not allowed to apply for until now. So, the agreement strongly challenges the Canadian public procurement’s protection, at the expense of local development and in favour of transnational European corporations.

The agreement also adds new duties and procedures that should ensure a certain transparency in passing public procurement contracts. In reality, this will actually lead to an increasing of legal publications and the production of technical files, resulting in the limiting of SME access to public procurement. Finally, due to the non-discrimination and transparency principles, public actors will be pushed to take price as the main criteria in the selection of offers. This will push the social and environmental gains generated by the production method (that support ecological transition and local development) into a second criteria plan.

The opening of the Canadian public procurement should not be confused with a “victory” of the European negotiators. This has been obtained in return for compensations. These new public procurements benefit only a few European big champions and at the expense of the farming industry. The massive import of 65,000 tonnes of Canadian beef and 75,000 tonnes of Canadian pork for seven years, will surely unsettle the European farming sector that has already been weakened.
Notes

2 http://www.senat.fr/rap/r96-374/r96-3743.html#%29
3 http://www.assemblee-nationale.fr/14/rapports/r1092.asp#P382_85943
9 http://www.assemblee-nationale.fr/14/rapports/r1092.asp#P382_85943
16 European Commissioner for Trade
18 Ibid.
22 http://www.ase.tufts.edu/gdae/Pubs/wp/14-03CapaldoTTIP_FR.pdf
23 Ibid.
26 Institution part of the French Ministry of Economy, Finance and the ministry of Foreign Affairs. It produces economic analysis and advises the government in elaborating and managing economic policies.
27 https://www.tresor.economie.gouv.fr/Files/408732
28 https://www.collectifstopataka.org/ressources-materiels/article/ttip-tafta-point-de-situation-des-negociations-apres-la-11eme-session-de
30 Treaty annex 19-2.
31 These import tariff contingent are about pork and beef meat, sweet corn, and soft wheat.
Over 1,500 cities and counties in Europe have already been declared TTIP & CETA free

Join them!
Find out more on www.ttip-free-zones.eu
What you can do here and now

On both sides of the Atlantic, citizens go into action to demand democracy and transparency in the TTIP negotiations whose final text is still secret, not only for us but also for our representatives. Over 3 million Europeans have signed the European Citizen Initiative (ECI) asking the negotiations of TTIP and CETA to be stopped.

Local authorities are also highly mobilised. Over 1,500 local authorities across Europe passed motions to declare themselves as “TTIP/CETA free” or “concerned by TTIP/CETA”. Among them, small rural municipalities, counties and major cities (such as Bristol, Edinburgh, Amsterdam, Maastricht, Grenoble, Munich, Vienna, Barcelona, Milan, Madrid, Thessaloniki…).

Are you a councillor? Don’t wait any more to propose a motion “TTIP/CETA free” or “concerned by TTIP/CETA” in your city or county. Visit the European website of the TTIP-free zones to find out more on how to proceed.

Do you wish to inform your citizens on what is at stake with TTIP and how it will impact their daily lives? Feel free to organise public debates, meetings… on your territory. If necessary, you can contact your Stop TTIP national platform for more information, analysis...

1 https://stop-ttip.org/
2 https://www.ttip-free-zones.eu/