

Position Paper

The Transatlantic Trade and Investment Partnership (TTIP)

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Key Messages

1. UNIFE supports a reinforced transatlantic partnership and calls for a comprehensive and ambitious agreement addressing procurement, tariffs, protection of intellectual property and regulatory cooperation.
2. Procurement commitments under the Agreement on Government Procurement (GPA) should be expanded in terms of coverage, to ensure that all federal and sub-federal entities are covered, while guaranteeing transparent and open procedural requirements.
3. Reinforced or additional 'Buy America' requirements that significantly hamper EU suppliers' access to US markets due to their higher level of US content (e.g. under the American Recovery and Reinvestment Act) should be lowered to a reasonable level to offer EU suppliers a net benefit under the proposed agreement, and additional state requirements supplementing the federal ones should not be allowed. The same goes for requirements in relation to local employment generation.
4. A convergence of EU and US regulatory and standardisation systems should be encouraged in order to facilitate access to US markets for EU suppliers, especially on market segments with strong development potential.
5. Recent cooperation initiatives in the rail sector should be pursued and supported by a regular technical dialogue between the EU and the US, each party sharing its experience and achievements.

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1. What is at stake for the European rail industry?

UNIFE, the European Rail Industry, welcomes the launch of negotiations for a Transatlantic Trade and Investment Partnership (TTIP). According to the European Commission, the agreement would increase EU GDP by 0.5% and EU exports by 28%. This is an unprecedented opportunity to boost EU competitiveness and to generate much needed jobs and growth.

The European rail industry could benefit from an improved business environment by diminishing tariff and non-tariff barriers. Trade relations between the two blocs, however, are hampered by **obstacles in the fields of public procurement and regulatory cooperation**. UNIFE is therefore convinced that an ambitious and comprehensive agreement addressing these issues should be reached to guarantee the maximum impact on the real economy.

The question of access to the US railway equipment market will be addressed by the **following key components of the agreement**:

- (a) Market access, in particular through the chapter on public procurement. The agreement shall aim at additional transparency and access to US public procurement markets at all levels;
- (b) Regulatory issues and Non-Tariff Barriers (NTBs), in particular the chapter on technical regulations, standards and conformity assessment procedures. In this respect, a broad mandate covering technical standards is of utmost importance.

2. Achieving a level playing field in public procurement

2.1 Little progress in the revised Agreement on Government Procurement (GPA)

The revision of the WTO Agreement on Government Procurement (GPA) in 2011 has extended its coverage by securing the EU approximately €30 billion of additional market opportunities. Although undeniable progress has been made, the revision of the GPA has shown its limits in improving international public procurement opportunities for EU economic operators, especially with respect to mass transit.

After the revision of the GPA, the European Commission has estimated that while 95% of EU public procurement is open to the agreement signatories, only 32% of US public procurement is. The state of play is the following:

- Only 37 US States are covered by GPA commitments;
- Sub-federal entities are not covered, which means that e.g. metropolitan agencies do not fall in the scope of the GPA;
- No entity is covered in the transport sector (e.g. Amtrak);
- Mass transit procurement is not covered;
- A general carve-out for any procurement benefitting from Federal Transit Administration (FTA) grants bringing the procurement within the purview of federal statutory Buy America-provisions.

2.2 Main hurdles to public procurement

Although a number of European railway manufacturers have managed to establish themselves on the US market, they face a number of trade barriers. The most important one is related to public procurement, in the form of 'Buy America' provisions. For major infrastructure investments such as in the transport sector, US federal authorities indeed require a certain share of domestically-produced equipment:

- **The Buy America Act¹** (Section 165 of the Surface Transportation Assistance Act), adopted in 1982, applies to transit-related procurements valued over US\$100,000. Under the Buy America Act, the Federal Transit Administration (FTA) requires that public authorities receiving federal funds procure products with 60% of domestic content (iron, steel, manufactured products). Buy America provisions are a condition of US federal government grants to state, municipal or other organizations, including transit authorities.
- **The Federal Railroad Administration (FRA) Buy America requirement and the American Recovery and Reinvestment Act (ARRA)** from 2009, include a 'Buy America' provision requiring that any public works project funded by US Secretary of Transportation or by ARRA must use exclusively iron, steel and manufactured goods produced in the US. This 100% domestic provision applies to all public transportation and intercity passenger rail (including high-speed rail) projects funded by the US Secretary of Transportation or the ARRA.
- **Increasing tendency of US states to superimpose on those restrictions an additional layer of domestic requirements.** Federal 'Buy America' regulations allow states to impose contracting preference provisions based on more stringent domestic content requirements than those stated in the federal law, on condition that those preference provisions are explicitly set out under state law. In 2012, the State of California enforced such preference law (AB 1097), hereby authorizing State and transit agencies receiving federal funds to give a preference (in the form of a bonus) to bidders who could produce rolling stock with domestic content that exceeds the current 60% requirement set by the Federal Transit Administration.

2.3 Recent trends on public procurement

In April 2015, the US Department of Transportation unveiled a revised version of the '**Grow America Act**', the Administration's proposal for a multi-year surface transportation bill. The new version of this Act authorizes \$115 billion for public transportation programs, and again calls for increasing Buy America domestic content requirements for public transportation rolling stock. An increase in 10% of domestic content per year has been proposed and by 2020, 100% of the cost of components and subcomponents for rolling stock (including rolling stock prototypes) would have to be produced in the United States. This, added to a stricter enforcement of existing legislation at federal level (e.g. increasing difficulties to obtain waivers), is worrying for the European rail industry.

As revealed in the 11th EU Commission's report² on potentially trade-restrictive measures, there is also a **growing trend of US states to impose their own domestic content requirements**. In 2014, the Chinese rolling stock manufacturer CNR (since called CRRC as the result of the merger with CSR) won a \$566.6 million contract to supply metro cars for Boston's Red and Orange lines. One of the key requirements of this contract was to build an assembly factory in the state of Massachusetts – irrespective of the

¹ United States Code, Title 49, Section 5323(j).

² See http://trade.ec.europa.eu/doclib/docs/2014/november/tradoc_152872.pdf

potential presence of suppliers in the US. This was made possible by the fact that the project did not use federal funds, but rather relied on proceeds from state bonds. CNR won the contract based on a very low price; in this respect, **the emergence of state content requirements is likely to favour manufacturers that benefit from strong government support** – enabling them to build factories upon customers' request.

Most importantly, UNIFE members are very concerned by the Department of Transportation (DoT) Notice of Proposed Rulemaking (NPRM) on **Geographic-Based Hiring Preferences in Administrative Federal Awards** published in March 2015. The rulemaking would amend current regulations to allow geographic hiring preferences in federal grant awards, except in areas explicitly prohibited by federal statute. In effect, give states and local governments (as grant recipients and sub-recipients) would be empowered, but not mandated, to apply local hiring preferences in federally-supported projects. This rulemaking is extremely broad and would create an undue burden on manufacturers with significant negative consequences for EU manufacturers:

- A potential substantial loss of jobs in current manufacturing facilities across the US by forcing car builders to move jobs to a new facility for each new contract;
- No ability to compete in procurements for projects located in a geographic preference zone in which a competitor has a permanent manufacturing facility;
- Finally, the proposed legislation would reduce the number of transit projects: the cost of RS procurements would increase since transit agencies would have to pay 100% of the capital investment on their projects.

To test this rationale, the FTA launched a **pilot programme** ('Special Experimental Project No. 14-Local Labor Hiring Pilot Program') to determine if these hiring preferences will restrict competition or are consistent with a competitive bidding process. The Los Angeles County Metropolitan Transportation Authority (LACMTA) decided to participate in this programme.

2.4 UNIFE recommendations

For the European rail industry, the US market is of critical importance for the **creation of export-related jobs in the EU**. Domestic content laws, in various forms, have been in place for 80 years in the US. They have impacted transit procurement especially since the 1980s, and European rail suppliers have striven to adapt themselves in order to respond to the provisions. However, recent developments such as raising requirements to unreasonable levels (e.g. 100% US content for projects benefiting from ARRA funds) or adding even more stringent requirements at state level (e.g. AB 1097 law), put European goods and services at a serious disadvantage, and could also prevent new European businesses from establishing themselves on American soil.

In the course of TTIP negotiations, **UNIFE therefore supports actions and public procurement disciplines at three levels**: the federal level, the 'flow-down' (e.g. urban transport projects using federal funds) and sub-central entities (including when no federal funds are used). UNIFE's recommendations are as follows:

1. **Public procurement related barriers should be tackled with the view of achieving a true level playing field between the EU and the US.** Both the EU and the US should guarantee transparent and open procedural requirements, which should lie at the core of the chapter on public procurement.

2. **US procurement commitments, as per the revised GPA**, should be expanded to include:
 - At the central level: all federal entities – in particular the National Railroad Passenger Corporation (AMTRAK), as being the only rail operator for US intercity passenger transport at the moment;
 - At the sub-central level: the 13 remaining states – with particular interest for States with cities of strong potential in terms of mass transit and commuter rail (e.g. New-Jersey, North Carolina, Georgia) – and all US States' Departments of Transportation;
 - Mass transit procurement via as many relevant entities as possible (including transit agencies e.g. New-York MTA, Washington WMATA, Chicago CTA, Boston MBTA, San Francisco BART).

In this respect, UNIFE welcomes the European Commission's intention to develop with the US 'GPA plus' elements to complement the revised GPA disciplines.
3. **'Buy America' requirements that significantly hamper EU suppliers' access to US markets due to their high stringency level should be lowered to a reasonable level**, in other words not above the 60% level set forth by the 1982 Buy America Act. Furthermore, further transparency should be promoted with regards to requirements at the state or local level; their discretionary use, as well as the variety of stringency levels, creates a complex, heterogeneous and discriminatory landscape for foreign suppliers.
4. **TTIP negotiations offer a significant opportunity to improve government procurement practices on both sides and at all levels**, e.g.:
 - The procurement chapter should establish a new level of transparency on the European Tenders European Daily model, with the importance of open and predictable procedural requirements at its core.
 - The EU and the US should promote best practices, such as self-cleaning mechanisms and product-linked award criteria. Although procurement has become a strategic tool, the award criteria must be linked to the specific contract at hand and exclusively focus on the products that are the subject of the procurement. This could include social and environmental product performance criteria, but should not extend to non-product related general public policy objectives such as general jobs creation. The agreement should set the global standard for future agreements.
5. **Extend to TTIP, the concept of 'local value' (instead of 'local content') agreed upon within the Comprehensive Economic and Trade Agreement (CETA) with Canada**. Following the example of CETA, the term 'value' in TTIP would refer to the eligible costs in the procurement of mass transit vehicles for components, sub-components and raw materials produced in the US, including labour or other related services such as after-sale and maintenance services, as determined in the tender. It would also include all costs related to a final assembly of the mass transit vehicle in the US. However, it should be for the bidder to determine which part of the contract value will be fulfilled through the use of US acquired value.
6. **Exclude rail manufacturing from any local hiring initiative**. Local hiring preferences affect companies' ability to conduct competitive procurements, with no net gain in employment.

3. Enabling convergence of EU and US regulatory and standardisation approaches

3.1 Main hurdles in regulatory and standardisation cooperation

The use of international standards is widespread in areas such as electronics. However, in a number of sectors, **divergences resulting from different regulatory and standardisation systems can hamper trade flows and, ultimately, access to market segments.** For example, European rail suppliers encounter difficulties in accessing the light rail sector in the US because of diverging standards. European norms, as drafted and published by CEN and CENELEC, differ from American standards produced by the American National Standards Institute and are not recognised by American authorities and customers. Divergences in technical regulations, in standards and conformity assessment procedures may therefore require businesses to manufacture different families of products, with considerable additional costs. This is particularly counterproductive for American customers in the rail sector where few or no US system integrators are available in many rail fields. The requirement for US standards therefore brings only additional costs to the US rail procurement process for EU manufacturers.

Regarding the **placing of products on the market**, the EU is a single entity in so far as compliance with harmonized technical requirements at EU level gives full access to the whole EU market. On the US side however, states are allowed to enforce autonomous technical regulations that apply on their own territory (e.g. CPUC in California). This creates difficulties for EU exporters to understand the rules they have to abide by in order to access the US market, in particular when several and potentially conflicting regulatory layers exist.

In that respect, UNIFE strongly supports the final report of the High Level Working Group on Jobs and Growth³ calling for ‘an ambitious ‘TBT-plus’ chapter [aiming at] convergence in regulatory approaches and requirements and related standards development processes, as well as, *inter alia*, to reduce redundant and burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardization issues globally’.

In the past years, the US has progressed in aligning US safety standards for mainline rail vehicles with international best practices. This initiative, which is led by the FRA, has resulted in:

- A set of new draft regulations for high speed trains operated on segregated right-of-way line and above 125 mph (**Tier 3 requirements**). They are sensibly equivalent to the European ones (TSIs) and have been introduced as a Notice of Proposed Rulemaking (NPRM) by the FRA. The NPRM is still being reviewed by the Office of Management and Budget before it can formally be recommended to proceed and become an update regulation under the Code of Federal Regulations. Until Tier 3 becomes the governing regulation for rolling stock operating above 125 mph, **EU suppliers anticipate that any customer considering procuring high speed rolling stock will obtain a waiver to operate in accordance with the Tier 3 requirements as outlined in the NPRM.**
- A set of equivalent approaches for intercity vehicles operated on mixed right-of-way lines and below 125 mph (**Tier 1 requirements**). The FRA allows structural design approaches for Tier 1

³ http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf

vehicles which rely on Crash Energy Management solutions in order to meet a number of Occupied Volume Integrity criteria as opposed to the more traditional static load resistance criteria applied in the US. The FRA is currently updating the Tier 1 regulations with a similar approach to the one used for Tier 3, but this process is still in its early stage and will likely last about two years. Until Tier 1 becomes the governing regulation for rolling stock operating up to 125 mph, EU suppliers anticipate that customers will either buy existing designs, require car builders to meet existing US regulation – particularly for crash standards, or seek a waiver from FRA to purchase a ‘proven global solution’ that can be used on their property. **The *status quo* makes it difficult for EU suppliers to bid in the US market for Tier 1 vehicles, so UNIFE encourages continued attention on the development of the updated Tier 1 regulations.**

3.2 UNIFE recommendations

Both EU and US businesses would benefit from processes and mechanisms to reduce costs and burdens stemming from regulatory differences. UNIFE is taking an active part in cooperating with the European Commission and the European Railway Agency (ERA), and in increasing exchanges with its US counterparts (e.g. signing of a Memorandum of Understanding with the American Public Transportation Association (APTA)).

Within TTIP negotiations, UNIFE calls for the following actions to be implemented:

1. **Regulatory cross-acceptance should be fostered.** In order to make mutual recognition possible, UNIFE calls for the implementation of a mechanism that would enable regulatory agencies to formally recognise compatible and functionally equivalent approaches to approving products and services for sale in their respective markets.
2. **Making the new draft Tier 3 regulations for high speed rail mandatory as soon as possible.** Furthermore, the regulatory convergence process settled in Tier 3 negotiations should be replicated for any rail product concerned by Tier 1, in particular with respect to certification matters. The aim is to allow for the harmonization of Tier 1 and Tier 3 regulations with European standards for any rail vehicle operating on FRA-regulated properties.
3. **Increased convergence of future regulations, and harmonisation where appropriate, should be encouraged.** Indeed, tackling potential differences at the source is more effective than removing barriers that lie at the core of the regulatory system. In particular, the agreement should put in place a consultation process between both sides enabling them to consult with each other when starting regulatory activities.
4. **Recent cooperation initiatives in the rail sector should be pursued and supported by a regular technical dialogue between the EU and the US,** each party sharing experience of its main successes and achievements. A positive step forward is the Memorandum of Understanding signed in July 2012 between the European Railway Agency (ERA) and the Federal Railroad Administration (FRA), which features cooperation in technical rail regulations. This could mark the beginning of a regular rail technical dialogue between the EU and the US, for instance on high-speed rail developments with additional related standards that are commonly developed.

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About UNIFE

UNIFE has represented the European rail manufacturing industry in Brussels since 1992. With 23 fulltime staff, the Association gathers over 80 of Europe's leading large and SME rail supply companies active in the design, manufacture, maintenance and refurbishment of rail transport systems, subsystems and related equipment. UNIFE also brings together 15 national rail industry associations of European countries. UNIFE members have an 84% market share in Europe and supply 46% of the worldwide production of rail equipment and services. UNIFE advocates its members' interests at both the European and International level—actively promoting EU rail equipment and standards within Europe and abroad.

All segments of the rail supply industry are represented in the membership: system integrators, railway infrastructure supply companies, rolling stock as well as subsystem and signalling suppliers and engineering companies join under the UNIFE umbrella to collaborate on common challenges and issues facing the rail supply industry. Our members are committed to providing the best technology to meet the challenges of growing transport volumes and the demand for sustainable and environmentally friendly transport. UNIFE and its members also work on the setting of interoperability standards and coordinate EU-funded research projects that aim at the technical harmonisation of railway systems. Through this broad spectrum of work and contributions to the European transport system, UNIFE has established itself as a trusted partner of the European Institutions in all matters related to rail and transport and is one of the official supporting bodies of the European Railway Agency.

UNIFE. The European Rail Industry

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