



Plenary sitting

A9-0337/2021

6.12.2021

*****I**

SECOND REPORT

on the proposal for a regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries

(COM(2016)0034 – C9-0018/2016 – 2012/0060(COD))

Committee on International Trade

Rapporteur: Daniel Caspary

Rapporteurs for the opinion (*):
Ivan Štefanec, Committee on the Internal Market and Consumer Protection,

(*) Associated committees – Rule 57 of the Rules of Procedure

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in ***bold italics***. Deletions are indicated using either the ▬ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM(2016)0034 – C9-0018/2016 – 2012/0060(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2012)0124) and the amended proposal (COM(2016)0034),
 - having regard to Article 294(2) and Article 207 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C9-0018/2016),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to Rules 59 and 60 of its Rules of Procedure,
 - having regard to the report of the Committee on International Trade (A7-0454/2013),
 - having regard to the Decision of the Conference of Presidents of 16 October 2019 on unfinished business from the eighth parliamentary term,
 - having regard to the opinion of the Committee on the Internal Market and Consumer Protection,
 - having regard to the letter from the Committee on Legal Affairs,
 - having regard to the second report of the Committee on International Trade (A9-0337/2021),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a regulation
Title of the Regulation

Text proposed by the Commission

Amended proposal for a
REGULATION OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
on the access of third-country goods and
services to the Union's *internal market in*
public procurement and procedures
supporting negotiations on access of Union
goods and services to the *public*
procurement markets of third countries

Amendment

REGULATION OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
on the access of third-country *economic*
operators, goods and services to the
Union's procurement *market* and
procedures supporting negotiations on
access of Union *economic operators*,
goods and services to the procurement
markets of third countries

Amendment 2

Proposal for a regulation
Recital 5

Text proposed by the Commission

(5) The revised plurilateral WTO
Agreement on Government Procurement
provides only for limited market access
for Union companies to the public
procurement markets of third countries
and applies only to a limited number of
WTO Members, which are parties to that
Agreement. The revised Agreement on
Government Procurement was concluded
by the Union in December 2013.

Amendment

deleted

Amendment 3

Proposal for a regulation
Recital 6

Text proposed by the Commission

(6) Within the context of the WTO and
through its bilateral relations, the Union
advocates an ambitious opening of

Amendment

(6) Within the context of the WTO and
through its bilateral relations, the Union
advocates an ambitious opening of

international **public** procurement markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.

international procurement markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit

Amendment 4

Proposal for a regulation Recital 6 a (new)

Text proposed by the Commission

Amendment

(6a) The plurilateral WTO Agreement on Government Procurement and EU trade agreements that include provisions on procurement provide for market access for Union economic operators only to the procurement markets of third countries that are parties to those agreements.

Amendment 5

Proposal for a regulation Recital 7

Text proposed by the Commission

Amendment

(7) If **the** country **concerned** is a Party to the WTO Agreement on Government Procurement or has concluded a trade agreement with the EU that includes provisions on **public** procurement, the Commission should follow the consultation mechanisms and/or dispute settlement procedures set out in **that agreement** when the restrictive practices relate to procurement covered by market access commitments undertaken by **the** country **concerned** towards the Union.

(7) If **a third** country is a Party to the WTO Agreement on Government Procurement or has concluded a trade agreement with the EU that includes provisions on procurement, the Commission should follow the consultation mechanisms and/or dispute settlement procedures set out in **those agreements** when the restrictive practices relate to procurement covered by market access commitments undertaken by **that third** country towards the Union.

Amendment 6

Proposal for a regulation Recital 8

Text proposed by the Commission

Amendment

(8) Many third countries are reluctant to open their *public* procurement and *their* concessions markets to international competition, or to open those markets further than what they have already done. As a result, Union economic operators face restrictive procurement practices in many of the trading *partner* of the Union. Those restrictive procurement practices result in the loss of substantial trading opportunities.

(8) Many third countries are reluctant to open their procurement and concessions markets to international competition, or to open those markets further than what they have already done. As a result, Union economic operators face restrictive procurement practices in many of the trading *partners* of the Union. Those restrictive procurement practices result in the loss of substantial trading opportunities.

Amendment 7

Proposal for a regulation Recital 9

Text proposed by the Commission

Amendment

(9) Directive 2014/25/EU of the European Parliament and of the Council¹⁶ contains only a few provisions concerning the external dimension of the public procurement policy of the Union, in particular Articles 85 and 86. These provisions have a limited scope and should be replaced.

deleted

¹⁶ Directive 2014/25/EU of the European Parliament and of the Council, of February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 94, 28.3.2014, p. 243).

Amendment 8

Proposal for a regulation Recital 10

Text proposed by the Commission

Amendment

(10) Regulation (EU) No 654/2014 of the European Parliament and of the Council¹⁷ lays down rules and procedures in order to ensure the exercise of the

(10) Regulation (EU) No 654/2014 of the European Parliament and of the Council⁴ lays down rules and procedures in order to ensure the exercise of the Union's

Union's rights under international trade agreements concluded by the Union. No rules and procedures exist for the treatment of goods and services not covered by such international agreements.

¹⁷ Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50.)

rights under international trade agreements concluded by the Union. No **such** rules and procedures exist for the treatment of **economic operators**, goods and services not covered by such international agreements.

⁴ Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50.)

Amendment 9

Proposal for a regulation Recital 11

Text proposed by the Commission

(11) ***In the interest of legal certainty for Union and third-country economic operators, contracting authorities and contracting entities, the international market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions should be reflected in the legal order of the EU, thereby ensuring effective application thereof.***

Amendment

(11) International market access commitments undertaken by the Union towards third countries in the field of ***procurement and concessions require, inter alia, the equal treatment of economic operators from those countries. Consequently, measures adopted under this Regulation can only apply to economic operators, goods or services from countries that are not parties to the plurilateral WTO Agreement on Government Procurement or to bilateral or multilateral trade agreements with the Union that include commitments on access to procurement and concessions markets, or from countries that are parties to such agreements but only regarding procurement procedures for goods,***

services or concessions that are not covered by those agreements. Irrespective of the application of measures adopted under this Regulation and in accordance with the European Commission's Communication of 24 July 2019 on “Guidance on the participation of third-country bidders and goods in the EU procurement market”^{1a} and Directives 2014/23/EU, 2014/24/EU and 2014/25/EU of the European Parliament and of the Council, economic operators from third countries which do not have any agreement providing for the opening of the EU procurement market or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and could be excluded.

^{1a} C(2019) 5494 final

Amendment 10

Proposal for a regulation Recital 12

Text proposed by the Commission

(12) The ***objectives of*** improving the access of Union economic operators to the ***public*** procurement and concessions markets of certain third countries ***protected by restrictive and discriminatory procurement measures or practices and of preserving equal conditions of competition within the internal market require to refer to the non-preferential rules of origin established in the EU customs legislation, so that contracting authorities and contracting entities know whether*** goods and services ***are covered by the international commitments of the Union.***

Amendment

(12) The ***effective application of any measure adopted under this Regulation with a view to*** improving the access of Union economic operators to the procurement and concessions markets of certain third countries ***requires a clear set of rules of origin for economic operators,*** goods and services.

Amendment 11

Proposal for a regulation Recital 13

Text proposed by the Commission

(13) The origin of a good should be determined in accordance with Article 22 to 26 of *Council Regulation (EEC) No 2913/1992*⁵.

⁵ *Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 9.10.1992, p. 1).*

Amendment

(13) The origin of a good should be determined in accordance with Articles 59 to 62 of Regulation (EU) No 952/2013⁵ of *the European Parliament and of the Council*.

⁵ *Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).*

Amendment 12

Proposal for a regulation Recital 14

Text proposed by the Commission

(14) The origin of a service should be determined on the basis of the origin of the natural or legal person providing it.

Amendment

(14) The origin of a service should be determined on the basis of the origin of the natural or legal person providing it. *The origin of a legal person should be considered to be the country under the laws of which a legal person is constituted or organised and in the territory of which the legal person is engaged in substantive business operations. The criterion of substantive business operations should not allow the potential circumvention of any measure adopted under this Regulation by the creation of letterbox companies. The term ‘substantive business operations’ is a concept used in the WTO General Agreement on Trade in Services. In Union law it is equivalent to the term ‘effective and continuous link with the economy’ and is closely linked to the right of establishment set out in Article 49 of the Treaty on the*

Functioning of the European Union. The Commission regularly publishes guidelines based on the case law related to the right of establishment, addressing, inter alia, the concept of an effective or stable and continuous link with the economy. Article 86 of Directive 2014/25/EU also refers to the concept of a “direct and effective link with the economy” which is equivalent to the concept of ‘substantive business operations’.

Amendment 13

Proposal for a regulation

Recital 15

Text proposed by the Commission

Amendment

(15) In the light of the overall policy objective of the Union to support the economic growth of developing countries and their integration into the global value chain, which is the basis for the establishment by the Union of a generalised system of preferences as outlined in Regulation (EU) No 978/2012 of the European Parliament and of the Council⁶, this Regulation should not apply to tenders where more than 50% of the total value of the tender is made up of goods and services originating, in accordance with the Union’s non-preferential rules of origin, in least-developed countries benefitting from the "Everything But Arms" arrangement or in developing countries considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system as defined respectively in Annexes IV and VII to Regulation (EU) No 978/2012.

deleted

⁶Regulation (EU) No 978/2012 of the European Parliament and of the Council

of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).

Amendment 14

Proposal for a regulation

Recital 16

Text proposed by the Commission

(16) In the light of the overall policy objective of the Union to support small and medium-sized enterprises, this Regulation should also not apply to tenders submitted by SMEs established in the Union and in engaged in substantive business operations entailing a direct and effective link with the economy of at least one Member State.

Amendment

deleted

Amendment 15

Proposal for a regulation

Recital 17

Text proposed by the Commission

(17) When assessing whether restrictive and/or discriminatory procurement measures or practices exists in a third country, the Commission should examine to what degree laws on public procurement and concessions of the country concerned ensure transparency in line with international standards in the field of public procurement and preclude any discrimination against Union goods, services and economic operators. In addition, it should examine to what degree individual contracting authorities or contracting entities maintain or adopt discriminatory practices against Union goods, services and economic operators.

Amendment

(17) When assessing whether specific measures or practices exist in a third country that could result in the impairment of access of Union goods, services or economic operators to the procurement or concession markets, the Commission should examine to what degree laws, rules or other measures on procurement and concessions of the country concerned ensure transparency in line with international standards, and do not result in serious and recurring restrictions against Union goods, services or economic operators. In addition, it should examine to what degree individual contracting authorities or contracting entities maintain or adopt restrictive practices against Union goods, services or

economic operators.

Amendment 16

Proposal for a regulation Recital 19

Text proposed by the Commission

(19) The Commission should be able, ***on its own initiative or at the application of interested parties or a Member State***, to initiate at any time an investigation into restrictive procurement measures or practices allegedly adopted or maintained by a third country. ***Such investigative procedures should be without prejudice to Regulation (EU) No 654/2014 of the European Parliament and of the Council.***

Amendment

(19) The Commission should be able to initiate at any time ***a transparent*** investigation into restrictive or ***discriminatory*** procurement measures or practices allegedly adopted or maintained by a third country, ***if it considers that such an investigation is in the interest of the Union.***

Amendment 17

Proposal for a regulation Recital 19 a (new)

Text proposed by the Commission

Amendment

(19a) The determination of whether an investigation is in the interest of the Union should be based on an appreciation of all the various interests taken as a whole, including the interests of the Union's industry, users, consumers, workers and social partners. The Commission should weigh the consequences of starting or not starting an investigation against its impact, and the potential measures that could be adopted under this Regulation, in the Union's broader interests. The general objective of achieving reciprocity by opening third-country markets and improving market access opportunities for Union economic operators should be given special consideration, and in that context the presence of third country bidders on EU procurement market could be taken into account. The objective of

limiting any unnecessary administrative burden for contracting authorities and contracting entities as well as economic operators should also be taken into account. The Commission should pay particular attention to sectors that are considered strategic in respect of EU public procurement.

Amendment 18

Proposal for a regulation Recital 19 b (new)

Text proposed by the Commission

Amendment

(19b) Given the overall policy objective of the Union to support the economic growth of least developed countries (LDCs), of low and lower-middle income countries, and their integration into global value chains, it would not be in the Union's interest to start an investigation against such countries under this Regulation, unless there are reasonable indications of circumvention of any adopted IPI measures. Consequently, this Regulation is not intended to apply to LDCs benefitting from the "Everything But Arms" arrangement, developing countries considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system, as defined in Regulation (EU) No 978/2012, as well as to countries beneficiaries of the general arrangement referred to in that Regulation, unless the economy of such countries is considered to be competitive in the sectors concerned.

Amendment 19

Proposal for a regulation Recital 20

Text proposed by the Commission

(20) ***If the existence of a restrictive and/or discriminatory procurement measure or practice in a third country is confirmed***, the Commission should invite the country concerned to enter into consultations with a view to improving the tendering opportunities for Union economic operators, goods and services ***in respect of public*** procurement in that country.

Amendment

(20) ***When conducting the investigation***, the Commission should invite the ***third*** country concerned to enter into consultations with a view to ***eliminating and remedying any restrictive measures or practices and effectively*** improving the tendering opportunities for Union economic operators, goods and services ***regarding*** procurement ***and concessions markets*** in that country.

Amendment 20

Proposal for a regulation

Recital 22

Text proposed by the Commission

(22) If the consultations with the country concerned do not lead to ***sufficient*** improvements to the tendering opportunities for Union economic operators, goods and services within a reasonable timeframe, the Commission should be able to adopt, ***where appropriate, price adjustment measures applying to tenders submitted by economic operators originating in that country and/or including goods and services originating in that country.***

Amendment

(22) ***If the investigation confirms the existence of restrictive measures or practices and*** the consultations with the country concerned do not lead to ***satisfactory corrective actions that result in effectively remedying the serious and recurrent impairment of access*** for Union economic operators, goods and services within a reasonable timeframe, ***or where the third country concerned declines to enter into consultations***, the Commission should adopt, ***under this Regulation, IPI measures in the form of a score adjustment or exclusion of tenders.***

Amendment 21

Proposal for a regulation

Recital 23

Text proposed by the Commission

(23) ***Such measures should be applied only for the purpose of the evaluation of tenders comprising goods or services originating in the country concerned. To***

Amendment

(23) ***A score adjustment measure should be applied only for the purpose of the evaluation of tenders submitted by economic operators originating in the***

avoid circumvention of those measures, it may also be necessary to target certain foreign- controlled or owned legal persons that, although established in the European Union, are not engaged in substantive business operations that have a direct and effective link with the economy of at least one Member State. Appropriate measures should not be disproportionate to the restrictive procurement practices to which they respond.

country concerned. It should not affect the price actually due to be paid under the contract to be concluded with the successful tenderer.

Amendment 22

Proposal for a regulation Recital 23 a (new)

Text proposed by the Commission

Amendment

(23a) IPI measures should apply to procurement procedures falling under the scope of this Regulation, including framework agreements and dynamic purchasing systems. IPI measures should also apply in the case of specific contracts awarded under a dynamic purchasing system, where those dynamic purchasing systems are subject to an IPI measure. However, they should not apply to such contracts below a certain threshold with a view to limiting the overall administrative burden for contracting authorities and contracting entities. In order to avoid a possible double application of IPI measures, such measures should not apply to contracts awarded based on a framework agreement, once IPI measures have already been applied at the stage of concluding that framework agreement.

Amendment 23

Proposal for a regulation Recital 23 b (new)

Text proposed by the Commission

Amendment

(23b) In light of the overall policy objective of the Union to support small and medium-sized enterprises (SMEs), the Commission and contracting authorities and contracting entities should duly consider the effects of this Regulation, with a view to preventing an overburdening of SMEs. The Commission in cooperation with the Member States should make available guidelines for best practices to achieve this objective, in order to ensure the efficiency of this Regulation and the consistency of its implementation.

Amendment 24

Proposal for a regulation Recital 23 c (new)

Text proposed by the Commission

Amendment

(23c) To avoid a possible circumvention of an IPI measure, additional contractual obligations should be imposed on successful tenderers. Those obligations should apply only in case of procurement procedures to which an IPI measure is applicable, as well as to contracts awarded based on a framework agreement where such contracts are equal to or above a certain threshold and when that framework agreement is subject to an IPI measure.

Amendment 25

Proposal for a regulation Recital 24

Text proposed by the Commission

Amendment

(24) Price adjustment measures should not have a negative impact on on-going

deleted

trade negotiations with the country concerned. Therefore, where a country is engaging in substantive negotiations with the Union concerning market access in the field of public procurement, the Commission may suspend the measures during the negotiations.

Amendment 26

Proposal for a regulation

Recital 25

Text proposed by the Commission

Amendment

(25) In order to simplify the application of a price adjustment measure by contracting authorities or contracting entities, there should be a presumption that all economic operators originating in a targeted third country with which there is no agreement on procurement will be subject to the measure, unless they can demonstrate that less than 50% of the total value of their tender is made up of goods or services originating in the third country concerned. **deleted**

Amendment 27

Proposal for a regulation

Recital 26

Text proposed by the Commission

Amendment

(26) Member States are best placed to identify the contracting authorities or contracting entities, or categories of contracting authorities or contracting entities, which should apply the price adjustment measure. To ensure that an appropriate level of action is taken and that a fair distribution of the burden among Member States is achieved, the Commission should take the final decision, based on a list submitted by each Member State. Where necessary, the **deleted**

Commission may establish a list on its own initiative.

Amendment 28

Proposal for a regulation Recital 27

Text proposed by the Commission

(27) It is imperative that contracting authorities and contracting entities have access to a range of high-quality products meeting their purchasing requirements at a competitive price. Therefore contracting authorities and contracting entities should be able **not to** apply **price adjustment** measures limiting access of non-covered goods and services **in case** there are no Union and/or covered goods or services available which meet the requirements of the contracting authority or contracting entity to **safeguard** essential public needs, for example **in the fields of health and public safety, or where the application of the measure would lead to a disproportionate increase in the price or costs of the contract.**

Amendment

(27) It is imperative that contracting authorities and contracting entities have access to a range of high-quality products meeting their purchasing requirements at a competitive price. Therefore, contracting authorities and contracting entities should be able, **on an exceptional basis, to not** apply **IPI** measures limiting access of non-covered goods and services **where** there are no Union and/or covered goods or services available which meet the requirements of the contracting authority or contracting entity **or where such action relates to safeguarding** essential public **policy** needs, for example **regarding public health or protection of the environment.** **The application of these exceptions should require the approval of the Commission. The contracting authorities and contracting entities should notify the Commission in a timely and comprehensive manner to allow for the appropriate monitoring of the implementation of this Regulation.**

Amendment 29

Proposal for a regulation Recital 28

Text proposed by the Commission

(28) In case of misapplication by contracting authorities or contracting entities of exceptions to **price adjustment** measures limiting access of non-covered goods and services, the Commission

Amendment

(28) In case of misapplication by contracting authorities or contracting entities of exceptions to **IPI** measures limiting access of non-covered goods and services, the Commission should be able to

should be able to apply the corrective mechanism of Article 3 of Council Directive 89/665/EEC²⁰ or Article 8 of Council Directive 92/13/EEC²¹. In addition, contracts concluded with an economic operator by contracting authorities or contracting entities in violation of **price adjustment** measures limiting access of non-covered goods and services should be ineffective.

²⁰ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

²¹ Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

apply the corrective mechanism of Article 3 of Council Directive 89/665/EEC²⁰ or Article 8 of Council Directive 92/13/EEC²¹. In addition, contracts concluded with an economic operator by contracting authorities or contracting entities in violation of **IPI** measures limiting access of non-covered goods and services should be ineffective.

²⁰ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

²¹ Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

Amendment 30

Proposal for a regulation Recital 30

Text proposed by the Commission

(30) The examination procedure should be used for the adoption of implementing acts regarding the adoption, withdrawal, **or** suspension or reinstatement of **a the price adjustment** measure.

Amendment

(30) The examination procedure should be used for the adoption of implementing acts regarding the adoption, withdrawal, suspension or reinstatement of **an IPI** measure **and the Commission should be assisted by the Committee established by Regulation (EU) 2015/1843 of the European Parliament and of the Council²² (the “Trade Barriers Regulation”)**. **If necessary and for matters affecting the Union’s legal framework on public procurement, the Commission should be able to also seek the advice of**

the Advisory Committee on Public Procurement established by Council Decision 71/306/EEC.

²² Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 272, 16.10.2015, p. 1).

Amendment 31

Proposal for a regulation Recital 30 a (new)

Text proposed by the Commission

Amendment

(30a) Information received pursuant to this Regulation should only be used for the purpose for which it was requested and with due respect to the applicable Union and national data protection and confidentiality requirements. Regulation (EC) No 1049/2001 as well as Article 28 of Directive 2014/23/EU, Article 21 of Directive 2014/24/EU and Article 39 of Directive 2014/25/EU, should apply accordingly.

Amendment 32

Proposal for a regulation Recital 32

Text proposed by the Commission

Amendment

(32) *Regular reporting* by the Commission should *make it possible to monitor* the *application* and efficiency of *the procedures established* by this Regulation.

(32) *In line with the Interinstitutional Agreement of 13 April 2016 on Better Law-Making^{1a} and with a view, inter alia, to reduce administrative burdens, in particular on Member States, the Commission should regularly review* the

scope, functioning and efficiency of this Regulation. The Commission should report on its assessment to the European Parliament and the Council. The review may be followed up by appropriate legislative proposals.

Regulation 2018/46/EU of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (hereinafter the Financial Regulation) provides that procurement rules and principles applicable to public contracts awarded by Union institutions on their own account should be based on the rules set out in the relevant EU acquis on public procurement. When reviewing the Financial Regulation, it is therefore appropriate to provide for the application of the IPI Regulation also to public contracts awarded by Union institutions.

^{1a} OJ L 123, 12.5.2016, p. 1.

Amendment 33

Proposal for a regulation

Recital 33

Text proposed by the Commission

Amendment

(33) In accordance with the principle of proportionality, it is necessary and appropriate for achievement of the basic objective of establishing a common external policy in the field of public procurement to lay down common rules on the treatment of tenders which include goods and services not covered by the international commitments of the Union. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the fourth paragraph of Article 5 of the Treaty on European Union,

deleted

Amendment 34

Proposal for a regulation Article 1 – paragraph 1

Text proposed by the Commission

1. This Regulation establishes measures intended to improve the access of Union economic operators, goods and services to the **public** procurement and concessions markets of third countries. It lays down procedures for the Commission to undertake investigations into alleged **restrictive and discriminatory procurement** measures or practices **adopted or maintained by third countries** against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.

It provides for the possibility of applying price adjustment measures to certain tenders for contracts for the execution of works or a work, for the supply of goods and/or the provision of services and for concessions, on the basis of the origin of the economic operators, goods or services concerned.

Amendment 35

Proposal for a regulation Article 1 – paragraph 2 – introductory part

Text proposed by the Commission

2. This Regulation shall apply to **contracts** covered by the following acts:

Amendment

1. This Regulation establishes measures intended to improve the access of Union economic operators, goods and services to the procurement and concessions markets of third countries, **regarding non-covered procurement**. It lays down procedures for the Commission to undertake investigations into alleged **third-country** measures or practices against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.

This Regulation provides for the possibility for the Commission to impose IPI measures, by means of implementing acts, in relation to such third country measures or practices to restrict the access of economic operators, goods or services from third countries to Union procurement procedures.

Amendment

2. This Regulation shall apply to **procurement procedures** covered by the following acts:

Amendment 36

Proposal for a regulation Article 1 – paragraph 3

Text proposed by the Commission

Amendment

3. This Regulation shall apply to the award of contracts for the supply of goods and/or services and to the award of works and services concessions. It shall only apply where the goods or services are procured for governmental purposes. It shall not apply where the goods are purchased with a view to commercial resale or with a view to use in the production of goods for commercial sale. It shall not apply where the services are purchased with a view to commercial resale or with a view to use in the supply of services for commercial sale.

deleted

Amendment 37

Proposal for a regulation Article 1 – paragraph 4

Text proposed by the Commission

Amendment

4. This Regulation shall apply only with regard to restrictive and/or discriminatory procurement measures or practices implemented by a third country in respect of purchases of non-covered goods and services. The application of this Regulation shall be without prejudice to any international obligations of the Union.

deleted

Amendment 38

Proposal for a regulation Article 1 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. This Regulation shall be without prejudice to any international obligations of the Union or measures that Member States and their contracting authorities and contracting entities may take in accordance with the acts referred to in paragraph 2.

Amendment 39

Proposal for a regulation Article 1 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. This Regulation shall only apply to procurement procedures launched after its entry into force. An IPI measure shall only apply to procurement procedures covered by the IPI measure and launched at any moment between the entry into force of that IPI measure and its expiry, withdrawal or suspension. A reference to the application of this Regulation and any applicable IPI measure shall be included by contracting authorities and contracting entities in the procurement documents for procedures falling within the scope of an IPI measure.

Amendment 40

Proposal for a regulation Article 1 – paragraph 5 b (new)

Text proposed by the Commission

Amendment

5b. Contracting authorities and contracting entities shall, in order to appropriately integrate environmental, social and labour requirements into public procurement and concession award

procedures, take relevant measures to ensure that environmental, social and labour obligations resulting from laws, regulations or administrative provisions, at both Union and national level, as well as from collective agreements compatible with Union law, applicable to the procurement contract, are complied with. Equally, obligations stemming from international conventions ratified by all Member States and listed in Annex X to Directive 2014/23/EU, Annex X to Directive 2014/24/EU and Annex XIV to Directive 2014/25/EU shall apply during the execution of the contract.

Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by their economic operators and which are due to the non-observance of the international environmental, social and labour law referred to in subparagraph 1, when those undertakings have tried to secure the award of contracts within the EU or in third countries.

Amendment 41

Proposal for a regulation

Article 2 – paragraph 1– point a

Text proposed by the Commission

(a) 'economic operator' means **any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which submits a tender for the execution of works and/or a work, the supply of goods or the provision of services on the market;**

Amendment

(a) 'economic operator' means **an economic operator as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;**

Amendment 42

Proposal for a regulation

Article 2 – paragraph 1– point a a (new)

Text proposed by the Commission

Amendment

(aa) 'goods' means goods referred to in the object of the public procurement tender and in the specifications of the contract, but does not cover any input, material or ingredient incorporated in the supplied goods;

Amendment 43

Proposal for a regulation

Article 2 – paragraph 1– point a b (new)

Text proposed by the Commission

Amendment

(ab) 'estimated value' means the estimated value of a contract calculated in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;

Amendment 44

Proposal for a regulation

Article 2 – paragraph 1– point a c (new)

Text proposed by the Commission

Amendment

(ac) 'evidence' means any information, certificate, supporting document, statement and other means of proof aimed at proving compliance with the obligations set out in Article 9a(1)(c), such as:

(i) certificates of origin, supplier declarations or import declarations for goods originating in third countries;

(ii) a description of manufacturing processes (including samples, descriptions or photographs) for goods to be supplied;

(iii) an extract of relevant registers or of financial statements for the origin of services, including a VAT identification number;

Amendment 45

Proposal for a regulation Article 2 – paragraph 1– point a d (new)

Text proposed by the Commission

Amendment

(ad) ‘score adjustment measure’ means the relative diminution by a given percentage of the score of a tender, resulting from its evaluation by a contracting authority or a contracting entity, on the basis of the contract award criteria defined in the procurement documents. In cases where price or cost is the only contract award criterion, the score adjustment measure means the relative increase, for the purpose of the evaluation of tenders, by a given percentage of the price offered by a tenderer;

Amendment 46

Proposal for a regulation Article 2 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) ‘contracting authority means ‘contracting authority’ as defined in *Article 2(1) of Directive 2014/24/EU*;

(b) ‘contracting authority’ means *a* contracting authority as defined in *Directives 2014/23/EU, 2014/24/EU and 2014/25/EU*;

Amendment 47

Proposal for a regulation Article 2 – paragraph 1 – point c

Text proposed by the Commission

(c) ‘contracting entity’ means ‘contracting entity’ as defined in **Article 4(1) of Directive 2014/25/EU** and **Article 7 of Directive 2014/23/EU**;

Amendment

(c) ‘contracting entity’ means **a** contracting entity as defined in Directives **2014/23/EU** and **2014/25/EU**;

Amendment 48

Proposal for a regulation

Article 2 – paragraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(c a) ‘interested party’ means any person or entity whose interest might be affected by a third country measure, such as undertakings, an association of undertakings, trade associations, trade unions, or civil society organisations, including consumers organisations;

Amendment 49

Proposal for a regulation

Article 2 – paragraph 1 – point d

Text proposed by the Commission

Amendment

(d) ‘covered goods or services’ means a goods or services originating in a country with which the Union has concluded an international agreement in the field of public procurement and/or concessions including market access commitments and in respect of which the relevant agreement applies;

deleted

Amendment 50

Proposal for a regulation

Article 2 – paragraph 1 – point e

Text proposed by the Commission

Amendment

(e) ‘non-covered goods or services’ means a goods or services originating in a country with which the Union has not concluded an international agreement in the field of public procurement or concessions including market access commitments, as well as goods or services originating in a country with which the Union has concluded such an agreement but in respect of which the relevant agreement does not apply;

deleted

Amendment 51

Proposal for a regulation

Article 2 – paragraph 1 – point f

Text proposed by the Commission

Amendment

(f) ‘restrictive and/or discriminatory procurement measure or practice’ means any legislative, regulatory or administrative measure, procedure or practice, or combination thereof, adopted or maintained by public authorities or individual contracting authorities or contracting entities in a third country, that result in a serious and recurrent impairment of access of Union goods, services and/or economic operators to the *public* procurement or concession *market of that country*.

(f) ‘third-country measure or practice’ means any legislative, regulatory or administrative measure, procedure or practice, or combination thereof, *of a general nature, stemming from a national or sub-national policy*, adopted or maintained by public authorities or individual contracting authorities or contracting entities in a third country, that results in a serious and recurrent impairment of access of Union goods, services and/or economic operators to the procurement or concession *markets*.

Amendment 52

Proposal for a regulation

Article 2 – paragraph 1 – point f a (new)

Text proposed by the Commission

Amendment

(fa) ‘IPI measure’ means a measure adopted by the Commission under this

Regulation limiting the access of economic operators and/or goods and services originating in third countries to the Union procurement or concessions market in the area of non-covered procurement;

Amendment 53

**Proposal for a regulation
Article 2 – paragraph 1 – point f b (new)**

Text proposed by the Commission

Amendment

(fb) ‘non-covered procurement’ means procurement procedures for goods, services or concessions regarding which the Union has not undertaken market access commitments in an international agreement in the field of procurement or concessions;

Amendment 54

**Proposal for a regulation
Article 2 – paragraph 1 – point f c (new)**

Text proposed by the Commission

Amendment

(fc) ‘contracts’ means ‘public contracts’ as defined in Directive 2014/24/EU, ‘concessions’ as defined in Directive 2014/23/EU and ‘supply, works and service contracts’ as defined in Directive 2014/25/EU;

Amendment 55

**Proposal for a regulation
Article 2 – paragraph 1 – point f d (new)**

Text proposed by the Commission

Amendment

(fd) ‘tenderer’ means a tenderer as defined in Directives 2014/23/EU,

Amendment 56

Proposal for a regulation

Article 2 – paragraph 1 – point g a (new)

Text proposed by the Commission

Amendment

(ga) ‘subcontracting’ means arranging the part execution of a contract by a third party; the simple delivery of goods or parts necessary for the provision of a service is not considered to be subcontracting.

Amendment 57

Proposal for a regulation

Article 2 – paragraph 1 – point h

Text proposed by the Commission

Amendment

(h) SME means SME as defined in Commission Recommendation 2003/361/EC²³.

deleted

²³ *Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).*

Amendment 58

Proposal for a regulation

Article 2 – paragraph 2

Text proposed by the Commission

Amendment

2. For the purpose of this Regulation, the execution of works **and**/or a work within the meaning of Directives **2014/25/EU**, 2014/24/EU and Directive **2014/23/EU** shall be considered as the

2. For the purpose of this Regulation, **except for Articles 8a(3) and 8a(7) thereof**, the execution of works or a work within the meaning of Directives **2014/23/EU**, 2014/24/EU and Directive **2014/25/EU**

provision of a service.

shall be considered as the provision of a service.

Amendment 59

Proposal for a regulation Article 3 – title

Text proposed by the Commission

Amendment

Rules of origin

Determination of origin

Amendment 60

Proposal for a regulation Article 3 – paragraph 1

Text proposed by the Commission

Amendment

1. The origin of a good shall be determined in accordance with Article 22 to 26 of Council Regulation (EEC) No 2913/1992²⁴.

deleted

²⁴ Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1).

Amendment 61

Proposal for a regulation Article 3 – paragraph 2

Text proposed by the Commission

Amendment

2. The origin of a service shall be determined on the basis of the origin of economic operator providing it.

deleted

Amendment 62

Proposal for a regulation Article 3 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) in the case of a natural person, the country of which the person is a national or where **he** has a right of permanent residence;

(a) in the case of a natural person, the country of which the person is a national or where **that person** has a right of permanent residence;

Amendment 63

Proposal for a regulation

Article 3 – paragraph 3 – subparagraph 1 – point b – subpoint i

Text proposed by the Commission

Amendment

(i) ***if the service is not provided through a commercial presence within the Union***, the country under the laws of which the legal person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations;

(i) the country under the laws of which the legal person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations, ***entailing a direct and effective link with the economy of the country concerned***;

Amendment 64

Proposal for a regulation

Article 3 – paragraph 3 – subparagraph 1 – point b – subpoint ii

Text proposed by the Commission

Amendment

(ii) the Member State where the legal person is established and engaged in substantive business operations entailing a direct and effective link with the economy of the Member State concerned.

(ii) ***if the legal person is not engaged in substantive business operations in the territory of the country in which it is constituted or otherwise engaged, the origin of the legal person shall be that of the person or persons which may exercise, directly or indirectly, a dominant influence on the legal person by virtue of their ownership of it, their financial participation therein, or the rules which govern it.***

Amendment 65

Proposal for a regulation

Article 3 – paragraph 3 – subparagraph 2

Text proposed by the Commission

For the purposes of point (b) (ii) of the first subparagraph if the legal person is not engaged in substantive business operations entailing a direct and effective link with the economy of a Member State, the origin of a legal person shall be that of the person or persons which own or control the legal person.

Amendment

For the purposes of point (b) (ii) of the first subparagraph, ***that person or persons shall be presumed as having a dominant influence on the legal person in any of the following cases in which they, directly or indirectly:***

- (a) hold the majority of the legal person's subscribed capital;***
- (b) control the majority of the votes attaching to shares issued by the legal person;***
- (c) can appoint more than half of the legal person's administrative, management or supervisory body.***

Amendment 66

Proposal for a regulation

Article 3 – paragraph 3 – subparagraph 3

Text proposed by the Commission

A legal person shall be considered to be "owned" by persons of a given country where more than 50 % of the equity interest in it is beneficially owned by persons of that country.

Amendment

deleted

Amendment 67

Proposal for a regulation

Article 3 – paragraph 3 – subparagraph 4

Text proposed by the Commission

A legal person shall be considered to be "controlled" by persons of a given

Amendment

deleted

country where such persons have the power to appoint a majority of its directors or otherwise to legally direct its actions.

Amendment 68

Proposal for a regulation

Article 3 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. *Where an economic operator is a group of natural or legal persons and/or of public entities, and at least one of such persons or entities originates from a third country whose economic operators and goods and services are subject to an IPI measure, that IPI measure shall equally apply to tenders submitted by that group. This shall not apply if the participation of those persons or entities in a group amounts to less than 15% of the value of the tender in question, unless those persons or entities are necessary for fulfilling the majority of at least one of the selection criteria in a procurement procedure.*

Amendment 69

Proposal for a regulation

Article 3 – paragraph 3 b (new)

Text proposed by the Commission

Amendment

3b. *Contracting authorities or contracting entities may at any time during the procurement procedure request the economic operator to submit, clarify or complete the information or documentation related to the verification of the economic operator's origin within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency. Tenders from economic operators that fail to provide such*

information or documentation shall be rejected in accordance with the rules applicable to the award procedure.

Amendment 70

Proposal for a regulation

Article 3 – paragraph 3 c (new)

Text proposed by the Commission

Amendment

3c. For the application of the additional contractual obligations upon the successful tenderer set out in Article 9a, the origin of a good shall be determined in accordance with Articles 59 to 62 of Regulation (EU) No 952/2013, while the origin of a service shall be determined on the basis of the origin of the economic operator providing it.

Amendment 71

Proposal for a regulation

Chapter 2 – title

Text proposed by the Commission

Amendment

Chapter II

deleted

Exemptions

Amendment 72

Proposal for a regulation

Article 4 – paragraph 1

Text proposed by the Commission

Amendment

Tenders shall be exempted from this Regulation where ***more than 50% of the total value of the tender is made up of goods and/or services*** originating in least-developed countries listed in Annex IV to

Tenders shall be exempted from this Regulation where ***they have been submitted by an economic operator*** originating in least-developed countries listed in Annex IV to Regulation (EU) No

Regulation (EU) No 978/2012²⁷, and in developing countries considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system as defined in Annex VII to Regulation (EU) No 978/2012.

978/2012²⁷, and in developing countries considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system as defined in Annex VII to Regulation (EU) No 978/2012. ***The Commission may exempt tenders submitted by an economic operator originating in developing countries that are beneficiaries of the general arrangement referred to in point (a) of Article 1(2) of Regulation (EU) No 978/2012, unless the economy of such countries is considered to be competitive in the sectors concerned.***

²⁷ Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).

²⁷ Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).

Amendment 73

Proposal for a regulation Article 5

Text proposed by the Commission

Amendment

Article 5

deleted

Exemption for tenders submitted by SMEs

Tenders submitted by SMEs²⁸ established in the Union and engaged in substantive business operations entailing a direct and effective link with the economy of at least one Member State, shall be exempted from this Regulation.

²⁸ ***As defined in the Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).***

Amendment 74

Proposal for a regulation Chapter III– title

Text proposed by the Commission

Investigations, consultations and *price adjustment* measures

Amendment

Investigations, consultations, measures *and additional contractual obligations*

Amendment 75

Proposal for a regulation Article 6 – title

Text proposed by the Commission

Investigations

Amendment

Investigations *and consultations*

Amendment 76

Proposal for a regulation Article 6 – paragraph 1

Text proposed by the Commission

1. *Where* the Commission considers it to be in the interest of the Union, it *may at any time*, on its own initiative or upon *application* of interested *parties* or a Member State, initiate an investigation into alleged *restrictive and/or discriminatory procurement measures or practices*. *If an investigation is initiated, the Commission shall publish* a notice in the *Official Journal of the European Union, inviting* interested parties and Member States to provide *all relevant* information to the Commission within a specified period of time.

Amendment

1. *If* the Commission considers it to be in the interest of the Union, it *shall* on its own initiative or upon *a substantiated complaint of a Union interested party, the European Parliament*, or a Member State, initiate an investigation into *an* alleged *third-country measure or practice by publishing* a notice in the *Official Journal of the European Union. The notice of initiation shall include the Commission's preliminary assessment of the third-country measure or practice and invite Union* interested parties and Member States to provide information to the Commission within a specified period of time.

The Commission shall make available on its website the form which the interested parties or Member States are required to complete in order to submit a substantiated complaint.

A determination as to whether the Union's interest calls for an investigation shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers. An investigation may not be started where the Commission, on the basis of all the information submitted, can clearly conclude that it is not in the Union's interest to start such an investigation.

Amendment 77

Proposal for a regulation Article 6 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Upon publication of the notice, the Commission shall invite the third country concerned to submit its views, provide information and enter into consultations with the Commission in order to remedy the alleged third-country measure or practice. The Commission shall regularly inform interested parties, the European Parliament, and Member States within the Committee established by Article 7 of Regulation (EU) 2015/1843 of the European Parliament and of the Council^{1a} (“Trade Barriers Regulation”).

^{1a} Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union’s rights under international trade rules, in particular

those established under the auspices of the World Trade Organization (OJ L 272, 16.10.2015, p. 1).

Amendment 78

Proposal for a regulation Article 6 – paragraph 2

Text proposed by the Commission

2. *The assessment by the Commission of whether the alleged restrictive and/or discriminatory procurement measures or practices have been adopted or are maintained by the third country concerned shall be made on the basis of the information supplied by interested parties and Member States, of facts collected by the Commission during its investigation, or both. The assessment shall be concluded within a period of eight months after the initiation of the investigation. In duly justified cases, this period may be extended by four months.*

Amendment

2. The *investigation and consultations* shall be concluded within a period of six months after the *date of the publication in the Official Journal of the initiation notice*. In duly justified cases, *the Commission* may, *before the end of the initial six months, extend that period by three months, by publishing a notice in the Official Journal of the European Union and informing the third country, interested parties, the European Parliament, and Member States.*

Amendment 79

Proposal for a regulation Article 6 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. *Upon conclusion of the investigation and consultations, the Commission shall make publicly available a report recording the main findings of the investigation and a proposed course of action. The Commission shall present the report to the European Parliament.*

Amendment 80

Proposal for a regulation Article 6 – paragraph 3

Text proposed by the Commission

3. Where the Commission ***concludes as a result of*** its investigation that the alleged ***restrictive and/or discriminatory procurement measures or practices are*** not maintained or that ***they do*** not result in ***restrictions to*** access ***by*** Union economic operators or Union goods ***and*** services to the ***public*** procurement or concession ***markets*** of the third country ***concerned***, the Commission shall terminate the investigation.

Amendment

3. Where the Commission ***finds, following*** its investigation, that the alleged ***third-country measure or practice is*** not maintained or that ***it does*** not result in ***a serious and recurrent impairment of*** access ***of*** Union economic operators, Union goods ***or*** services to the procurement or concession ***market*** of the third country, the Commission shall terminate the investigation, ***and publish a notice of termination in the Official Journal of the European Union.***

Amendment 81

Proposal for a regulation Article 6 – paragraph 4

Text proposed by the Commission

4. ***When the Commission has concluded its investigation, it shall make publicly available a report recording its main findings.***

Amendment

deleted

Amendment 82

Proposal for a regulation Article 6 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. The Commission may suspend the investigation and consultations at any time if the third country:

(a) takes satisfactory corrective measures remedying the serious and recurrent impairment of access of Union economic operators or Union goods or

services and effectively improving such an access, or

(b) undertakes commitments towards the Union to end or phase out the third-country measure or practice within a reasonable period of time and no later than three months.

The Commission shall resume the investigation and consultations at any time if it concludes that the reasons for the suspension are no longer valid.

The Commission shall publish a notice in the Official Journal of the European Union in case of suspension or resumption of the investigation and consultations.

Amendment 83

Proposal for a regulation Article 7

Text proposed by the Commission

Amendment

[...]

deleted

Amendment 84

Proposal for a regulation Article 8

Text proposed by the Commission

Amendment

[...]

deleted

Amendment 85

Proposal for a regulation Article 8 a (new)

Article 8 a

IPI measures

- 1. Where the Commission finds, following an investigation and consultations pursuant to Article 6, that a third-country measure or practice exists, it shall impose an IPI measure by means of an implementing act. An IPI measure shall only apply if the main object of the procurement procedure falls within the scope of the implementing act, as specified in accordance with paragraph 7 point (a). The procurement procedure shall not be designed with the intention of excluding that procedure from the scope of this Regulation.***
- 2. The IPI measure shall be determined on the basis of the following criteria, in light of available information:***
 - (a) the proportionality of the IPI measure with regard to the third-country measure or practice;***
 - (b) the availability of alternative sources of supply for the goods and services concerned, in order to avoid or minimise a significant negative impact on contracting authorities or contracting entities.***
 - (c) the engagement of undertakings from the targeted third country in procurement activities in the internal market, benefiting from the lack of reciprocity.***
- 3. The IPI measure shall only apply to procurement procedures with an estimated value of at least EUR 10 000 000 net of value-added tax for works and concessions, and of at least EUR 5 000 000 net of value-added tax for goods and services.***
- 4. The IPI measure shall also apply in the case of specific contracts awarded***

under a dynamic purchasing system, where those dynamic purchasing systems were subject to the IPI measure, with the exception of specific contracts the estimated value of which is below the respective values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU.

The IPI measure shall not apply to procedures for the award of contracts based on a framework agreement. The IPI measure shall also not apply to individual lots to be awarded according to Article 5 (10) of Directive 2014/24/EU or Article 16 (10) of Directive 2014/25/EU.

5. In its implementing act, the Commission may decide, within the scope established in paragraph 7 of this Article, to restrict the access of operators, goods or services from third countries to procurement procedures by requiring contracting authorities or contracting entities to:

(a) impose a score adjustment measure on tenders submitted by economic operators originating in that third country;

(b) exclude tenders submitted by economic operators originating in that third country; or

(c) impose a combination of (a) and (b), if different sectors or categories of goods and services are subject to IPI measures.

6. The score adjustment measure referred to in paragraph 5 point (a) shall apply only for the purpose of the evaluation and ranking of the tenders. It shall not affect the price due to be paid under the contract to be concluded with the successful tenderer.

7. The implementing act, adopted in accordance with Article 14(2), shall specify the scope of application of the IPI

measure, including:

(a) the sectors or the categories of goods, services and concessions based on the Common Procurement Vocabulary as well as any applicable exceptions;

(b) specific categories of contracting authorities or contracting entities;

(c) specific categories of economic operators;

(d) as regards the score adjustment measure referred to in paragraph 5 point (a), the percentage value of the adjustment, set up to 100% of the evaluation score of the tender depending on the third country and sector of goods, services, works or concessions envisaged.

8. When determining the IPI measure based on the options under points (a), (b) or (c) of paragraph 5, the Commission shall opt for the kind of measure that would most effectively remedy the level of impairment of EU operators on third country markets.

9. The Commission may either withdraw the IPI measure or suspend its application if the third country takes satisfactory corrective actions remedying the impairment of access of Union goods, services or economic operators to its procurement or concession markets, or if it undertakes commitments to end the measure or practice in question. If the Commission considers that the corrective actions or commitments undertaken have been rescinded, suspended or improperly implemented, it shall make publicly available its findings and reinstate the application of the IPI measure at any time. The Commission may withdraw, suspend or reinstate an IPI measure in accordance with the examination procedure referred to in Article 14(2) and followed by the publication of a notice in the Official Journal of the European Union.

10. An IPI measure shall expire five years from its entry into force. An IPI measure may be extended for a duration of five years. Nine months before the date of expiry of the IPI measure, the Commission, at its own initiative, shall initiate a review of the IPI measure in question by publishing a notice in the Official Journal of the European Union. Such a review shall be concluded within six months. Following such a review, the Commission may extend the duration of the IPI measure, adjust it appropriately or replace it by a different IPI measure.

Amendment 86

Proposal for a regulation Article 9

Text proposed by the Commission

Amendment

Article 9

deleted

Authorities or entities concerned

The Commission shall determine the contracting authorities or entities or categories of contracting authorities or entities, listed by Member State, whose procurement is concerned by the measure.

To provide the basis for this determination, each Member State shall submit a list of appropriate contracting authorities or entities or categories of contracting authorities or entities. The Commission shall ensure that an appropriate level of action is taken and that a fair distribution of the burden among Member States is achieved.

Amendment 87

Proposal for a regulation Article 9 a (new)

Article 9a

Additional contractual obligations upon the successful tenderer

1. In the case of procurement procedures to which an IPI measure is applicable, as well as in the case of contracts awarded based on a framework agreement where the estimated value of those contracts is equal or above the values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU, respectively, and where those framework agreements were subject to the IPI measure, contracting authorities and contracting entities shall also include, among the conditions of the contract with the successful tenderer:

(a) an obligation not to subcontract, including through the delivery of goods and parts, more than 25% of the total value of the contract to economic operators originating in a third country which is subject to an IPI measure;

(b) for contracts whose subject matter covers the supply of goods, a commitment that, for the duration of the contract, goods supplied and/or services provided in the execution of the contract and originating in a third country which is subject to the IPI measure represent no more than 25% of the total value of the contract, whether such goods and/or services are supplied or provided directly by the tenderer or by a subcontractor;

(c) an obligation to provide, upon request, adequate evidence corresponding to points (a) or (b) to the contracting authority or the contracting entity at the latest upon completion of the execution of the contract;

(d) a proportionate charge, in case of non-observance of the commitments

referred in points (a) or (b) of 25% of the total value of the contract.

2. For the purposes of paragraph 1 point (c), it is sufficient to provide evidence that more than 75% of the total value of the contract originates in countries other than the third country subject to the IPI measure. The contracting authority or contracting entity shall request evidence in case of reasonable indications of non-compliance with points (a) or (b) of paragraph 1 or if the contract is awarded to a group of economic operators comprising a legal person originating in a third country subject to an IPI measure.

3. For tenders submitted by autonomous SMEs, as defined in the Commission Recommendation 2003/361/EC, originating in the Union or in a third country with which the Union has concluded an international agreement in the field of procurement, the Commission and the Member States shall make available guidelines for best practices to ensure the efficiency of this Regulation and the consistency of its implementation. Those guidelines shall take into account, in particular, the information needs of SMEs.

4. Contracting authorities and contracting entities shall include a reference to the additional conditions laid down in this Article in the documents for procurement procedures to which an IPI measure is applicable.

Amendment 88

Proposal for a regulation Article 10

Text proposed by the Commission

[...]

Amendment

deleted

Amendment 89

Proposal for a regulation Article 11

Text proposed by the Commission

Amendment

[...]

deleted

Amendment 90

Proposal for a regulation Article 12 – paragraph 1 – introductory part

Text proposed by the Commission

Amendment

1. Contracting authorities and contracting entities may decide not to apply the *price adjustment* measure with respect to a procurement *or a concession* procedure if:

1. Contracting authorities and contracting entities may, *on an exceptional basis*, decide not to apply the *IPI* measure to a procurement procedure if:

Amendment 91

Proposal for a regulation Article 12 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) *there are no Union and/or covered goods or services available which meet the requirements of the contracting authority or contracting entity; or*

deleted

Amendment 92

Proposal for a regulation Article 12 – paragraph 1 – point a a (new)

Text proposed by the Commission

Amendment

(aa) *there are only tenders from economic operators originating in a third country subject to an IPI measure, or if*

only such tenders meet the tender requirements; or

Amendment 93

Proposal for a regulation

Article 12 – paragraph 1 – point a b (new)

Text proposed by the Commission

Amendment

(ab) this is justified for overriding reasons relating to the public interest, such as public health or protection of the environment;

Amendment 94

Proposal for a regulation

Article 12 – paragraph 1 –point b

Text proposed by the Commission

Amendment

(b) the application of the measure would lead to a disproportionate increase in the price or costs of the contract.

deleted

Amendment 95

Proposal for a regulation

Article 12 – paragraph 2

Text proposed by the Commission

Amendment

2. Where a contracting authority or contracting entity intends not to apply *a price adjustment measure*, it shall *indicate its intention in the contract notice that it publishes pursuant to Article 49 of Directive 2014/24/EU or Article 69 of Directive 2014/25/EU or in the concession notice pursuant to Article 31 of Directive 2014/23/EU*. It shall notify the Commission no later than *ten calendar days after the publication* of the contract *notice*.

2. Where a contracting authority or contracting entity intends not to apply *an IPI measure*, it shall notify the Commission *without delay and in any case* no later than *thirty days before the award* of the contract, *and provide a detailed justification for the use of the exception*.

Amendment 96

Proposal for a regulation

Article 12 – paragraph 3 – subparagraph 1 – point d

Text proposed by the Commission

(d) the ground on which the decision not to apply the *price adjustment* measure is based, and a detailed justification for the use of the exception;

Amendment

(d) the ground on which the decision not to apply the *IPI* measure is based, and a detailed justification for the use of the exception;

Amendment 97

Proposal for a regulation

Article 12 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Any request for an exception based on this Article shall require the approval by the Commission before the award of the contract.

Amendment 98

Proposal for a regulation

Article 12 – paragraph 3 b (new)

Text proposed by the Commission

Amendment

3b. The Commission may object to a request for an exception to an IPI measure if the notification lacks a sufficiently detailed justification. The Commission shall inform the contracting authority or contracting entity about its decision without undue delay.

(Ex AM 44 (Or. EN) of FdR IMCO AD\1242055EN)

Amendment 99

Proposal for a regulation

Article 12 – paragraph 4

Text proposed by the Commission

Amendment

4. In the event that a contracting authority or contracting entity conducts a negotiated procedure without prior publication, under Article 2 of Directive 2014/24/EU or under Article 50 of Directive 2014/25/EU and decides not to apply a price adjustment measure, it shall indicate this in the contract award notice it publishes pursuant to Article 50 of Directive 2014/24/EU or Article 70 of Directive 2014/25/EU or in the concession award notice it publishes pursuant to Article 32 of Directive 2014/23/EU and notify the Commission no later than ten calendar days after the publication of the contract award notice.

deleted

The notification shall contain the following information:

- (a) the name and contact details of the contracting authority or contracting entity;**
- (b) a description of the object of the contract or the concession;**
- (c) information on the origin of the economic operators, the goods and/or services admitted;**
- (d) the justification for the use of the exception;**
- (e) where appropriate, any other information deemed useful by the contracting authority or contracting entity.**

Amendment 100

Proposal for a regulation Article 13 – paragraph 2

Text proposed by the Commission

Amendment

2. Contracts concluded with an

2. Contracts concluded with an

economic operator in violation of **price adjustment** measures adopted or reinstated by the Commission pursuant to this Regulation shall be ineffective.

economic operator in violation of **IPI** measures adopted or reinstated by the Commission pursuant to this Regulation shall be ineffective.

Amendment 101

Proposal for a regulation Article 13 a (new)

Text proposed by the Commission

Amendment

Article 13a

Resources

The Commission shall make sure that an adequate amount of resources is allocated to the implementation and enforcement of this Regulation.

Amendment 102

Proposal for a regulation Article 15

Text proposed by the Commission

Amendment

[...]

deleted

Amendment 103

Proposal for a regulation Article 16 – paragraph 1

Text proposed by the Commission

Amendment

By 31 December 2018 and at least every three years thereafter, the Commission shall submit a report to the European Parliament and the Council on the application of this Regulation and on progress made in international negotiations regarding access for Union economic operators to ***public contract or concession***

Two years after the date of entry into force of this Regulation and at least every ***two*** years thereafter, the Commission shall submit a report to the European Parliament and the Council on the application of this Regulation and on progress made in international negotiations regarding access for Union economic operators to

award procedures in third countries undertaken under this Regulation. **To this effect**, Member States shall upon request provide the Commission with appropriate information.

procurement and concession markets of third countries undertaken under this Regulation. Member States shall, upon request, provide the Commission with appropriate information **on the application of measures under this Regulation, including as regards the number of procurement procedures at central and sub-central level in which a given IPI measure was applied, the number of tenders received from third countries subject to that IPI measure, as well as cases in which a specific exception from the IPI measure was applied. The report shall be made public.**

Amendment 104

Proposal for a regulation Article 16 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

The Commission shall establish at Union level a database of public procurement contracts or concession award procedures with third countries and the application of IPI measures under this Regulation, based on the information received from Member States. The Commission shall update the database annually.

Amendment 105

Proposal for a regulation Article 17

Text proposed by the Commission

Amendment

Article 17

deleted

Amendment of Directive 2014/25/EU

Articles 85 and 86 of Directive 2014/25/EU shall be deleted with effect from the entry into force of this

Regulation.

Amendment 106

Proposal for a regulation

Article 17 a (new)

Text proposed by the Commission

Amendment

Article 17a

Review

No later than three years after the date of entry into force of this Regulation, and every three years thereafter, the Commission shall review the scope, functioning and efficiency of this Regulation, and shall report its findings to the European Parliament and the Council. In duly justified cases, the Commission may extend the timeframe for the second review up to five years. In the event of such an extension, the Commission shall, in advance, inform the European Parliament and the Council.

EXPLANATORY STATEMENT

In March 2012 the Commission published its legislative proposal on “Public procurement: access of third-country goods and services to the Union’s internal market and procedures supporting negotiations on access of Union goods and services to the markets of third countries”. The Commission’s aim was to create leverage in bilateral trade negotiations with third countries on opening up public procurement markets, as many third countries are reluctant to open their public procurement markets to international competition at all, or to open markets further than what they have already done. As a result, EU economic operators face restrictive procurement practices in many of the trading partners of the Union. The main idea of the Commission’s proposal hence was to improve the conditions under which EU businesses can compete for public contracts in third countries and to strengthen the position of the European Union when negotiating the terms of access of EU goods, services and suppliers to the public procurement markets and thereby work towards a level-playing field in public procurement procedures.

In general, public procurement markets constitute a strong offensive interest of the EU in trade negotiations with third countries, since many EU companies are highly competitive in various sectors. Many third countries are reluctant to opening up their procurement markets to EU companies. Moreover, the Commission witnessed an increasing number of protectionist measures taken by third countries in recent years, which de facto or de jure restrict access to their respective public procurement markets. This includes protectionist requirements such as imposing technology transfers as a condition for the award of public contracts or local content requirements.

So far, the EU has only succeeded to a limited extent in opening up public procurement markets through trade agreements. The GPA only counts a limited number of signatory countries - major emerging economies such as India, Brazil and China do not show much appetite for joining the GPA in the near future. Despite the revision of the GPA, the GPA still contains various exceptions and does not systematically commit all levels of government. Bilateral Free Trade Agreements (FTA) of the EU with third countries often also contain exemptions to access to public procurement markets for European companies. Given that the EU public procurement markets are largely open to foreign bidders, it has proven difficult for the Commission to achieve commitments by third countries in this area in trade negotiations.

In order to create leverage for the opening of public procurement opportunities in third countries, the Commission with its 2012 proposal suggested the possibility to restrict market access for third countries not engaging in trade negotiations with the EU. The 2012 proposal foresaw a decentralised and a centralised procedure for goods and services not benefiting from market access commitments. Under the decentralised procedure, the Commission could approve that contracting authorities/entities exclude tenders in which the value of non-covered goods and services exceeds 50% of the total value of goods and services included in the tender in case there was a lack of substantial reciprocity in market opening between the EU and the country from which the goods and/or services originate. In addition, this proposal with the centralised pillar established an EU mechanism to further increase the leverage of the EU in international negotiations on market access, based on Commission investigations, consultation with third countries and, where appropriate, imposition of temporary restrictive measures by the Commission. The Commission believed that this would provide an incentive

to third countries to start negotiations on the matter of opening up their public procurement markets with the EU.

Reactions in Council were mixed: One block of Member States supported the proposal, and an equally important block of Member States did not perceive a need for action and rejected the idea as the instrument was considered a protectionist measure with negative repercussions on global trade (notably by possible retaliation measures by powerful third countries). Council was not able to overcome this deadlock and advance discussions on the substance of the proposal. On 15 January 2014, Parliament adopted 85 amendments to the Commission's proposal, without adopting a legislative resolution and hence without closing the first reading. With these amendments, Parliament tried to build a bridge between proponents and opponents of the proposal.

Important points of Parliament's vote on 15 January 2014 were:

- the introduction of a revision clause which allows, after a period of time, to evaluate whether the instrument succeeds in opening up foreign procurement markets or simply leads to protectionism on the European Union's procurement market
- the exclusion of developing countries from the regulation
- a better link between the decentralised and the centralised pillar, hence that measures could only be taken when the Commission has started an investigation on the alleged restrictive measures
- the prevention of the fragmentation of the internal market for public procurement

The Italian Presidency presented a compromise text in autumn 2014, which, however, failed to bridge the gap between positions in Council. Following an orientation debate at the Trade Minister's Council in November 2014, the Commission presented a revised proposal to move the discussions forward. On 29 January 2016, the European Commission adopted its amended proposal for an international public procurement instrument. INTA Coordinators on 27 February 2017 decided to put the item back on the agenda of one of the next INTA meetings with the aim of up-dating the negotiating mandate by bringing further amendments to a vote, as the revised proposal included significant changes.

The amended proposal on the one hand delivered improvements in key areas, such as the deletion of the decentralised pillar, which also Parliament feared could lead to a fragmentation of the internal market, but on the other hand did not take on board key requests of the European Parliament. Furthermore, it introduced new elements which require the INTA committee's and Parliament's scrutiny. The rapporteur hence presented an updated draft report in order to update the European Parliament's mandate and take into account the changes brought forward with the revised 2016 proposal. Accordingly, this report was based on two key pillars: Firstly, for those parts which were equal or comparable to the initial 2012 proposal, the rapporteur introduced the amendments adopted in plenary on 15 January 2014, where appropriate adapted to the revised 2016 proposal. Secondly, the report amended the new elements brought forward by the revised 2016 proposal.

New elements of the revised 2016 proposal:

The major change in this regard is that the proposal only foresees a 'price adjustment measure' and completely suppresses the market closure measure. Following a Commission investigation, when it is determined that a country applies barriers to EU participation in procurement; a price adjustment would be applied to products or services from that country. This means that, contrary to the initial proposal, targeted foreign products and services would always be eligible, if the offer is price and quality competitive after taking into account the price adjustment. The price adjustment would only apply to the evaluation process and it would not determine the final award price. Under no circumstances would the EU market be closed to foreign operators.

However, the basic objective of the proposal is to gain leverage in order to open up public procurement markets in trade negotiations and thus ensure a level-playing field in market access in public procurement. The rapporteur's suggestion would hence be to also keep the original mechanism of temporarily restricting the access of goods and/or services from the third country to the EU public procurement market, as proposed by the Commission in their 2012 proposal and endorsed by Parliament in January 2014.

Moreover, Member States would suggest which procuring entities would be implementing the measure, in order to make sure it does not fall on the smallest entities with more limited administrative capacities. While this is a valid goal, the regulation must be implemented in a uniform way in the entire internal market. Otherwise, this could lead to a fragmentation of the single market and leverage may be lost.

Another element is that the price penalty would no longer have to apply to the whole country where the Commission has identified discriminations of EU bidders. It would be possible to allow targeting territories at regional or local level, like states, regions or municipalities. The objective is to differentiate between territories and encourage sub-central entities to open their procurement procedures to EU bidders.

Another point of the revised 2016 proposal is a clearer allocation of the burden of proof. Companies and products with more than 50% of the tender value originating in a country with confirmed discriminatory measures against EU companies, goods or services would be subject to the measure. It would be presumed that economic operators from a targeted country will supply targeted goods and services. The burden of proof will be on the bidder from that country, not the contracting authority, to demonstrate that the bid will not consist of such targeted goods or services. The original proposal insinuated that the burden in this regard would be on contracting authorities.

In line with the Commission's approach to transparency in trade policy, it is further proposed to make public the findings of the Commission investigations identifying barriers to tenders in third countries. The 'naming and shaming' effect should create new dynamics towards the elimination of these barriers. Also the measures taken by third countries to ameliorate a problematic situation should be made public. This change is appreciated.

Inclusion of some of Parliament's amendments:

Apart from the exclusion of least developed countries from the scope of the proposal, developing countries and SMEs are excluded as well. Moreover, several Member States and Parliament have considered that the decentralised pillar – according to which contracting

authorities would have the possibility to exclude foreign bidders from participating in their tenders – would risk fragmenting the internal market. The revised proposal completely eliminates this possibility.

Parliament's requests not included:

This concerns the consideration of environmental, labour or social issues in the assessment of reciprocity, or Parliament's request for a review clause allowing to assess the question whether the regulation contributes to further opening public procurement markets or is a protectionist instrument. To reject the regulation in its entirety on that ground would be questionable, however, Parliament suggested incorporating a review clause, which obliges the Commission to assess the impact of the regulation, after it has come into force and has been applied for a pre-defined number of years, and revise it accordingly. For the same reason, Parliament suggested to limit the application of any restrictive measures taken through an implementing act to up to 5 years (similar to provisions in the EU Trade Defence Regulations) as to avoid that these measures turn into a permanent closure of the market. An additional request that was only marginally taken into account is the shortening of the time period for investigations. Parliament asked for a shortening of the period for conclusion of the investigation to three months with the option to extend by one month. The Commission shortened the period from nine to eight months, while at the same time increasing the possible extension from three to four months, which in effect leaves the time for investigation as it is.

Evolution of the discussions since 2018:

Following the presentation of an amended draft report in INTA in February 2018 and the introduction and discussion of amendments in March/April 2018, the works on the dossier came to a halt in May 2018 due to the prolonged blockade of the dossier in Council. In the Rapporteur's perspective and in accordance with Shadow Rapporteurs, proceeding by renewing Parliament's mandate for trilogue negotiations would not have been constructive given the absence of any viable perspective in Council to move ahead.

Given the 2019 election recess, the file became part of previous Parliament's 'unfinished business' (Rule 240). In parallel, Member States repeatedly called for a new impetus and urged the adoption of a common position on the public procurement instrument (European Council conclusion of 22 March 2019/02 October 2020), which fell short of tangible results in Council. Following detailed preparatory works under the Finnish, Croatian and German Presidencies, the Portuguese Presidency presented a substantially overhauled draft position to Council in April 2021, which marked a fundamental shift in the intrinsic logic of the proposed instrument. After more than nine years of standstill, Council adopted its position on the procurement instrument in June 2021, thereby laying the groundwork for the continuation of works on the dossier in INTA on the basis of a new draft report presented by the Rapporteur.

The Rapporteur supports the significant departure from the logic of the 2016 Commission proposal, signalled by the bidder-centric approach rather the tender-based design. Due to the shift in paradigm, previous difficulties in establishing the origin of goods, services, works and concessions are circumvented. The complexity of the instrument is being reduced while its practicability is substantially being enhanced.

The Rapporteur continues to be of the opinion that IPI measures must be assessed according

to their effectiveness, proportionality and applicability.

Next to effective and efficient IPI measures, the duration of investigations and consultations is decisive for the added value provided by the instrument. Against this background, shorter timeframes for both procedures, which are proposed to be overlapping rather than subsequent, are introduced to guarantee a timely application of IPI measures without unnecessary delay.

The intended leverage effect of the instrument can be derived from the degree to which it is applied to economic operators and by procurement authorities and procuring entities. The sole focus on the fixed value of the procurement contracts as measuring criteria guarantees the simplicity and efficiency of the instrument.

Exceptions to the requirement of applying the instrument are supported under narrowly defined circumstances, namely cases where (1) only bids from bidders from third countries which are subject to an IPI measure are available or (2) in which overriding reasons on the ground of public interest exist. Further exceptions would hamper overall objective of the instrument.

29.10.2021

OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION

for the Committee on International Trade

on the proposal for a regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries

(COM(2016)0034 – C8-0018/2016 – 2012/0060(COD))

Rapporteur for opinion(*): Ivan Štefanec

(*) Associated committee – Rule 57 of the Rules of Procedure

SHORT JUSTIFICATION

In March 2012, the European Commission adopted the first proposal for a Regulation, establishing a so-called International Procurement Instrument (IPI) in order to increase the leverage of the European Union in international trade negotiations, with a view to achieving improved market access opportunities for European economic operators in third countries' public procurement markets.

In January 2014, the European Parliament adopted, in plenary, amendments to the proposal and the matter was referred back to the committee responsible for further consideration. The file was blocked in the Council, and the Parliament did not engage in trilogue negotiations.

On 29 January 2016, the Commission presented an amended proposal. The amended proposal removed some provisions of stronger relevance to the internal market rules, in particular the power of individual contracting authorities to reject tenders (old Article 6). However, even in the centralised Commission-driven mechanism, the legislative proposal affects the behaviour of EU contracting authorities in the tendering procedures and the internal market.

IMCO adopted its opinion to INTA, based on the amended Commission proposal, on 26 September 2017. INTA, on the other hand, discussed the amended proposal during the last legislative term, but decided to postpone the vote in committee until there was further clarity on the direction of Council's deliberations.

After years of standstill, on 2 June 2021, the Council finally agreed its negotiating mandate. Given that the committees involved (INTA, IMCO) have been newly composed following the 2019 EP elections, the lead committee on this file, INTA, decided to draft a new draft report, taking the contextual changes in Parliament and Council into account. Following that, on 22 June 2021, IMCO Coordinators also decided that IMCO should draft a new opinion.

IMCO remains associated committee under Rule 57 RoP on a limited number of issues, including:

A. exclusive competence on

- new Article 11 (2), (3), (4): on the application of the price adjustment measures
- new Article 12 (2), (3), (4): on the exception to price adjustment measures
- new Article 14(3): on the Committee procedure
- new Article 17: on repealing articles 85 and 86 of Directive 2014/25/EU

B. shared competences on

- Article 2: Definitions
- new Article 9: about the authorities or entities concerned by the measures taken under Article 8
- new Article 12 (1): on the exception to price adjustment measures
- new Article 13 on implementation
- new Article 14 (1): Committee procedure
- new Article 15: on confidentiality
- new Article 16: on reporting.

This opinion therefore builds upon the opinions adopted by the IMCO committee in 2013 and 2017, respectively, and incorporates a number of amendments contained therein.

The Rapporteur welcomes the progress made in the Council after so many years of standstill since the adoption of the Commission's proposal for an International Procurement Instrument (IPI) in 2012 and its amended version, in 2016.

The Rapporteur took into account several aspects of the reached Council negotiation mandate, especially the aim to create an instrument allowing the EU to limit or exclude, on a case-by-case basis, access to its public procurement markets by economic operators originating in countries that apply restrictive or discriminatory measures to EU businesses, while minimising the administrative burden upon contracting authorities.

The opinion proposes to simplify and improve the effectiveness of the Regulation eliminating the problem points without creating a space for overriding the Regulation.

In line with Council approach, the opinion proposes to move from the price adjustment measure to IPI measures, where thresholds for the exclusion of bids are introduced. It also supports new bidder approach that allows focusing on tenders instead of goods and services.

The adopted opinion narrows down the exceptions foreseen in Article 12 and aligns them as well with the Public Procurement Directive, thus - avoiding that the exemptions are used extensively and without sufficient monitoring-. It also foresees stronger Commission role by authorising to object an exception that lack sufficient justification.

The Commission proposal to define and create the list of contracting authorities and entities concerned by this Regulation has been considered as leading to the fragmentation of internal market and thus reducing the credibility of this instrument. All contracting authorities procuring goods or services above the agreed threshold should apply the Regulation, therefore the opinion suggests deleting Article 9 regarding the authorities or entities concerned.

The adopted opinion also strengthens the position of the Commission and its competences in decision-making process.

In order to ensure the effectiveness of this Regulation and correct potential inefficiencies related to IPI measures, the opinion proposes a review clause every 3 years.

Finally, the opinion kept several elements from the opinion adopted in 2017 related to work with confidential information, protection of environment or relation to safety regulation.

AMENDMENTS

The Committee on the Internal Market and Consumer Protection calls on the Committee on International Trade, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a regulation

Title 1

Text proposed by the Commission

Amendment

Amended proposal for a
REGULATION OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
on the access of third-country goods and
services to the Union's internal market in
public procurement and procedures
supporting negotiations on access of Union
goods and services to the public
procurement markets of third countries

Amended proposal for a
REGULATION OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
on the access of third-country **economic
operators**, goods and services to the
Union's internal market in public
procurement and **on** procedures supporting
negotiations on access of Union **economic
operators**, goods and services to the public
procurement markets of third countries

Amendment 2

Proposal for a regulation

Recital 1

Text proposed by the Commission

Amendment

(1) In accordance with Article 21 of the

(1) In accordance with Article 21 of the

Treaty on European Union, the Union is to define and pursue common policies and actions, and improve cooperation in all fields in international relations in order, inter alia, to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.

Treaty on European Union, the Union is to define and pursue common policies and actions, and improve cooperation in all fields in international relations in order, inter alia, to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade, ***to ensure sustainable development and to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.***

Amendment 3

Proposal for a regulation

Recital 6

Text proposed by the Commission

(6) Within the context of the WTO and through its bilateral relations, the Union advocates an ambitious opening of international public procurement markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.

Amendment

(6) Within the context of the WTO and through its bilateral relations, the Union advocates an ambitious opening of international public procurement markets of the Union and its trading partners, in a spirit of reciprocity, ***collaboration, cooperation*** and mutual benefit.

Amendment 4

Proposal for a regulation

Recital 8

Text proposed by the Commission

(8) Many third countries are reluctant to open their public procurement and their concessions markets to international competition, or to open those markets further than what they have already done. As a result, Union economic operators face restrictive procurement practices in many of the trading ***partner*** of the Union. Those restrictive procurement practices result in the loss of substantial trading

Amendment

(8) Many third countries are reluctant to open their public procurement and their concessions markets to international competition, or to open those markets further than what they have already done. As a result, Union economic operators face restrictive procurement practices ***and protectionist policies*** in many of the trading ***partners*** of the Union. Those restrictive procurement practices result in the loss of substantial trading

opportunities.

opportunities, *and therefore a procedure to prevent imbalances in third-country public procurement markets should be established under this Regulation.*

Amendment 5

Proposal for a regulation Recital 9

Text proposed by the Commission

Amendment

(9) Directive 2014/25/EU of the European Parliament and of the Council¹⁶ contains only a few provisions concerning the external dimension of the public procurement policy of the Union, in particular Articles 85 and 86. These provisions have a limited scope and should be replaced.

deleted

¹⁶ Directive 2014/25/EU of the European Parliament and of the Council, of February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 94, 28.3.2014, p. 243).

Amendment 6

Proposal for a regulation Recital 11

Text proposed by the Commission

Amendment

(11) In the interest of legal certainty for Union and third-country economic operators, contracting authorities and contracting entities, the international market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions should be reflected in the legal order of the EU, thereby ensuring effective application thereof.

(11) In the interest of legal certainty for Union and third-country economic operators, *consumers*, contracting authorities and contracting entities, the international market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions should be reflected in the legal order of the EU, thereby ensuring *the* effective *and rigorous* application thereof.

Amendment 7

Proposal for a regulation Recital 12

Text proposed by the Commission

(12) The objectives of **improving** the access of Union economic operators to the public procurement and concessions markets of certain third countries protected by restrictive and discriminatory procurement measures or practices and of preserving equal conditions of competition within the internal market **require to refer to the non-preferential** rules of origin **established in the EU customs legislation, so that contracting authorities and contracting entities know whether** goods and services **are covered by the international commitments of the Union.**

Amendment

(12) The objectives of **addressing the serious and recurrent limitations on** the access by Union economic operators to the public procurement and concessions markets of certain third countries protected by restrictive and discriminatory procurement measures or practices and of preserving equal conditions of competition **and of ensuring respect for environmental, social and labour standards** within the internal market **requires a clear set of** rules of origin **for economic operators,** goods and services.

Amendment 8

Proposal for a regulation Recital 14

Text proposed by the Commission

(14) The origin of a service should be determined on the basis of the origin of the natural or legal person providing it.

Amendment

(14) The origin of a service should be determined on the basis of the origin of the natural or legal person providing it. **The origin of a legal person should be considered to be the country where that legal person is constituted or organised under the respective law of that country, and where it is engaged in substantive business operations. In order to avoid potential circumvention of the measures adopted under this Regulation, the Commission should provide guidelines on the substantive business operations criteria taking into account the WTO's General Agreement on Trade in Services, Union legislation and the respective case-law related to the right of establishment.**

Amendment 9

Proposal for a regulation

Recital 18 a (new)

Text proposed by the Commission

Amendment

(18a) With a view to an appropriate integration of environmental, social and labour requirements into public procurement and concession award procedures, it is of particular importance that Member States, contracting authorities and contracting entities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and that result from laws, regulations or administrative provisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law. Equally, obligations stemming from international conventions ratified by all Member States and listed in Annex X to Directive 2014/23/EU of the European Parliament and of the Council^{1a}, Annex X to Directive 2014/24/EU of the European Parliament and of the Council^{1b} and Annex XIV to Directive 2014/25/EU of the European Parliament and of the Council^{1c} should apply during the execution of the contract. This is of particular importance since a number of third countries have not ratified or are not implementing some of the international conventions referred to in those Annexes, while Union economic operators are bound by them. The instruments foreseen under this Regulation should therefore aim to foster the application of the provisions foreseen under those Directives in order to give effect to them in the framework of international public procurement and ensure a level-playing

field in the Union's public procurement market.

^{1a} Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

^{1b} Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

^{1c} Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

Amendment 10

Proposal for a regulation

Recital 19

Text proposed by the Commission

(19) The Commission should be able, on its own initiative or at the application of interested parties or a Member State, to initiate at any time an investigation into restrictive procurement measures or practices allegedly adopted or maintained by a third country. Such investigative procedures should be without prejudice to Regulation (EU) No 654/2014 of the European Parliament and of the Council.

Amendment

(19) The Commission should be able, on its own initiative or at the application of interested parties or a Member State, to initiate at any time an ***external procurement*** investigation into restrictive procurement measures or practices allegedly adopted or maintained by a third country, ***if it considers that such an investigation is in the interest of the Union. In particular, it should take into account the fact that the Commission has approved a number of intended exclusions concerning a third country pursuant to Article 6(2) of this Regulation.*** Such investigative procedures should be without prejudice to Regulation (EU) No 654/2014 of the European Parliament and of the

Council^{1a}.

^{1a} Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50.).

Amendment 11

Proposal for a regulation Recital 19 a (new)

Text proposed by the Commission

Amendment

(19a) In order to establish whether it is in the Union interest to launch an investigation or to impose International Procurement Instrument (IPI) measures, account should be taken of a wide variety of aspects related to the investigation and its potential consequences, including the interests of domestic industry and users and consumers. Priority should be given to the general objective of opening third country markets and improving market access opportunities for Union economic operators in order to achieve reciprocity in market access. The Commission should take into account the presence in the Union's public procurement market of economic operators from a country concerned. The Commission should also pay particular attention to sectors that are considered to be of strategic importance for the Union's public procurement market.

Amendment 12

Proposal for a regulation

Recital 21

Text proposed by the Commission

(21) It is of the utmost importance that the investigation is carried out in a transparent manner. A report on the main findings of the investigation should therefore be publicly available.

Amendment

(21) It is of the utmost importance that the investigation is carried out in a transparent manner **and within a reasonable period**. A report on the main findings of the investigation should therefore be publicly available.

Amendment 13

Proposal for a regulation

Recital 22

Text proposed by the Commission

(22) If the consultations with the country concerned do not lead to sufficient improvements to the tendering opportunities for Union economic operators, goods and services within a reasonable timeframe, the Commission should be able to adopt, **where appropriate, price adjustment measure applying to tenders submitted by economic operators originating in that country and/or including goods and services originating in that country**.

Amendment

(22) If the consultations with the country concerned do not lead to sufficient **corrective action resulting in** improvements to the tendering opportunities for Union economic operators, goods and services within a reasonable timeframe, the Commission should be able to adopt **an IPI measure in the form of either an exclusion from the tender procedure or a score adjustment**.

Amendment 14

Proposal for a regulation

Recital 23

Text proposed by the Commission

(23) **Such measures should be applied only for the purpose of the evaluation of tenders comprising goods or services originating in the country concerned.** To

Amendment

(23) To avoid circumvention of those measures, it **should** also be **possible, where necessary, to impose additional contractual obligations on any successful**

avoid circumvention of those measures, it *may* also be necessary to ***target certain foreign-controlled or owned legal persons that, although established in the European Union, are not engaged in substantive business operations that have a direct and effective link with the economy of at least one Member State. Appropriate measures should not be disproportionate to the restrictive procurement practices to which they respond.***

tenderer.

Amendment 15

Proposal for a regulation Recital 24

Text proposed by the Commission

(24) ***Price adjustment measures*** should not have a negative impact on on-going trade negotiations with the country concerned. Therefore, where a country is engaging in substantive negotiations with the Union concerning market access in the field of public procurement, the Commission may suspend the ***measures*** during the negotiations.

Amendment

(24) ***An IPI measure adopted under this Regulation*** should not have a negative impact on on-going trade negotiations with the country concerned. Therefore, where a country is engaging in substantive negotiations with the Union concerning market access in the field of public procurement, the Commission may suspend ***that measure*** during the negotiations.

Amendment 16

Proposal for a regulation Recital 25

Text proposed by the Commission

(25) ***In order to simplify the application of a price adjustment measure by contracting authorities or contracting entities, there should be a presumption that all economic operators originating in a targeted third country with which there is no agreement on procurement will be subject to the measure, unless they can demonstrate that less than 50% of the***

Amendment

deleted

total value of their tender is made up of goods or services originating in the third country concerned.

Amendment 17

Proposal for a regulation

Recital 26

Text proposed by the Commission

(26) Member States are best placed to identify the contracting authorities or contracting entities, or categories of contracting authorities or contracting entities, which should apply the price adjustment measure. To ensure that an appropriate level of action is taken and that a fair distribution of the burden among Member States is achieved, the Commission should take the final decision, based on a list submitted by each Member State. Where necessary, the Commission may establish a list on its own initiative.

Amendment

deleted

Amendment 18

Proposal for a regulation

Recital 27

Text proposed by the Commission

(27) It is imperative that contracting authorities and contracting entities have access to a range of high-quality products meeting their purchasing requirements at a competitive price. **Therefore** contracting authorities and contracting entities should be able not to apply **price adjustment measures** limiting access of non-covered goods and services in case there are **no Union and/or covered goods or services available which** meet the requirements of the contracting authority or contracting entity **to safeguard essential public needs**, for example in the fields of health and

Amendment

(27) It is imperative that contracting authorities and contracting entities have access to a range of high-quality products meeting their purchasing requirements at a competitive price **to safeguard the public interest. In exceptional situations the** contracting authorities and contracting entities should be able not to apply **an IPI measure** limiting access of non-covered goods and services in case there are **only tenders from economic operators originating in the country subject to an IPI measure or only such tenders** meet the requirements of the contracting authority or

public safety, *or* where *the* application of *the measure would lead to a disproportionate increase in the price or costs* of the *contract*.

contracting entity *or where overriding reasons relating to the public interest make a contract award indispensable*, for example in the fields of health *emergency, natural disaster* and public safety. *This might, for example, be the case* where *urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom IPI measures apply*. *The application of these exceptions should require the approval* of the *Commission*. *The Commission should be notified of such exceptions in a timely and comprehensive manner to allow for appropriate monitoring of the implementation of this Regulation*. *The Commission should develop guidelines on the application of the exceptions to ensure that they are applied in a harmonised manner across the Member States, and to avoid any circumvention*.

Amendment 19

Proposal for a regulation Recital 28

Text proposed by the Commission

(28) In case of misapplication by contracting authorities or contracting entities of exceptions to *price adjustment* measures limiting access of non-covered goods and services, the Commission should be able to apply the corrective mechanism of Article 3 of Council Directive 89/665/EEC²⁰ or Article 8 of Council Directive 92/13/EEC²¹. In addition, contracts concluded with an economic operator by contracting authorities or contracting entities in violation of *price adjustment* measures limiting access of non-covered goods and services should be ineffective.

²⁰ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the

Amendment

(28) In case of misapplication by contracting authorities or contracting entities of exceptions to *IPI* measures limiting access of non-covered goods and services, the Commission should be able to apply the corrective mechanism of Article 3 of Council Directive 89/665/EEC²⁰ or Article 8 of Council Directive 92/13/EEC²¹. In addition, contracts concluded with an economic operator by contracting authorities or contracting entities in violation of *IPI* measures limiting access of non-covered goods and services should be ineffective.

²⁰ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the

application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

²¹ Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

²¹ Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

Amendment 20

Proposal for a regulation Recital 30

Text proposed by the Commission

(30) The examination procedure should be used for the adoption of implementing acts regarding the adoption, withdrawal, or suspension or reinstatement of **a** the **price adjustment measure**.

Amendment

(30) The examination procedure should be used for the adoption of implementing acts regarding the adoption, withdrawal, or suspension or reinstatement of the **IPI measures**.

Amendment 21

Proposal for a regulation Recital 33

Text proposed by the Commission

(33) In accordance with the principle of proportionality, it is necessary and appropriate for achievement of the basic objective of establishing a common external policy in the field of public procurement to lay down common rules on the treatment of tenders which include goods and services not covered by the international commitments of the Union. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the **fourth paragraph** of Article 5 of the Treaty on European Union,

Amendment

(33) In accordance with the principle of proportionality, it is necessary and appropriate for achievement of the basic objective of establishing a common external policy in the field of public procurement to lay down common rules on the **fair** treatment of tenders which include goods and services not covered by the international commitments of the Union. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the Article 5**(4)** of the Treaty on European Union,

Amendment 22

Proposal for a regulation

Article 1 – paragraph 1 – subparagraph 1

Text proposed by the Commission

This Regulation establishes measures intended to improve the access of Union economic operators, goods and services to the public procurement and concessions markets of third countries. It lays down procedures for the Commission to undertake investigations into alleged restrictive and discriminatory procurement measures or practices adopted or maintained by third countries against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.

Amendment

This Regulation establishes measures intended to ***ensure that the international procurement market offers a level-playing field and to*** improve the access of Union economic operators, goods and services to the public procurement and concessions markets of third countries ***by addressing the third country measures or practices that result in serious and recurrent impairment of access.*** It lays down procedures for the Commission to undertake investigations into alleged restrictive and discriminatory procurement measures or practices adopted or maintained by third countries against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.

Amendment 23

Proposal for a regulation

Article 1 – paragraph 1 – subparagraph 2

Text proposed by the Commission

It provides for the possibility of applying ***price adjustment*** measures to certain tenders for contracts for the execution of works or a work, for the supply of goods and/or the provision of services and for concessions, on the basis of the origin of the economic operators, ***goods or services*** concerned. .

Amendment

It provides for the possibility of applying, ***to procurement procedures, IPI*** measures ***in the form of score adjustment or in the form of an exclusion of*** certain tenders for contracts for the execution of works or a work, for the supply of goods and/or ***for*** the provision of services and for concessions, on the basis of the origin of the economic operators concerned.

Amendment 24

Proposal for a regulation

Article 1 – paragraph 2 – introductory part

Text proposed by the Commission

2. This Regulation shall apply to *contracts* covered by the following acts:

Amendment

2. This Regulation shall apply to ***procurement procedures*** covered by the following acts:

Amendment 25

Proposal for a regulation

Article 1 – paragraph 4

Text proposed by the Commission

4. This Regulation shall apply only ***with regard to restrictive and/or discriminatory procurement measures or practices implemented by a third country in respect of purchases of non-covered goods and services.*** The application of this Regulation shall be without prejudice to any international obligations of the Union.

Amendment

4. This Regulation shall apply only ***to procurement procedures that are covered by IPI measures and that are launched between the entry into force of those IPI measures and their expiry, withdrawal or suspension.*** The application of this Regulation shall be without prejudice to any international obligations of the Union.

Amendment 26

Proposal for a regulation

Article 1 – paragraph 5

Text proposed by the Commission

5. ***Member States and their contracting authorities and contracting entities shall not apply restrictive measures in respect of third country economic operators, goods and services beyond those provided for in this Regulation.***

Amendment

deleted

Amendment 27

Proposal for a regulation

Article 1 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. 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 and social conventions listed in Annex X to Directive 2014/23/EU, Annex X to Directive 2014/24/EU, Annex XIV to Directive 2014/25/EU and by the Paris Agreement, so to ensure that there is a level playing field as regards covered and non-covered goods and services.

Amendment 28

Proposal for a regulation

Article 2 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) 'economic operator' means **any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which submits a tender for the execution of works and/or a work, the supply of goods or the provision of services on the market;**

(a) 'economic operator' means **an 'economic operator' as defined in Article 5, point (2), of Directive 2014/23/EU, Article 2, point (10), of 2014/24/EU and Article 2, point (6), of 2014/25/EU;**

Amendment 29

Proposal for a regulation

Article 2 – paragraph 1 – point a a (new)

Text proposed by the Commission

Amendment

(aa) 'tenderer' means an economic operator that has submitted a tender;

Amendment 30

Proposal for a regulation Article 2 – paragraph 1 – point a b (new)

Text proposed by the Commission

Amendment

(ab) ‘score adjustment measure’ means the relative diminution by a given percentage of the score of a tender resulting from its evaluation by a contracting authority or a contracting entity on the basis of the contract award criteria defined in the procurement documents; in cases where price or cost is the only contract award criterion, the ‘score adjustment measure’ means the relative increase, for the purpose of the evaluation of tenders, by a given percentage of the price or cost offered by a tenderer;

Amendment 31

Proposal for a regulation Article 2 – paragraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) ‘non-covered procurement’ means a procurement procedure for goods, services, works or concessions in respect of which the Union has not undertaken market access commitments in an international agreement in the field of procurement or concessions;

Amendment 32

Proposal for a regulation Article 2 – paragraph 1 – point f a (new)

Text proposed by the Commission

Amendment

(fa) ‘IPI measure’ means a measure

adopted by the Commission in accordance with this Regulation in the form of a score adjustment measure applying to a tender, or in the form of the exclusion of a tender from the Union's procurement or concessions market;

Amendment 33

Proposal for a regulation Article 9

Text proposed by the Commission

Amendment

Article 9

deleted

Authorities or entities concerned

The Commission shall determine the contracting authorities or entities or categories of contracting authorities or entities, listed by Member State, whose procurement is concerned by the measure.

To provide the basis for this determination, each Member State shall submit a list of appropriate contracting authorities or entities or categories of contracting authorities or entities. The Commission shall ensure that an appropriate level of action is taken and that a fair distribution of the burden among Member States is achieved.

Amendment 34

Proposal for a regulation Article 11

Text proposed by the Commission

Amendment

[...]

deleted

Amendment 35

Proposal for a regulation

Article 12 – paragraph 1 – introductory part

Text proposed by the Commission

1. Contracting authorities and contracting entities may decide not to apply the **price adjustment measure** with respect to a procurement **or a concession** procedure if:

Amendment

1. Contracting authorities and contracting entities may, **on an exceptional basis**, decide not to apply the **IPI measures provided for in this Regulation** with respect to a procurement procedure if:

Amendment 36

Proposal for a regulation

Article 12 – paragraph 1 – point a

Text proposed by the Commission

(a) **there are no Union and/or covered goods or services available which meet the requirements of the contracting authority or contracting entity; or**

Amendment

deleted

Amendment 37

Proposal for a regulation

Article 12 – paragraph 1 – point a a (new)

Text proposed by the Commission

Amendment

(aa) **there are only tenders from economic operators originating in the country subject to IPI measures, or only such tenders meet the tender requirements;**

Amendment 38

Proposal for a regulation

Article 12 – paragraph 1 – point b

Text proposed by the Commission

(b) **the application of the measure would lead to a disproportionate increase in the price or costs of the contract.**

Amendment

deleted

Amendment 39

Proposal for a regulation Article 12 – paragraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) there are overriding reasons relating to the public interest in accordance with Directive 2014/24/EU that justify such a decision.

Amendment 40

Proposal for a regulation Article 12 – paragraph 2

Text proposed by the Commission

Amendment

2. Where a contracting authority or contracting entity intends not to apply **a price adjustment measure**, it shall **indicate its intention in the contract notice that it publishes pursuant to Article 49 of Directive 2014/24/EU or Article 69 of Directive 2014/25/EU or in the concession notice pursuant to Article 31 of Directive 2014/23/EU**. It shall notify the Commission no later than **ten calendar days after the publication** of the contract notice.

2. Where a contracting authority or contracting entity intends not to apply **an IPI measure**, it shall notify the Commission **without delay and in any case no later than thirty days before the award** of the contract, **and provide a detailed justification for the use of the exception**.

Amendment 41

Proposal for a regulation Article 12 – paragraph 3 – point d

Text proposed by the Commission

Amendment

(d) the ground on which the decision not to apply the **price adjustment** measure is based, and a detailed justification for the use of the exception;

(d) the ground on which the decision not to apply the **IPI** measure is based, and a detailed justification for the use of the exception;

Amendment 42

Proposal for a regulation Article 12 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Any request for an exception based on this Article requires the approval by the Commission before the award of the contract.

Amendment 43

Proposal for a regulation Article 12 – paragraph 3 b (new)

Text proposed by the Commission

Amendment

3b. The Commission may object to a request for an exception to an IPI measure if the notification lacks a sufficiently detailed justification. The Commission shall inform the contracting authority or contracting entity about its decision without undue delay.

Amendment 44

Proposal for a regulation Article 12 – paragraph 4

Text proposed by the Commission

Amendment

4. In the event that a contracting authority or contracting entity conducts a negotiated procedure without prior publication, under Article 2 of Directive 2014/24/EU or under Article 50 of Directive 2014/25/EU and decides not to apply a price adjustment measure, it shall indicate this in the contract award notice it publishes pursuant to Article 50 of Directive 2014/24/EU or Article 70 of Directive 2014/25/EU or in the concession award notice it publishes pursuant to Article 32 of Directive 2014/23/EU and

deleted

notify the Commission no later than ten calendar days after the publication of the contract award notice.

The notification shall contain the following information:

- (a) the name and contact details of the contracting authority or contracting entity;*
- (b) a description of the object of the contract or the concession;*
- (c) information on the origin of the economic operators, the goods and/or services admitted;*
- (d) the justification for the use of the exception;*
- (e) where appropriate, any other information deemed useful by the contracting authority or contracting entity.*

Amendment 45

Proposal for a regulation Article 13 – paragraph 2

Text proposed by the Commission

2. Contracts concluded with an economic operator in violation of *price adjustment* measures adopted *or reinstated by the Commission* pursuant to this Regulation shall be ineffective.

Amendment

2. Contracts concluded with an economic operator in violation of *IPI* measures adopted pursuant to this Regulation shall be *considered to be 'ineffective' within the meaning of Directive 89/665/EEC.*

Amendment 46

Proposal for a regulation Article 16 – paragraph 1

Text proposed by the Commission

By 31 December 2018 and at least every three years thereafter, the Commission shall submit a report to the European

Amendment

By ... [two years after the date of entry into force of this Regulation] and at least every three years thereafter, the

Parliament and the Council on the application of this Regulation and on progress made in international negotiations regarding access for Union economic operators to public contract or concession award procedures in third countries undertaken under this Regulation. To this effect, Member States shall upon request provide the Commission with appropriate information.

Commission shall submit a report to the European Parliament and the Council on the application of this Regulation and on progress made in international negotiations regarding access for Union economic operators to public contract or concession award procedures in third countries undertaken under this Regulation. To this effect, Member States shall upon request provide the Commission with appropriate information. ***That report shall be made public.***

Amendment 47

Proposal for a regulation Article 16 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

The Commission shall establish at Union level a database of public procurement contracts or concession award procedures with third countries and the application of IPI measures under this Regulation, based on the information received from Member States. The Commission shall update the database annually.

Amendment 48

Proposal for a regulation Article 16 – paragraph 1 b (new)

Text proposed by the Commission

Amendment

Member States shall ensure that the application of this Regulation is monitored with a view to detecting threats to the financial interests of the Union and its Member States, strengthening the unity of the single market and/or protecting the rights of the consumers. Such monitoring shall be used to prevent, detect and adequately report possible instances of procurement fraud, corruption, conflict of interest and other serious irregularities.

Where monitoring authorities or structures identify specific violations or systemic problems, they shall be empowered to refer those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or parliamentary committees.

Amendment 49

Proposal for a regulation

Article 17

Text proposed by the Commission

Article 17

Amendment of Directive 2014/25/EU

Articles 85 and 86 of Directive 2014/25/EU shall be deleted with effect from the entry into force of this Regulation.

Amendment

deleted

Amendment 50

Proposal for a regulation

Article 17 a (new)

Text proposed by the Commission

Amendment

Article 17a

Review

By ... [three years after the entry into force of this Regulation], the Commission shall review whether this Regulation offers sufficient scope, functionality and efficiency to enable new procurement markets to be opened. The Commission shall report its findings to the European Parliament and Council.

If the goals of this Regulation have not been achieved, the Commission shall evaluate whether the leverage on third

countries that are not willing to cooperate would be reinforced by making Articles 85 and 86 of Directive 2014/25/EU mandatory.

PROCEDURE – COMMITTEE ASKED FOR OPINION

Title	Access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries		
References	COM(2016)0034 – C8-0018/2016 – COM(2012)0124 – C7-0084/2012 – 2012/0060(COD)		
Committee responsible Date announced in plenary	INTA 20.4.2012		
Opinion by Date announced in plenary	IMCO 20.4.2012		
Associated committees - date announced in plenary	25.10.2012		
Rapporteur for the opinion Date appointed	Ivan Štefanec 18.7.2019		
Discussed in committee	12.7.2021	1.9.2021	11.10.2021
Date adopted	27.10.2021		
Result of final vote	+: –: 0:	34 0 11	
Members present for the final vote	Alex Agius Saliba, Andrus Ansip, Pablo Arias Echeverría, Alessandra Basso, Brando Benifei, Adam Bielan, Hynek Blaško, Biljana Borzan, Vlad-Marius Botoș, Markus Buchheit, Andrea Caroppo, Dita Charanzová, Deirdre Clune, David Cormand, Carlo Fidanza, Evelyne Gebhardt, Sandro Gozi, Maria Grapini, Svenja Hahn, Virginie Joron, Eugen Jurzyca, Kateřina Konečná, Andrey Kovatchev, Jean-Lin Lacapelle, Maria-Manuel Leitão-Marques, Morten Løkkegaard, Adriana Maldonado López, Antonius Manders, Beata Mazurek, Leszek Miller, Anne-Sophie Pelletier, Miroslav Radačovský, Christel Schaldemose, Andreas Schwab, Tomislav Sokol, Ivan Štefanec, Róza Thun und Hohenstein, Tom Vandenkendelaere, Kim Van Sparrentak, Marion Walsmann, Marco Zullo		
Substitutes present for the final vote	Rasmus Andresen, Maria da Graça Carvalho, Claude Gruffat, Sarah Wiener		

FINAL VOTE BY ROLL CALL IN COMMITTEE ASKED FOR OPINION

34	+
ID	Alessandra Basso, Hynek Blaško, Markus Buchheit, Virginie Joron, Jean-Lin Lacapelle
NI	Miroslav Radačovský
PPE	Pablo Arias Echeverría, Andrea Caroppo, Maria da Graça Carvalho, Deirdre Clune, Andrey Kovatchev, Antonius Manders, Andreas Schwab, Tomislav Sokol, Ivan Štefanec, Róza Thun und Hohenstein, Tom Vandenkendelaere, Marion Walsmann
S&D	Alex Agius Saliba, Brando Benifei, Biljana Borzan, Evelyne Gebhardt, Maria Grapini, Maria-Manuel Leitão-Marques, Adriana Maldonado López, Leszek Miller, Christel Schaldemose
The Left	Kateřina Konečná, Anne-Sophie Pelletier
Verts/ALE	Rasmus Andresen, David Cormand, Claude Gruffat, Kim Van Sparrentak, Sarah Wiener

0	-

11	0
ECR	Adam Bielan, Carlo Fidanza, Eugen Jurzyca, Beata Mazurek
Renew	Andrus Ansip, Vlad-Marius Botoș, Dita Charanzová, Sandro Gozi, Svenja Hahn, Morten Løkkegaard, Marco Zullo

Key to symbols:

+ : in favour

- : against

0 : abstention

LETTER FROM THE COMMITTEE ON LEGAL AFFAIRS

COMMITTEE ON LEGAL AFFAIRS
THE CHAIR

Ref. D(2021) 21627

Mr Bernd Lange
Chair
Committee on International Trade
BRUSSELS

Subject: Opinion on Access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM2016/0034 – C8-0018/2016 – 2012/0060(COD))

Dear Chair,

Under the procedure referred to above, the Committee on Legal Affairs has been asked to submit an opinion to your committee. At its meeting of 09 September 2021, the committee decided to send the opinion in the form of a letter. It considered the matter at its meeting of 14 Octobre 2021 and adopted the opinion at that meeting¹.

The proposition for a new international procurement instrument should reflect the strong call of the European Union for more responsible business practices, including with regards to the respect of human rights, the environment and good governance.

¹ The following were present for the final vote: Adrián Vázquez Lázara(Chair), Raffaele Stancanelli(Vice-Chair), Pascal Arimont, Manon Aubry, Patrick Breyer, Daniel Buda, Caterina Chinnici, Geoffroy Didier, Pascal Durand, Angel Dzhambazki, Daniel Freund (Rule 209(7)), Jean-Paul Garraud, Esteban González Pons, Gilles Lebreton, Karen Melchior, Jiří Pospíšil, Marcos Ros Sempere, Nacho Sánchez Amor, Stéphane Séjourné, Axel Voss, Tiemo Wölken, Lara Wolters, Javier Zarzalejos.

A key legislative tool in this regard is the requirement for companies to exercise due diligence in their value chains to identify, prevent, mitigate, cease, and address human rights violations, environmental damage, and corruption. The European Council has adopted Conclusions calling for a proposal from the Commission for an EU legal framework on sustainable corporate governance, including cross-sector corporate due diligence obligations along global supply chains (1st of December 2020) and the European Commission has committed to put forward a legislative proposal for mandatory corporate due diligence (European Commission Work Program 2021).

Most importantly, the European Parliament has adopted by a vast majority a legislative own-initiative report on “Corporate due diligence and corporate accountability” calling for mandatory corporate due diligence rules to protect human rights, the environment and good governance in value chains and setting forth clear and ambitious propositions in that regard (10th of March 2021).

This resolution states that “*Member States are encouraged not to provide state support, including through (...) public procurement (...) to undertakings that do not comply with the objectives of this Directive.*” The design of a new international procurement instrument is an opportunity to achieve this objective of the European Parliament and require reciprocal standards to third countries in terms of the protection of human rights, the environment and good governance. Embedding due diligence and sustainability requirements into the international procurement instrument would show that the European Union takes leadership and that its public authorities are leading by example in terms on sustainability.

In adopting such a position, the European Parliament would also echo the opinion of the European Economic and Social Committee (27 April 2016) which recommends that the Regulation “develop a more ambitious approach to promoting the objectives of sustainable development, respect for fundamental rights and consumer protection in public procurement procedures”.

The Committee on Legal Affairs accordingly invites the Committee on International Trade, as the committee responsible, to incorporate the following requirements regarding sustainability and due diligence into its report:

- a) contracting authorities should ensure that the economic operators they award the contracts to conduct due diligence with regards to human rights, the environment and good governance in their entire value chain, in particular during their contract performance
- b) contracting authorities should ensure that the economic operators they award contracts to do not cause or contribute to human rights violations, environmental damages, or corruption, including outside their contract performance

- c) in awarding contracts, contracting authorities should prioritise economic operators that have a positive track record of responsible business conduct with regards to human rights, the environment and good governance

The suggestions are made with due regard given by the Committee on Legal Affairs to: the European Parliament resolutions of 17 December 2020 on Sustainable corporate governance² and of 10 March 2021 on Corporate due diligence and corporate accountability³ as well as the upcoming Commission proposals on the Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting and on the instrument to ensure Corporate due diligence and corporate accountability.

Yours sincerely,

A handwritten signature in blue ink, consisting of a large, stylized 'V' followed by a horizontal line and a small dash.

Vázquez Lázara

² P9_TA(2020)0372

³ P9_TA(2021)0073

PROCEDURE – COMMITTEE RESPONSIBLE

Title	Access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries			
References	COM(2016)0034 – C8-0018/2016 – COM(2012)0124 – C7-0084/2012 – 2012/0060(COD)			
Date submitted to Parliament	29.1.2016			
Committee responsible Date announced in plenary	INTA 20.4.2012			
Committees asked for opinions Date announced in plenary	DEVE 20.4.2012	EMPL 20.4.2012	ITRE 20.4.2012	IMCO 20.4.2012
	JURI 20.4.2012			
Not delivering opinions Date of decision	DEVE 9.11.2021	EMPL 10.9.2021	ITRE 23.2.2016	
Associated committees Date announced in plenary	IMCO 25.10.2012			
Rapporteurs Date appointed	Daniel Caspary 18.7.2019			
Discussed in committee	3.12.2019	17.3.2021	1.9.2021	26.10.2021
Date adopted	29.11.2021			
Result of final vote	+ : 36 - : 0 0 : 6			
Members present for the final vote	Barry Andrews, Anna-Michelle Asimakopoulou, Tiziana Beghin, Geert Bourgeois, Saskia Bricmont, Jordi Cañas, Daniel Caspary, Miroslav Číž, Arnaud Danjean, Paolo De Castro, Emmanouil Fragkos, Raphaël Glucksmann, Markéta Gregorová, Roman Haider, Christophe Hansen, Danuta Maria Hübner, Herve Juvin, Karin Karlsbro, Maximilian Krah, Danilo Oscar Lancini, Margarida Marques, Gabriel Mato, Sara Matthieu, Emmanuel Maurel, Carles Puigdemont i Casamajó, Samira Rafaela, Inma Rodríguez-Piñero, Massimiliano Salini, Helmut Scholz, Liesje Schreinemacher, Sven Simon, Dominik Tarczyński, László Trócsányi, Mihai Tudose, Kathleen Van Brempt, Marie-Pierre Vedrenne, Jörgen Warborn, Iuliu Winkler, Jan Zahradil, Juan Ignacio Zoido Álvarez			
Substitutes present for the final vote	Reinhard Bütikofer, Joachim Schuster			
Date tabled	6.12.2021			

FINAL VOTE BY ROLL CALL IN COMMITTEE RESPONSIBLE

36	+
ID	Roman Haider, Herve Juvin, Maximilian Krah, Danilo Oscar Lancini
NI	Tiziana Beghin, Carles Puigdemont i Casamajó
PPE	Anna-Michelle Asimakopoulou, Daniel Caspary, Arnaud Danjean, Christophe Hansen, Danuta Maria Hübner, Gabriel Mato, Massimiliano Salini, Sven Simon, Jörgen Warborn, Iuliu Winkler, Juan Ignacio Zoido Álvarez
Renew	Barry Andrews, Jordi Cañas, Karin Karlsbro, Samira Rafaela, Liesje Schreinemacher, Marie-Pierre Vedrenne
S&D	Miroslav Číž, Paolo De Castro, Raphaël Glucksmann, Margarida Marques, Inma Rodríguez-Piñero, Joachim Schuster, Mihai Tudose, Kathleen Van Brempt
The Left	Emmanuel Maurel
Verts/ALE	Saskia Bricmont, Reinhard Bütikofer, Markéta Gregorová, Sara Matthieu

0	-

6	0
ECR	Geert Bourgeois, Emmanouil Fragkos, Dominik Tarczyński, Jan Zahradil
NI	László Trócsányi
The Left	Helmut Scholz

Key to symbols:

+ : in favour

- : against

0 : abstention