

EU international procurement instrument

OVERVIEW

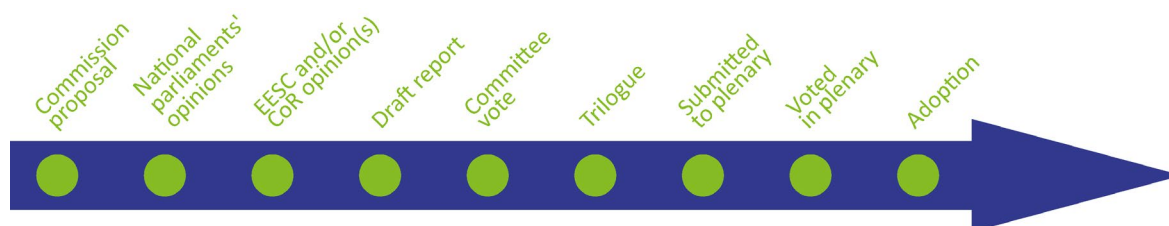
Government procurement forms an important part of national economies. The EU has opened up its public procurement markets to third countries to a large degree, while many other economies have had limited appetite to liberalise market access.

In 2012, the European Commission tabled a proposal for an international procurement instrument (IPI). The IPI would give the EU leverage in negotiating the reciprocal opening of public procurement markets in third countries. The Commission revised the proposal in 2016, taking on board some recommendations from the Council and the European Parliament. However, the revised proposal did not advance owing to differences in Member States' positions.

In 2019, discussions in the Council gathered new momentum in the context of a growing recognition of the need to level the playing field in international trade and the new negotiating mandate was adopted in June 2021. Parliament adopted its position on the revised IPI proposal in December 2021, modifying its design, scope and application. The trilogues concluded successfully in March 2022. Parliament approved the agreement in plenary by a large majority on 9 June 2022 and the Council formally adopted it on 17 June. The IPI entered into force on 29 August 2022.

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

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|-------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Committee responsible:</i> | International Trade (INTA) | Revised proposal: COM(2016) 34 |
| <i>Rapporteur:</i> | Daniel Caspary (EPP, Germany) | Initial proposal: COM(2012) 124 |
| <i>Shadow rapporteurs:</i> | Inma Rodríguez-Piñero (S&D, Spain) Catharina Rinzema (Renew, the Netherlands) Reinhard Bütikofer (Greens/EFA, Germany) Jan Zahradil (ECR, Czechia) Emmanuel Maurel (The Left, France) Hervé Juvin (ID, France) | 2012/0060(COD) Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision') |
| <i>Procedure completed.</i> | Regulation (EU) 2022/1031 OJ L 173/1 30.6.2022 | |



Introduction

The EU has aimed to open up its public procurement markets to third countries to a significant extent. Desiring a certain degree of reciprocal access for its businesses on foreign public procurement markets, the EU has consistently advocated the need for more open international public procurement. In 2012, the European Commission proposed an international procurement instrument (IPI), aiming to both improve the conditions under which EU businesses can compete for public contracts in third countries and strengthen the EU's position when negotiating the access of EU goods, services and suppliers to foreign public procurement markets. The EU has attempted to achieve this both plurilaterally, within the context of the 2014 revised Government Procurement Agreement (GPA) in the World Trade Organization (WTO), and bilaterally, through its free trade agreements (FTA), such as the government procurement chapter of the EU-Japan Economic Partnership Agreement (EPA), which foresees the liberalisation of additional procuring entities and sectors in addition to those covered by the GPA.

Results have been mixed, however, as many emerging economies remain reluctant to join the GPA or to open their public procurement markets to the EU bilaterally. In many economies, public procurement is seen as a [legitimate tool](#) to promote domestic production or employment (e.g. the United States (US) [Buy American Act](#)), even if this leads to imperfect competition or cost inefficiencies. Governments protect their procurement markets in either an explicit or *de jure* manner, with rules or regulations, or implicitly (*de facto*) with language or administrative barriers impeding market entry – even if unintentionally. The IPI seeks to address this imbalance.

In 2016, the Commission issued a revised IPI proposal. After several years of legislative deadlock, the initiative resurfaced in 2019 as a result of concerns about the competitiveness of European industry vis-à-vis emerging players such as China, as set out in the [Franco-German manifesto](#) for a European industrial policy. For instance, when in 2019 the Commission blocked plans for a Siemens-Alstom rail merger on competition grounds, [critics](#) argued that the merger would have helped the European rail industry to compete with the world's largest train manufacturer Chinese CRRG; the [Commission](#) pointed to the fact that Chinese suppliers had never taken part in EU public tenders in the sector and it will take a long time until they become 'credible suppliers'. The debate spurred calls for a [stronger EU industrial policy](#) both internally in the single market and externally on international procurement markets. In March 2020 the Commission presented its [new industrial strategy](#) for Europe, calling for the swift adoption of the IPI. The renewed discussions on the IPI are also part of an endeavour by the EU to find answers to a more challenging trading environment for the EU. As the EU attempts take a more assertive stance in the context of its pursuit of [open strategic autonomy](#), Member States now view the IPI as a more legitimate and necessary tool to pursue EU business interests on a global scale. In this context, the IPI proposal is seen as a practical way to help improve reciprocity, as it could be used as leverage to induce partner countries to withdraw discriminatory measures. Above all, the IPI carries a political message about the EU taking action to rebalance its competitive position with regard to emerging economies.

Economic context

Government procurement typically [accounts](#) for roughly 10 to 20 % of an average economy's gross domestic product (GDP); in [2016](#) the EU average for public procurement expenditure was about 13.4 %. In comparison, it was 16.2 % in Japan and 9.4 % in the US. Within the EU, the countries with the highest levels of public procurement were the Netherlands, Finland and Sweden, and those with the lowest were Ireland, Cyprus and Portugal.

According to the Commission, in 2018 the EU had opened *de jure* some [€352 billion](#) worth of its [€2 trillion](#) public procurement of goods, services and works markets to bidders from GPA signatories (e.g. Australia, Canada, Japan and the US). Important trade partners such as Brazil, China, India and Turkey have not (yet) joined the GPA. At the same time, the Commission has reported a clear increase in protectionist measures applied by countries such as Brazil, China, Russia and the US since

2013. The Commission [estimates](#) that half the global procurement market is currently closed to foreign bidders but that greater access could more than double EU procurement exports, adding €12 billion to the existing €10 billion in exports (tenders won by EU companies abroad). This would still represent a minor share of total EU goods and services exports, which stood at €2.875 trillion in 2018. Common [hurdles](#) faced by EU companies abroad include: a lack of transparency (no online publication of notices or fragmented procedures), a requirement for national establishment such as joint ventures (China, Indonesia) or local establishment (Brazil, Indonesia), local origin requirements (India 50 %, Indonesia 50 %) or the '[buy Chinese](#)' policy (also present in the US as 'buy American'), and the exclusion of major government procurement projects (e.g. the Three Gorges Dam, the Bird's Nest and other 2008 Olympic venues in China).

Filling the data gap in public procurement

Reliable statistical data on procurement is challenging to obtain, as a result in part of differing accounting standards. In 2019, to address this issue, the European Commission launched an international public procurement initiative ([IPPI](#)). The Commission's new database provides detailed data on government contracts, including barriers that EU companies face. The database includes information on nearly 40 million public contracts and covers nine key EU trading partners: Australia, Brazil, Canada, China, India, Indonesia, New Zealand, Thailand and the US.

Improved access to third countries' public procurement markets is of interest to competitive and growth-oriented EU businesses eager to gain access to new markets, in particular companies that are highly competitive in various segments traditionally covered by procurement contracts (e.g. railways, road construction or telecommunications). In addition, economic analyses have [shown](#) that opening public procurement markets to international competition can increase GDP, and that closing them can have the reverse effect. Since the EU's public procurement markets are already *de jure* open to foreign bidders, it has proven difficult for the Commission to get third countries to commit to opening their public procurement markets through trade negotiations. On the other hand, third countries have argued that *de facto* EU public procurement markets are difficult to access, and cite low penetration rates for foreign bidders in EU tenders. Even within the [EU single market](#), cross-border integration remains limited; in 2015 the proportion of direct contracts awarded to foreign companies remained largely under 5 % for the EU-28. The common hurdles EU companies face when bidding for contracts in other Member States include gaps in the publication of tenders or use of negotiated procedures without publication in certain sectors (e.g. IT solutions), as well as the lack of systematic data on national procurement systems.

Existing situation

EU legislative framework

The EU has a relatively open public procurement market and gives equal treatment to bidders regardless of their origin. In 2019, the Commission issued [guidance](#) on the participation of third-country bidders and goods in EU procurement markets, addressing issues such as abnormally low tenders and quality standards. The guidance states that the EU should provide treatment that is no less favourable to signatories than to the EU's own companies. Yet operators from third countries with which no agreement is in place may potentially be excluded. For the [utilities sector](#) (water, energy, transport, postal services), public buyers can reject tenders where over half of the value of the products come from third countries that are not covered by the GPA or a bilateral agreement. There are also exceptions in place for the security and defence sectors, allowing public buyers to refrain from giving access to third countries. However, this guidance is non-binding, and it is up to the procuring entities at governmental or sub governmental levels to exclude companies from non-covered countries for strategic reasons. As the fundamental principle of procurement is value for

taxpayers' money, it is not necessarily in the procuring entities' interest to exclude potential bidders that can tender at a competitive price.

The general [Directive 2014/24/EU](#) on public works, public supply and public service aims to open procurement for bidders from anywhere in the EU, but does not contain provisions on opening markets for non-EU bidders. The various Member States have developed [differing systems in domestic law](#). For instance, Germany treats bidders equally regardless of nationality, while Belgium and Italy forbid third-country bids unless there are international commitments at WTO or bilateral level. Spain requires symmetric reciprocity, while Estonia, Hungary and Austria give discretion to procuring authorities.

The sectoral Directive [2014/25/EU](#) coordinates procurement procedures for utilities (water, energy, transport and postal services) and sets out rules on third-country bidders participating in EU tenders, including conditions for the rejection of third-country tenders. Article 85 on 'Tenders comprising products originating in third countries' and Article 86 on 'Relations with third countries as regards works, supplies and service contracts' in Section 4 are both relevant.

US threat to withdraw from the GPA

In February 2020, the Trump administration [threatened](#) to withdraw from the GPA by means of a draft executive order, so that GPA parties such as the EU and Canada would lose their preferential access to US public procurement markets. The proportion of foreign-located firms winning US tenders was 0.04 % in 2015 (US\$12.1 billion out of a total procurement market of US\$290.9 billion), of which EU firms accounted for 23 % and Canadian firms for 5 %. The US market represents about a quarter of all tenders won abroad by EU firms.

In 2021, the Biden administration [reversed](#) this course of action, in particular removing the previous administration's order to withdraw public purchases of [medicines](#) and pharmaceutical products from the US commitments under the GPA, to which trade partners had objected.

Source: US Government Accountability Office, [Foreign Sourcing in Government Procurement](#), 2019.

WTO Agreement on Government Procurement

Under the WTO General Agreement on Tariffs and Trade ([GATT](#)), government procurement is exempt from the national treatment principle ([Article III 8\(a\)](#)). As a result, WTO members are free to give preference to domestic companies in public procurement.

Within the framework of the WTO, signed in 1994 and substantially revised in 2014, the GPA is a plurilateral agreement, meaning that not all of the 164 WTO members have signed it. The GPA aims to open public procurement markets to partner countries and has only 20 signatory parties comprising 48 WTO members (including Canada, the EU, Japan, the UK and the US), but not including major emerging economies such as Brazil, China, India and Russia.

The aim of the GPA is to open up public procurement to international competition as much as possible. Under the GPA, parties agree to abide by the principles of non-discrimination and national treatment (treat firms from third countries as your own). [Article 2](#) sets out the scope and coverage of the GPA (definition of procurement for governmental purposes, threshold values, exceptions). Each signatory party sets out in their own coverage schedules which a) procuring entities, b) goods, services and construction services, and c) threshold values they agree to liberalise under the GPA, and which exceptions they wish to retain. Hence, the GPA does not cover all levels of government systematically, and some of the parties have limited coverage of procurement in their schedules.

Beyond the WTO: Work on public procurement by the OECD, development banks and the UN

Several intergovernmental organisations have developed procurement-related policy instruments, frameworks and principles. One of the key focus areas for the Organisation for Economic Co-operation and Development (OECD), development banks and United Nations (UN) on public procurement is tackling corruption, which can be an undesirable by-product of public procurement activities that involve discretionary decision-making at different levels of government. Cooperation

at international level is important to agree on common principles and to complement national and EU-level laws and regulations on public procurement.

OECD

The [OECD](#) has an important public procurement role that includes helping governments reform their public procurement systems, running specific country projects (e.g. in Algeria and Mexico) and establishing policy dialogue. In addition, the OECD has developed [survey-based datasets](#) on public procurement, an area where data collection has long been an issue.

Development banks

Multilateral development banks, such as the World Bank and the Asian Development Bank, are major financial players in public infrastructure projects. They have therefore developed their own rules to ensure that financing is objective, principled and devoid of corruption. In addition, to ensure consistency, development banks have cooperated on [common core principles](#), such as economy (competitive tenders win) and transparency (e.g. publication of contract opportunities).

United Nations

The [UNCITRAL model law on public procurement](#) (2011) aims to help states formulate procurement laws, and contains procedures and principles to prevent corruption. Additional guidelines have been developed ([guide to enactment of the UNCITRAL model law on public procurement](#)) to support policymakers. In addition, the [UN Convention against Corruption](#) aims to combat corruption, facilitate international cooperation in the fight against corruption, and promote integrity, and includes provisions on public procurement (Article 9), related to the public distribution of information, the establishment of award criteria, domestic review and appeal systems for instance.

EU FTAs with provisions on public procurement

FTAs do not necessarily guarantee full access to other party's public procurement markets. However, since 2000, EU trade agreements have included public procurement provisions that aim to liberalise markets beyond the WTO GPA. They typically include a specific definition of 'covered procurement', which, together with threshold values, exemptions and coverage schedules, defines the forms of public procurement that fall within the scope of each FTA. Some of the most ambitious government procurement chapters to be found in EU FTAs are those in the EU-UK Trade and Cooperation Agreement ([TCA](#)), which incorporates and goes beyond the GPA with a wider range of sectors ([Annex 25](#)), as well as in the [EU-Japan EPA](#), which fully incorporates the GPA and adds new procuring entities and sectors (e.g. railways, telecommunications, insurance), increasing transparency processes and mutual recognition of conformity assessment rules. Another example is the EU-Canada trade agreement ([CETA](#)) that extends public procurement market access to Canadian provinces. However, many of the EU's trade agreements contain exemptions that limit EU companies' access to third countries' public procurement markets.

Preparation of the proposal

Original 2012 proposal

The Commission's [2012 proposal](#) targeted only 'non-covered procurement', i.e. goods and services that are not subject to an international agreement on procurement between the EU and a third country or the GPA which provide for dispute settlement mechanisms. Covered procurement was not targeted by the proposal, as it was subject to international commitments ([article 4](#)). For non-covered procurement, the proposal would have introduced two distinct procedures – a decentralised and a centralised one – for the application of restrictions to the EU's procurement market. Under the decentralised pillar, procuring entities could have requested the Commission's

approval to exclude a tender from tendering procedures ([article 6](#)) as long as its estimated total value, net of value-added tax (VAT), was equal to or above €5 million, and the proportion of non-covered goods constituting the tender was at least 50 % of its total value. Under the centralised pillar, the Commission would investigate alleged restrictive procurement measures in a third country. Other key provisions covered abnormally low-priced tenders ([article 7](#)) and exceptions ([article 13](#)).

The initial proposal was considered rather burdensome to implement, notably as it contained two different procedures for launching a potential closure of EU procurement markets, one bottom-up driven by Member States' competent authorities, and one driven by the Commission. It also encountered opposition on ideological grounds from some Member States, who did not see measures to restrict access to the EU market as the right tool to encourage third countries to open up, fearing, on the contrary, the risk of escalating trade protectionist measures.

In the run-up to its 2012 proposal for an IPI, the Commission carried out an open internet consultation from 8 June to 2 August 2011 and received 215 contributions. It subsequently organised various other consultations with civil society, including a public hearing on 8 July 2011 and a liaison hearing with social partners on 7 February 2011. It released its [impact assessment](#) together with its [proposal](#) in March 2012. The chosen legal basis for the IPI was Article 207 of the Treaty on the Functioning of the European Union, setting out the procedure for common commercial policy.

Revised 2016 proposal

The deadlock in negotiations on the 2012 proposal led the European Commission to present an [amended proposal](#) on 29 January 2016. Its main points include:

- eliminating the decentralised pillar while keeping the centralised one; shortening the time limit for country investigations conducted under the centralised procedure and making their findings public ([article 6](#)) – in line with the Parliament's amendments;
- removing the option of complete closure of the EU procurement market for a third country, thereby leaving the possibility for price adjustment measures only ([article 8](#));
- adding price adjustment measures: the procuring entity will adjust the price of big tenders (at least €5 million in value excluding VAT, with a penalty of up to 20 %). At least 50 % of the tender's value must originate in the third country that has adopted or maintained discriminatory measures. The burden of proof regarding the proportion of non-covered goods is on the foreign bidder (in the 2012 proposal, this obligation rested with the EU Member States' national contracting authorities in cases of temporary market closure) ([articles 8 and 11](#));
- introducing two exemptions: one for European small and medium-sized enterprises (SMEs), and one for goods and services originating in least developed countries subject to a generalised scheme of preferences ([GSP+](#)) treatment or the '[Everything but arms](#)' arrangement (provided that more than 50 % of the total value of the tender originates in such a country – [articles 4-5](#)). This is also in line with one of the Parliament's amendments.

Hence, the revised centralised pillar of the IPI consists of the following main steps:

- 1 Where there is alleged discrimination against EU companies in the procurement market of a third country in an area not falling under the GPA or an FTA, the Commission may initiate an investigation ([article 6](#)).
- 2 When this investigation finds discriminatory restrictions vis-à-vis EU goods, services and/or suppliers, the Commission shall invite the country concerned to consult on the opening of its procurement market ([article 7](#)). Such consultations can also take place in the form of negotiations on an international agreement.

- 3 As a last resort, the Commission can, after consulting with the Member States, propose an implementing act that would impose a price adjustment measure
 - on tenders from the targeted country;
 - having a total value of at least €5 million (exclusive of VAT);
 - of which at least 50 % is made up of goods and services originating in the targeted country.

Accordingly, a penalty of up to 20 % would be calculated on the price of the tenders concerned, but only to determine the evaluation and ranking of the tenders' price component (not actually hiking up the price). This would eventually need to be applied by the EU Member States' contracting authorities and entities. Potentially, the price adjustment would result in a competitive advantage on EU public procurement markets for EU and non-targeted countries' tenders.

Parliament's starting position

The plenary voted in January 2014 on a set of [amendments](#), but referred the file back to the Committee on International Trade (INTA), giving a mandate to its rapporteur to enter into negotiations with the Council of the EU. Parliament suggested:

- aligning the decentralised procedure with the centralised one (meaning that the former could only be used when the latter had already been initiated); this was linked to fears of possible fragmentation of the internal market and a heavy administrative burden on procuring entities;
- expanding the scope of exceptions so as to avoid applying the instrument to least developed countries and to developing countries participating in GSP+ framework;
- tightening the time limits for Commission investigations.

The Parliament's position was largely reflected in the Commission's 2016 revised proposal. However, concerns about the IPI's efficacy remained.

Council starting position

The Council did not support the Commission's original proposal because of reservations voiced by certain Member States, in particular [doubts](#) as to whether the IPI could be interpreted as protectionist, and whether it would actually help EU companies access foreign markets. A number of Member States, including Germany, the Netherlands, Sweden and certain central and eastern European countries, were against the proposal. The Member States supporting the proposal were led by France and Italy.

In 2019, the IPI appeared as one of 10 actions for EU relations with China in the [EU-China strategic outlook](#) presented by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP) as a contribution to the European Council meeting in March 2019. This was taken up in the European Council [conclusions](#) of 22 March 2019, which called on the Council to resume discussions on the EU's international procurement instrument. The discussions in the Council, however, went beyond the amended Commission proposal, and focused on the respective merits and shortcomings of the different mechanisms to achieve the proposal's objectives (e.g. market closure versus price adjustment; targeting bidders versus targeting goods and services). Following the revision of the proposal and recognition of the need for a stronger EU industrial policy and more strategic autonomy in trade, discussions in the Council gained new momentum. While [differences remain](#) with regard to the specific design of the IPI, the changed global trading environment, with protectionist measures on the rise, means that the EU needs to become more assertive towards its trading partners to maintain a fair, reciprocal and rules-based trading system.

The changes the revised proposal would bring

At international level, the IPI might improve the EU's leverage in [government procurement negotiations](#) and result in subsequent market opening at bi- or plurilateral levels through the built-in leverage of investigations and consultations.

Within the EU, the key change the IPI would bring is that the EU procuring entities would need to enact possible price adjustment measures in their tender processes following negative findings in Commission investigations and failure of consultations. However, it is likely that the IPI will be used sparingly and on specific sectoral grounds. In addition, the threshold (currently proposed to be €5 million) would help limit the administrative burden, excluding smaller tenders from the scope of the IPI. Procurement entities will need nevertheless to delineate carefully the origins of the goods or products procured in cases of integrated global value chains, and analyse the establishment and centre of economic activity for tenders involving works and services. This can be complicated for tenders with long time horizons, when it is too early for bidding companies to set out their sourcing strategy definitively. Therefore, the alternative method to target bidders based on their origin is also currently under discussion. Clear guidance should also be provided on whether the maximum 20 % price adjustment should apply to the tender's price at face value and/or to the full lifecycle costs. A mechanism to allow market closure would help avoid this issue. However, concerns with regard to the IPI include its possible [administrative burden](#) on [businesses](#) and the national contracting authorities at different levels of government. The 20 % maximum on the price adjustment measure could also prove insufficient to achieve the underlying objective of inflating the third-country tender above the EU companies' offers.

Companies whose economic activity is predominantly located in third countries that lack reciprocity could still continue to bid in EU public procurement markets after the introduction of the IPI in its current form. These companies could also continue to win tenders in areas not falling under Commission investigations. Since participation in public procurement markets is a strategic choice for firms on account of the resource- and time-intensive nature of large tenders, third-country companies will have to take into account the risk of an IPI procedure being launched in their area when deciding whether to participate in a bid. EU companies might benefit in individual tender procedures as a result of price adjustment, or exclusion of foreign bidders from third countries, but generally their competitiveness would remain unaffected. The price adjustment measure in the revised IPI aims to target specific products, or sectors of works and services (including construction services), but does not explicitly exclude applying the restriction to entire countries.

Rules for third-country bidders in EU 5G public procurement markets

EU public procurement rules enable EU Member States to consider security, labour and environmental standards in their 5G award criteria, rather than only focusing on the lowest price. The Commission notes that tenders from third countries with which the EU does not have international or bilateral trade agreements with provisions on government procurement can be excluded. In addition, Member States are free to exclude bidders on the basis of national security concerns.

Source: [Cybersecurity of 5G networks – EU toolbox of risk mitigating measures](#), January 2020.

While foreign-sourced procurement is still rare in Europe, specific areas highlighted by the [Commission](#) include the construction of a bridge in Croatia (€345 million) and construction work for water projects in Poland (€53 million) by Chinese companies; gas pipelines in Romania by Turkish companies (€127 million); high-voltage cables in Greece by Norwegian companies (€111 million); and railway and tramway rolling stock in Italy by Swiss companies (€115 million). Data remain scarce and do not for instance capture situations where third-country bidders create financial subsidiaries within the EU or strike partnerships with EU companies.

Advisory committees

The European Economic and Social Committee (EESC) issued an [opinion](#) on the Commission's amended proposal on 27 April 2016. Among other things, the EESC expressed doubts as to whether the proposal could achieve balanced liberalisation of public procurement markets in third countries. In particular, it noted that only 7 % of public purchasing contracts exceeded the proposal's threshold value of €5 million, and also considered the maximum penalty of 20 % calculated on the price of the tender to be insufficient. While the EESC regretted that not enough attention had been given to sustainable development, it voiced support for the proposed exemptions for least developed countries and SMEs.

In its [opinion](#) on the implementation of free trade agreements of 2 July 2020, the European Committee of the Regions (CoR) endorsed the Commission's work on the IPI. More specifically, the CoR shared the view that 'the EU needs to shift into offensive gear to ensure reciprocity and tackle protectionism in access to procurement markets in third countries', and therefore regretted the lack of progress in the interinstitutional negotiations on the revised IPI proposal.

Stakeholder views¹

[BusinessEurope](#) considers that the IPI proposal pursues the right objective of encouraging third countries such as China to maintain balanced market access, but that modifications are needed, e.g. avoiding complex price adjustment mechanisms. Non-governmental organisations and climate advocacy organisations have focused on the integration of [social](#) and environmental objectives into public procurement rules more broadly.

Academic views

The claim that EU public procurement markets are much more open than those of other major economies is not uncontested. Using a different methodology, based on World Input Output Database (WIOD) and OECD data, economics professor Patrick Messerlin has [held](#) that the openness of the EU's public procurement markets towards third countries is actually similar to that of both the US and Japan. Concerns have been voiced as to whether the IPI, and the broader underlying context of a [geopolitical Commission](#), will be perceived as a threat and lead to tensions with trading partners.

In *EU Economic Law in Times of Crisis*, EU official Frank Hoffmeister (2016) argued that the fragmentation of Member States' systems with regard to treatment of third-country bidders represented an important weakness of the EU, and that the IPI would help redress this shortcoming. In contrast, a [Maastricht University research paper](#) on the 2012 IPI proposal noted that, while in the short run, the IPI could increase the EU's bargaining power with industrialised trading partners, in the long term, it was doubtful that the IPI would contribute to more *de facto* liberalisation because of risks of retaliation and ensuing lack of leverage.

The question of the WTO-compatibility of the revised IPI has also been raised ([Dawar, 2016](#)), mainly with reference to the scope of the GATT Article III 8(a) carve-out and whether the condition of 'products purchased for governmental purposes' should be interpreted broadly or narrowly. Another issue is whether the IPI's threshold requirement of 50 % to determine the origin of the product could be seen as conferring unfair benefits or as a 'domestic content requirement'.

Legislative process

After the Commission submitted its original proposal for an IPI in March 2012, the European Parliament debated it in committees – with INTA as lead and IMCO as associated committee – and in plenary. In January 2014, the plenary voted on amendments, but referred the file back to INTA, giving a mandate to its rapporteur to enter into negotiations with the Council. The latter, however, failed to agree on a position to start interinstitutional negotiations with the Parliament. The

Commission subsequently decided to revise its proposal, and published an amended version in January 2016. INTA discussed the amended proposal during the last legislative term (on the basis of a draft report by the rapporteur), and a deadline for amendments was set. However, it was decided to postpone the vote in committee until there was further clarity on the direction of the Council's deliberations. Following the European elections in 2019, INTA requested that the European Parliament's position be carried over to the current legislative term.

After years of deadlock, the Member States eventually began to converge on a common position. The revised IPI proposal regained traction during the German Presidency of the Council, and Member States reached a compromise during the Portuguese Presidency. In June 2021, the Council agreed on its IPI [mandate](#) (general approach) for negotiations with the Parliament, and the legislative process picked up again. The Council made several key amendments to the Commission's revised proposal; these include:

- altered deadlines for investigations and consultations;
- a bidder-focused procedure for determination of origin;
- the possibility for both adjustment measures and market exclusion of a bidder;
- potential for adjustment measures to take into consideration both price and quality criteria;
- IPI to be applicable to new procedures launched after the adoption of the regulation, and subject to revision;
- differentiated and proportional thresholds for goods and services, as well as works and concessions;
- additional contractual obligations ('add-on provisions') to avoid circumvention of IPI measures;
- possibility for exceptions, for instance for public policy purposes or disproportionate price/cost increases;
- consideration of least developed countries and EU SMEs;
- requirement for regular revision of the list of contracting authorities exempted from the regulation (list valid for three years, can be revised every three years).

In reaction, Parliament's INTA committee also resumed work on the IPI with a view to obtaining a mandate for interinstitutional negotiations. In November 2021, INTA adopted its report on the IPI by rapporteur Daniel Caspary (EPP, Germany). Members voted in favour of the [report](#) during the December 2021 plenary session by a strong majority of 590 votes. Parliament's position supported giving the Commission power to determine the application of the IPI and to grant exceptions to it. The IPI is primarily to cover countries that are not part of the GPA or do not have an FTA with procurement commitments with the EU. However, countries that are engaged in the above, but with no reciprocal commitments to the EU in certain areas of procurement may be subjected to the IPI in these specific areas. Parliament's mandate set new thresholds for the application of IPI measures to procurement procedures that have an estimated value of at least €10 million net for works and concessions, and at least €5 million net for goods and services. Parliament's position also shortened the time required for investigation and consultations with third countries from eight months to six, with one possible extension of three months. If the negotiations with a third country do not lead to a satisfactory outcome, the Commission may apply either of two remedies by means of [implementing acts](#): exclude the company from the bidding process, or adjust the score of a bidder in the evaluation process. The latter means that the score used in the evaluation is diminished by a certain percentage. Parliament's mandate provided for that percentage to be set to as much as 100 % of the evaluation score of the tender.

Moreover, the Parliament proposed to narrow to two the number of exceptions allowing the contracting authorities not to apply the IPI measures: when all bidders originate from the country subject to the IPI measures; and when there are over-riding reasons of public interest, such as public health or environment protection. Furthermore, the Parliament supported exempting least developed countries from the IPI, as well as developing countries covered by the GSP+, 'unless the

economy of such countries is considered to be competitive in the sectors concerned'. Parliament, the Council and the Commission entered into interinstitutional negotiations (trilogues) in mid-December 2021.

The trilogues concluded with a provisional [agreement](#) on 14 March 2022. The negotiators set the thresholds for application of the IPI measures at €15 million for tenders for works and concessions, and at €5 million for goods and services, both before VAT. This compromise should serve to minimise the administrative burden, while at the same time maintaining the instrument's wide reach. Parliament was successful in including within the IPI an obligation to take social, environmental and labour requirements into consideration when judging bids. Parliament's negotiating team, led by International Trade Committee chair Bernd Lange and rapporteur Daniel Caspary, also managed to reduce the exceptions under which public authorities looking for tenderers are allowed to opt out of IPI measures. Large contracting authorities, such as the city halls of big cities or central governments, will always be under an obligation to apply the new rules. Only local contracting authorities representing fewer than 50 000 people will be exempt – while the annual overall tender value percentage for which contracting authorities must apply the IPI is set at 80 %. Bidders from least developed countries, which benefit from the ['everything but arms'](#) trade scheme, are also exempt from the IPI measures.

The IPI applies to economic operators, goods and services from third countries that either do not have an international public procurement agreement with the EU or that have an agreement that does not include commitments to open up markets for the goods or services in question. The IPI seeks to convince third countries to cease practices that close their public procurement markets by negotiating with the EU. To that end, when the Commission conducts an investigation on barriers to EU companies, it will consult with the third country concerned to try to persuade it to remove them. If these barriers are serious and persist, despite the consultation, the EU will be able to restrict the access of that country's firms to EU public procurement markets. This will be done by means of a price penalty or a reduced score for the bid. The reduced score could reach 50 % for score adjustment measures and 100 % when solely price is used to select the successful bidder. Tenderers could also be excluded from the award procedures. The companies will not be asked to charge more; rather the public authorities would consider the offer to have a [higher price](#) than the actual price specified by the bidder.

In order to prevent circumvention of these rules, additional [contractual obligations](#) will be imposed on successful tenderers in procedures covered by the IPI. This could be, for example, an obligation to prohibit subcontracting of more than 50 % of the total value of the contract to economic operators from a third country subject to an IPI measure. To help public authorities implement the IPI, the Commission will publish guidelines with a particular focus on SMEs. The Commission will also review the scope, functioning and effectiveness of the instrument on a regular basis.

The European Parliament approved the agreement by a large majority during its plenary session on 9 June 2022, and the Council formally adopted it on 17 June 2022. The [Official Journal](#) of the EU published the text of the regulation on 23 June 2022. The IPI entered into force on 29 August 2022.

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ENDNOTE

- ¹ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.

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