



2012/0060(COD)

27.7.2021

*****I**

DRAFT 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 second report of the Committee on International Trade (A9-0000/2021),
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

Text proposed by the Commission

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

Or. en

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

Or. en

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

Or. en

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 these agreements.

Or. en

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.

Or. en

Amendment 6

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 opportunities.

Amendment

(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.

Or. en

Amendment 7

Proposal for a regulation Recital 10

Text proposed by the Commission

(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 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.

Amendment

(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 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

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.)

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).

Or. en

Amendment 8

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 Communication from the Commission of 24 July 2019 on 'Guidance on the participation of third-country bidders and goods in the EU procurement market' and with 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 Union's 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 Union and could be excluded.

Or. en

Amendment 9

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.

Or. en

Amendment 10

Proposal for a regulation Recital 13

Text proposed by the Commission

(13) The origin of a good should be

Amendment

(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).*

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).*

Or. en

Amendment 11

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 effective or***

stable and continuous link with the economy. Article 86 of Directive 2014/25/EU also refers to the concept of “direct and effective link with the economy” which is equivalent to the concept of ‘substantive business operations’.

Or. en

Amendment 12

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

Amendment 13

Proposal for a regulation Recital 16

Text proposed by the Commission

Amendment

(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.

deleted

Amendment 14

Proposal for a regulation Recital 17

Text proposed by the Commission

Amendment

(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

(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

goods, services **and** economic operators.

contracting authorities or contracting entities maintain or adopt **restrictive** practices against Union goods, services **or** economic operators.

Or. en

Amendment 15

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 an 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.***

Or. en

Amendment 16

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 industry, users and consumers. The Commission should weigh the consequences of 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 opening third-country markets and improving market access opportunities for Union economic operators should 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.

Or. en

Amendment 17

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) 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 as defined in Regulation (EU) No 978/2012.

Or. en

Amendment 18

Proposal for a regulation Recital 20

Text proposed by the Commission

Amendment

(20) If the existence of a restrictive and/or discriminatory procurement

(20) When conducting the investigation, the Commission should

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.

invite the *third* country concerned to enter into consultations with a view to *eliminating any restrictive measures or practices and* improving the tendering opportunities for Union economic operators, goods and services *regarding* procurement *and concessions markets* in that country.

Or. en

Amendment 19

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* improvements to the tendering opportunities for Union economic operators, goods and services within a reasonable timeframe, the Commission, *where appropriate*, should be able to adopt *measures under this Regulation, in the form of exclusion of tenders ('IPI measures')*.

Or. en

Amendment 20

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

deleted

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.

Or. en

Amendment 21

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, when those dynamic purchasing systems were 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.

Or. en

Amendment 22

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.

Or. en

Amendment 23

Proposal for a regulation Recital 23 c (new)

Text proposed by the Commission

Amendment

(23c) To avoid 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 was subject to an IPI measure.

Or. en

Amendment 24

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 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. *deleted*

Or. en

Amendment 25

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*

Or. en

Amendment 26

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 Commission may establish a list on its own initiative.

deleted

Or. en

Amendment 27

Proposal for a regulation

Recital 27

Text proposed by the Commission

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 **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.**

(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 **if** 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 security or public health emergencies. 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 appropriate monitoring of the implementation of this Regulation.

Or. en

Amendment 28

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/EEC¹⁹ or Article 8 of Council Directive 92/13/EEC²⁰. 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.***

¹⁹ 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).

²⁰ 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,

Amendment

(28) In case of misapplication ***of IPI measures*** by contracting authorities or contracting entities, ***which negatively affects the chances to participate in the procurement procedure of economic operators having such a right, Council Directives 89/665/EEC and 92/13/EEC should be applicable. The affected economic operator could therefore initiate a review procedure according to the national law implementing these Directives, if, for example, a competing economic operator should have been excluded. The Commission should also be able to apply the corrective mechanism according to Article 3 of Council Directive 89/665/EEC¹⁹ or Article 8 of Council Directive 92/13/EEC²⁰.***

¹⁹ 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).

²⁰ 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).

23.3.1992, p. 14).

Or. en

Amendment 29

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 Council* (the “Trade Barriers Regulation”)*.

** 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).*

Or. en

Amendment 30

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.

Or. en

Amendment 31

Proposal for a regulation

Recital 32

Text proposed by the Commission

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

Amendment

(32) *In line with the Interinstitutional Agreement of 13 April 2016 on Better Law-Making^{9a} 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.***

^{9a} OJ L 123, 12.5.2016, p. 1.

Or. en

Amendment 32

Proposal for a regulation

Recital 33

Text proposed by the Commission

(33) *In accordance with the principle of proportionality, it is necessary and*

Amendment

deleted

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,

Or. en

Amendment 33

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

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.

Or. en

Amendment 34

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:

Or. en

Amendment 35

Proposal for a regulation

Article 1 – paragraph 3

Text proposed by the Commission

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.***

Amendment

deleted

Or. en

Amendment 36

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

Or. en

Amendment 37

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.

Or. en

Amendment 38

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.

Or. en

Amendment 39

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 respectively;**

Or. en

Amendment 40

Proposal for a regulation

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

Text proposed by the Commission

(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 41

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 respectively;

Or. en

Amendment 42

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

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

Or. en

Amendment 43

Proposal for a regulation

Article 2 – paragraph 1 – point b

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 44

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 **Directive 2014/23/EU and 2014/25/EU** respectively;

Or. en

Amendment 45

Proposal for a regulation

Article 2 – paragraph 1 – point d

Text proposed by the Commission

(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**;

Amendment

deleted

Amendment 46

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

Or. en

Amendment 47

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, 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*.

Or. en

Amendment 48

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;

Or. en

Amendment 49

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;

Or. en

Amendment 50

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;

Or. en

Amendment 51

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, 2014/24/EU and 2014/25/EU respectively;

Or. en

Amendment 52

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.

Or. en

Amendment 53

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).**

Or. en

Amendment 54

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 provision of a service.

2. For the purpose of this Regulation, **except for Articles 8a(3) and 8a(6) thereof**, the execution of works or a work within the meaning of Directives **2014/23/EU**, 2014/24/EU and Directive **2014/25/EU** shall be considered as the provision of a service.

Or. en

Amendment 55

Proposal for a regulation Article 3 – title

Text proposed by the Commission

Amendment

Rules of origin

Determination of origin

Or. en

Amendment 56

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).*

Or. en

Amendment 57

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**

Or. en

Amendment 58

Proposal for a regulation Article 3 – paragraph 3 – first subparagraph – 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 59

Proposal for a regulation

Article 3 – paragraph 3 – first subparagraph – 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***;

Or. en

Amendment 60

Proposal for a regulation

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

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.***

Or. en

Amendment 61

Proposal for a regulation

Article 3 – paragraph 3 – second subparagraph

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.*

Or. en

Amendment 62

Proposal for a regulation

Article 3 – paragraph 3 – third subparagraph

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

Or. en

Amendment 63

Proposal for a regulation

Article 3 – paragraph 3 – fourth subparagraph

Text proposed by the Commission

Amendment

A legal person shall be considered to be "controlled" by persons of a given country where such persons have the power to appoint a majority of its directors or otherwise to legally direct its actions.

deleted

Or. en

Amendment 64

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 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 10% 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.

Or. en

Amendment 65

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 may be rejected in accordance with the rules applicable to the award procedure.

Or. en

Amendment 66

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.

Or. en

Amendment 67

Proposal for a regulation Chapter II

Text proposed by the Commission

Amendment

Chapter II

deleted

Amendment 68

Proposal for a regulation Chapter III– title

Text proposed by the Commission

Investigations, consultations and **price adjustment** measures

Amendment

Investigations, consultations measures and **contractual obligations**

Or. en

Amendment 69

Proposal for a regulation Article 6 – title

Text proposed by the Commission

Investigations

Amendment

Investigations **and consultations**

Or. en

Amendment 70

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

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** 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

Commission within a specified period of time.

Member States to provide information to the Commission within a specified period of time.

Or. en

Amendment 71

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 remove the alleged third-country measure or practice. The Commission shall regularly inform Member States within the Committee established by Article 7 of Regulation (EU) 2015/1843 of the European Parliament and of the Council²⁵ (“Trade Barriers Regulation”).

²⁵ 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).

Or. en

Amendment 72

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 and Member States.***

Or. en

Amendment 73

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

Text proposed by the Commission

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.***

Amendment

Or. en

Amendment 74

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

Amendment

3. Where the Commission ***finds, following*** its investigation, that the alleged

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.

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 or 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.*

Or. en

Amendment 75

Proposal for a regulation Article 6 – paragraph 4

Text proposed by the Commission

Amendment

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

deleted

Or. en

Amendment 76

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, 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 may 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.

Or. en

Amendment 77

Proposal for a regulation Article 7

Text proposed by the Commission

Amendment

[...]

deleted

Or. en

Amendment 78

Proposal for a regulation Article 8

Text proposed by the Commission

Amendment

[...]

deleted

Or. en

Amendment 79

Proposal for a regulation Article 8 a (new)

Text proposed by the Commission

Amendment

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 may, if it considers it to be in the interest of the Union, 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 6 point (a). The procurement procedure shall not be designed with the intention of excluding it 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 and the Union's interest:

(a) the proportionality of the IPI measure regarding 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.

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, when 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 6, to restrict the access of operators, goods or services from third countries to procurement procedures by requiring contracting authorities or contracting entities to exclude tenders submitted by economic operators originating in those third countries;

6. 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 set out in Regulation (EC) No 2195/2002²⁶ as well as any applicable exceptions therein;

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

(c) specific categories of economic operators.

7. The Commission shall impose an IPI measure, according to paragraph 5, only when the third-country measure or practice is sufficiently severe and the potential negative impact due to the limited availability of alternative sources, as provided for in paragraph 2 point (b), is comparatively small.

8. The Commission may withdraw the IPI measure or suspend its application if the third country takes satisfactory corrective actions or 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 its findings publicly available and may 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.

9. An IPI measure shall expire five years from its entry into force or its extension, unless a review shows a need for its continued application. Such a review shall be initiated by a publication of a notice in the Official Journal of the European Union, at the initiative of the Commission nine months before the date of expiry, and shall be concluded within six months. Following the review, the Commission may extend the duration of an IPI measure for a period of five years in accordance with the examination procedure referred to in Article 14(2).

²⁶ Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ L 340, 16.12.2002, p. 1).

Or. en

Amendment 80

Proposal for a regulation Article 9

Text proposed by the Commission

Article 9

Authorities or entities concerned

Amendment

deleted

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.

Or. en

Amendment 81

Proposal for a regulation Article 9 a (new)

Text proposed by the Commission

Amendment

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) a commitment not to subcontract more than 10% 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 10% 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) and/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) between 10% and 30% 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 90% 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.

Or. en

Amendment 82

Proposal for a regulation Article 10

Text proposed by the Commission

Amendment

[...]

deleted

Or. en

Amendment 83

Proposal for a regulation Article 11

Text proposed by the Commission

Amendment

[...]

deleted

Or. en

Amendment 84

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

1. Contracting authorities and contracting entities may, *on an exceptional*

apply the *price adjustment* measure with respect to a procurement *or a concession* procedure if:

basis, decide not to apply the *IPI* measure to a procurement procedure if:

Or. en

Amendment 85

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

Or. en

Amendment 86

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

Or. en

Amendment 87

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;

Or. en

Amendment 88

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

Or. en

Amendment 89

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 measures, 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, in a manner to be decided by the respective Member State, no later than thirty days before the award of the contract. The Commission may object to a non-application of an IPI measure if the notification lacks sufficient justification. If the Commission intends to object to the non-application of an IPI measure, it shall notify the contracting authority or contracting entity within the aforementioned time period.***

Or. en

Amendment 90

Proposal for a regulation Article 12 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. *Any contracting authority or contracting entity seeking to invoke an exception set out in paragraph 1 shall require the approval by the Commission.*

Or. en

Amendment 91

Proposal for a regulation Article 12 – paragraph 3 – introductory part

Text proposed by the Commission

Amendment

3. The notification shall contain the following information:

3. The notification ***of a contracting authority or contracting entity to the Commission*** shall contain the following information:

Or. en

Amendment 92

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

Text proposed by the Commission

Amendment

(b) *a description of the object of the contract;*

(b) *an exact reference to the publication of the relevant tender in the Official Journal of the European Union (Tenders Electronic Daily);*

Or. en

Amendment 93

Proposal for a regulation

Article 12 – paragraph 3 – 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 **intention** not to apply the **IPi measures** is based, and a detailed justification for the use of the exception;

Or. en

Amendment 94

Proposal for a regulation

Article 12 – paragraph 3 – point e

Text proposed by the Commission

(e) where appropriate, **any other** information deemed useful by the contracting authority and/or contracting entity.

Amendment

(e) where appropriate, **further** information deemed useful by the contracting authority and/or contracting entity.

Or. en

Amendment 95

Proposal for a regulation

Article 13

Text proposed by the Commission

Article 13

Implementation

1. **In case of misapplication by contracting authorities or contracting entities of exceptions laid down in Article 12, the Commission may apply the corrective mechanism of Article 3 of Directive 89/665/EEC²⁶ or Article 8 of Directive 92/13/EEC²⁷.**

2. **Contracts concluded with an economic operator in violation of price**

Amendment

deleted

adjustment measures adopted or reinstated by the Commission pursuant to this Regulation shall be ineffective.

²⁶ Council Directive 89/665/EEC of 21 December 1989 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).

²⁷ Council Directive 92/13/EEC of 25 February 1992 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).

Or. en

Amendment 96

Proposal for a regulation Article 13 a (new)

Text proposed by the Commission

Amendment

Article 13 a

Remedies

To ensure legal protection of economic operators having or having had an interest in obtaining a particular contract falling under the scope of this Regulation, Council Directive 89/665/EEC and Council Directive 92/13/EEC shall apply accordingly.

Or. en

Amendment 97

Proposal for a regulation Article 14 – paragraph 1

Text proposed by the Commission

1. The Commission shall be assisted by *the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC and by the Committee set up by Article 7 of the Council Regulation (EU) 2015/1843* (Trade Barriers Regulation)²⁹. *These committees* shall be *committees* within the meaning of Article 3 of Regulation (EU) No 182/2011.

²⁹ *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 (Trade Barriers Regulation), (OJ L 272, 16.10.2015, p. 1).*

Amendment

1. The Commission shall be assisted by the Committee *established* by Article 7 of the Trade Barriers Regulation. *That committee* shall be *a committee* within the meaning of Regulation (EU) No 182/2011.

Or. en

Amendment 98

Proposal for a regulation Article 14 – paragraph 2

Text proposed by the Commission

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply *and the competent committee shall be the Committee set up by the Trade Barriers Regulation.*

Amendment

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Or. en

Amendment 99

Proposal for a regulation Article 14 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Where the Committee delivers no opinion, the Commission shall not adopt the draft implementing act and Article 5(4), third subparagraph, of Regulation (EU) No 182/2011 shall apply.

Or. en

Amendment 100

Proposal for a regulation Article 15

Text proposed by the Commission

Amendment

[...]

deleted

Or. en

Amendment 101

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 award procedures in** third countries undertaken under this Regulation. **To this effect**, Member States shall upon request

Three years after the date of entry into force of this Regulation 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 **procurement and concession markets of** third countries undertaken under this Regulation. Member States

provide the Commission with appropriate information.

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.*

Or. en

Amendment 102

Proposal for a regulation Article 17 a (new)

Text proposed by the Commission

Amendment

Article 17a

Review

No later than five years after the adoption of an implementing act or no later than six years after the date of entry into force of this Regulation, whichever is the earliest, and every six 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.

Or. en

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 proposed price adjustment measure does not seem to pursue this goal anymore, but in the rapporteurs’ opinion is rather an “anti-dumping” duty. The rapporteur’s suggestion would hence be to return to 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. Given the lack of proof of effectiveness of the price adjustment mechanism ('score adjustment measure' as defined by Council), maintaining the option of market closure as the only IPI measure is proposed.

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.