

A NEW EU INTERNATIONAL PROCUREMENT INSTRUMENT (IPI)

[DEPARTURES]

> EU TRADE REGULATION



CONTENT

Background

Public procurement represents a substantial part of the EU economy and the economies of many countries around the world. The EU has opened its public procurement markets to a significant degree to competitors from third countries and has frequently advocated the need for more open public procurement markets, both within the context of the revised WTO Agreement on Public Procurement (GPA) and in its bilateral trade negotiations.

Many non-EU countries, however, are reluctant to open their public procurement markets to the EU. According to the Commission, while the EU opened some €352 billion of EU public procurement to bidders that came from member countries to the GPA in 2012, foreign bidders only had access to €178 billion of US procurement and €27 billion of Japanese procurement in that same year. In addition, only a fraction of Chinese procurement is open to foreign bidders.

In 2012, the Commission proposed the creation of an International Procurement Instrument (IPI). After a legislative deadlock, the Commission presented a revised proposal in 2016. In March 2019, in the context of a review of relations with China, the Commission called on the Council and Parliament to revive the trilogues based on the revised proposal, and adopt the IPI before the end of 2019. Progress appears more likely during the Portuguese Presidency.

The 2012 Proposal

The Commission first proposed an IPI in 2012. This proposal made a distinction between 'covered procurement', which corresponds to international commitments that the EU has undertaken in this area, and 'non-covered procurement', which is not subject to the EU's international commitments. For non-covered procurement, the proposal introduced a new procedure to restrict access of foreign products to the EU procurement market whenever there was a substantial lack of reciprocal opening of public procurement access in the originating country.

The Commission proposed two distinct procedures for the introduction of restrictive measures. The first was the 'decentralised procedure' in which the procuring entity would request the Commission's approval in order to exclude a foreign tender. The second procedure was the 'centralised procedure' in which the Commission directly investigated the situation in the foreign market and

negotiated with the third country. If necessary, the Commission could adopt a restrictive measure in the centralised procedure, namely either market closure or a price penalty (also called price adjustment measure), which would then be applied by procuring authorities to the foreign product originating from the investigated country.

The 2016 Amended Proposal

Due to the deadlock in the negotiations on the 2012 proposal, the Commission presented a revised proposal on 29 January 2016.

A key change is that the new proposal only keeps the centralised procedure for which the Commission also decided to shorten the time of country investigations. In addition, the Commission only left the possibility to introduce a price adjustment measure as a restrictive measure, provided that the total value of the contract is at least € 5 million excluding VAT and at least 50 % or more of that total value is made up of non-covered goods originating in the targeted country. Third, the proposal introduced exceptions for LDCs and European SMEs.

The proposed procedure would accordingly consist of the following basic steps:

1. In cases of alleged discrimination by a third country of EU companies in foreign procurement markets, the Commission initiates a public investigation.
2. When this investigation finds discriminatory restrictions vis-à-vis EU goods, services and/or suppliers, the Commission will invite the country concerned to consult on the opening of its procurement market. Such consultations can also take place in the form of negotiations on an international agreement.
3. As a last resort, the Commission can, after consultation with Member States, apply a price penalty to bids from the targeted country with a total value of at least € 5 million of which at least 50 % consists of goods and services originating from the targeted country. Concretely, bids from that country would, compared to other bids, be considered to offer a higher price of up to 20 % of the actual price put forward. This would give EU and non-targeted countries' bids a competitive advantage on EU public procurement markets.

Position of the European Parliament

The European Parliament debated the original IPI proposal both in its Committee on International Trade (INTA) and in plenary. The latter voted in January 2014 to introduce amendments, including aligning the decentralised towards the centralised procedure, tightening time-limits for investigations, and expanding exceptions to least developed countries (LDCs) and European small and medium-sized enterprises (SMEs). It also referred the file back to INTA, giving a mandate to the rapporteur to enter into negotiations with the Council. Technically, the proposal is therefore still in first reading, where no deadlines apply. The Council, however, never managed to issue an opinion because of deep Member State divisions, including on the principle of closing EU procurement markets which could be viewed as a protectionist measure. A vote on a draft report planned for May 2018 has been postponed. The associated committee IMCO (rapporteur: Ivan Stefanec, EPP) adopted an opinion for INTA on 26 September 2017. Following European elections,

INTA asked to carry over the Parliament's position into the current legislative term.

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