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**NOTE**

From:	Presidency
To:	Council
No. prev. doc.:	15675/14 COMER 231 WTO 304 MAP 49 MI 899 CODEC 2279
Subject:	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 [First reading] - State of play

1. On 26 March 2012, the Commission submitted to the Council a 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 (doc. 8257/12 + ADD 1-13).

The main objective of the proposal is to create a leverage in bilateral trade negotiations with third countries to open up their public procurement markets. It aims to improve the access of EU economic operators to the public procurement markets of certain third countries protected by restrictive procurement measures and to ensure that all companies are on an equal footing when it comes to competing on the EU's Single Market.

2. The European Parliament adopted the amendments in plenary on 15 January 2014 (473 votes in favour), giving a positive and a clear mandate to the rapporteur to enter into negotiations with the Council.
3. Building up on the efforts undertaken during previous Presidencies and on the basis of the intensive work undertaken in July and September 2014 in order to find an acceptable solution, the Italian Presidency issued a draft compromise proposal on 3 September 2014, attached as a consolidated version in the ANNEX.
4. Technical discussions held in the Trade Questions Working Party have confirmed that delegations remain deeply divided as for the substance of the file: **ten** Member States ( BG, EL, FR, HU, IT, LT, PL, PT, SK and RO) are in favour of the draft Presidency proposal, whereas **eighteen** Member States (AT, BE, CY, CZ, DE, DK, EE, ES, FI, HR, IE, LV, LU, MT, NL, SE, SI and UK) are strongly against it.
5. In the light of the above, on 20 November 2014, the Chair of Coreper confirmed the Presidency would be submitting this file to the FAC (Trade) on 21 November 2014 for a state of play.

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**PRESIDENCY COMPROMISE PROPOSAL**

for a draft

**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 *concessions and procedures supporting negotiations on access of Union goods and services to the public procurement markets and to the concessions of third countries***

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

***Having regard to the revised public procurement directives (2011/0438(COD), 2011/0439(COD) and 2011/0437(COD));***

***Having regard to the revised Plurilateral Agreement on Government Procurement (GPA);***

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 21 of the Treaty on European Union provides that the Union is to define and pursue common policies and actions, and work for a high degree of cooperation in all fields in international relations in order, inter alia, to ***safeguard its values, fundamental interests, security, independence and integrity and*** to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.

***(1a) The revised plurilateral World Trade Organisation (WTO) Agreement on Government Procurement (GPA) 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 the GPA. The revised GPA was ratified by the Union in December 2013.***

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

- (2) Pursuant to Article 206 of the Treaty on the Functioning of the European Union (TFEU) the Union, by establishing a customs union, is to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.
- (3) In accordance with Article 26 of the TFEU the Union is to adopt measures with the aim of establishing or ensuring the functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
- (4) Article III:8 of the General Agreement on Tariffs and Trade 1994 and Article XIII of the General Agreement on Trade in Services exclude government procurement from the main multilateral WTO disciplines.
- (5) Within the context of the World Trade Organisation and through its bilateral relations the Union advocates an ambitious opening of international public procurement ***and concessions*** markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.
- (6) 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.

- (7) *Market access for bidders from third countries to Union public procurement markets should be provided in accordance with Directives 2014/.../EU<sup>12</sup>, 2014/.../EU<sup>13</sup> and 2014/.../EU<sup>14</sup> of the European Parliament and of the Council;*
- (8) In accordance with Article 207 TFEU the common commercial policy in the field of public procurement **and concessions** is to be based on uniform principles.
- (9) In the interest of legal certainty for Union and third-country economic operators and contracting authorities/entities, the international market access commitments undertaken by the Union vis-à-vis 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. The Commission should issue guidance on the application of the existing international market access commitments of the European Union. This guidance should be updated on a regular basis and provide easy to use information.
- (9a) *The Commission should ensure that it does not fund programmes for which international public contracts are awarded or implemented in a manner inconsistent with the principles laid down in the public procurement directives (2011/0438(COD), 2011/0439(COD) and 2011/0437(COD)).*

- (10) The objectives of improving the access of EU economic operators to the public procurement ***and concessions*** markets of certain third countries protected by restrictive procurement measures and preserving equal conditions of competition within the European Single Market require that the treatment of third-country goods and services not covered by the international commitments of the Union be harmonised throughout the European Union.
- (11) For this purpose rules of origin should be established so that contracting authorities/entities know whether goods and services are covered by the international commitments of the European Union. The origin of a good should be determined in accordance with Article 22 to 26 of Regulation (EC) No 2913/1992 of the European Parliament and of the Council of 12 October 1992 establishing the Community Customs Code<sup>3</sup>. According to this Regulation goods should be considered to be Union goods when they are wholly obtained or produced in the Union. Goods whose production involved one or more third countries should be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture. The origin of a service should be determined on the basis of the origin of the natural or legal person providing it. The guidance referred to in recital 9 should cover the application in practice of the rules of origin.

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<sup>3</sup> OJ L 302, 19.10.1992, p. 1

- (12) When assessing whether a lack of substantial reciprocity exists, the Commission should examine to what degree *the 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 public authorities and/or individual procuring entities maintain or adopt discriminatory practices against Union goods, services and economic operators.
- (13) The Commission should be able to prevent the possible negative impact of an intended exclusion on on-going trade negotiations with the country concerned. Therefore, the Commission may, where a country is engaging in substantive negotiations with the Union concerning market access in the field of public procurement *and/or concessions* the Commission considers that there is a reasonable prospect of removing the restrictive procurement *and/or concessions* practices in the near future, it should be able to adopt a implementing act providing that goods and services from that country should not be excluded from procedures for the award of contracts for a period of one year.



- (14) In view of the fact that the access of third country goods and services to the public procurement market of the Union falls within the scope of the common commercial policy, Member States or their contracting authorities/entities should not be able to restrict the access of third country goods or services to their tendering procedures by any other measure than the ones provided for in this Regulation *or by relevant Union law*.
- (15) *The Commission should be able, on its own initiative or at the application of interested parties or a Member State, to initiate at any time an external procurement investigation into restrictive procurement practices allegedly maintained by a third country. Such investigative procedures should be without prejudice to Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization<sup>4</sup>.*
- (16) Where the Commission has, on the basis of information available to it, reason to believe that a third country has adopted or maintains a restrictive procurement *and concession* practice, it should be able to start an investigation. If the existence of a restrictive procurement 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 economic operators, goods and services in public procurement in that country.

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<sup>4</sup> OJ L 349, 31.12.1994

- (17) *If the consultations with the country concerned do not lead to sufficient improvement in the tendering opportunities for EU economic operators, goods and services, the Commission should propose to the Council appropriate restrictive measures.*
- (18) Such measures may entail the mandatory exclusion of certain third-country goods and services from public procurement procedures *or procedures for the award of concessions* in the European Union, or may subject tenders made up of goods or services originating in that country to a mandatory price penalty. To avoid circumvention of these measures, it may also be necessary to exclude certain foreign-controlled or owned juridical persons established in the European Union, that are not engaged in substantive business operations such that it has a direct and effective link with the economy of a Member State concerned. Appropriate measures should not be disproportionate to the restrictive procurement practices to which they respond.
- (19) It is imperative that contracting authorities/entities have access to a range of high-quality products meeting their purchasing requirements at a competitive price. Therefore contracting authorities/entities should be able to set aside 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/entity to safeguard essential public needs for example health and public safety, or application of the measure would lead to a disproportionate increase in the price or costs of the contract.

- (20) In case of misapplication by contracting authorities/entities of exceptions to 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/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<sup>5</sup> or Article 8 of 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<sup>6</sup>. For the same purpose, contracts concluded with an economic operator in violation of Commission's decisions on intended exclusions notified by contracting authorities/entities or in violation of measures limiting access of non-covered goods and services should be declared ineffective within the meaning of Directive 2007/66/EC of the European Parliament and Council<sup>7</sup>.
- (21) 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 the European Parliament and Council Regulation (EU) No 978/2012, it is appropriate to assimilate goods and services from countries benefitting from the "GSP" arrangement.*

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<sup>5</sup> OJ L 395, 30.12.1989, p. 33

<sup>6</sup> OJ L 76, 23.3.1992, p. 14

<sup>7</sup> OJ L 335, 20.12.2007, p. 31

- (22) In order to reflect in the legal order of the European Union the international market access commitments undertaken in the field of public procurement ***and concessions*** after the adoption of this Regulation, the Commission should be empowered to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union amendments to the list of international agreements annexed to this Regulation. It is of particular importance that the Commission should carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.
- (23) In order to ensure uniform conditions for implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for the control by the Member States of the Commission's exercise of implementing powers.

- (24) The advisory procedure should be used for the adoption of implementing acts for the drawing up of the standard forms for the publication of notices, the submission of notifications to the Commission and the origin of goods or services. These decisions do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Regulation. On the contrary, these acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Regulation.
- (25) The Commission should report at least every three years on the application of this Regulation.
- (26) In accordance with the principle of proportionality, it is necessary and appropriate for achievement of the basic objective of establishing a common external policy in the field of public procurement ***and concessions*** to lay down rules on the treatment of goods and services not covered by the international commitments of the European Union. This Regulation on the access of third-country economic operators, goods and services does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the third paragraph of Article 5 of the Treaty on European Union,

HAVE ADOPTED THIS REGULATION:

**Chapter I**  
**GENERAL PROVISIONS**

*Article 1*

**Subject matter and scope of application**

1. This Regulation lays down rules on the access of third-country goods and services to the award of contracts for the execution of works or a work, the supply of goods and the provision of services by Union contracting authorities/entities, and establishes procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries.  
***Member States or their contracting authorities/entities may restrict the access of third country goods and services to their tendering procedures only by measures provided for in this Regulation or by relevant Union law.***
2. This Regulation shall apply to contracts covered by the following acts:
  - (a) Directive [2004/17/EC];
  - (b) Directive [2004/18/EC];
  - (c) Directive [201./... (*on the award of concession contracts*)].

This Regulation shall apply to the award of contracts where the goods or services are procured for governmental purposes ***and to the award of works and services concessions provided for governmental purposes*** and not with a view to commercial resale or with a view to use in the production of goods or in the provision of services for commercial sale.

*Article 2*  
**Definitions**

1. For the purposes of this Regulation, the following definitions shall apply.
  - (a) *'economic operator'* means any natural or legal person *or group of such persons* which offers *the execution of works, the supply of products or the provision of services* on the market;
  - (b) *'tenderer'* means *an economic operator that has submitted a tender*;
  - (c) 'contracting authority/entity' means 'contracting authority' as defined in [Article 1 (9) of Directive 2004/18/EC, and 'contracting entity' as defined in Article 2 of Directive 2004/17/EC and Articles 3 and 4 of Directive 20.. on the award of concession contracts];
  - (d) 'covered goods or services' means a good or service originating in a country with which the Union has concluded an international agreement in the field of public procurement *and concessions* including market access commitments and in respect of which the relevant agreement applies. Annex I to this Regulation contains a list of relevant agreements;
  - (e) 'non-covered goods or services' means a good or service originating in a country with which the Union has not concluded an international agreement in the field of public procurement including market access commitments or a goods or service originating in a country with which the Union has concluded such an agreement, but in respect of which the relevant agreement does not apply;

- (f) 'measure' means any law, regulation, or practice, or combination thereof;
- (g) "interested parties" means a company or firm formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the Union, directly concerned by the production of goods or the provision of services which are the subject of restrictive procurement measures of third countries.
- (ga) 'lack of substantial reciprocity' means the existence of any legislative, regulatory or administrative measure, procedure or practice, adopted or performed by public authorities or individual procuring entities in a third country, restricting access to public procurement or concession markets, in particular by a lack of transparency compared to international standards and discriminatory legislative provisions and administrative practices, which results in serious and recurrent discriminatory treatment against Union economic operators, goods or services.***

2. For the purposes of this Regulation

- (a) the term "country" may refer to any State or separate customs territory, without such nomenclature having implications for sovereignty;
- (b) the execution of works and/or a work within the meaning of Directives [2004/17/EC, 2004/18/EC and Directive 201../. on the award of concession contracts] shall for the purposes of this Regulation be considered as the provision of a service;
- (c) a 'mandatory price penalty' shall refer to an obligation for contracting entities to increase, subject to certain exceptions, the price of services and/or goods originating in certain third countries that have been offered in contract award procedures ***or concession award procedures.***



### *Article 3*

#### **Rules of origin**

1. The origin of a good shall be determined in accordance with Article 22 to 26 of Regulation (EC) No 2913/1992 of the European Parliament and of the Council of 12 October 1992 establishing the Community Customs Code<sup>8</sup>.
2. The origin of a service shall be determined on the basis of the origin of the natural or legal person providing it. The origin of the *economic operator providing the service* shall be deemed to be:
  - (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;
  - (b) in the case of a legal person any of the following:
    - (1) if the service is provided other than through a commercial presence within the Union, the country where the juridical person is constituted or otherwise organised under the laws of that country and in the territory of which the legal person is engaged in substantive business operations;

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<sup>8</sup> OJ L 302, 19.10.1992, p. 1

- (2) if the service is provided through a commercial presence within the Union, the Member State where the legal person is established and in which territory it is engaged in substantive business operations such that it has a direct and effective link with the economy of a Member State concerned.

For the purposes of point (2) if the legal person is not engaged in substantive business operations such that it has a direct and effective link with the economy of a Member State concerned, the origin of the natural or legal persons which own, or control the juridical person providing the service.

The legal person providing the service shall be considered to be:

"owned" by persons of a given country if more than 50% of the equity interest in it is beneficially owned by persons of that country and "controlled" by persons of a given country if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

3. For the purpose of this Regulation, goods or services originating in the countries of the European Economic Area other than the Member States shall be treated like those originating in the Member States.

## Chapter II

### TREATMENT OF COVERED AND NON-COVERED GOODS AND SERVICES, ABNORMALLY LOW TENDERS

#### *Article 4*

##### **Treatment of covered goods and services**

When awarding contracts for the execution of works and/or a work, the supply of goods or the provision of services, *or when awarding work and services concessions*, contracting authorities/entities shall treat covered goods and services equally to goods and services originating in the European Union.

Goods or services originating in *countries listed in Annexes II, III and IV of Regulation (EU) No 978/2012 of the European Parliament and of the Council shall be treated as covered goods and services*.

#### *Article 5*

##### **Rules of access for non-covered goods and services**

Non-covered goods and services may be subject to restrictive measures taken by the Commission according to the rules set out in Articles 10 and 11.

## Chapter III

### RULES ON ABNORMALLY LOW TENDERS

#### *Article 7*

#### **Abnormally low tenders**

Where the contracting authority/entity intends, under Article 69 of the Directive on public procurement or under Article 79 of the Directive on procurement by entities operating in the water, energy, transport and postal services sectors, after verifying the explanations of the tenderer, to accept an abnormally low tender comprising goods and/or services originating outside the Union, in which the value of the non-covered goods or services exceeds 50 % of the total value of the goods or services constituting the tender, it shall inform the other tenderers of this in writing, including the reasons for the abnormally low character of the price or costs charged. *Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex XI to the Directive on public procurement [...] 2013.*

*After being informed by the contracting authority/entity of their intention to accept an abnormally low tender, the other tenderers shall have the possibility to provide relevant information to the contracting authority/entity within a reasonable period of time in order to allow the contracting authority/entity to take a decision on the acceptance in full knowledge of potential factors which might have an influence on the assessment of the abnormally low character of the price or costs charged.*

*Where the Contracting authority/entity rejects the tender considered to be abnormally low comprising goods and/or services originating outside the Union, in which the value of the non-covered goods or services exceeds 50% of the total value of the goods or services constituting the tender, it shall inform the EC.*

## Chapter IV

### COMMISSION INVESTIGATION, CONSULTATION AND MEASURES TEMPORARILY LIMITING ACCESS OF NON-COVERED GOODS AND SERVICES TO THE EU PUBLIC PROCUREMENT MARKET

#### *Article 8*

#### **Investigation relating to the access of EU economic operators, goods and services to the public procurement markets of third countries**

1. The Commission may at any time, on its own initiative or upon application of interested parties or a Member State, initiate an external procurement investigation into alleged restrictive procurement measures, *if it is apparent that there is sufficient evidence to justifying initiating a proceeding. In the event that the Commission declines to initiate an investigation, it shall duly justify its decision to the Member State or the interested party that submitted the application.*

Should an investigation be initiated, the Commission shall publish a notice in the *Official Journal of the Union*, inviting interested parties and Member States to provide all relevant information to the Commission within a specified period of time.

2. *The investigation referred to in paragraph 1 is conducted on the basis of the criteria laid down in point (ga) of Article 2(1).*

3. The assessment by the Commission of whether restrictive procurement measures are maintained by the third country concerned shall be made on the basis of the information supplied by interested parties, and Member States and/or facts collected by the Commission during its investigation, *or its regular reports on existing trade barriers in third countries*, and shall be concluded within a period of **Four** months after the initiation of the investigation. In duly justified cases this period may be extended by *two months*.
4. When the Commission concludes as a result of the external procurement investigation that the alleged restrictive procurement measures are not maintained by the third country concerned, the Commission shall adopt a decision terminating the investigation. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17 (3).

#### *Article 9*

#### **Consultation of a third country**

1. When it is found as a result of an investigation that restrictive procurement measures are maintained by a third country and the Commission considers it to be justified by the EU interest, the Commission shall invite it to enter into consultations with a view to ensuring that Union economic operators, goods and services can participate in tendering procedures for the award of public procurement contracts in that country on the conditions no less favourable than those accorded to national economic operators, goods and services of that country and also with a view also to ensuring the application of the principles of transparency and equal treatment.

In the event that the country concerned declines the invitation to enter into consultation, the Commission shall, when adopting implementing acts under Article 10 to limit the access of goods and services originating in that third country, decide on the basis of the facts available.

2. 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 shall 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.
3. When, after the initiation of a consultation, the country concerned takes satisfactory remedial/corrective measures, but without undertaking new market access commitments, the Commission may suspend or terminate the consultation *or invite the country concerned to enter into negotiations under Article 9(4)*.

The Commission shall monitor the application of those remedial/corrective measures, where appropriate on the basis of information supplied at intervals, which it may request from the third country concerned.

Where the remedial/corrective measures taken by the third country concerned are rescinded, suspended or improperly implemented, *and the Commission considers that further consultations will not deliver results*, the Commission *acts under Article 10 to adopt implementing acts to limit the access of goods and services originating in a third country*.

The implementing acts referred to in this paragraph shall be adopted in accordance with the examination procedure referred to in Article 17(2).

4. Where, after the initiation of a consultation, it appears that the most appropriate means to end a restrictive procurement practice is the conclusion of an international agreement, negotiations shall be carried out in accordance with the provisions of Articles 207 and 218 of the Treaty on the Functioning of the European Union.
5. The Commission may terminate the consultation if the country concerned undertakes *meaningful* international commitments agreed with the Union in any of the following frameworks:
  - (a) Accession to the WTO Agreement on Government Procurement,
  - (b) Conclusion of a bilateral agreement with the Union which includes market access commitments in the field of public procurement, or
  - (c) Expansion of its market access commitments undertaken under the WTO Agreement on Government or under a bilateral agreement concluded with the Union in that framework,

The consultation may also be terminated in cases where the restrictive procurement measures are still in place at the time these commitments are undertaken, as long as they include detailed provisions relating to the phasing-out of those practices.

6. In the event that a consultation with a third country does not lead to satisfactory results within **12** months from the *calendar* day the consultation with the third country started, the Commission shall terminate the consultation and consider acting under Article 10 to adopt implementing acts to limit the access of goods and services originating in a third country.



*Article 10*

**Adoption of measures limiting access of non-covered goods and services to the EU public procurement market**

1. Where it is found in an investigation pursuant to Article 8, and after following the procedure foreseen in Article 9, that ***there is*** a lack of substantial reciprocity in market opening between the Union and the third country as referred to in ***point (ga) of Article 2(1)***, the Commission may adopt implementing acts to temporarily limit the access of non-covered goods and services originating in a third country. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17(2).
2. The measures adopted pursuant to paragraph 1 may take any of the following forms:
  - (a) the exclusion ***of suppliers of goods or services established in and operating from the third country concerned and/or*** of tenders of which more than 50 % of the total value is made up of non-covered goods or services originating in the country adopting or maintaining a restrictive procurement practice; and/or
  - (b) a mandatory price penalty ***on tenders of suppliers of goods or services established in and operating from the third country concerned and/or*** on that part of the tender consisting of non-covered goods or services which originate in the country adopting or maintaining a restrictive procurement practice.

3. Measures adopted pursuant to paragraph 1 **shall** in particular:
- (a) *include thresholds, according to the characteristics of the goods or services concerned, above which the exclusion and/or mandatory price penalty is to apply, taking into account the economic impact of restrictive procurement measures adopted or maintained by the third country and the administrative burden.*
  - (b) *determine the sectors or the categories of goods or services to which they apply, as well as any applicable exceptions;*
  - (c) *determine the contracting authorities or entities or categories of contracting authorities or entities who will apply the measure. To provide the basis for this determination each Member State shall submit a list of appropriate contracting entities or categories of contracting authorities or entities. The measures shall ensure that an appropriate level of restriction and a fair distribution among Member States is achieved.*
4. *The measure shall be determined in order to avoid disproportionate administrative complexity and costs in its the application. The Commission should therefore shape the measure in close and full cooperation with Member States.*
5. *When shaping the measures, the Commission shall duly consider the availability of alternative sources of supply for the products concerned, in order to avoid any disproportionate negative impact on procuring authorities/entities.*

## *Article 11*

### **Withdrawal or suspension of measures**

1. Where the Commission considers that the reasons justifying the measures adopted pursuant to Articles 9 (4) and 10 no longer apply, the Commission may adopt an implementing act to:
  - (a) repeal the measures; or
  - (b) suspend the application of the measures for a period of up to one year.

For the purposes of point (b), the application of the measures may, at any moment in time, be reinstated by the Commission by means of an implementing act.

2. The implementing acts referred to in this Article shall be adopted in accordance with the examination procedure referred to in Article 17(2).

## *Article 12*

### **Information to tenderers**

1. When contracting authorities/entities conduct a procurement procedure subject to restrictive measures, adopted pursuant to Article 10 or reinstated pursuant to Article 11, they shall indicate this in the contract notice they publish pursuant to Article 35 of Directive 2004/18/EC or Article 42 of Directive 2004/17/EC. The Commission shall adopt implementing acts establishing the standard forms in accordance with the advisory procedure referred to in Article 17 (3).<sup>2</sup> Where the exclusion of a tender is based on the application of measures adopted pursuant 10 or reinstated pursuant to Article 11, contracting authorities/entities shall inform unsuccessful tenderers.

### *Article 13*

#### **Exceptions**

1. Contracting authorities/entities may decide not to apply the measures pursuant to Article 10 with respect to a procurement procedure if:
  - (a) there are no Union and/or covered goods or services available which meet the requirements of the contracting entity; or
  - (b) application of the measure would lead to a disproportionate increase in the price or costs of the contract.
2. Where a contracting authority/entity intends not to apply measures adopted pursuant to Article 10 of this Regulation, or reinstated pursuant to Article 11, it shall indicate its intention in the contract notice that it shall publish pursuant to Article 35 of Directive 2004/18/EC or Article 42 of Directive 2004/17/EC. It shall notify the Commission no later than ten calendar days after the publication of the contract notice.

This notification shall be sent by electronic using a standard form. The Commission shall adopt implementing acts establishing the standard forms for contract notices and notification in accordance with the advisory procedure referred to in Article 17 (3).

The notification shall contain the following information:

- (a) the name and contact details of the contracting authority/entity;
- (b) a description of the object of the contract;

- (c) information on the origin of the economic operators, the goods and/or services to be admitted;
- (d) the ground on which the decision not to apply the restrictive measures is based, and a detailed justification for the use of the exception;
- (e) where appropriate, any other information deemed useful by the contracting authority/entity.

The Commission may ask the contracting authority/entity concerned for additional information.

3. In the event that a contracting authority/entity conducts, under Article 31 of Directive 2004/18/EC or under Article 40 (3) 2 of Directive 2004/17/EC and decides not to apply a measure adopted pursuant to Article 10 of this Regulation, or reinstated pursuant to Article 11, it shall indicate this use in the contract award notice it publishes pursuant to Article 35 of Directive 2004/18/EC or Article 43 of Directive 2004/17/EC and notify the Commission no later than ten calendar days after the publication of the contract award notice.

This notification shall be sent by electronic means using a standard form. The Commission shall adopt implementing acts establishing the standard forms for contract notices and notifications in accordance with the advisory procedure referred to in Article 17 (2). The notification shall contain the following information:

- (a) the name and contact details of the contracting authority/entity;
- (b) a description of the object of the contract;

- (c) information on the origin of the economic operators, the goods and/or services admitted;
- (d) the ground on which the decision not to apply the restrictive measures is based, and a detailed justification for the use of the exception;
- (e) where appropriate, any other information deemed useful by the contracting entity.

## **Chapter V**

### **DELEGATED AND IMPLEMENTING POWERS, REPORTING AND FINAL PROVISIONS**

#### *Article 14*

#### **Amendments to the Annex**

The Commission shall be empowered to adopt delegated acts in accordance with Article **15** concerning amendments to the Annex to reflect the conclusion of new international agreements by the Union in the field of public procurement.

## *Article 15*

### **Exercise of the delegation of powers**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Article 14 shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of this Regulation].
3. The delegation of power referred to in Article **14** *may* be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect on the **calendar** day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to this Article shall enter into force only where no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.

## Article 16

### Implementation

1. In case of misapplication by contracting authorities/entities of exceptions laid down in Article 13, the Commission may apply the corrective mechanism of Article 3 of Directive 89/665/EEC or Article 8 of Directive 92/13/EEC.
2. ***Contracts concluded with an economic operator in violation of Commission implementing acts adopted pursuant to Article 10 or reinstated pursuant to Article 11 shall be declared ineffective within the meaning of Directive 2007/66/EC.***

## Article 17

### Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC<sup>9</sup> and by the Committee set up by Article 7 of the Trade Barriers Regulation<sup>10</sup>. These committees shall be committees within the meaning of Article 3 of Regulation (EU) No 182/2011.
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.  
***Where the Committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.***

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<sup>9</sup> OJ L 185, 16.8.1971, p. 15.

<sup>10</sup> OJ L 349, 31.12.1994, p. 71



3. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply and the competent committee shall be the Committee established by Council Decision 71/306/EEC.

#### *Article 18*

#### **Confidentiality**

1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.
3. The supplier of information may request to treat information submitted as confidential and shall be accompanied by a non-confidential summary of the information or a statement of the reasons why the information cannot be summarised.
4. If it appears that a request for confidentiality is not justified and if the supplier is unwilling either to make the information public or to authorise its disclosure in generalised or summary form, the information in question may be disregarded.
- 4a. Under no circumstances shall information received pursuant to this Regulation and declared by the provider of the information to be of a confidential nature be revealed, unless the provider gives his specific permission.***
5. Paragraphs 1 to 5 shall not preclude the disclosure of general information by the Union authorities. Such disclosure must take into account the legitimate interest of the parties concerned in not having their business secrets divulged.

*Article 19*

**Reporting**

By 1 January 2017 and at least every three years after the entry into force of this Regulation, 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 EU economic operators to public contract award procedures in third countries undertaken under this Regulation. To this effect, Member States shall upon request provide the Commission with appropriate information.

*Article 20*

**Repeals**

***Article 59 of Directive 2004/17/EC shall be repealed with effect from the entry into force of this Regulation.***

*Article 21*

**Entry into force**

This Regulation shall enter into force on the 60th day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21.3.2012

*For the European Parliament*

*For the Council*

*The President*

*The President*