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**Dossier interinstitutionnel:  
2012/0060(COD)**

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REV 1

**LIMITE**

**POLCOM 18  
COMER 31  
MAP 7  
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**NOTE**

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Origine:	la présidence
Destinataire:	Comité des représentants permanents
N° doc. Cion:	5752/16
Objet:	Proposition modifiée de règlement du Parlement européen et du Conseil concernant l'accès des produits et services des pays tiers au marché intérieur des marchés publics de l'Union et établissant des procédures visant à faciliter les négociations relatives à l'accès des produits et services originaires de l'Union aux marchés publics des pays tiers (première lecture) - Confirmation du texte de compromis final en vue d'un accord

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1. Le 29 janvier 2016, la Commission a publié une proposition modifiée de règlement du Parlement européen et du Conseil concernant l'accès des produits et services des pays tiers au marché intérieur des marchés publics de l'Union et établissant des procédures visant à faciliter les négociations relatives à l'accès des produits et services originaires de l'Union aux marchés publics des pays tiers. Une proposition antérieure adoptée par la Commission le 21 mars 2012 n'a pas recueilli le soutien de la majorité qualifiée nécessaire au sein du Conseil, 18 États membres ayant exprimé des réserves.

2. La proposition en objet constitue la réponse de l'UE à l'absence de règles du jeu équitables sur les marchés publics mondiaux. L'instrument relatif aux marchés publics internationaux ("IPI" pour "International Procurement Instrument") serait un outil de politique commerciale offensif visant à i) rendre plus équitables les conditions de concurrence, ii) accroître la participation des entreprises de l'UE aux marchés publics des pays tiers et iii) exercer un effet de levier pour l'UE dans le contexte de négociations menées en vue de l'ouverture des marchés dans les pays tiers. L'IPI permettrait à l'UE de limiter ou d'exclure, au cas par cas, l'accès à ses marchés publics pour les opérateurs économiques originaires des pays qui appliquent des restrictions discriminatoires à l'égard des entreprises de l'UE. Cependant, les engagements existants de l'UE vis-à-vis des pays tiers – y compris l'accord sur les marchés publics (AMP) de l'OMC et les accords commerciaux bilatéraux – ne seraient pas affectés par l'IPI.
3. En mars 2019, le Conseil européen a demandé que des mesures soient prises pour préserver les intérêts de l'UE à la lumière des pratiques déloyales des pays tiers en assurant une réciprocité effective en matière de marchés publics avec les pays tiers; en particulier, le Conseil européen a appelé à la reprise des discussions sur l'IPI. En octobre 2020, le Conseil européen a conclu que les travaux sur l'IPI devaient être accélérés.
4. À la suite de discussions et d'échanges intensifs au sein du groupe "Questions commerciales", la présidence portugaise est parvenue à recueillir un large soutien en faveur du texte de compromis le 26 mai 2021.
5. Le 2 juin 2021, le Comité des représentants permanents a donné mandat à la présidence pour entamer des négociations informelles en trilogie avec le Parlement européen et la Commission (doc. 9175/21).

6. À la suite à l'accord intervenu au Coreper, le Parlement européen a repris ses travaux en septembre 2021, avec la présentation à la commission INTA (la commission IMCO étant également associée), par le rapporteur M. Caspary, d'un projet de rapport comprenant une liste d'amendements à la proposition modifiée de 2016. Après la soumission de son premier rapport le 1<sup>er</sup> septembre, la commission INTA a voté un projet de rapport final les 29 et 30 novembre 2021. Lors de sa séance plénière tenue du 13 au 16 décembre 2021, le PE a voté le mandat pour le lancement des trilogues.
7. Sur la base de ces positions du Conseil et du Parlement européen, cinq trilogues informels ont eu lieu aux dates suivantes: 16 décembre 2021, 18 janvier 2022, 10 février 2022, 1<sup>er</sup> mars 2022 et 14 mars 2022. Lors du dernier trilogue informel tenu le 14 mars 2022, un compromis politique a été trouvé. Le compromis global comprend également un certain nombre de déclarations, qui visent à répondre à d'autres préoccupations et demandes du Parlement européen et du Conseil:
- la Commission a confirmé sa volonté de faire une déclaration dans laquelle elle s'engage à examiner, lors d'une future révision du règlement, l'exclusion des pays bénéficiaires du SPG et à se pencher sur la question des secteurs stratégiques lors de l'application de la disposition supplémentaire ("add-on");
  - le PE et le Conseil sont parvenus à un accord sur la question de la procédure de comité, subordonné à la publication d'une déclaration commune qui confirmerait que cet accord ne constitue pas un précédent pour les futurs textes législatifs.
8. Au cours des négociations informelles en trilogue, la présidence a régulièrement informé les États membres et les a consultés sur la voie à suivre proposée. Il ressort clairement de ces consultations que l'approche proposée par la présidence recueille le soutien d'un grand nombre d'États membres.

9. La commission INTA du Parlement européen devrait voter prochainement sur le compromis global, ouvrant ainsi la voie à l'adoption du projet de règlement en première lecture.
10. Le Comité des représentants permanents est donc invité:
- à confirmer le texte de compromis final, tel qu'il figure aux annexes de la présente note; et
  - à autoriser la présidence à adresser une lettre au président de la commission INTA du Parlement européen confirmant que, si le Parlement européen arrête sa position en première lecture, conformément à l'article 294, paragraphe 3, du traité, dans les termes du texte de compromis final figurant aux annexes de la lettre (sous réserve de sa mise au point par les juristes-linguistes des deux institutions), le Conseil, conformément à l'article 294, paragraphe 4, du traité, approuvera la position du Parlement européen et l'acte sera adopté dans cette formulation.
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2012/0060 (COD)

~~Amended proposal for a~~

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the access of third-country *economic operators*, goods and services to the Union's ~~internal market~~ ~~in~~ public procurement *market* and procedures supporting negotiations on access of Union *economic operators*, goods and services to the public procurement markets of third countries (*International Procurement Instrument - IPI*)**

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~~**207(2)** 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 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) In accordance with Article 21 of the Treaty on European Union, the Union is to define and pursue common policies and actions, and— improve cooperation in all fields in international relations in order, inter alia, to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.

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<sup>1</sup> OJ C

<sup>2</sup> OJ C

- (2) Pursuant to Article 206 of the Treaty on the Functioning of the European Union,— 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. ***The access of third country economic operators, goods and services to the public procurement market of the Union falls within the scope of the common commercial policy.***
- (3) In accordance with Article 26 of the Treaty on the Functioning of the European Union, 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 World Trade Organization (WTO) disciplines.
- (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.~~
- (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.
- (6a) The plurilateral WTO Agreement on Government Procurement and EU trade agreements that include provisions on public procurement provide for market access for Union companies only to the public procurement markets of third countries that are parties to those agreements.***

- (7) If ~~the~~ **third** 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~~ **those agreements** when the restrictive practices relate to **public** procurement covered by market access commitments undertaken by ~~the~~ **that third** country ~~concerned~~ towards the Union.
- (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 **public** procurement practices in many of the trading ~~partner~~ **partners** of the Union. Those restrictive **public** procurement practices result in the loss of substantial trading opportunities.
- (9) ~~Directive 2014/25/EU of the European Parliament and of the Council<sup>3</sup> contains only a few provisions concerning the external dimension of the public procurement policy of the Union, in particular Articles 85 and 86. These provisions have a limited scope and should be replaced.~~
- (10) —Regulation (EU) No 654/2014 of the European Parliament and of the Council<sup>4</sup> 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.

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<sup>3</sup> ~~Directive 2014/25/EU of the European Parliament and of the Council, of February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 94, 28.3.2014, p. 243).~~

<sup>4</sup> 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.)

- (11) *International market access commitments undertaken by the Union towards third countries* in the interest of legal certainty for Union and third country *field of public procurement and concessions require, among other things, 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*, contracting authorities and contracting entities, ~~the international market access commitments undertaken by the Union towards third~~ *that include commitments on access to public procurement and concessions markets, or from countries that are Parties to such agreements but only with respect to public procurement procedures for goods, services or concessions that are not covered by those agreements. In accordance with EU* in the field of public procurement *directives and as clarified by the European Commission's Communication of 24 July 2019 on "Guidance on the participation of third-country bidders and goods* and concessions should be reflected in the legal order *EU procurement market", economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market or whose goods, services or works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded*, thereby ensuring effective application thereof.
- (12) The objectives of *effective application of any measure adopted under this Regulation with a view to* 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* **requires a clear set of** rules of origin established in the EU customs legislation, so that contracting authorities and contracting entities know whether *for economic operators, goods and services are covered by the international commitments of the Union.*



- (13) The origin of a good should be determined in accordance with Article 22 to 26 of Council Regulation (EECEU) No 2913/1992<sup>5</sup>-No 952/2013 of the European Parliament and of the Council.
- (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 otherwise organised and in the territory of which the legal person is engaged in substantive business operations. Legal persons constituted or otherwise organised under the laws of a Member State of the Union should only be considered to have their origin in the Union if they have a direct and effective link with the economy of a Member State. To avoid possible circumvention of an IPI measure, the origin of foreign-controlled or owned legal persons that are not engaged in substantive business operations in the territory of the third country or in the territory of a Member State, under the laws of which they are constituted or otherwise organized, may also need to be determined taking into account other elements, such as the origin of the owners or other persons exercising a dominant influence over it.*
- (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 Council, 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.~~

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<sup>5</sup> ~~Council Regulation (EECEU) No 2913/1992 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 9.10.1992)269, 10.10.2013, p. 1).~~ *No 952/2013 of the European Parliament and of the Council of 9 October 1992 establishing the Community Customs Code (OJ L 302, 9.10.1992)269, 10.10.2013, p. 1).*

<sup>6</sup> ~~Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).~~ *Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).*

- (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.~~
- (17) When assessing whether ~~restrictive and/or discriminatory procurement~~*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 public procurement or concession markets,*** the Commission should examine to what degree—~~laws~~ ***laws, rules or other measures*** on public procurement and concessions of the country concerned ensure transparency in line with international standards, ***and do not result in serious and recurring restrictions***—~~in the field of public procurement and preclude any discrimination against Union goods, services and/or economic operators.~~ In addition, it should examine to what degree individual contracting— authorities or— contracting entities maintain or adopt ~~discriminatory~~***restrictive*** practices against Union goods, services ~~and/or~~ economic operators.
- (18)
- (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—***a transparent*** investigation into restrictive ***public*** 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.~~
- (19a) ***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, the Commission should not start an investigation in respect of countries benefitting from the "Everything But Arms" arrangement as listed in Annex IV of Regulation 978/2012.***

- (20) ~~If the existence of a restrictive and/or discriminatory procurement measure or practice in a third country is confirmed~~**When conducting the investigation**, the Commission should invite the *third* country concerned to enter into consultations with a view to ***eliminating or remedying any restrictive measures or practices, thereby*** improving the tendering opportunities for Union economic operators, goods and services ~~in respect of public procurement~~**regarding public procurement and concessions markets** in that country.
- (21) It is of the utmost importance that the investigation is carried out in a transparent manner. A report on the main findings of the investigation should therefore be publicly available.
- (22) If the ***investigation confirms the existence of restrictive measures or practices, and the consultations with the third country concerned do not lead to sufficient improvements to the tendering opportunities***~~satisfactory corrective actions that result in remedying the serious and recurrent impairment of access~~ for Union economic operators, goods and services within a reasonable timeframe, ~~the Commission should be able to adopt, where appropriate, price adjustment measure applying to tenders submitted by economic operators originating in that country and/or including goods and services originating in that country~~ ***or the third country concerned declines to enter into consultations, the Commission, if it considers to be in the interest of the Union, should adopt, where appropriate, under this Regulation, IPI measures in the form of a score adjustment or exclusion of tenders.***
- (22a) ***The determination of whether the adoption of an IPI measure is in the interest of the Union should be based on an appreciation of all the various interests taken as a whole, including the interests of the Union's economic operators. The Commission should weigh the consequences of adopting such a measure against its impact on the Union's broader interests. The general objective of achieving reciprocity by opening third-country markets and improving market access opportunities for Union economic operators should be given special consideration. 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.***

- (23) ~~Such measures.~~ ***A score adjustment measure*** should be applied only for the purpose of the evaluation of tenders ~~comprising goods or services~~ ***submitted by economic operators*** originating in the country ~~concerned. To 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~~ ***It should not affect the price actually due to be paid under the contract to be concluded with the successful tenderer. When contracting authorities or contracting entities decide to base their evaluation of tenders on a price or cost as the only contract award criterion, the level of score adjustment measure*** should ~~not be disproportionate to the restrictive procurement practices to which they respond~~ ***be set significantly higher to ensure comparable effectiveness of the IPI measure.***
- (23a) ***IPI measures should apply to public procurement procedures falling under the scope of this Regulation, including framework agreements and dynamic purchasing systems. Where a specific contract is awarded under a dynamic purchasing system to which an IPI measure applies, IPI measures should also apply to that specific contract. 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.***
- (23c) ***To avoid a possible circumvention of an IPI measure, appropriate obligations should be imposed on successful tenderers. Those obligations should apply only in case of public procurement procedures to which an IPI measure is applicable, as well as to contracts awarded based on a framework agreement where such contracts are equal to or above a certain threshold and when that framework agreement is subject to an IPI measure.***

- (24) ~~Price adjustment measures should not have a negative impact on on going trade~~*Where a third country is engaging in substantive and advanced negotiations with the country concerned. Therefore, where a country is engaging in substantive negotiations with the Union concerning market access in the field of****Union concerning market access in the field of public procurement, with a view to eliminating or remedying the impairment of access of Union goods, services or economic operators to its public procurement and concession markets, the Commission may***~~could, during the negotiations, suspend the measures during the negotiations~~*which refer to this country.*
- (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.~~
- (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.~~
- (26a) *IPI measures are uniformly applied in the EU by contracting authorities and contracting entities. To take into account the diversity of administrative capacity of contracting authorities and contracting entities, Member States should be able to request the exemption from IPI measures for a limited list of local contracting authorities under certain strict requirements. When checking the proposed lists of local contracting authorities, the Commission should take into consideration the particular situation of those authorities as regard, inter alia, the levels of population and the geographical situation. Such exemption could also refer to public procurement procedures that those contracting authorities should be able to carry out under framework agreements or dynamic purchasing systems.*

- (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~~ **IPI** 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 *or* to safeguard essential public *policy* 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~~ **regarding overriding reasons relating to public health or protection of the environment. When contracting authorities or contracting entities apply these exceptions the Commission should be informed in a timely and comprehensive manner to allow for appropriate monitoring of the contract implementation of this Regulation.**
- (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~~ **IPI measures, which negatively affects the chances of economic operators having a right to participate in the public procurement procedure, Council Directives 89/665/EEC and 92/13/EEC** should be able to apply the corrective mechanism of Article 3 of Council Directive 89/665/EEC<sup>7</sup> or Article 8 of Council Directive 92/13/EEC<sup>8</sup>. ~~In addition, contracts concluded with an~~ **applicable. The affected economic operator should therefore be able to initiate a review procedure according to the national law implementing those Directives, if, for example, a competing economic operator—by contracting authorities or contracting entities—in violation of price adjustment measures limiting access of non-covered goods and services should have been excluded or a bid should have been ranked lower due to the application of an IPI measure. The Commission should also be able to apply the corrective mechanism according to Article 3 of Council Directive 89/665/EEC or Article 8 of Council Directive 92/13/EEC.** ~~be ineffective.~~

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<sup>7</sup> 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).

<sup>8</sup> 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).

- (29) In order to ensure uniform conditions for the 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<sup>9</sup>.
- (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~~ *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<sup>10</sup> (the "Trade Barriers Regulation"). Given that IPI measures could have different effects on the Union's public procurement market, the comitology procedure applicable to draft implementing acts foreseeing to exclude tenders should be adapted and for these cases the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 should apply.*
- (30a) *If necessary and for matters affecting the application of the Union's legal framework on public procurement, the Commission should be able to seek also the advice of the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC.*
- (30b) *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.*
- (31) ~~The advisory procedure should be used for the adoption of implementing acts adapting standard forms for the publication of contract or concession notices.~~

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<sup>9</sup> 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 (OJ L 55, 28.2.2011, p. 13).

<sup>10</sup> *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).'*

- (32) ~~Regular reporting by the Commission should make it possible to monitor the application~~*In line with the Interinstitutional Agreement of 13 April 2016 on Better Law-Making<sup>11</sup> 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. Such review would address, inter alia, the possibility of making use of any means available for facilitating the exchange of information, including electronic procurement facilities such as the standard forms for the publication of notices in the field of public procurement<sup>12</sup>, as well as the burden incurred by contracting authorities and contracting entities when applying the procedures established by this Regulation. The Commission should report on its assessment to the European Parliament and the Council. The review should, where appropriate, be followed up by appropriate legislative proposals.*
- (32a) *Public procurement rules and principles applicable to public contracts awarded by Union institutions on their own account are laid down in Regulation 2018/1046/EU of the European Parliament and of the Council on the Financial rules applicable to the general budget of the European Union and thus fall outside the scope of this Regulation. Under Regulation 2018/1046/EU, those rules are based on the rules set out in Directives 2014/23/EU and 2014/24/EU. It is therefore appropriate to assess whether the rules and principles laid down in this Regulation should be made applicable also to public contracts awarded by Union institutions in the context of a revision of Regulation 2018/1046/EU.*

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<sup>11</sup> OJ L 123, 12.5.2016, p. 1.

<sup>12</sup> Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 (eForms).



*(32b) To facilitate the application of this Regulation by contracting authorities, contracting entities and economic operators, the Commission should issue guidelines. These guidelines should provide information, in particular, on the notions of the origin of natural or legal persons, the origin of goods and services, additional obligations and the application of these provisions within the framework of this Regulation. In light of the overall policy objective of the Union to support small and medium-sized enterprises (SMEs), these guidelines should also take into account the specific information needs of SMEs in their application of this Regulation with a view to preventing an overburdening of SMEs.*

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

HAVE ADOPTED THIS REGULATION:

## Chapter I

### General provisions

#### Article 1

##### Subject matter and scope of application

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, **regarding non-covered procurement**. It lays down procedures for the Commission to undertake investigations into alleged ~~restrictive and discriminatory procurement~~**third-country** 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.

~~†This Regulation~~ 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~~ **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 concerned. ~~from third countries to Union public procurement procedures.~~

2. This Regulation shall apply to ~~contracts~~**public procurement procedures** covered by the following acts:
- (a) Directive 2014/23/EU<sup>13</sup>
  - (b) Directive 2014/24/EU<sup>14</sup>
  - (c) Directive 2014/25/EU<sup>15</sup>.
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.~~
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.~~
- 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.***
5. ~~deleted~~

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<sup>13</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014. p.1).

<sup>14</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

<sup>15</sup> ***Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243–374).***

5a. *This Regulation shall apply only to public procurement procedures launched after its entry into force. An IPI measure shall only apply to public procurement procedures which are covered by the IPI measure and have been 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 public procurement documents for procedures falling within the scope of an IPI measure.*

*Environmental, social and labour requirements shall apply to economic operators in accordance with Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU, or other Union legislation.*

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

## 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 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~~ *means an economic operator as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;*
  - (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;*

- (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;*
- (ac) *‘score adjustment measure’ means the relative diminution by a given percentage of the score of a tender, resulting from its evaluation by a contracting authority or a contracting entity, on the basis of the contract award criteria defined in the public procurement documents. In cases where price or cost is the only contract award criterion, the score adjustment measure means the relative increase, for the purpose of the evaluation of tenders, by a given percentage of the price offered by a tenderer;*
- (ad) *For the application of the obligations upon the successful tenderer set out in Article 9a, ‘evidence’ means any information, certificate, supporting document, or statement aimed at proving compliance with the obligations set out in that Article. This may refer to:*
- i documents showing that the goods are originating in the EU or a third country;*
  - ii a description of manufacturing processes (including samples, descriptions or photographs) for goods to be supplied;*
  - iii an extract of relevant registers or of financial statements for the origin of services, including a VAT identification number;*
- (b) *‘contracting authority’ means ‘a contracting authority’ as defined in ~~Article 2(1) of Directive 2014/24/EU~~ Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;*
- (c) *—‘contracting entity’ means ‘a contracting entity’ as defined in ~~Article 4(1) of Directive 2014/25/EU and Article 7 of Directive 2014/23/EU~~ Directives 2014/23/EU and 2014/25/EU;*
- (ca) *‘interested party’ means any person or entity whose interest might be affected by a third country measure, such as undertakings, associations of undertakings or the main cross-industry organisations representing social partners at EU level;*

- (d) ~~‘covered goods or services’ means 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;~~
- (e) ~~‘non covered goods or services’ means 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~~
- (f) ~~‘restrictive and/or discriminatory procurement~~**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, **at any level, that results**~~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~~**markets**.
- (fa) ***‘IPI measure’ means a measure adopted by the Commission in accordance with this Regulation limiting the access of economic operators and/or goods and services originating in third countries to the Union public procurement or concessions market in the area of non-covered procurement;***
- (fb) ***‘non-covered procurement’ means public 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 public procurement or concessions;***
- (fc) ***‘contract’ 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;***
- (fd) ***‘tenderer’ means a tenderer as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;***

(g) "country" means— any State or separate customs territory, without such— term having implications for sovereignty;

**(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.**

(h) ~~SME means SME as defined in Commission Recommendation 2003/3<sup>16</sup>61/EC.~~

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

### Article 3

#### ~~Rules~~**Determination** of origin

- ~~1. The origin of a good shall be determined in accordance with Article 22 to 26 of Council Regulation (EEC) No 2913/<sup>17</sup>1992.~~
2. ~~The origin of a service shall be determined on the basis of the origin of the economic operator providing it.~~
3. The origin of— an economic operator 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~~**that person** has a right of permanent residence;
  - (b) in the case of a legal person either of the following:

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<sup>16</sup> ~~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).~~

<sup>17</sup> ~~Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1).~~

- (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;~~
- (ii) ~~the Member State where~~***if the legal person is established and ~~not~~ engaged in substantive business operations—entailing a direct and effective link with the economy of the Member State concerned ***in the territory of the country in which it is constituted or otherwise organised, 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.******

For the purposes of point (b) (ii) of the first subparagraph ~~if the legal, ***that*** person is not engaged in substantive business operations entailing a direct and effective link with the economy of a Member State , the origin ~~of~~ ***for persons shall be presumed as having a dominant influence on*** the legal person ~~shall be that~~***in any of the person or persons following cases in*** which own or control the legal person ~~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.***

~~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.~~

~~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.~~



- 3a.** *Where an economic operator is a group of natural or legal persons and/or of public entities, and at least one of such persons or entities originates from a third country whose economic operators and goods and services are subject to an IPI measure, that IPI measure shall equally apply to tenders submitted by that group. This shall not apply if the participation of those persons or entities in a group amounts to less than 15% of the value of the tender in question, unless those persons or entities are necessary for fulfilling the majority of at least one of the selection criteria in a public procurement procedure.*
- 3aa.** *Contracting authorities or contracting entities may at any time during the public procurement procedure request the economic operator to submit, supplement, 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. Where the economic operator without any reasonable explanation fails to provide such information or documentation, thereby preventing the verification of the economic operator's origin by contracting authorities or contracting entities or making such a verification practically impossible or very difficult, it shall be excluded from the participation in a public procurement procedure.*
- 3c.** *The origin of a good shall be determined in accordance with Article 60 of the 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.*

## Chapter II

### Exemptions

#### Article 4

~~-Exemption for goods and services originating in least-developed and certain developing countries~~

~~Tenders shall be exempted from this Regulation where more than 50% of the total value of the tender is made up of goods and/or services originating in least developed~~***The Commission shall not initiate an investigation in respect of least developed*** countries listed in Annex IV to Regulation (EU) No 978/2012<sup>18</sup>, ~~and in developing countries considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system as defined in Annex VII to Regulation (EU) No 978/2012~~***unless there is evidence of circumvention of any IPI measures imputable to the listed third country or their economic operators.***

#### Article 5

##### Exemption for tenders submitted by SMEs

~~—Tenders submitted by<sup>19</sup> SMEs established in the Union and engaged in substantive business operations entailing a direct and effective link with the economy of at least one Member State, shall be exempted from this Regulation.~~

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<sup>18</sup> Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).

<sup>19</sup> ~~As defined in the Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium sized enterprises (OJ L 124, 20.5.2003, p. 36).~~

## Chapter III

Investigations, consultations, *measures and obligations* and price adjustment measures

### Article 6

#### Investigations *and consultations*

1. ~~Where~~ ***On its own initiative or upon a substantiated complaint of an EU interested party or a Member State, the Commission considers it to be may initiate an investigation into an alleged third-country measures or practice by publishing a notice in the interest Official Journal of the European Union, it may at any time, on its own initiative or upon application of. The notice of initiation shall include the Commission's preliminary assessment of the third-country measure or practice and invite interested parties or and Member State, initiate an investigation into alleged restrictive and/or discriminatory procurement measures or practices States to provide information to the Commission within a specified period of time.***

~~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 interested parties and Member States to provide information to the Commission within a specified period of time.~~

***The Commission shall make available on its website an online tool which the interested parties or Member States are required to use in order to submit a substantiated complaint.***

- 1a. *Upon publication of the notice, the Commission shall invite the third country concerned to submit its views, provide information and enter into consultations with the Commission in order to remedy the alleged third-country measure or practice. The Commission shall regularly inform Member States within the Committee established by Article 7 of the Trade Barriers Regulation.*
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~~*The investigation and consultations shall be concluded within a period of nine months after the date of initiation. In duly justified cases, the Commission may extend this period by five months by publishing a notice in the Official Journal of the European Union and informing the third country, all interested parties and Member States.*
- 2a. *Upon conclusion of the investigation and consultations, the Commission shall make publicly available a report recording the main findings of the investigation and a proposed course of action. The Commission shall present the report to the European Parliament and the Council.*
3. ~~—Where the Commission concludes as a result of~~*finds, following* its investigation, that the alleged restrictive and/or discriminatory procurement measures or practices ~~are~~*third-country measure or practice is* not maintained or that ~~they do it does~~ not result in restrictions ~~to a serious and recurrent impairment of~~ access ~~by~~*of* Union economic operators ~~or, Union goods and/or services to the public procurement or concession markets~~*market* of the third country ~~concerned, the Commission shall terminate— the investigation.—, and publish a notice of termination in the Official Journal of the European Union.~~
4. ~~When the Commission has concluded its investigation, it shall make publicly available a report recording its main findings.~~

- 4a. *The Commission may suspend the investigation and consultations at any time if the third country:*
- (a) *takes satisfactory corrective measures eliminating or remedying the serious and recurrent impairment of access of Union economic operators or Union goods or services, thereby improving such an access, or*
  - (b) *undertakes commitments towards the Union to end or phase out the third country measure or practice, including by extending the scope of an existing agreement to public procurement, within a reasonable period of time and no later than six months.*
  - (c) Deleted
- 4b *The Commission shall resume the investigation and consultations at any time if it concludes that the reasons for the suspension are no longer valid.*
- 4c *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.*

#### Article 7

##### ~~Consultations with third countries and Commission action~~

- ~~1. Where it is found as a result of an investigation that restrictive and/or discriminatory procurement measures or practices have been adopted or maintained by a third country and the Commission considers it to be in the Union interest, the Commission shall invite the country in question to enter into consultations. Those consultations shall aim at ensuring that Union economic operators, goods and services can participate in tendering procedures for the award of public procurement or concession contracts in that country on conditions no less favourable than those accorded to national economic operators, goods and services of that country and also with a view to ensuring the application of the principles of transparency and equal treatment.~~

~~If the third country concerned declines the invitation to enter into consultations, the Commission shall take appropriate action, on the basis of the facts available,~~

- ~~2. When, after the initiation of consultations, the country concerned takes satisfactory remedial or corrective measures, but without undertaking new market access commitments, the Commission may suspend or terminate the consultations.~~

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

- ~~3. — Where the remedial or corrective measures taken by the third country concerned are rescinded, suspended or improperly implemented, the Commission may take the following steps:~~

- ~~(i) resume consultations with the third country concerned, and/or~~
- ~~(ii) decide, by implementing act, to impose a price adjustment measure pursuant to Article 8.~~

~~The implementing act referred to in point (ii) of the first subparagraph shall be adopted in accordance with the examination procedure referred to in Article 14(2).~~

- ~~4. Where, after the initiation of consultations, it appears that the most appropriate means to end a restrictive and/or discriminatory procurement measure or practice is the conclusion of an international agreement, negotiations shall be carried out in accordance with Articles 207 and 218 of the Treaty on the Functioning of the European Union.. While such negotiations are ongoing, the investigation may be suspended.~~

- ~~5. The Commission may terminate consultations if the country concerned undertakes 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 and/or concessions; or~~

- (e) ~~Expansion of its market access commitments undertaken under the WTO Agreement on Government Procurement or under a bilateral agreement concluded with the Union.~~

~~The consultations may also be terminated in cases where the restrictive and/or discriminatory procurement measures or practices are still in place at the time these commitments are undertaken, as long as they include detailed provisions relating to the phasing out of such measures or practices within a reasonable period of time.~~

6. ~~In the event that consultations with a third country do not lead to satisfactory results within 15 months from the day those consultations started, the Commission shall terminate the consultations and shall take appropriate action. In particular, the Commission may decide, by means of an implementing act, to impose a price adjustment measure, pursuant to Article 8. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 14(2).~~

## ~~Article 8~~

### ~~Price adjustment measures~~

1. ~~Tenders more than 50 % of the total value of which is made of goods and/or services originating in a third country, may be subject to a price adjustment measure where the third country concerned adopts or maintains restrictive and/or discriminatory procurement measures or practices.~~

~~Price adjustment measures shall only apply to contracts with an estimated value equal to or above EUR 5.000.000 exclusive of value added tax.~~

2. ~~The price adjustment measure shall specify the penalty of up to 20% to be calculated on the price of the tenders concerned. It shall also specify any restrictions to the scope of application of the measure, such as those related to:~~
- ~~(a) public procurement of specific categories of contracting authorities or contracting entities;~~
  - ~~(b) public procurement of specific categories of goods or services or tenders submitted by specific categories of economic operators;~~

- (c) ~~public procurement above or within certain thresholds;~~
  - (d) ~~tenders submitted for specific categories of concessions;~~
  - (e) ~~the territories of certain subcentral levels of government.~~
3. ~~Contracting authorities and contracting entities on the list adopted pursuant to Article 9 shall apply the price adjustment measure to the following:~~
- (a) ~~to tenders submitted by economic operators originating in the third country concerned, unless these economic operators 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; and~~
  - (b) ~~to any tenders offering goods and services originating in the country concerned, where the value of these goods and services accounts for more than 50 % of the total value of the tender.~~

#### *Article 8a*

#### *IPI measures*

1. *Where the Commission finds, following an investigation and consultations pursuant to Article 6, that a third-country measure or practice exists, it shall, if it considers it to be in the interest of the Union, impose an IPI measure by means of an implementing act.*
2. *A determination as to whether it is in the Union's interest to adopt an IPI measure shall be based on an appreciation of all the various interests taken as a whole, including the interests of the Union's economic operators. IPI measures shall not be adopted where the Commission, on the basis of all the information available, can conclude that it is not in the Union's interest to adopt such measures.*
3. *The IPI measure shall be determined on the basis of the following criteria, in light of available information:*
  - (a) *the proportionality of the IPI measure with regard to the third-country measure or practice;*



*(b) the availability of alternative sources of supply for the goods and services concerned, in order to avoid or minimise a significant negative impact on contracting authorities or contracting entities.*

*4. The IPI measure shall only apply to public procurement procedures with an estimated value above a threshold to be determined by the Commission following the investigation and consultations, taking into consideration the criteria laid down in the previous paragraph. That estimated value should be equal to or above EUR 15 000 000 net of value-added tax for works and concessions, and equal to or above EUR 5 000 000 net of value-added tax for goods and services.*

*5. The IPI measure shall also apply in the case of specific contracts awarded under a dynamic purchasing system, where the IPI measure also applies to those dynamic purchasing systems 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 public procurement 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.*

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

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

*(b) exclude tenders submitted by economic operators originating in that third country.*

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

6. *The score adjustment measure referred to in paragraph 5 point (a) shall apply only for the purpose of the evaluation and ranking of the tenders. It shall not affect the price due to be paid under the contract to be concluded with the successful tenderer.*
8. *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<sup>20</sup> as well as any applicable exceptions,*
  - (b) specific categories of contracting authorities or contracting entities;*
  - (c) specific categories of economic operators;*
  - (d) specific thresholds equal or above those set out in paragraph 3;*
  - (e) As regards the score adjustment measure referred to in paragraph 5 point (a), the percentage value of the adjustment shall be set up to 50% of the evaluation score of the tender depending on the third country and sector of goods, services, works or concessions envisaged. For the purpose of public procurement procedures, where price or cost is the only contract award criterion, the score adjustment measure shall be twice the percentage value as set out in the first sentence of this point. The respective percentage values shall be indicated separately in the implementing act to be adopted pursuant to paragraph 1.*
9. *When determining the IPI measure based on the options under points (a) or (b) of paragraph 5, the Commission shall opt for the kind of measure that would be proportionate and most effectively remedy the level of impairment of EU operators on third country markets.*

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<sup>20</sup> *Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV).*

10. *The Commission may either withdraw the IPI measure or suspend its application if the third country takes satisfactory corrective actions eliminating or remedying the impairment of access of Union goods, services or economic operators to its public procurement or concession markets, thereby improving such an access, or if it undertakes commitments to end the measure or practice in question.*
11. *If the Commission considers that the corrective actions or commitments undertaken have been rescinded, suspended or improperly implemented, it shall make publicly available its findings and reinstate the application of the IPI measure at any time. The Commission may withdraw, suspend or reinstate an IPI measure in accordance with the examination procedure referred to in Article 14(2) and followed by the publication of a notice in the Official Journal of the European Union.*
12. *An IPI measure shall expire five years from its entry into force. An IPI measure may be extended for a duration of five years. Nine months before the date of expiry of the IPI measure, the Commission, at its own initiative, shall initiate a review of the IPI measure in question by publishing a notice in the Official Journal of the European Union. Such a review shall be concluded within six months. Following such a review, the Commission may, in accordance with the examination procedure referred to in Article 14(2), extend the duration of the IPI measure, adjust it appropriately or replace it by a different IPI measure.*

#### Article 96

##### ***List of contracting authorities or entities concerned to be exempted from the Regulation***

~~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.~~

*Upon a duly justified request by a Member State, the Commission may adopt, with a view to a fair distribution of the award procedures subject to IPI measures among Member States, a list of local contracting authorities in that Member State, within administrative units with population below 50 000 inhabitants, that are exempted from the application of this Regulation.*

*In its request, the Member State shall provide detailed information justifying the request for exemption and the value of the contracts above thresholds set in Article 8a(3) of this Regulation, awarded by all listed contracting authorities or contracting entities over the past 3 years from the 31st December preceding the request for exemption. An exemption may only be granted if the total value of contracts above thresholds set in Article 8a(3) of this Regulation, awarded by the contracting authorities or contracting entities not to be exempted exceeds 80% of the total value of above thresholds contracts falling under the scope of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU awarded in the requesting Member State in the same 3-year period.*

*The exemption shall be limited to what is strictly necessary and proportionate, taking the administrative capacity of the contracting authorities to be exempted into consideration.*

*The Commission shall inform Members States before adopting an exemption list. The exemption list, published in the Official Journal of the European Union, shall be valid for a period of three years and may be revised or renewed every three years upon duly justified request by the Member State concerned.*

## *Article 9a*

### *Obligations upon the successful tenderer*

- 1. In the case of public 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 public procurement documents the following obligations on successful tenderers:*
  - (a) an obligation not to subcontract more than 50% 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, an obligation, for the duration of the contract, to ensure that goods and/or services supplied or provided in the execution of the contract and originating in the third country which is subject to the IPI measure represent no more than 50% 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 obligations 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 50% 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 paragraph 1 points (a) and/or (b) or if the contract is awarded to a group of economic operators comprising a legal person originating in the 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 obligations laid down in this Article in the documents for public procurement procedures to which an IPI measure is applicable.*

#### Article 10

##### ~~Withdrawal or suspension of price adjustment measures~~

- ~~1. The Commission may decide, by implementing act, to withdraw the price adjustment measure or suspend its application for a period of time if the country concerned takes satisfactory remedial or corrective actions.  
  
Where the remedial or corrective actions taken by the third country concerned are rescinded, suspended or improperly implemented, the Commission may reinstate the application of the price adjustment measure, at any time, by means of an implementing act.~~
- ~~2. The Commission shall make publicly available its findings regarding the remedial or corrective actions taken by the third country concerned.~~

3. ~~The implementing acts referred to in this Article shall be adopted in accordance with the examination procedure referred to in Article 14(2).~~

#### ~~Article 11~~

##### ~~Application of price adjustment measures~~

1. ~~Contracting authorities and contracting entities on the list adopted pursuant to Article 9 shall apply price adjustment measures to the following:~~

- ~~(a) tenders submitted by economic operators originating in the third country concerned, or~~
- ~~(b) tenders offering goods and services originating in the third country concerned, where the value of those goods and services accounts for more than 50 % of the total value of the tender.~~

~~Contracting authorities and contracting entities shall not apply price adjustment measures to tenders referred to in point (a) where the tenderers can demonstrate that less than 50 % of the total value of their tender is made of goods and services originating in the third country concerned.~~

~~The price adjustment measure shall apply only for the purpose of the evaluation and ranking of the price component of the tenders. It shall not affect the price due to be paid under the contract which will be concluded with the successful tenderer.~~

- ~~2. When contracting authorities and contracting entities conduct a procurement or a concession procedure that is subject to a price adjustment measure they shall include that information in the contract notice they publish pursuant to Article 49 of Directive 2014/24/EU or Article 69 of Directive 2014/25/EU or in the concession notice they publish pursuant to Article 31 of Directive 2014/23/EU. The Commission may adopt implementing acts in accordance with the advisory procedure referred to in Article 14(3) adapting the standard forms for contract or concession notices adopted under Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU.~~
- ~~3. Contracting authorities and contracting entities shall inform unsuccessful tenderers of the award of a contract or a concession based on the application of a price adjustment measure adopted or reinstated pursuant to this Regulation.~~
- ~~4. Where a price adjustment measure is applied, contracting authorities and contracting entities shall require tenderers to provide information on the origin of the goods and/or services contained in the tender, and on the value of the goods and services originating in the third country concerned as a percentage of the total value of the tender. They shall accept self-declarations from tenderers.~~

~~A contracting authority may ask a tenderer at any moment during the procedure to submit additional documentation where necessary, in order to ensure the proper conduct of the procedure. The successful tenderer shall always be asked to submit more detailed information on the origin of the goods and services to be provided.~~

## Article 12

### Exceptions

1. Contracting authorities and contracting entities may *on an exceptional basis* decide not to apply the price adjustment *PI* measure with respect to a procurement or a concession *public procurement* procedure if:
- (a) there are no Union and/or covered goods or services available which meet the requirements of the contracting authority or contracting entity; or



*(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*

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

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

2. Where a contracting authority or contracting entity ~~intends~~**decides** not to apply a ~~price adjustment~~**IPI** measure—, it shall ~~indicate its intention in the contract notice that it publishes pursuant to Article 49 of Directive 2014/24/EU or Article 69 of Directive 2014/25/EU or in the concession notice pursuant to Article 31 of Directive 2014/23/EU. It shall notify the Commission~~**inform the Commission, in a manner to be decided by the respective Member State**, no later than ~~ten calendar~~**thirty** days after the ~~publication~~**award** of the contract ~~notice~~.

3. The notification shall contain the following information:

(a) the name and contact details of the contracting authority ~~and/or~~**and / or** contracting 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 ~~price adjustment~~**IPI** measure is based, and a detailed justification for the use of the exception;

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

The Commission may ask the ~~contracting authority or contracting entity~~**Member States** concerned, for additional information.

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

~~The notification shall contain the following information:~~

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

## Article 139

### Implementation *Remedies*

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 89/66<sup>21</sup>/EECor Article 8 of Directive 92/1<sup>22</sup>3/EEC.~~

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<sup>21</sup> ~~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).~~

<sup>22</sup> ~~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).~~

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

## Chapter IV

### -Implementing powers, reporting and final provisions

#### Article 14

##### Committee procedure

1. The Commission shall be assisted by the ~~Advisory Committee for Public Contracts established by Council Decision 71/306/EEC<sup>23</sup> and by the Committee set up by Article 7 of the Council Regulation (EU) 2015/1843 (Trade Barriers Regulation)<sup>24</sup>. These committees.~~ *That committee* shall be ~~committees~~ *a committee* 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.~~

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<sup>23</sup> *Regulation (EU) 2015/1843 of the European Parliament and of the Council Decision (71/306/EEC) of 26 July 1971 setting up an Advisory Committee for Public Works Contracts (OJ L 185, 16.8.1971, p. 15) 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 349, 31.12.1994 272, 16.10.2015, p. 1).*

<sup>24</sup> ~~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 349, 31.12.1994 272, 16.10.2015, p. 1).~~

2a. *Where the Committee delivers no opinion for the adoption of draft IPI measures in the form of exclusion of tenders, according to paragraph 5 point (b) of Article 8a, 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.*

~~3. Where the Committee delivers no opinion for the adoption of draft IPI measures in the form of exclusion of tenders according to paragraphs 5(b) of Article 5, 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.~~

#### *Article 14a*

##### *Guidelines*

1. *To facilitate the application of this Regulation by contracting authorities and entities and economic operators, the Commission shall, within six months from the date of the entry into force of this Regulation, issue guidelines.*

#### ~~Article 15~~

##### ~~Confidentiality~~

- ~~1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.~~
- ~~2. Neither the Commission nor the Council, nor the European Parliament nor Member States, nor their officials shall reveal any information of a confidential nature received pursuant to this Regulation, without specific permission from the supplier of such information.~~

3. ~~The supplier of information may request to treat information submitted as confidential. The request for confidentiality 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 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.~~
5. ~~Paragraphs 1 to 4 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 16

### Reporting

~~By 31 December 2018~~ ***Three years after the date of entry into force of this Regulation*** and at least every ~~three~~***two*** years thereafter, the Commission shall submit a report to the European Parliament and the Council on the application of this Regulation and on progress made in international negotiations regarding access for Union economic operators to public ~~contract~~ ***procurement and concession award procedures in markets of*** third countries undertaken under this Regulation. ~~To this effect,~~ Member States shall, upon request, provide the Commission with appropriate information ***on the application of measures under this Regulation, including as regards the number of public procurement procedures at central and sub-central level in which a given IPI measure was applied, the number of tenders received from third countries subject to that IPI measure, as well as cases in which a specific exception from the IPI measure was applied. The report shall be made public.***

*Contracting authorities and contracting entities shall report to the Commission through the Tender Electronic Daily about the application of IPI measures, as part of the information on contract awards. The reported information shall include information on the application of IPI measures in a given procedure, the number of tenders received, in that procedure, from third countries subject to IPI measure, the number of tenders, in that procedure, for which exclusion of the tender or score adjustment measures were applied, the application, in that procedure, of specific exceptions from the IPI measure. The Commission shall use this data in its regular reporting required under this Article. Member States shall, upon request, provide the Commission with additional information on the application of measures under this Regulation.*

#### ~~Article 17~~

#### ~~Amendment of Directive 2014/25/EU~~

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

#### *Article 17a*

##### *Review*

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

Article 18

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.

~~1.~~ ~~2.~~

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*

**Joint statement of the European Parliament and the Council**

The European Parliament and Council recognise that the rules on comitology agreed in this instrument do not prejudge the outcome of other ongoing or future legislative negotiations and are not to be seen as precedent for other legislative files.

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**Statement by the Commission on the generalised scheme of tariff preferences (GSP)**

When conducting a review of the scope, functioning and efficiency of Regulation (EU) 2022/xxx, in line with its Article 17, the Commission will also assess the need to exempt from its application any of the developing countries that are beneficiaries of the general arrangement referred to in point (a) of Article 1(2) of Regulation (EU) No 978/2012, and in particular the beneficiaries of the special incentive arrangement for sustainable development and good governance as defined in Article 9 of Regulation (EU) No 978/2012. In the review, the Commission will pay particular attention to sectors that are considered strategic in respect of EU public procurement.

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**Statement by the Commission on the exclusive competence**

As confirmed in the Opinion 2/15 of the Court of Justice, the participation of third-country economic operators, goods and services in the Union's procurement procedures falls within the scope of the common commercial policy for which, as explicitly stated in Article 3(1)(e) TFEU, the Union has exclusive competence. Therefore, Member States and their contracting authorities and contracting entities shall not adopt or maintain any legislative or other generally applicable measures governing access by third-country economic operators, goods and services beyond those applied in accordance with this Regulation and other Union legislation.

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