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THE EUROPEAN UNION**

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**PROPOSAL**

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from:	European Commission
dated:	26 March 2012
No Cion doc.:	COM(2012) 124 final
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

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Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union.

Encl.: COM(2012) 124 final



EUROPEAN COMMISSION

Brussels, 21.3.2012  
COM(2012) 124 final

2012/0060 (COD)

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**

(Text with EEA relevance)

{SWD(2012) 57 final}  
{SWD(2012) 58 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### **Grounds for and objectives of the proposal**

This is a new proposal in the area of the European Union's international procurement policy. The key objective of this initiative is to improve the conditions under which EU businesses can compete for public contracts in third countries. Currently, EU suppliers face manifold restrictive procurement practices in many of the countries that are the EU's main trading partners. Moreover, the initiative confirms the legal status of bidders, goods and services from countries that have an international agreement with the EU in the area of public procurement and clarifies the rules applicable to bidders, goods and services not covered by these agreements.

#### **General context**

In the negotiations on a revised Government Procurement Agreement (GPA) in the context of the World Trade Organisation (WTO) and in bilateral negotiations with third countries, the EU has advocated an ambitious opening of international public procurement markets. Some €352 billion of EU public procurement is open to bidders from member countries of the WTO agreement on government procurement.

However, many third countries are reluctant to open their procurement markets to international competition or to open those markets further than what they have already done. The value of US procurement offered to foreign bidders is currently just €178 billion and €27 billion for Japan, whereas only a fraction of the Chinese public procurement market is open to foreign business. Many countries have also adopted protectionist measures, especially in the wake of the economic crisis. All in all, more than half of the world's procurement market is currently closed due to protectionist measures and this share is only growing. As a result, only €10 billion of EU exports (0.08% of EU GDP) currently find their way in global procurement markets, whereas an estimated €12 billion of further EU exports remains unrealised due to restrictions.

In contrast, the EU has kept its public procurement market largely open to international competition, despite growing pressure on its domestic market, in particular from emerging economies on certain key sectors (railways, construction, IT services). With the exception of some provisions limited in scope to supply and service contracts in the utilities sector<sup>1</sup>, the EU has not exercised its power to regulate the access of foreign goods, services and companies to the EU's public procurement market.

Given the rising importance of emerging economies, the absence of a level playing field causes many problems. The EU's principal problem is a lack of leverage in its international negotiations with trading partners to redress the imbalance and to gain substantial market access commitments for the benefit of EU business. Also, contracting authorities lack a clear framework to be able to apply the international commitments of the EU.

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<sup>1</sup> Articles 58 and 59 of Directive 2004/17 on utilities public procurement procedures.

This initiative aims at solving these problems by firstly strengthening the position of the European Union when negotiating access for EU companies to the public procurement markets of third countries, in order to open up our trading partners' markets. Secondly, for this purpose it seeks to clarify the rules governing access by third-country companies, goods and services to the EU's public procurement market. Ultimately the objective is to improve, in line with the EU's 2020 strategy, business opportunities for EU firms on a global scale, thereby creating new jobs and promoting innovation.

### **Existing provisions in the area of the proposal**

The two basic public procurement directives of the European Union<sup>2</sup> do not provide a general framework for dealing with bids containing foreign goods and services on the EU's public procurement market. The only specific rules are set out in Articles 58 and 59 of Directive 2004/17/EC. However, these provisions are limited to procurement by utilities and are too narrow in their scope to make a substantial impact on negotiations on market access. Indeed the EU public procurement for Utilities only stands for around 20% of the total EU public procurement market.

In the Commission proposal on the modernization of the EU rules on public procurement, the Commission decided not to take over Article 58 and 59 of the Utilities-directive, in view of the present initiative<sup>3</sup>.

### **Consistency with the other policies and objectives of the Union**

This initiative implements the Europe 2020 strategy for smart, sustainable and inclusive growth [COM(2010) 2020] and the Europe 2020 Flagship Initiative on Integrated Industrial Policy for the Globalisation Era [COM(2010) 614]. It also implements the Single Market Act [COM(2011) 206] and the Communication on Trade, Growth and World Affairs [COM(2010) 612]. It is a CWP 2011 strategic initiative (COM(2010) 623 final).

This proposal is also consistent with the developmental policies and objectives of the Union, in particular by generally sheltering goods and services from least-developed countries from action under this instrument.

## **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

### **Consultation of interested parties**

To gather the views of stakeholders, the Commission organised, in addition to individual meetings, a series of consultations and outreach activities.

An open internet consultation was carried out between 7 June and 2 August 2011. It consisted of three detailed questionnaires aimed at (i) contracting authorities and Member States (MS), (ii) businesses and/or their representatives, and (iii) other potentially interested parties

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<sup>2</sup> Directive 2004/18/EC for entities in the so-called classic sectors, and Directive 17/2004/EC for entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1 and p. 114, respectively).

<sup>3</sup> COM(2011) 895 final and COM(2011) 896 final.

(citizens, NGOs, trade unions). The Commission received a total of 215 contributions<sup>4</sup>. A summary report of the contributions is given in Annex I to the Impact Assessment report. As part of this process the Commission organised a public hearing on 8 July 2011 in Brussels. Social partners also had the opportunity to express their views in the Liaison Forum organised by DG Employment on 7 February 2011. Specific consultations were also conducted with EU Delegations in third countries and the MS in the Advisory Committee for Public Contracts. Specific topics (i.e. Article 58 of the Utilities-Directive and the treatment of abnormally low tenders) have also been addressed in the consultation on the Modernisation of Public Procurement Policy. The Commission's minimum standards for consultations were fully met.

### Summary of responses and how they have been taken into account

The Commission initiative was generally welcomed. A large majority of the respondents were in agreement with the Commission's description of the current level of access to the EU's public procurement market for goods, services and companies from outside the EU and they also supported the identified objectives of the initiative.

As regards the outlined policy options it is important to note that the views expressed were divergent: overall, a significant majority of stakeholders appear to support a legislative initiative (around 65%), while a sizeable minority of around 35% prefer the 'nothing happens' option. However, views within the different groups of stakeholders also diverge as to the preferred option. Among contracting entities and government authorities (including from third countries), for example, two thirds are in favour of the 'nothing happens' or non-legislative option, while for businesses and other stakeholders some 75% are in favour of a legislative initiative. There are also divergent opinions as to what that legislative option should be. Although almost half of respondents support legislative option 'approach A'<sup>5</sup>, a significant number of respondents also favour alternative approaches. It is worth noting that, despite being the least preferred legislative option, 'approach B'<sup>6</sup> also received support from a considerable number of respondents.

The main reasons put forward by stakeholders in favour of or against one or the other policy option included the importance of best value for money, the competitiveness and productivity that could be undermined by some of the policy options, the risk of retaliation by our trading partners, the administrative burden that could be attached to such an initiative and the fact that the initiative would endanger the status of the EU as an advocate of open markets. Trade unions and non-governmental organisations (NGOs) have been fairly neutral on the choice of options and have tended to focus their contributions on the need for third countries to respect ILO Conventions when tendering in the EU or for the EU to open its borders to maintain fair trade vis-à-vis least-developed countries.

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<sup>4</sup> Written submissions were received in addition to the online responses.

<sup>5</sup> Approach A: EU contracting authorities/entities would be required in principle to exclude third-country goods, services and companies not covered by international commitments of the EU.

<sup>6</sup> Approach B: Subject to notification to the Commission, EU contracting authorities/entities would have the option to decide to exclude third-country goods, services and companies not covered by international commitments of the EU. In addition, the Commission would be entrusted with a specific tool to conduct enquiries about the market access situation for EU goods, services and companies and to impose restrictive measures on goods and services originating in third countries when EU goods, services and companies do not have sufficient access to the public procurement markets of those countries.

## **Collection and use of expertise**

The use of external expertise was not considered necessary in addition to the consultations mentioned above. In the area of public procurement the Commission traditionally commands significant expertise.

## **Impact assessment**

Several options have been considered by the Commission in order to identify the most appropriate one.

The first option is not to take any additional action in this field at all, and continue with business as usual with the international market access negotiations (possibly in a reinforced manner) with the European Union's trading partners. However, judging from past experience, it is unlikely that such an option would lead to substantial improvements in entitling EU goods, services and suppliers to participate in procurement processes in third countries. The inevitable result would be a continued loss of tendering opportunities on a significant scale.

A second type of option would consist in upgrading the implementation of existing tools under Directive 2004/17/EC (Articles 58 and 59), based on better guidance or an extension of the scope of these tools to cover the entire scope of Directives 2004/17/EC and 2004/18/EC. Based only on optional use by individual contracting authorities/entities, this scenario would clearly not improve significantly the leverage of the EU in international negotiations.

A third option could be to close generally or by sector the EU public procurement market to goods, services and suppliers from third countries, subject to the EU's international obligations in this field. However, such an option gives rise to serious concerns as to its impact in terms of retaliation and the costs involved for individual contracting authorities/entities and the competitiveness of the EU.

Therefore, the Commission favours a fourth option, namely to create an autonomous instrument that would strike the right balance between, on the one hand, the need to enhance the Union position in negotiations on market access, and on the other hand, the preservation of a competitive procurement regime in the European Union.

To this effect, the proposal establishes a double mechanism. Individual contracting authorities/entities would be entitled to exclude tenders of which more than 50% of the value is made up of goods and/or services not benefiting from international market access commitments, under supervision by the Commission. In addition the Commission would be allowed to respond by limiting temporarily market access for those countries which demonstrably exclude or discriminate against Union suppliers, goods and services in their national procurement practices, and refuse to grant better market access in negotiations. Any restrictions on access to the EU public procurement market which the Commission may one day adopt under this Regulation would be measured and finely targeted.

This Commission's Impact Assessment Board (IAB) has issued two opinions on the Impact assessment report. In the light of the first opinion impact assessment-report has been revised as follows: the problem definition has been reshuffled in order to focus on the central issue identified across the impact assessment, the need for further opening of third countries' procurement markets and the problems of compliance of EU international commitments. The scale of options to be considered has been broadened. In addition to a more active negotiating

policy the impact assessment takes into account the extension of the current regime of articles 58 and 59 of directive 2004/17/EC to all procurements covered by the EU directives and the possibility for selective acceptance of non-covered procurement. Finally, the analysis of impacts has been refined to upgrade the measurement of retaliation and the employment figures. Annex 10 of the Impact assessment report provides a more detailed review of how the IAB's first opinion has been incorporated in the revised report, resubmitted on 8 February 2012.

In its opinion on the resubmitted report, the IAB acknowledges the improvements made to the report and the incorporation of the recommendations it made in its first opinion, but stated it could not give a positive opinion. The IAB believes there are still a number of areas where the assessment could be strengthened and identifies a number of actions to further improve the report (i.e. refine presentation of the options, improve the presentation of the model used to estimate the impacts, better justify the proportionality of the preferred option, etc). The final impact assessment report has integrated to the extent possible these recommendations.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

#### **Summary of the proposed action**

The main objectives of this proposal are to strengthen the position of the European Union when negotiating the terms of access of EU goods, services and suppliers to the public procurement markets of third countries and to clarify the legal situation for foreign bidders, goods and services participating in the EU public procurement market. Accordingly, this proposal establishes a comprehensive EU external public procurement policy that governs the access of foreign goods and services to the EU public procurement market and includes mechanisms to encourage the EU's trading partners to start market access discussions.

In the first place, the proposal reflects in EU legislation the principle that, on the EU's internal market in procurement, goods and services benefiting from market access commitments are treated equally to EU goods and services and it extends this treatment to goods and services originating in least-developed countries.

As regards the treatment of goods and services not benefiting from market access commitments, a three-stage approach is envisaged.

The Commission may approve that Contracting authorities/entities exclude tenders where the value of non-covered goods and services exceeds 50% of the total value of goods and services included in the tender. After informing potential tenderers, in the contract notice, of its intention to exclude such tenders, a contracting authority/entity has to notify the Commission when it receives tenders that fall into this category. The Commission would give its approval to the exclusion if there is a lack of substantial reciprocity in market opening between the EU and the country from which the goods and/or services originate. The Commission will approve the exclusion where the goods and services concerned fall within the scope of a market reservation by the EU in an international agreement.

In addition, this proposal establishes an EU mechanism to further increase the leverage of the EU in international negotiations on market access, based on Commission investigations, consultation with third countries and, where appropriate, imposition of temporary restrictive measures by the Commission.

Upon request by interested stakeholders or on its own initiative, the Commission may conduct investigations to verify the existence of restrictive procurement practices. Where the existence of such practices is confirmed, the Commission would invite the country concerned to enter into consultation in order to address such restrictive practices and thereby create a better market access situation for EU companies.

If the country concerned is unwilling to engage into consultations or provide satisfactory solutions to the restrictive procurement measures, the European Union could take a decision to temporarily restrict the access of goods and/or services from that country to the EU public procurement market.

Finally, as a complement to the provisions on abnormally low tenders in the proposed reform of the public procurement directives, contracting authorities/entities will be required to inform the other tenderers when they intend to accept abnormally low tenders where the value of non-covered goods and services exceeds 50% of the total value of goods and services included in the tender. As the need for third countries to respect core ILO labour standards is addressed in the proposed reform of the public procurement directives, it is not necessary to treat it in the present text.

Designed as a policy tool to stimulate negotiations, it should be underlined that the thrust of this initiative is not to close the procurement market in the European Union, but to gain better access to the public procurement markets of the European Union's trading partners. It is imperative to preserve competitive tendering conditions on the internal market which give tangible benefits to contracting authorities/entities and society at large.

### **Legal basis**

Articles 207 of the Treaty on the Functioning of the European Union.

### **Subsidiarity principle**

The proposal falls under the exclusive competence of the European Union. The subsidiarity principle therefore does not apply.

### **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons.

This proposal strikes a careful balance between the interests of all relevant stakeholders and the form and substance of the EU action does not exceed what is necessary to achieve the objectives of the Treaty.

First, the contracting authorities/entities will have the right to exclude tenders consisting, for more than 50%, of non-covered goods and services, under the supervision by the Commission. This ensures that contracting authorities/entities are left the choice to accept goods and services irrespective of their origin or restrict the access of goods and services not covered by the EU's international agreements, to the extent such restrictions are consistent with the EU's common commercial policy, which is exclusively an area of EU competence. The supervision by the Commission is carefully designed to ensure uniformity and proportionality. Secondly, the Commission tool established by this regulation will ensure that the EU has a mechanism available to investigate restrictive procurement practices and consult



with the third country concerned on these. Only where no other solution can be found will the Commission adopt temporary restrictive measures.

Administrative costs are kept as low as possible, but measures have to be taken to preserve the consistency of the common commercial policy. The setting up of supervision and investigation mechanisms are to be carried out by Commission services currently working on the external public procurement policy and on market access monitoring, thus limiting the impact on human resources within the Commission. The administrative burden for contracting authorities/entities will be reduced to situations where restrictive measures are taken by the Commission or when contracting authorities/entities choose to use the mechanism, and would be based on standard forms or self-declarations, limiting the investigations that individual entities would perform to verify the origin of goods or services.

### **Choice of instruments**

The proposed instrument is a regulation.

Other means would not be adequate, since only a regulation can sufficiently ensure uniform action by the European Union in the field of common commercial policy. Moreover, this instrument gives powers to the European Commission, meaning that transposition would not be useful.

## **4. BUDGETARY IMPLICATION**

The proposal in itself does not have budgetary implications. The additional tasks for the Commission can be met with existing resources.

## **5. OPTIONAL ELEMENTS**

### **Review/revision/sunset clause**

The proposal includes a review clause.

### **European Economic Area**

The proposed act concerns an EEA matter and should therefore extend to the European Economic Area.

### **Detailed explanation of the proposal**

**Article 1** defines the subject matter and the scope of application of this Regulation, based on the EU public procurement Directives 2004/17/EC and 2004/18/EC and the Directive on the award of concessions contracts, as proposed by the Commission<sup>7</sup>.

**Article 2** contains relevant definitions, most of which are taken over from the EU public procurement Directives. The text also defines the "covered goods and services" and non-covered goods and services, which are central to the application of this Regulation.

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<sup>7</sup> COM(2011) 897 final.

**Article 3** sets out, for the purpose of this Regulation, the applicable rules of origin, for goods and services procured by contracting authorities/entities. In compliance with the EU international commitments, rules of origin for goods are in line with the non-preferential rules of origin as defined in the EU Customs Code (Regulation 2913/92). The origin of a service is defined on the basis of the relevant rules under the Treaty on the Functioning of the European Union on the right of establishment and on the definitions that the GATS provides (Article XXVIII).

**Article 4** spells out the rules on access to the EU public procurement market applicable to foreign goods and services benefiting from the EU market access commitments (referred to as ‘covered goods and services’) and to goods and services originating in the least-developed countries. Both categories have to be treated equally to EU goods and services.

**Article 5** outlines the rules of access for goods and services originating in third countries not benefiting from market access commitments of the EU (referred to as ‘non-covered goods and services’). The access of these goods and services may be subject to restrictive measures taken by contracting authorities/entities or the Commission under the mechanisms established by this Regulation.

**Article 6** sets out the conditions under which the Commission may approve that individual contracting authorities/entities exclude tenders from tendering procedures, where the value of non-covered goods and services exceeds 50% of the total value of goods or services included in the tender for contracts with an estimated value equal or above EUR 5.000.000.

When a contracting authority/entity has indicated in the contract notice its intention to exclude non-covered goods and services and receives tenders that fall into this category, it must notify the Commission and indicate the characteristics of the tenders concerned. According to the publication of notices in the Official Journal (TED, Tenders European Daily) only 7% of all contracts published in the Official Journal have a value above EUR 5 million. However, those contracts represent 61% of the whole EU public procurement market. The Commission estimates that it would receive each year a maximum of 35-45 notices.

For contracts with an estimated value equal or above EUR 5.000.000 the Commission should take a decision on the exclusion. The Commission should, for all contracts, approve the intended exclusion when the goods and services concerned are subject to a market access reservation under the EU international agreements on public procurement. Where such an agreement does not exist, the Commission shall approve the exclusion where the third country maintains restrictive procurement measures leading to a lack of substantial reciprocity in market opening between the Union and the third country concerned. When assessing whether a lack of substantial reciprocity exists, the Commission shall examine, to what degree public procurement laws 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. Moreover it shall examine to what degree public authorities and/or individual procuring entities maintain or adopt discriminatory practices Union goods, services and economic operators.

**Article 7** imposes on contracting authorities/entities the specific obligation to inform the other tenderers in an award procedure of their decision to accept an abnormally low tender where the value of non-covered goods and services exceeds 50% of the total value of goods or services included in the tender.

**Article 8** sets out the conditions under which the Commission, on its own initiative or at the request of Member States or interested parties, may launch an external procurement investigation into restrictive procurement measures by third countries, and how to conduct such an investigation.

**Article 9** establishes a mechanism for consultation with third countries in cases where the Commission concludes, after conducting an external procurement investigation, that the country concerned has adopted or maintains a restrictive procurement practice. Under this mechanism, the Commission will invite the country concerned to enter into discussions with a view to removing the restrictive procurement practice and ensuring transparency and equal treatment for EU suppliers, goods and services. The consultation scheme takes into account the different situations to be considered, such as the existence of a dispute settlement mechanism for restrictive procurement practices affecting covered procurement, unilateral remedial measures or the conclusion of an international agreement providing for equal treatment for EU suppliers, goods and services previously affected by restrictive procurement practices. The Commission is empowered to adopt an implementing act prohibiting exclusion of tenders comprising non-covered goods and services originating in countries with which substantive market access negotiations take place and there is a reasonable prospect of removing restrictive procurement practices in the near future.

**Article 10** empowers the Commission to adopt an implementing Act concerning ‘restrictive measures’, provided that its investigation has confirmed the existence of restrictive procurement measures in a third country, and that the Commission has attempted to conduct discussions on market access under the consultation mechanism. Such measures may in principle consist of (i) the disqualification of certain tenders made up for more than 50% of goods or services originating in the country concerned; and/or (ii) a mandatory price penalty on those goods or services tendered which originate in the country concerned.

**Article 11** provides rules for withdrawal or suspension of restrictive measures adopted, as well as a Commission decision to prohibit the use of Article 6 by contracting authorities/entities.

**Article 12** sets the rules for the provision of information of tenderers on the application of restrictive measures adopted by the Commission in the context of individual public procurement procedures.

**Article 13** sets out the circumstances when contracting authorities/entities are authorised to set aside measures adopted pursuant to this Regulation. The objective of this provision is to give contracting authorities/entities a requisite degree of flexibility to satisfy their purchasing needs and, at the same time, to ensure proper monitoring by the Commission by means of the notification obligation.

**Article 14 and 15** sets out the delegation of powers conferred on the Commission to adopt delegated acts in accordance with Article 14 concerning amendments to the Annex to reflect the conclusion of new international agreements by the Union in the field of public procurement.

**Article 16** provides legal remedies in case of violation of the provisions of this Regulation.

**Article 17** designates the relevant committee procedure for the adoption of implementing acts. Moreover, it empowers the Commission to adopt implementing measures for the adoption of standard forms.

**Article 18** requires the Commission to report on implementation of this Regulation at least every three years after its entry into force.

**Article 18** contains rules on confidentiality of information received pursuant to this Regulation.

**Article 20** provides for the repeal of Articles 58 and 59 of Directive 2004/17/EC.

**Article 21** determines the entry into force of this Regulation.

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**

(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 opinion of the European Economic and Social Committee<sup>8</sup>,

Having regard to the opinion of the Committee of the Regions<sup>9</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 encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.
- (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

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<sup>8</sup> OJ C , , p. .

<sup>9</sup> OJ C , , p. .

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 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 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) Directives 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>10</sup> and 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts<sup>11</sup> contain only a few provisions concerning the external dimension of the public procurement policy of the Union, in particular Articles 58 and 59 of Directive 2004/17/EC. These provisions however only have a limited scope and due to a lack of guidance they are not much applied by contracting entities.
- (8) In accordance with Article 207 TFEU the common commercial policy in the field of public procurement 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 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.
- (10) The objectives of improving the access of EU economic operators to the public procurement 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

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<sup>10</sup> OJ L 134, 30.4.2004, p. 1

<sup>11</sup> OJ L 134, 30.4.2004, p. 114.

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>12</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.

- (12) The Commission should assess whether to approve that contracting authorities/entities within the meaning of Directives [2004/17/EC, 2004/18/EC and Directive [...] of the European Parliament and the Council of [...]....on the award of concession contracts<sup>13</sup>] exclude, for contracts with an estimated value equal or above EUR 5.000.000 from procedures for the award of contracts goods and services not covered by the international commitments undertaken by the European Union.
- (13) For the sake of transparency, contracting authorities/entities intending to make use of their power in accordance with this Regulation to exclude tenders comprising goods and/or services originating outside the European Union, in which the value of the non-covered goods or services exceeds 50 % of the total value of these goods or services from procedures for the award of contracts should inform economic operators thereof in the contract notice published in *the Official Journal of the European Union*.
- (14) In order to enable the Commission to decide on any exclusion of third-country goods and services not covered by the international commitments of the Union, contracting authorities/entities should notify the Commission of their intention to exclude such goods and services, using a standard form that contains sufficient information to enable the Commission to decide.
- (15) For contracts with an estimated value equal or above EUR 5.000.000 the Commission should approve the intended exclusion if the international agreement concerning market access in the field of public procurement between the Union and the country where the goods and/or services originate contains, for the goods and/or services for which the exclusion is proposed, explicit market access reservations taken by the Union. Where such an agreement does not exist, the Commission should approve the exclusion where the third country maintains restrictive procurement measures leading to a lack of substantial reciprocity in market opening between the Union and the third country concerned. A lack of substantial reciprocity should be presumed where restrictive procurement measures result in serious and recurring discriminations of EU economic operators, goods and services.
- (16) When assessing whether a lack of substantial reciprocity exists, the Commission should examine to what degree public procurement laws of the country concerned

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<sup>12</sup> OJ L 302, 19.10.1992, p. 1

<sup>13</sup> OJ L....

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.

- (17) 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 the Commission considers that there is a reasonable prospect of removing the restrictive procurement 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.
- (18) 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.
- (19) In view of the greater difficulty for contracting authorities/entities to assess, in the context of tenders comprising goods and/or services originating outside the European Union, in which the value of the non-covered goods or services exceeds 50% of the total value of these goods or services, the explanations of tenderers it is appropriate to provide for an increased transparency in the treatment of abnormally low tenders. In addition to the rules provided by Article 69 of the Directive on public procurement and Article 79 of the Directive on procurement by entities operating in the water, energy, transport and postal services sectors the contracting authority/entity that intends to accept such an abnormally low tender, should inform the other tenderers of this in writing including the reasons for the abnormally low character of the price or costs charged. This allows these tenderers to contribute to a more accurate assessment as to whether the successful tenderer will be able to fully perform the contract under the conditions spelled out in the tender documentation. Therefore, this additional information would achieve a more level playing field on the EU public procurement market.
- (20) 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. In particular it shall take into account the fact that the Commission has approved a number of intended exclusions concerning a third country pursuant to Article 6(2) of this Regulation. 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>14</sup>.

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<sup>14</sup> OJ L 349, 31.12.1994



- (21) 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 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.
- (22) 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 take appropriate restrictive measures.
- (23) Such measures may entail the mandatory exclusion of certain third-country goods and services from public procurement procedures 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.
- (24) 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.
- (25) 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>15</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>16</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>17</sup>.

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<sup>15</sup> OJ L 395, 30.12.1989, p. 33

<sup>16</sup> OJ L 76, 23.3.1992, p. 14

<sup>17</sup> OJ L 335, 20.12.2007, p. 31

- (26) In the light of the overall policy of the Union with regard to least-developed countries as provided for, *inter alia*, in Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences from 1 January 2009, it is appropriate to assimilate goods and services from these countries to Union goods and services.
- (27) In order to reflect in the legal order of the European Union the international market access commitments undertaken in the field of public procurement 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.
- (28) 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.
- (29) 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.
- (30) The Commission should report at least every three years on the application of this Regulation.
- (31) 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 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.
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 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) ‘supplier’ means any natural or legal person which offers on the market goods;
  - (b) ‘service provider’ means any natural or legal person which offers on the market the execution of works or a work, or services;
  - (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 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.

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 term 'economic operator' shall cover equally the concepts of supplier and service provider;
- (c) an economic operator who has submitted a tender shall be designated a 'tenderer';
- (d) 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;
- (e) 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.

*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>18</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 service provider 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

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<sup>18</sup> OJ L 302, 19.10.1992, p. 1

otherwise organised under the laws of that country and in the territory of which the legal person is engaged in substantive business operations;

- (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, contracting authorities/entities shall treat covered goods and services equally to goods and services originating in the European Union.

Goods or services originating in least-developed countries listed in Annex I to Regulation (EC) No 732/2008 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:

- (a) upon request of individual contracting entities according to the rules set out in Article 6;
- (b) according to the rules set out in Articles 10 and 11.

### *Article 6*

#### **Empowerment of contracting authorities/entities to exclude tenders comprising non-covered goods and services**

1. Upon request of contracting authorities/entities the Commission shall assess whether to approve, for contracts with an estimated value equal or above EUR 5.000.000 exclusive of value-added tax (VAT) the exclusion from procedures for the award of contracts tenders comprising goods or services originating outside the Union, if the value of the non-covered goods or services exceeds 50% of the total value of the goods or services constituting the tender, under the following conditions.
2. Where contracting authorities/entities intend to request the exclusion from procedures for the award of contracts on the basis of paragraph 1 they shall indicate this in the contract notice they publish pursuant to Article 35 of Directive 2004/18/EC or pursuant to Article 42 of Directive 2004/17/EC or Article 26 of the Directive on the award of concession contracts.

Contracting authorities/entities shall require tenderers to provide information on the origin of the goods and/or services contained in the tender, and their value. They shall accept self-declarations as preliminary evidence that tenders cannot be excluded pursuant to paragraph 1. A contracting authority may ask a tenderer at any moment during the procedure to submit all or parts of the required documentation where this appears necessary to ensure the proper conduct of the procedure. The Commission may adopt implementing acts establishing standard forms for declarations concerning the origin of goods and services. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 17 (3).

Where contracting authorities/entities receive tenders that meet the conditions of paragraph 1 for which they intend to request the exclusion for that reason, they shall notify the Commission. During the notification procedure the contracting authority/entity may continue its analysis of the tenders.

The notification shall be sent by electronic means using a standard form. The Commission shall adopt implementing acts establishing the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 17 (3). That standard form 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) the name and contact details of the economic operator whose tender would be excluded;

- (d) information on the origin of the economic operator, the goods and/or services and their value.

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

That information shall be provided within eight working days, commencing on the first working day following the date on which it receives the request for additional information. If the Commission receives no information within this period the period established in paragraph 3 shall be suspended, until the Commission receives the requested information.

- 3. For contracts referred to in paragraph 1, the Commission shall adopt an implementing act concerning the approval of the intended exclusion within a period of two months commencing on the first working day following the date on which it receives the notification. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17 (2). This period may be extended once by a maximum of two months in duly justified cases, in particular if the information contained in the notification or in the documents annexed thereto is incomplete or inexact or if the facts as reported undergo any substantive changes. If, at the end of this two-month period, or the extended period the Commission has not adopted a decision approving or disapproving the exclusion, the exclusion shall be deemed to have been disapproved by the Commission.
- 4. When adopting implementing acts pursuant to paragraph 3, the Commission shall approve the intended exclusion in the following cases:
  - (a) if the international agreement concerning market access in the field of public procurement between the Union and the country where the goods and/or services originate contains, for the goods and/or services for which the exclusion is proposed, explicit market access reservations taken by the Union;
  - (b) where an agreement referred to in point (a) does not exist and the third country maintains restrictive procurement measures leading to a lack of substantial reciprocity in market opening between the Union and the third country concerned.

For the purposes of point (b), a lack of substantial reciprocity is presumed where restrictive procurement measures result in serious and recurring discriminations of Union economic operators, goods and services.

When adopting implementing acts pursuant to paragraph 3, the Commission shall not approve an intended exclusion where it would violate market access commitments entered into by the Union in its international agreements.

- 5. When assessing whether a lack of substantial reciprocity exists, the Commission shall examine the following:
  - (a) to what degree public procurement laws 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;

- (b) to what degree public authorities and/or individual procuring entities maintain or adopt discriminatory practices against Union goods, services and economic operators.
6. Before the Commission takes a decision pursuant to paragraph 3 it shall hear the tenderer or tenderers concerned.
7. Contracting authorities/entities which have excluded tenders pursuant to paragraph 1 shall indicate this in the contract award notice they publish pursuant to Article 35 of Directive 2004/18/EC, Article 42 of Directive 2004/17/EC, or Article 27 of the Directive on the award of concession contracts. The Commission shall adopt implementing acts establishing the standard forms for contract award notices. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 17 (3).
8. Paragraph 1 shall not apply where the Commission has adopted the implementing act on temporary access of the goods and services from a country engaged in substantive negotiations with the Union as set out in Article 9(4).

### **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.

A contracting authority/entity may withhold any information release of it would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

### **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. Where the Commission considers it to be in the interest of the Union, it may at any time, on its own initiative or upon application of interested parties or a Member State, may initiate an external procurement investigation into alleged restrictive procurement measures.

In particular, the Commission shall take into account whether a number of intended exclusions have been approved pursuant to Article 6(3) of this Regulation.

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 Article 6.
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, and shall be concluded within a period of nine months after the initiation of the investigation. In duly justified cases this period may be extended by three 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 (2).

### *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:

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, the Commission may:

(i) resume or restart the consultation with the third country concerned, and/or

(ii) act 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. If a country has engaged in substantive negotiations with the European Union concerning market access in the field of public procurement, the Commission may adopt an implementing act providing that goods and services from that country cannot be excluded from procedures for the award of contracts pursuant to Article 6.

5. The Commission may terminate the consultation 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, 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 15 months from the 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 restrictive procurement measures adopted or maintained by that third country leads to an lack of substantial reciprocity in market opening between the Union and the third country as referred to in Article 6, 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 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 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 may in particular be limited to:
  - (a) public procurement by certain defined categories of contracting authorities/entities;
  - (b) public procurement of certain defined categories of goods or services;
  - (c) public procurement above or within certain defined thresholds.

#### *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 14 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 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 6 upon intended exclusion notified by contracting authorities/ entities or measures 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>19</sup> and by the Committee set up by Article 7 of the Trade Barriers Regulation<sup>20</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.
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.
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.

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<sup>19</sup> OJ L 185, 16.8.1971, p. 15.

<sup>20</sup> OJ L 349, 31.12.1994, p. 71

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.
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**

Articles 58 and 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*  
*The President*

*For the Council*  
*The President*



## ANNEX

List of international agreements that the Union has concluded in the field of public procurement including market access commitments

Plurilateral agreement:

- Agreement on Government procurement (OJ L, 336, 23.12.1994)

Bilateral agreements:

- Free Trade Agreement between the European Community and Mexico (OJ L 276, 28.10.2000, L 157/30.6.2000)
- Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement (OJ L 114, 30.04.2002)
- Free Trade Agreement between the European Community and Chile (OJ L352, 30.12.2002)
- Stabilisation and Association Agreement between the European Community and its Member States and Former Yugoslav Republic of Macedonia (OJ L 87, 20.03.2004)
- Stabilisation and Association Agreement concluded between the European Community and Croatia (OJ L 26, 28.1.2005)
- Stabilisation and Association Agreement concluded between the European Community and its Member States and Montenegro (OJ L 345 of 28.12.2007)
- Stabilisation and Association Agreement concluded between the European Community and Albania (OJ L 107, 28.4.2009)
- Free Trade Agreement by the European Union and South Korea - (OJ L 127/14.5.2011)