



Council of the  
European Union

Brussels, 28 May 2021  
(OR. en)

9175/21

LIMITE

COMER 49  
WTO 142  
MAP 9  
MI 399  
CODEC 776

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Interinstitutional File:  
2012/0060(COD)

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#### 'I' ITEM NOTE

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From:	Presidency
To:	Permanent Representatives Committee (Part 2)
No. Cion doc.:	5752/16
Subject:	Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (First reading) - Mandate for negotiations with the European Parliament

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1. On 29 January 2016, the European Commission adopted an amended 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 (the International Procurement Instrument, further referred to as the "IPI"). An earlier proposal adopted by the Commission on 21 March 2012 failed to get the support of the necessary qualified majority from the Council, as 18 Member States had expressed reservations.

2. The proposal is the EU response to the lack of a level playing field in world procurement markets. The IPI would be a trade policy tool that aims to (i) improve the level playing field, (ii) increase the participation of EU businesses in procurement markets of third countries, and (iii) provide leverage for the EU in the context of negotiations for opening markets in third countries. The IPI would enable the EU to limit or exclude, on a case-by-case basis, the access to its public procurement markets of economic operators originating in the countries that apply discriminatory restrictions vis-à-vis EU businesses. However, the existing EU commitments with third countries – including the WTO Government Procurement Agreement (GPA) and bilateral trade agreements – would remain unaffected by the IPI. In addition, the IPI foresees some exceptions to safeguard essential public needs, to prevent disproportionate procurement cost increases, and to support least-developed countries and SMEs.
3. The amendments introduced by the Commission in 2016 intended to eliminate some aspects of the instrument that were perceived as negative and to simplify the procedures, shorten investigations and reduce the number of actors involved in implementation. However, 14 Member States maintained their reservations and discussions were put on hold.
4. In March 2019<sup>1</sup>, the European Council called for action to safeguard the EU interests in the light of unfair practices of third countries by ensuring effective reciprocity for public procurement with third countries; in particular, the European Council called for resuming discussions on the IPI. In October 2020<sup>2</sup>, the European Council concluded that work on the IPI should be accelerated.
5. In follow-up to the European Council, the Presidency accelerated technical discussions to find the right balance between, on the one hand, creating an instrument with sufficient leverage for the Commission in negotiations with third countries to open up their procurement markets for European businesses, and, on the other hand, limiting the administrative burden on the Member States' contracting authorities and entities.

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<sup>1</sup> EUCO 1/19

<sup>2</sup> EUCO 13/20

6. The Presidency presented a first compromise proposal on 9 April 2021, and following intensive discussions and exchanges in the Working Party on Trade Questions, the Presidency managed to strike a compromise, which was reflected in a revised text distributed to delegations on 25 May 2021.
7. In view of the broad support to the compromise text expressed by delegations at the Working Party on Trade Questions on 26 May 2021, the Presidency considers that the text constitutes a good basis for entering into negotiations with the European Parliament.
8. Coreper will find in Annex I to this note the full text of the Presidency's compromise text. Changes compared to the Commission proposal are marked with **bold underlined** and ~~striketrough~~ for deletions.
9. Against this background, the Permanent Representatives' Committee is invited to agree to mandate the Presidency to start negotiations with the European Parliament on the basis of the compromise proposal set out in the Annex to this note.

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**

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>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.
- (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.
- (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.

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1 OJ C  
2 OJ C

- (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 procurement provides for market access for Union companies only to the procurement markets of third countries that are parties to these agreements.**
- (7) If the country concerned is a Party to the WTO Agreement on Government Procurement or has concluded a trade agreement with the EU that includes provisions on public procurement, the Commission should follow the consultation mechanisms and/or dispute settlement procedures set out in ~~that agreement~~**those agreements** when the restrictive practices relate to procurement covered by market access commitments undertaken by the 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 procurement practices in many of the trading **partners** of the Union. Those restrictive 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.

~~3 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).~~

4 Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50.)

- (11) **International market access commitments undertaken by the Union towards third countries in the field of procurement and concessions require, among other things, equal treatment of economic operators from those countries. Consequently, measures adopted under this Regulation can only apply to economic operators, goods or services from countries that are not Parties to the plurilateral WTO Agreement on Government Procurement or to bilateral or multilateral trade agreements with the Union that include commitments on access to procurement and concessions markets, or from countries that are Parties to such agreements but only with respect to procurement procedures for goods, services or concessions that are not covered by those agreements. In the interest of legal certainty for Union and third country economic operators, contracting authorities and contracting entities, the international market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions should be reflected in the legal order of the EU, thereby ensuring effective application thereof. Irrespective of the application of measures adopted under this Regulation and in accordance with the European Commission's Communication C(2019) 5494 final of 24 July 2019 and EU procurement directives, economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market or whose goods, services and works are not covered by such an agreement do not have secured access to procurement procedures in the EU and may be excluded.**
- (12) ~~The objectives of~~ **The 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 ~~2259~~ to ~~2662~~ of Council Regulation (EEC) No ~~2913/1992~~<sup>5</sup>~~952/2013~~.
- (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 the country where a legal person is constituted or organised under the respective law of that country and engaged in substantive business operations in the respective territory. There is a need for the criterion of substantive business operations to avoid potential circumvention of any measure adopted under this Regulation by creation of letter box companies. The term 'substantive business operations' is a concept used in the WTO General Agreement on Trade in Services. In the Union it is equivalent to the term 'effective and continuous link with the economy' and closely linked to the right of establishment pursuant to Article 49 of the Treaty on the Functioning of the European Union. The Commission publishes regularly guidelines to the case law related to the right of establishment (addressing among other things the concept of effective (or stable) and continuous link. Article 86 of Directive 2014/25/EU also refers to a concept of "direct and effective link" which captures the same concept of 'substantive business operations'.**

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<sup>5</sup> Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 9.10.1992, p. 1)

- (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<sup>6</sup>, 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.~~
- (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 may result in the impairment of access of Union goods, services or economic operators to the procurement or concession markets**, the Commission should examine to what degree laws, rules or other measures on public procurement and concessions of the country concerned ensure transparency in line with international standards in the field of public procurement and **preclude any discrimination do not result in serious and recurring restrictions** 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) ~~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 and their contracting authorities and contracting entities should not be able to restrict the access of third country goods or services to their tendering procedures by any other measure than those provided for in this Regulation.~~
- (19) The Commission should be able, ~~on its own initiative or at the application of interested parties or a Member State,~~ to initiate at any time an investigation into restrictive procurement measures or practices allegedly adopted or maintained by a third country, **if it considers that such an investigation is in the interest of the Union**. ~~Such investigative procedures should be without prejudice to Regulation (EU) No 654/2014 of the European Parliament and of the Council.~~

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<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).~~

- (19a) In order to determine whether an investigation is in the interest of the Union, the Commission should consider a wide variety of aspects of political, economic or any other nature, in relation to the investigation and its potential consequences. The Commission should weigh up the effects of starting the investigation against the impact of the investigation (and potential measures under this Regulation) on the EU's broader interests. The general objective of opening third country markets and improving market access opportunities for EU economic operators should be taken into account. The objective of limiting any unnecessary administrative burden for contracting authorities and contracting entities as well as economic operators should also be taken into account. Member States and interested parties should have the possibility to present their views with regard to the interest of the Union.**
- (19b) Given the overall policy objective of the Union to support the economic growth of least developed countries (LDCs) and their integration into global value chains it would not be in the Union's interest to start an investigation against such countries under this Regulation, unless there are reasonable indications of circumvention of any adopted IPI measures. Consequently, this Regulation is not intended to apply to LDCs benefitting from the "Everything But Arms" arrangement as defined in Regulation (EU) No 978/2012.**
- (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 any restrictive measures or practices and** improving the tendering opportunities for Union economic operators, goods and services in respect of 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 the restrictive measures or practices and the consultations with the country concerned do not lead to sufficient**~~sufficient~~ **satisfactory corrective action(s) that result in** improvements to the tendering opportunities for Union economic operators, goods and services within a reasonable timeframe, the Commission should be able to adopt, where appropriate, ~~price adjustment measure applying to tenders submitted by economic operators originating in that country and/or including goods and services originating in that country~~ **under this Regulation, measures (IPI measures) in the form of a score adjustment or of exclusion of tenders.**
- (23) ~~Such~~ **A score adjustment** measures 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. **It should not affect the price actually due to be paid under the contract to be concluded with the successful tenderer.**

**(23a) IPI measures should apply to procurement procedures falling under the scope of this Regulation, including framework agreements and dynamic purchasing systems. IPI measures should also apply in the case of specific contracts awarded under a dynamic purchasing system, when those dynamic purchasing systems were subject to an IPI measure. However, they should not apply to such contracts below a certain threshold with a view to limiting the overall administrative burden for contracting authorities and contracting entities. In order to avoid a possible double application of IPI measures, such measures should not apply to contracts awarded based on a framework agreement, once they have already been applied at the stage of concluding that framework agreement.**

**(23b) In the light of the overall policy objective of the Union to support small and medium-sized enterprises (SMEs), this Regulation should also not apply to tenders submitted by autonomous SMEs manufacturing the goods or providing services subject to the procurement covered by IPI measures.**

**(23c) To avoid possible circumvention of those ~~an~~ IPI measures, it ~~may~~ **will** also be necessary to target certain foreign-controlled or owned legal persons that, although established in the European Union, are not engaged in substantive business operations that have a direct and effective link with the economy of at least one Member State. Appropriate measures should not be disproportionate to the restrictive procurement practices to **impose additional contractual obligations on any successful tenderer**, which they respond. **Those obligations should apply only in case of procurement procedures to which an IPI measure is applicable, as well as to contracts awarded based on a framework agreement where such contracts are equal or above a certain threshold and when that framework agreement was subject to an IPI measure.****

(24) ~~Price adjustment~~ **Any** measures **under this Regulation** should not have a negative impact on on-going trade negotiations with the country ~~concerned~~ **to which the measure refers**. Therefore, where a country is engaging in substantive negotiations with the Union concerning market access in the field of public procurement, the Commission may suspend the measures during the negotiations.

~~(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 may request the exemption from IPI measures for a limited list of subcentral contracting authorities and contracting entities under certain strict requirements. Such exemption may also refer to procurement procedures that those contracting authorities and contracting entities may 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 to safeguard essential public policy needs, for example regarding public security or public health emergencies, or where the application of the measure would lead to a disproportionate increase in the price or costs of the contract. The disproportionate increase in price or costs should be assessed by comparing the remaining offers with the estimated value of the contract notice. The exception should only apply in cases where the estimated value is significantly lower than the value in the remaining offers, rendering the execution of the contract economically unviable. 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 implementation of this Regulation.**

(28) In case of misapplication by contracting authorities or contracting entities of ~~exceptions to price adjustment~~ **IPI measures, which negatively affects the chances of economic operators having a right to participate in the procurement procedure, Council Directives 89/665/EEC and 92/13/EEC should be applicable. limiting access of non-covered goods and services. The affected economic operator may therefore initiate a review procedure according to the national law implementing these Directives, if, for example, a competing economic operator 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 of according to 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 economic operator by contracting authorities or contracting entities in violation of price adjustment measures limiting access of non-covered goods and services should be ineffective.~~

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7 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).

8 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 an IPI measure~~ **and the Commission should be assisted by the Committee set up under the Trade Barriers Regulation. If necessary and for matters affecting the Union's legal framework on public procurement, the Commission may also seek the advice of the Advisory Committee on Public Procurement established by Council Decision 71/306/EEC.**
- (30a) Information received pursuant to this Regulation should be used only for the purpose for which it was requested and with due respect to the applicable EU 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.~~
- (32) ~~Regular reporting by~~ **In line with the inter-institutional agreement on better law making and with the view, among others, to ease administrative burdens, in particular on Member States, the Commission should make it possible to monitor review the application scope, functioning and efficiency of the procedures established by this Regulation. Such review will 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>10</sup>, as well as the burden incurred by contracting authorities and contracting entities when applying the Regulation. The Commission should report on its assessment to the European Parliament and the Council. The review may be followed up by appropriate legislative proposals.**
- (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,~~

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9 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).

10 **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).**

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, **in respect of 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.

~~It~~ **This Regulation** provides for the possibility of ~~applying price adjustment~~ **for the Commission to adopt implementing acts imposing IPI** measures to ~~certain tenders for contracts for the execution of works or a work, for~~ **in relation to such third country measures or practices to restrict** the supply of goods and/or the provision of services and for concessions, ~~on the basis of the origin of the~~ **access of** economic operators, goods or services ~~concerned~~ **from third countries to procurement procedures**.

2. This Regulation shall apply to ~~contracts~~ **procurement procedures** covered by the following acts:
  - (a) Directive 2014/23/EU<sup>11</sup>
  - (b) Directive 2014/24/EU<sup>12</sup>
  - (c) Directive 2014/25/EU
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.~~

<sup>11</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>12</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).

- ~~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. The application of 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 mentioned in paragraph 2.**
- ~~5. Member States and their contracting authorities and contracting entities shall not apply restrictive measures in respect of third country economic operators, goods and services beyond those provided for in this Regulation.~~
- 5a. This Regulation shall apply only to procurement procedures launched after its entry into force. An IPI measure shall only apply to 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 procurement documents for procedures falling within the scope of an IPI measure.**

## *Article 2*

### **Definitions**

1. For the purposes of this Regulation, the following definitions shall apply.
- (a) 'economic operator' means **economic operator as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU respectively;** ~~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;~~
- (aa)'a good or goods' means a good or goods referred to in the object of the public procurement tender and in accordance with the specifications of the contract. It does not refer to any input, material or ingredient incorporated in a good or in goods supplied;**
- (ab)'estimated value' means estimated value as calculated in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU respectively;**

**(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 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) ‘evidence’ means any information, certificate, supporting document, statement and other means of proof aimed at proving compliance with the obligations set out in Art. 7.1(c). This may refer to:**

**(i) certificates of origin, supplier declarations or import declarations for goods originating in third countries;**

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

**(iii) 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 Directives 2014/23/EU, 2014/24/EU **and** 2014/25/EU **respectively**;~~

~~(c) ‘contracting entity’ means **a** ‘contracting entity’ as defined in Article 4(1) of Directive 2014/23/EU and Article 7 of Directive 2014/25/EU **respectively**;~~

~~(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, that result in a serious and recurrent impairment of access of Union goods, services and/or economic operators to the public procurement or concession markets **of that country**;~~

**(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 the third country to the Union procurement or concessions market in the area of non-covered procurement;**

**(fb) ‘non-covered procurement’ means procurement procedures for goods, services or concessions regarding which the Union has not undertaken market access commitments in an international agreement in the field of procurement or concessions;**

**(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 tenderer as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU respectively;**

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

**(ga) ‘to subcontract’ means to arrange with a third party to execute part of a contract. The simple delivery of goods or parts necessary for the execution of a service is not considered to be subcontracting.**

~~(h) SME means SME as defined in Commission Recommendation 2003/361/EC<sup>13</sup>.~~

2. For the purpose of this Regulation, **except for Articles 5(3) and 5(7)**, the execution of works ~~and/or~~ a work within the meaning of Directives 2014/23/EU, 2014/24/EU and Directive 2014/25/EU shall be considered as the provision of a service.

### *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 2913/1992<sup>14</sup>.~~
- ~~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;

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~~13 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).~~

~~14 Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1).~~

(b) in the case of a legal person either of the following:

- (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, **entailing a direct and effective link with the economy of the country concerned**;~~
- (ii) ~~the Member State where the legal person is established and engaged in substantive business operations entailing a direct and effective link with the economy of the Member State concerned~~

~~For the purposes of point (b) (ii) of the first subparagraph, if the legal person is not engaged in substantive business operations **in the territory of the country in which it is constituted or otherwise engaged** entailing a direct and effective link with the economy of a Member State, 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.**~~

~~**That person or persons shall be presumed as having a dominant influence on the legal person in any of the following cases in which they, directly or indirectly:**~~

~~**(a) hold the majority of the legal person's subscribed capital;**~~

~~**(b) control the majority of the votes attaching to shares issued by the legal person;**~~

~~**(c) can appoint more than half of the legal person's administrative, management or supervisory body,** which own or control the legal person.~~

~~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 public entities, and at least one of such persons or entities originates from the third country whose economic operators and goods and services are subject to the IPI measure, the IPI measure shall equally apply to tenders submitted by that group. This shall not apply in cases in which such persons' or entities' participation in a group amounts to less than 15% of the value of the tender in question, unless that person or entity is necessary for fulfilling the majority of at least one of the selection criteria in a procurement procedure.**

**3aa. Contracting authorities or contracting entities may at any time during the 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. Tenders from economic operators that fail to provide such information or documentation may be rejected in accordance with the rules applicable to the award procedure.**

**3b. For the application of the additional contractual obligations upon the successful tenderer set out in Article 7, the origin of a good shall be determined in accordance with Articles 59 to 62 of Council Regulation (EEC) 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 countries listed in Annex IV to Regulation (EU) No 978/2012<sup>15</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.~~

### *Article 5*

#### **Exemption for tenders submitted by SMEs**

~~Tenders submitted by by SMEs<sup>16</sup> 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>15</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>16</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 II

### INVESTIGATIONS, CONSULTATIONS, ~~AND PRICE ADJUSTMENT MEASURES~~ AND CONTRACTUAL OBLIGATIONS

#### Article 64

#### Investigations and consultations

1. ~~Where~~ **If** the Commission considers it to be in the interest of the Union, it may at any time, on its own initiative or upon application ~~substantiated complaint~~ **of an EU interested parties party** or a Member State, initiate an investigation into **an** alleged ~~restrictive and/or discriminatory procurement~~ **third country** measures or practices. ~~by publishing~~ **If an investigation is initiated, the Commission shall publish 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 ~~inviting~~ interested parties and Member States to provide all relevant information to the Commission within a specified period of time.**
- 1a. **Upon publication of the notice, the Commission shall invite the third country concerned to submit its views, provide information and enter into consultations with the Commission in order to remove the alleged third country measure or practice. The Commission shall regularly inform Member States within the Committee set up by Article 7 of the Council Regulation (EU) 2015/1843 (Trade Barriers Regulation)**<sup>17</sup>.
2. ~~The assessment by the Commission of whether the alleged restrictive and/or discriminatory 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, of facts collected by the Commission during its investigation, or both. The assessment~~ **investigation and consultations** shall be concluded within a period of ~~eight~~ **nine** months after the **date of initiation of the investigation**. In duly justified cases, ~~this period~~ **the Commission may extend** ~~be extended~~ **this period** by ~~four~~ **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.**

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<sup>17</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 272, 16.10.2015, p. 1).**

3. Where the Commission **finds, following** ~~concludes as a result of its investigation that the alleged restrictive and/or discriminatory procurement~~ **third country** measures or practices ~~are~~ **is** not maintained or that ~~they do~~ **it does** not result in restrictions to **serious and recurrent impairment of** access by ~~of~~ **of** Union economic operators or Union goods ~~and or~~ services to the public procurement or concession markets 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, or**

**(b) undertakes commitments towards the Union to end or phase out the third country measure or practice within a reasonable period of time and no later than six months; or**

**(c) undertakes commitments towards the Union to negotiate a new international agreement or to extend the scope of an existing one regarding procurement. Such negotiations shall be concluded within a reasonable period of time and no later than six months from such a commitment.**

**The Commission may resume the investigation and consultations at any time if it concludes that the reasons for the suspension are no longer valid.**

**The Commission shall publish a notice in the Official Journal of the European Union in case of suspension or resumption of the investigation and consultations.**

*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~~

~~(c) 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 5

### IPI measures

- 1. Where the Commission finds, following an investigation and consultations pursuant to Article 4, that a third country measure or practice exists, it may, if it considers it to be in the interest of the Union, adopt an implementing act to impose an IPI measure as provided in paragraph 5 of this article. An IPI measure shall only apply if the main subject of the procurement procedure falls within the scope of the implementing act as defined in accordance with paragraph 7(a). The design of the procurement procedure shall not be made with the intention of excluding it from the scope of this Regulation.**
- 2. The IPI measure shall be determined on the basis of the following criteria, in light of available information and the Union's interest:**
  - (a) proportionality of the IPI measure with regard to the third country measure or practice;**
  - (b) availability of alternative sources of supply for the goods and services concerned, in order to avoid or minimise a significant negative impact on contracting authorities or contracting entities.**
- 3. The IPI measure shall only apply to procurement procedures with an estimated value 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.**
- 4. The IPI measure shall also apply in the case of specific contracts awarded under a dynamic purchasing system, when those dynamic purchasing systems were subject to the IPI measure, with the exception of specific contracts the estimated value of which is below the respective values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU. The IPI measure shall not apply to procedures for the award of contracts based on a framework agreement. The IPI measure shall also not apply to individual lots to be awarded according to Article 5 (10) of Directive 2014/24/EU or Article 16 (10) of Directive 2014/25/EU.**
- 5. In its implementing act, the Commission may decide, within the scope defined in paragraph 6 of this Article, to restrict the access of operators, goods or services from third countries to procurement procedures by requiring contracting authorities or contracting entities to:**
  - (a) impose a score adjustment measure on tenders submitted by economic operators originating in the that third country; or**
  - (b) exclude tenders submitted by economic operators originating in that third country; or**

**(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(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.**

**7. The implementing act, adopted in accordance with Article 10(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>18</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(a), the percentage value of the adjustment shall be set up to 40% of the evaluation score of the tender depending on the third country and sector of goods, services, works or concessions envisaged.**

**8. When determining the proportionality of the IPI measure according to paragraph 2(a), the Commission shall in particular consider the percentage value according to paragraph 7(e). The Commission shall impose an IPI measure in the form of exclusion according to paragraph 5(b) only when the third country measure or practice is sufficiently severe and the potential negative impact according to paragraph 2(b) due to the limited availability of alternative sources is comparatively small.**

**9. The Commission may withdraw the IPI measure or suspend its application if the third country takes satisfactory corrective actions or undertakes commitments to end the measure or practice in question. If the Commission considers that the corrective actions or commitments undertaken have been rescinded, suspended or improperly implemented, it shall make publicly available its findings and may reinstate the application of the IPI measure at any time. The Commission may withdraw, suspend or reinstate an IPI measure in accordance with the examination procedure referred to in Article 10(2) and followed by the publication of a notice in the Official Journal of the European Union.**

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

**10. An IPI measure shall expire five years from its entry into force or its extension, unless a review shows a need for continued application of an IPI measure. Such a review shall be initiated, by a publication of a notice in the Official Journal of the European Union, on the initiative of the Commission nine months before the date of the expiry, and shall be concluded within six months. Following the review, the Commission may extend the duration of an IPI measure for a period of another five years in accordance with the examination procedure referred to in Article 10(2).**

*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.

- 1. 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 sub-central contracting authorities or contracting entities in that Member State that are exempted from the application of this Regulation.**
- 2. In its request, the Member State shall provide detailed information on the justification for the request for exemption and the value of the contracts above thresholds set in Article 5.3 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 value of contracts above thresholds set in Article 5.3 of this Regulation, awarded by the contracting authorities or contracting entities not to be exempted exceeds 75% 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.**
- 3. The exemption shall be limited to what is strictly necessary and proportionate.**
- 4. The Commission informs Members States before adopting an exemption list. The exemption list, published in the Official Journal of the European Union, is adopted for a period of three years and can be revised or renewed every three years upon duly justified request by the Member State concerned.**

Article 7

Additional contractual obligations upon the successful tenderer

1. In the case of procurement procedures to which an IPI measure is applicable, as well as in the case of contracts awarded based on a framework agreement where the estimated value of those contracts is equal or above the 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 and when those framework agreements were subject to the IPI measure, contracting authorities and contracting entities shall also include, among the conditions of the contract with the successful tenderer:

  - (a) a commitment not to subcontract more than 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, a commitment that, for the duration of the contract, 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 commitments referred in points (a) or (b) between 10% and 30% of the total value of the contract.
2. For the purposes of paragraph 1(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(a) and/or 1(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. 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, shall be exempted from the additional conditions laid down in this Article, provided that those SMEs manufacture the good or goods or provide services for the supply of which they were awarded the contract.
4. A reference to the additional conditions laid down in this Article shall be included by contracting authorities and contracting entities in the documents for 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 128*

#### **Exceptions**

1. Contracting authorities and contracting entities may **on an exceptional basis** decide not to apply the price adjustment **IPI** measure with respect to a procurement or a concession 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 the country subject to an IPI measure, or only such tenders meet the tender requirements; or**
  - (ab) this is justified for overriding reasons relating to the public interest; or**
  - (b) without prejudice to Article 69 of Directive 2014/24/EU and Article 84 of Directive 2014/25/EU, based on objective criteria taking into account, among others, the estimated value of the contract, the application of the measure would lead to a disproportionate increase in the price or costs of the contract that would render its execution economically unviable.**
2. Where a contracting authority or contracting entity **decides not to apply an IPI measure, it shall inform the Commission, in a manner to be decided by the respective Member State,** intends not to apply a price adjustment 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, no later than ~~ten~~ **thirty** calendar days after the publication of the contract notice **the award of the contract.**

3. The notification shall contain ~~the following information~~ **on the origin of the economic operators that have submitted a tender, due justification of the use of the exception and, where appropriate, any other information deemed useful by the contracting authority or contracting entity.**

- ~~(a) the name and contact details of the contracting authority 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 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 contracting entity.~~

The Commission may ask the **Member State** ~~contracting authority or contracting entity~~ 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 ~~13~~9

### **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 89/665/EEC<sup>19</sup> or Article 8 of Directive 92/13/EEC<sup>20</sup>.~~
- ~~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.~~

**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~~ III

### IMPLEMENTING POWERS, REPORTING AND FINAL PROVISIONS

## Article ~~14~~10

### Committee procedure

- ~~1. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC<sup>21</sup> and by the Committee set up by Article 7 of the Council Regulation (EU) 2015/1843 (Trade Barriers Regulation)<sup>22</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.~~
- ~~3. Where reference is made to this paragraph, **the Committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4)** of Regulation (EU) No 182/2011 shall apply and the competent committee shall be the Committee established by Council Decision 71/306/EEC.~~

<sup>19</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>20</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).

<sup>21</sup> 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).

<sup>22</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 272, 16.10.2015, p. 1).

## *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~~11*

### **Reporting**

By 31 December 2018 ~~Three years after the date of entry into force of this Regulation~~ and at least every three years thereafter, the Commission shall submit a report to the European Parliament and the Council on the application of this Regulation and on progress made in international negotiations regarding access for Union economic operators to ~~public contract or concession award procedures~~ procurement and concession markets ~~in~~ 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 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.

## *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 12

Review

**No later than five years after the adoption of an implementing act or no later than six years after the date of entry into force of this Regulation, whichever is the earliest, and every six years thereafter, the Commission shall review the scope, functioning and efficiency of this Regulation, and shall report its findings to the European Parliament and the Council.**

*Article ~~12~~13*

**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,

*For the European Parliament*

*For the Council*

*The President*

*The President*

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