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INFORMATION NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
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 - Outcome of the European Parliament's first reading (Strasbourg, 6-9 June 2022)

I. INTRODUCTION

In accordance with the provisions of Article 294 of the TFEU and the Joint declaration on practical arrangements for the codecision procedure¹, a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this file at first reading.

In this context, the rapporteur, Daniel CASPARY (EPP, DE), presented on behalf of the Committee on International Trade amendment number 107 to the abovementioned proposal for a Regulation, amendment number 108 to the legislative resolution, containing the joint statement by the European Parliament and the Council and amendments 109-110 to the legislative resolution, containing statements by the Commission. These amendments had been agreed during the informal contacts referred to above.

¹ OJ C 145, 30.6.2007, p. 5.

II. VOTE

When it voted on 9 June 2022, the plenary adopted the compromise amendment (amendment number 107) to the abovementioned proposal for a regulation as well as amendments 108-110 to the legislative resolution. No other amendments were adopted. The Commission's proposal as thus amended constitutes the Parliament's first-reading position which is contained in its legislative resolution as set out in the Annex hereto².

The Parliament's position reflects what had been previously agreed between the institutions. The Council should therefore be in a position to approve the Parliament's position.

The act would then be adopted in the wording which corresponds to the Parliament's position.

² The version of the Parliament's position in the legislative resolution has been marked up to indicate the changes made by the amendments to the Commission's proposal. Additions to the Commission's text are highlighted in *bold and italics*. The symbol "■" indicates deleted text.

P9_TA(2022)0241

International procurement instrument *I**

European Parliament legislative resolution of 9 June 2022 on the 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 (COM(2016)0034 – C9-0018/2016 – 2012/0060(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2012)0124) and the amended proposal (COM(2016)0034),
- having regard to Article 294(2) and Article 207 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C9-0018/2016),
- having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
- having regard to the opinion of the European Economic and Social Committee of 27 April 2016¹,
- after consulting the Committee of the Regions,
- having regard to the provisional agreement approved by the committee responsible under Rule 74(4) of its Rules of Procedure and the undertaking given by the Council representative by letter of 30 March 2022 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
- having regard to Rules 59 and 60 of its Rules of Procedure,
- having regard to the report of the Committee on International Trade (A7-0454/2013),
- having regard to the Decision of the Conference of Presidents of 16 October 2019 on unfinished business from the eighth parliamentary term,

¹ OJ C 264, 20.7.2016, p. 110.

- having regard to the opinion of the Committee on the Internal Market and Consumer Protection,
 - having regard to the letter from the Committee on Legal Affairs,
 - having regard to the second report of the Committee on International Trade (A9-0337/2021),
1. Adopts its position at first reading hereinafter set out²;
 2. Approves the joint statement by Parliament and the Council annexed to this resolution, which will be published in the L series of the *Official Journal of the European Union* together with the final legislative act;
 3. Takes note of the statements by the Commission annexed to this resolution; one on the review of the International Procurement Instrument Regulation, which will be published in the L series of the *Official Journal of the European Union* together with the final legislative act, and one on the exclusive competence, which will be published in the C series of the *Official Journal of the European Union*;
 4. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
 5. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

² This position replaces the amendments adopted on 14.12.2021 (Texts adopted P9_TA(2021)0497).

Position of the European Parliament adopted at first reading on 9 June 2022 with a view to the adoption of Regulation (EU) 2022/... of the European Parliament and of the Council on the access of third-country *economic operators*, goods and services to the Union's public procurement and concession *markets* and procedures supporting negotiations on access of Union *economic operators*, goods and services to the public procurement and concession markets of third countries (*International Procurement Instrument - IPI*)

(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(2) thereof,

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee⁵,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure⁶,

⁵ OJ C 264, 20.7.2016, p. 110.

⁶ Position of the European Parliament of 9 June 2022.

Whereas:

- (1) In accordance with Article 21 of the Treaty on European Union (TEU), 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 (TFEU), ■ the Union, by establishing a customs union, is to contribute, in the common interest, to the harmonious development of world trade, to the progressive abolition of restrictions on international trade and on foreign direct investment, and to the lowering of customs and other barriers
- (3) In accordance with Article 26 TFEU, the Union is to adopt measures with the aim of establishing or ensuring the functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the Treaties. ***The access of third-country economic operators, goods and services to the public procurement or concession markets of the Union falls within the scope of the common commercial policy.***

(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.

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(5) Within the framework of the █ WTO and through its bilateral relations, the Union advocates an ambitious opening of the international public procurement and concession markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.

(6) *The plurilateral WTO Agreement on Government Procurement and the Union trade agreements that include provisions on public procurement provide for market access for Union economic operators only to the public procurement or concession markets of third countries that are parties to those agreements.*

(7) Where *a third* country █ is a Party to the WTO Agreement on Government Procurement or has concluded a trade agreement with the Union that includes provisions on public procurement, the Commission should follow the consultation mechanisms or dispute settlement procedures set out in *those agreements* where the restrictive practices relate to *public* procurement covered by market access commitments undertaken by *that third* country █ towards the Union.

(8) Many third countries are reluctant to open their public procurement or concession markets to international competition, or to improve access to those markets. As a consequence, Union economic operators face restrictive *public* procurement practices in many third countries which result in the loss of substantial trading opportunities.

(9) Regulation (EU) No 654/2014 of the European Parliament and of the Council⁷ 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 that are not covered by such international agreements.

⁷ 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).

- (10) *International market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions require, inter alia, the equal treatment of economic operators from those third countries. Consequently, measures adopted under this Regulation can only apply to economic operators, goods or services from third countries that are not parties to the plurilateral WTO Agreement on Government Procurement or to bilateral or multilateral trade agreements concluded with the Union that include commitments on access to public procurement or concession markets, or to economic operators, goods or services from countries that are parties to such agreements but only with respect to public procurement procedures for goods, services or concessions that are not covered by those agreements. In accordance with Directives 2014/23/EU⁸, 2014/24/EU⁹ and 2014/25/EU¹⁰ of the European Parliament and the Council and as clarified by the communication of the Commission of 24 July 2019 on Guidance on the participation of third-country bidders and goods in the EU procurement market, economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market, or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded.*

⁸ 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).

⁹ 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).

¹⁰ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94 28.3.2014, p. 243).

- (11) 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 or concession markets of certain third countries requires a clear set of rules of origin for economic operators, goods and services* ■ .
- (12) The origin of a good should be determined in accordance with Article **60 of Regulation (EU) No 952/2013 of the European Parliament and of the Council**¹¹.
- (13) The origin of a service should be determined on the basis of the origin of the natural or legal person providing it. *The origin of a legal person should be considered to be the country under the laws of which a legal person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations. Legal persons constituted or otherwise organised under the laws of a Member State should only be considered to have their origin in the Union if they have a direct and effective link with the economy of a Member State. To avoid a possible circumvention of an International Procurement Instrument (IPI) measure, the origin of foreign-controlled or owned legal persons that are not engaged in substantive business operations in the territory of a third country or in the territory of a Member State, under the laws of which they are constituted or otherwise organised, may also need to be determined by taking into account other elements, such as the origin of the owners or other persons exercising a dominant influence over that legal person.*

¹¹ **Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).**

(14) When assessing whether *specific* measures or practices exist in a third country *that could result in an impairment of access of Union economic operators, goods or services to the public procurement or concession markets of that third country*, the Commission should examine to what degree *laws, rules or other measures* on the public procurement or concession markets of the third country concerned ensure transparency in line with international standards, *and do not result in serious and recurrent restrictions* against Union economic operators, goods, *or* services. In addition, the Commission should examine to what degree individual third-country contracting authorities or contracting entities adopt or maintain *restrictive* practices against Union economic operators, goods *or* services.

(15) The Commission should be able to initiate at any time *a transparent* investigation into allegedly restrictive measures or practices adopted or maintained by a third country.

- (16) ***Given the overall policy objective of the Union to support the economic growth of least developed countries and their integration into global value chains, the Commission should not start an investigation in respect of countries benefitting from the ‘Everything But Arms’ arrangement as listed in Annex IV of Regulation (EU) No 978/2012 of the European Parliament and of the Council¹².***
- (17) ***When conducting the investigation, the Commission should invite the *third* country concerned to enter into consultations with a view to *eliminating or remedying any restrictive measures or practices and thereby* improving the tendering opportunities for Union economic operators, goods and services *regarding public procurement or concession markets* in that third country.***
- (18) 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.
- (19) ***Where the *investigation confirms the existence of restrictive measures or practices, and the* consultations with the *third* country concerned do not lead to *satisfactory corrective actions that remedy the serious and recurrent impairment of access* for Union economic operators, goods and services within a reasonable timeframe *or where the third country concerned declines to enter into consultations, the Commission should adopt under this Regulation, if it considers such adoption to be in the interest of the Union, an IPI measure in the form of a score adjustment or of an exclusion of tenders.****

¹² 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).

- (20) *The determination of whether the adoption of an IPI measure is in the interest of the Union should be based on an appreciation of all the various interests taken as a whole, including the interests of the Union’s economic operators. The Commission should weigh the consequences of adopting such a measure against its impact on the Union’s broader interests. It is important that special consideration is given to the general objective of achieving reciprocity by opening third-country markets and improving market access opportunities for Union economic operators. 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.*
- (21) *A score adjustment should be applied only for the purpose of the evaluation of tenders submitted by economic operators originating in the third country concerned. Such a measure should not affect the price to be paid under the contract to be concluded with the successful tenderer. When contracting authorities or contracting entities decide to base their evaluation of tenders on a price or cost as the only contract award criterion, the level of score adjustment should be set significantly higher to ensure comparable effectiveness of the IPI measure.*

- (22) *IPI measures should apply to public procurement procedures falling under the scope of this Regulation, including framework agreements and dynamic purchasing systems. Where a specific contract is awarded under a dynamic purchasing system to which an IPI measure applies, IPI measures should also apply to that specific contract. However, IPI measures should not apply to 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 if IPI measures have already been applied at the stage of concluding that framework agreement.*
- (23) *To avoid a possible circumvention of an IPI measure, appropriate obligations should be imposed on successful tenderers. Those obligations should apply only to public procurement procedures which are subject to an IPI measure, as well as to contracts awarded based on a framework agreement where the value of such contracts are equal to or above a certain threshold and where that framework agreement is subject to an IPI measure.*

(24) *Where a third country engages in substantive and advanced negotiations with the Union concerning market access in the field of public procurement, with a view to eliminating or remedying the impairment of access of Union economic operators, goods or services to its public procurement or concession markets, the Commission should be able to, during the negotiations, suspend IPI measures which refer to the third country concerned.*

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(25) *It is important that IPI measures are uniformly applied in the Union by contracting authorities and contracting entities. To take into account the diversity of administrative capacity of contracting authorities and contracting entities, Member States should be able to request the exemption from IPI measures for a limited list of local contracting authorities under certain strict requirements. When checking the lists of local contracting authorities as proposed by the Member States, it is important that the Commission take into consideration the particular situation of those contracting authorities as regards, inter alia, the levels of population and the geographical situation. Such exemption could also refer to public procurement procedures that those contracting authorities should be able to carry out under framework agreements or dynamic purchasing systems.*

- (26) ■ 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. Contracting authorities and contracting entities should therefore be able not to apply *IPI* measures limiting access of non-covered goods and services where there are no Union or covered goods or services available which meet the requirements of the contracting authority or contracting entity *or* to safeguard essential public *policy* needs, for example *regarding overriding reasons relating to public health or protection of the environment. When contracting authorities or contracting entities apply those exceptions, the Commission should be informed in a timely and comprehensive manner thereof to allow for appropriate monitoring of the implementation of this Regulation.*

- (27) In the case of a misapplication by contracting authorities or contracting entities of *IPI measures that negatively affects the chances of economic operators having a right to participate in the public procurement procedure, Council Directives 89/665/EEC¹³ and 92/13/EEC¹⁴ should be applicable. The affected economic operators should be able to initiate a review procedure in accordance with the national law implementing those Directives if, for example, those economic operators consider that 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 in accordance with Article 3 of Directive 89/665/EEC or Article 8 of Directive 92/13/EEC.*

¹³ 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).

¹⁴ 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).

- (28) 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 Council¹⁵.
- (29) The examination procedure should be used for the adoption of implementing acts regarding the adoption, withdrawal, ■ suspension, reinstatement or extension of ***an IPI measure and the Commission should be assisted by the Trade Barriers Committee established by Regulation (EU) 2015/1843 of the European Parliament and of the Council***¹⁶. ***Given that IPI measures could have different effects on the Union's public procurement or concession markets, the comitology procedure applicable to draft implementing acts providing for the exclusion of tenders should be adapted and in such cases Article 5(4), third subparagraph, of Regulation (EU) No 182/2011 should apply.***
- (30) ***If necessary and for matters affecting the application of the Union's legal framework on public procurement, the Commission should be able to seek the advice of the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC***¹⁷.

¹⁵ 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).

¹⁶ ***Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 272, 16.10.2015, p. 1).***

¹⁷ 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).

(31) *Information received pursuant to this Regulation should only be used for the purpose for which it was requested and with due respect to the applicable Union and national data protection and confidentiality requirements. Regulation (EC) No 1049/2001 of the European Parliament and the Council¹⁸ 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.*

(32) *In line with the Interinstitutional Agreement of 13 April 2016 on Better Law-Making¹⁹ and with a view to, inter alia, reducing administrative burden, in particular on Member States, the Commission should regularly review the scope, functioning and efficiency of this Regulation. Such review would address, inter alia, the possibility of making use of any means available in order to facilitate the exchange of information, including electronic procurement facilities such as the standard forms for the publication of notices in the field of public procurement, pursuant to Commission Implementing Regulation (EU) 2019/1780²⁰, as well as the burden incurred by contracting authorities and contracting entities when applying this Regulation. The Commission should report on its assessment to the European Parliament and to the Council and, where appropriate, should submit appropriate legislative proposals.*

¹⁸ *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).*

¹⁹ *OJ L 123, 12.5.2016, p. 1.*

²⁰ *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') (OJ L 272, 25.10.2019, p. 7).*

- (33) *Public procurement rules and principles applicable to public contracts awarded by Union institutions on their own account are set out in Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council²¹ and thus fall outside the scope of this Regulation. Under Regulation (EU, Euratom) 2018/1046, those rules are based on the rules set out in Directives 2014/23/EU and 2014/24/EU. It is therefore appropriate to assess whether, in the context of a revision of Regulation (EU, Euratom) 2018/1046, the rules and principles set out in this Regulation should be made applicable also to public contracts awarded by Union institutions.*
- (34) *To facilitate the application of this Regulation by contracting authorities, contracting entities and economic operators, the Commission should issue guidelines. Those guidelines should provide information, in particular, on the notions of the origin of natural and legal persons, the origin of goods and services, additional obligation and the application of those provisions within the framework of this Regulation. In light of the overall policy objective of the Union to support small and medium-sized enterprises (SMEs), those guidelines should also take into account the specific information needs of SMEs in their application of this Regulation with a view to preventing their overburdening.*

²¹ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

(35) *In accordance with the principle of proportionality and in order to achieve the basic objective of improving the access of Union economic operators, goods and services to the public procurement or concession markets of third countries by establishing measures regarding non-covered procurement, it is necessary and appropriate to lay down rules on procedures for the Commission to undertake investigations into alleged third-country measures or practices against Union economic operators, goods and services, and to enter into consultations with the third countries concerned. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with Article 5(4) of the TEU,*

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HAVE ADOPTED THIS REGULATION:

Chapter I
General provisions

Article 1

Subject matter and scope of application

1. This Regulation ■ establishes measures ***regarding non-covered procurement***, intended to improve the access of Union economic operators, goods and services to the public procurement and concession markets of third countries. It lays down procedures for the Commission to undertake investigations into alleged ***third-country*** measures or practices ■ against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.

This Regulation provides for the possibility ■ for the ***Commission to impose IPI measures in relation to such third-country measures or practices to restrict the access of*** economic operators, goods ■ or services ***from third countries to Union public procurement procedures***.

2. This Regulation shall apply to ***public procurement procedures*** covered by the following acts:

(a) Directive 2014/23/EU;

(b) Directive 2014/24/EU;

(c) Directive 2014/25/EU.

3. ***This Regulation shall be without prejudice to any international obligations of the Union or to measures that Member States or their contracting authorities or contracting entities may take in accordance with the acts referred to in paragraph 2.***

4. *This Regulation shall apply to public procurement procedures launched after its entry into force. An IPI measure shall apply only to public procurement procedures which are covered by the IPI measure and have been launched between the entry into force of that IPI measure and its expiry, withdrawal or suspension. Contracting authorities and contracting entities shall include a reference to the application of this Regulation and any applicable IPI measure in the public procurement documents for procedures falling within the scope of an IPI measure.*

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

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Article 2
Definitions

1. For the purposes of this Regulation, the following definitions apply:
- (a) *'economic operator' means an economic operator as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;*
 - (b) *'goods' means goods referred to in the object of a public procurement procedure and in the specifications of the relevant contract, but does not cover any input, material or ingredient incorporated in the supplied goods;*
 - (c) *'estimated value' means the estimated value of a contract calculated in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;*
 - (d) *'score adjustment' 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 relevant public procurement documents. In cases where price or cost is the only contract award criterion, the score adjustment means the relative increase, for the purpose of the evaluation of tenders, by a given percentage of the price offered by a tenderer;*

- (e) *‘evidence’ means any information, certificate, supporting document or statement that aims to prove compliance with the obligations set out in Article 8, such as:*
- (i) *documents showing that the goods are originating in the Union or a third country;*
 - (ii) *a description of manufacturing processes, including samples, descriptions or photographs, for goods to be supplied;*
 - (iii) *an extract of relevant registers or of financial statements for the origin of services, including a value-added tax (VAT) identification number;*
- (f) *‘contracting authority’ means a contracting authority ■ as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;*
- (g) *‘contracting entity’ means a contracting entity ■ as defined in Directives 2014/23/EU and 2014/25/EU;*
- (h) *‘interested party’ means any person or entity whose interest might be affected by a third-country measure or practice, such as undertakings, associations of undertakings or the main cross-industry organisations representing social partners at Union level;*

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- (i) ***‘third-country*** measure or practice’ means any legislative, regulatory or administrative measure, procedure or practice, or combination thereof, adopted or maintained by public authorities or individual contracting authorities or contracting entities in a third country, ***at any level, that results*** in a serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession ***markets of that third country***;
- (j) ***‘IPI measure’*** means a measure adopted by the Commission in accordance with this Regulation limiting the access of economic operators, goods or services originating in third countries to the Union public procurement or concession markets in the area of non-covered procurement;
- (k) ***‘non-covered procurement’*** means public procurement procedures for goods, services or concessions regarding which the Union has not undertaken market access commitments in an international agreement in the field of public procurement or concessions;
- (l) ***‘contracts’*** 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;

(m) *‘tenderer’ means a tenderer as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;*

(n) ‘country’ means ■ any State or separate customs territory, without such ■ term having implications for sovereignty;

(o) *‘subcontracting’ means arranging the execution of a part of a contract by a third party and does not include the mere delivery of goods or parts that are necessary for the provision of a service.*

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2. For the purpose of this Regulation, *except for Article 6(3) and (7) thereof*, the execution of works *or* a work within the meaning of Directives *2014/23/EU*, 2014/24/EU and *2014/25/EU* shall ■ be considered as the provision of a service.

Article 3

Determination of origin

- █
1. 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 **that person** has a right of permanent residence;
 - (b) in the case of a legal person, either of the following:
 - (i) █ the country under the laws of which the legal █ person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations;
 - (ii) **if the legal person is *not* engaged in substantive business operations *in the territory of the country in which it is constituted or otherwise organised, the origin of the legal person is to be that of the person or persons who may exercise, directly or indirectly, a dominant influence on the legal person by virtue of their ownership of that legal person, their financial participation therein, or the rules which govern that legal person.***

For the purposes of the first subparagraph, point (b)(ii), *that person or persons shall be presumed to have 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; or*
- (c) can appoint more than half of the legal person's administrative, management or supervisory body.*

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2. *Where an economic operator is a group of natural or legal persons, public entities or any combination thereof, and at least one of such persons or entities originates from a third country whose economic operators, goods or services are subject to an IPI measure, that IPI measure shall also apply to tenders submitted by that group.*

However, where the participation of such persons or entities in a group amounts to less than 15% of the value of a tender submitted by that group, that IPI measure shall not apply to that tender, unless those persons or entities are necessary in order to fulfil the majority of at least one of the selection criteria in a public procurement procedure.

3. *Contracting authorities or contracting entities may, at any time during the public procurement procedure, request the economic operator to submit, supplement, clarify or complete the information or documentation related to the verification of the economic operator's origin within an appropriate time limit, provided that such requests are made in compliance with the principles of equal treatment and transparency. Where the economic operator fails to provide such information or documentation without any reasonable explanation, and thereby prevents the verification of the economic operator's origin by contracting authorities or contracting entities or makes such a verification practically impossible or very difficult, that economic operator shall be excluded from participation in the public procurement procedure concerned.*

4. *The origin of a good shall be determined in accordance with Article 60 of Regulation (EU) No 952/2013, and the origin of a service shall be determined on the basis of the origin of the economic operator providing it.*



Article 4

Exemption for goods and services originating in least developed **■** countries

The Commission shall not initiate an investigation in respect of least developed countries listed in Annex IV to Regulation (EU) No 978/2012, unless there is evidence of a circumvention of any IPI measure imputable to the listed third country or their economic operators.



Chapter II

Investigations, consultations, *measures and obligations*

Article 5

Investigations *and consultations*

1. ***On its own initiative or upon a substantiated complaint of a Union interested party or a Member State, the Commission may initiate an investigation into an alleged third-country measure or practice by publishing a notice in the Official Journal of the European Union. Such a notice of initiation shall include the Commission's preliminary assessment of the third-country measure or practice and invite interested parties and Member States to provide relevant information to the Commission within a specified period of time.***



The Commission shall make an online tool available on its website. Member States and Union interested parties shall use that tool in order to submit a substantiated complaint.

2. *Upon publication of the notice referred to in paragraph 1, the Commission shall invite the third country concerned to submit its views, provide relevant information and enter into consultations with the Commission in order to eliminate or remedy the alleged third-country measure or practice. The Commission shall regularly inform Member States on the progress of the investigation and consultations within the Trade Barriers Committee established by Article 7 of Regulation (EU) 2015/1843.*
3. *The investigation and consultations shall be concluded within a period of nine months after the date of their initiation. In justified cases, the Commission may extend this period by five months by publishing a notice in the Official Journal of the European Union and informing the third country, interested parties and Member States of that extension.*
4. *Upon conclusion of the investigation and the consultations, the Commission shall make publicly available a report setting out the main findings of the investigation and a proposed course of action. The Commission shall present that report to the European Parliament and to the Council.*

5. Where the Commission ***finds, following*** its investigation, that the alleged ***third-country measure or practice is*** not maintained or that ***it does*** not result in ***a serious and recurrent impairment of*** access of Union economic operators, goods ***or*** services to the public procurement or concession ***markets*** of the third country **■** , the Commission shall terminate **■** the investigation, ***and publish a notice of termination in the Official Journal of the European Union.***

■

6. ***The Commission may suspend the investigation and the consultations at any time where the third country concerned:***

(a) takes satisfactory corrective actions to eliminate or remedy the serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of the third country, and thereby improve such access; or

(b) undertakes commitments towards the Union to end or phase out the third-country measure or practice, including by extending the scope of an existing agreement to public procurement, within a reasonable period of time and no later than six months after undertaking such commitments.

■

7. *The Commission shall resume the investigation and the consultations at any time if it concludes that the reasons for the suspension are no longer valid.*
8. *The Commission shall publish a notice in the Official Journal of the European Union in the event of a suspension or resumption of the investigation and consultations.*



Article 6
IPI measures

1. *Where the Commission finds, following an investigation and consultations pursuant to Article 5, that a third-country measure or practice exists, it shall, if it considers it to be in the interest of the Union, adopt an IPI measure by means of an implementing act. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 11(2).*
2. *A determination as to whether it is in the Union's interest to adopt an IPI measure shall be based on an appreciation of all the various interests taken as a whole, including the interests of the Union's economic operators. IPI measures shall not be adopted where the Commission, on the basis of all the information available, concludes that it is not in the Union's interest to adopt such measures.*

3. *The IPI measure shall be determined in light of available information and on the basis of the following criteria:*
- (a) the proportionality of the IPI measure with regard to the third-country measure or practice;*
 - (b) the availability of alternative sources of supply for the goods and services concerned, in order to avoid or minimise a significant negative impact on contracting authorities and contracting entities.*
4. *The IPI measure shall only apply to public procurement procedures with an estimated value above a threshold to be determined by the Commission in light of the results of the investigation and consultations and taking into consideration the criteria set out in paragraph 3. That estimated value should be equal to or above EUR 15 000 000 net of VAT for works and concessions, and equal to or above EUR 5 000 000 net of VAT for goods and services.*

5. *The IPI measure shall apply in the case of specific contracts awarded under a dynamic purchasing system where the IPI measure also applies to those dynamic purchasing systems, with the exception of specific contracts the estimated value of which is below the respective values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU or Article 15 of Directive 2014/25/EU. The IPI measure shall not apply to public procurement procedures for the award of contracts based on a framework agreement or to contracts for individual lots to be awarded in accordance with Article 5(10) of Directive 2014/24/EU or Article 16(10) of Directive 2014/25/EU.*
6. *In the IPI measure referred to in paragraph 1, the Commission may decide, within the scope established in paragraph 8, to restrict the access of economic operators, goods or services from a third country to public procurement procedures by requiring contracting authorities or contracting entities to:*
- (a) impose a score adjustment on tenders submitted by economic operators originating in that third country; or*
 - (b) exclude tenders submitted by economic operators originating in that third country.*

■

7. *The score adjustment referred to in paragraph 6, point (a), shall apply only for the purpose of the evaluation and ranking of the tenders. It shall not affect the price to be paid under the contract to be concluded with the successful tenderer.*
8. *In the IPI measure referred to in paragraph 1 the Commission 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 as established by Regulation (EC) No 2195/2002 of the European Parliament and of the Council²², as well as any applicable exceptions;*
 - (b) the specific categories of contracting authorities or contracting entities;*
 - (c) the specific categories of economic operators;*
 - (d) the specific thresholds equal to or above those set out in paragraph 4;*
 - (e) where appropriate, the percentage values of a score adjustment referred to in paragraph 6, point (a).*

The percentage value of the adjustment as referred to in point (e) of the first subparagraph shall be set up to 50% of the evaluation score of the tender, depending on the third country and sector of envisaged goods, services, works or concessions. For the purpose of public procurement procedures, where price or cost is the only contract award criterion, the score adjustment shall be twice the percentage value as set out in the first sentence of this subparagraph. An IPI measure shall indicate the respective percentage values separately.

²² *Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ L 340, 16.12.2002, p. 1).*

9. *When determining the IPI measure based on the options under paragraph 6, point (a) or (b), the Commission shall opt for the kind of measure that would be proportionate and most effectively remedy the level of impairment of access for Union economic operators, goods or services to third-country public procurement or concession markets.*
10. *Where the Commission considers that the third country takes satisfactory corrective actions to eliminate or remedy the impairment of access for Union economic operators, goods or services to public procurement or concession markets of that third country, thereby improving such access, or if the third country undertakes commitments to end the measure or practice in question, the Commission may withdraw the IPI measure or suspend its application .*

Where the Commission considers that the corrective actions or commitments undertaken have been rescinded, suspended or improperly implemented, it shall make its findings publicly available and reinstate the IPI measure at any time.

The Commission may withdraw, suspend or reinstate an IPI measure by means of an implementing act and in such cases, shall publish a notice in the Official Journal of the European Union. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 11(2).

11. *An IPI measure shall expire five years from its entry into force. An IPI measure may be extended for a duration of five years. The Commission shall initiate a review of the IPI measure in question no later than nine months before the date of expiry of that IPI measure, by publishing a notice in the Official Journal of the European Union. Such a review shall be concluded within six months from publication of the relevant notice. Following such a review, the Commission may extend the duration of the IPI measure, adjust it appropriately or replace it with a different IPI measure by means of an implementing act. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 11(2).*

Article 7

List of contracting authorities exempted from the application of this Regulation

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

2. *In its request, the Member State shall provide detailed information justifying the request for exemption and regarding the value of the contracts that are above the thresholds set out in Article 6(4) of this Regulation, awarded by all listed contracting authorities or contracting entities over the past three years from the 31st December preceding the request for exemption. An exemption may only be granted if the total value of contracts above the thresholds set out in Article 6(4) of this Regulation, and awarded by the contracting authorities or contracting entities which are not to be exempted, exceeds 80 % of the total value of above thresholds contracts falling within the scope of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU awarded in the requesting Member State in the same three-year period.*
3. *The exemption shall be limited to what is strictly necessary and proportionate, taking into account the administrative capacity of the contracting authorities to be exempted.*
4. *The Commission shall inform Member States before adopting the list referred to in paragraph 1. That list, to be published in the Official Journal of the European Union, shall be valid for a period of three years and may be revised or renewed every three years upon justified request by the Member State concerned.*

Article 8

Obligations upon the successful tenderer

- 1. *In the case of public procurement procedures which are subject to an IPI measure, as well as in the case of contracts awarded on the basis of a framework agreement where the estimated value of those contracts is equal to or above the values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU and where those framework agreements were subject to the IPI measure, contracting authorities and contracting entities shall also include in public procurement documents the following obligations on successful tenderers:***
 - (a) 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, to ensure for the duration of the contract that goods 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, irrespective of whether such goods or services are supplied or provided directly by the successful tenderer or by a subcontractor;***

- (c) to provide to the contracting authority or to the contracting entity upon their request adequate evidence corresponding to point (a) or (b), at the latest upon completion of the execution of the contract;*
- (d) to pay a proportionate charge, in the event of non-observance of the obligations referred in point (a) or (b), of between 10% and 30% of the total value of the contract.*

2. For the purposes of paragraph 1, point (c), it is sufficient to provide evidence that more than 50% of the total value of the contract originates in countries other than the third country subject to the IPI measure. The contracting authority or contracting entity shall request relevant evidence where reasonable indications of non-compliance with paragraph 1, point (a) or (b), exist or where the contract is awarded to a group of economic operators comprising a legal person originating in the third country subject to an IPI measure.

3. Contracting authorities and contracting entities shall include a reference to the obligations set out in this Article in the documents for public procurement procedures to which an IPI measure is applicable.

Article 9
Exceptions

1. Contracting authorities and contracting entities may *on an exceptional basis* decide not to apply an *IPI* measure with respect to a *public procurement* procedure where:



- (a) *only tenders from economic operators originating in a third country subject to an IPI measure meet the tender requirements; or*
- (b) *the decision not to apply the IPI measure is justified for overriding reasons relating to the public interest, such as public health or protection of the environment.*



2. Where a contracting authority or contracting entity *decides* not to apply *an IPI* measure, it shall *provide* the following *information to the Commission, in a manner to be decided by the respective Member State* and no later than *thirty* days after the *award* of the contract:
- (a) the name and contact details of the contracting authority *or* contracting entity;
 - (b) a description of the object of the contract;

- (c) information on the origin of the economic operators **■** ;
- (d) the ground on which the decision not to apply the *IPI* measure is based, and a detailed justification for the application of the exception;
- (e) where appropriate, any other information deemed useful by the contracting authority *or* contracting entity.

The Commission may ask the *Member States* concerned for additional information.

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Article 10

Remedies

To ensure the legal protection of economic operators having or having had an interest in obtaining a particular contract falling under the scope of this Regulation, Directives 89/665/EEC and 92/13/EEC shall apply accordingly.

Chapter III
Implementing powers, reporting and final provisions

Article 11
Committee procedure

1. The Commission shall be assisted by the █ Committee established by Article 7 of Regulation (EU) 2015/1843. ***That committee*** shall be ***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 █ .
3. ***Where the Committee delivers no opinion for the adoption of draft IPI measure in the form of an exclusion of tenders, pursuant to Article 6, paragraph 6, point (b) of this Regulation, the Commission shall not adopt the draft implementing act and Article 5(4), third subparagraph, of Regulation (EU) No 182/2011 shall apply.***

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Article 12

Guidelines

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



Article 13

Reporting

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

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

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Article 14 *Review*

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

Article 15
Entry into force

This Regulation shall enter into force on the sixtieth 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 ...,

For the European Parliament

For the Council

The President

The President

JOINT STATEMENT OF THE EUROPEAN PARLIAMENT AND THE COUNCIL IN RESPECT OF REGULATION (EU) 2022/xxx*

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

STATEMENT BY THE COMMISSION ON THE REVIEW OF THE INTERNATIONAL PROCUREMENT INSTRUMENT REGULATION (Regulation (EU) 2022/xxx)*

When conducting a review of the scope, functioning and efficiency of Regulation (EU) 2022/xxx*, in line with its Article 14, the Commission will also assess the need to exempt from its application any of the developing countries that are beneficiaries of the general arrangement referred to in point (a) of Article 1(2) of Regulation (EU) No 978/2012, and in particular the beneficiaries of the special incentive arrangement for sustainable development and good governance as defined in Article 9 of Regulation (EU) No 978/2012. In the review, the Commission will pay particular attention to sectors that are considered strategic in respect of EU public procurement.

STATEMENT BY THE COMMISSION ON THE EXCLUSIVE COMPETENCE IN RESPECT OF REGULATION (EU) 2022/xxx)**

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

* OJ: please insert the publication number of the new regulation.

** OJ: please insert the publication number and a footnote with the publication reference of the document 2012/0060(COD).