

International Procurement Instrument (IPI)

The architecture of the 2016 proposal

The scope



- Contracts covered by procurement directives
- Trigger for the procedure: restrictive and/or discriminatory procurement measures or practices by a third country in the area of non-covered procurement
- Application of the Regulation: without prejudice to any international obligations of the Union

Key elements of the proposal

Threefold structure:

1. **Investigation**

by **Commission** upon application of interested parties,
MS or own initiative

within 8 months (possible extension of 4 months)

2. **Consultation** with third country

on eliminating restrictive measures and/or practices for
reciprocal access in procurement markets

within 15 months

3. **IPI decision – price adjustment measure to be applied by authorities and entities concerned**

Price Adjustment Measure

- For tenders, where more than 50% of total value is made up of goods and/or services originating in the third country concerned
- Penalty up to 20% to be calculated on the price of the tender
- Only for contracts equal to or over 5 million EUR
- A presumption concerning operators originating in the third country concerned

Further elements of the proposal I.

- **Exemptions from scope:**
 - Least developed countries and certain developing countries
 - SMEs established in the Union and engaged in substantive business operations entailing a direct and effective link with the economy of at least one MS
- **Exceptions from price adjustment measure:**
 - If no Union and/or covered goods or services available which meet the requirements of the contracting authority
 - If application would lead to a disproportionate increase in the price or costs of the contract

Further elements of the proposal II.

- **Rules of Origin:**

- For **goods**: in accordance with the non-preferential rules of origin as defined in the EU Customs Code
- For **services**: on the basis of residence of the economic operator

Further rules:

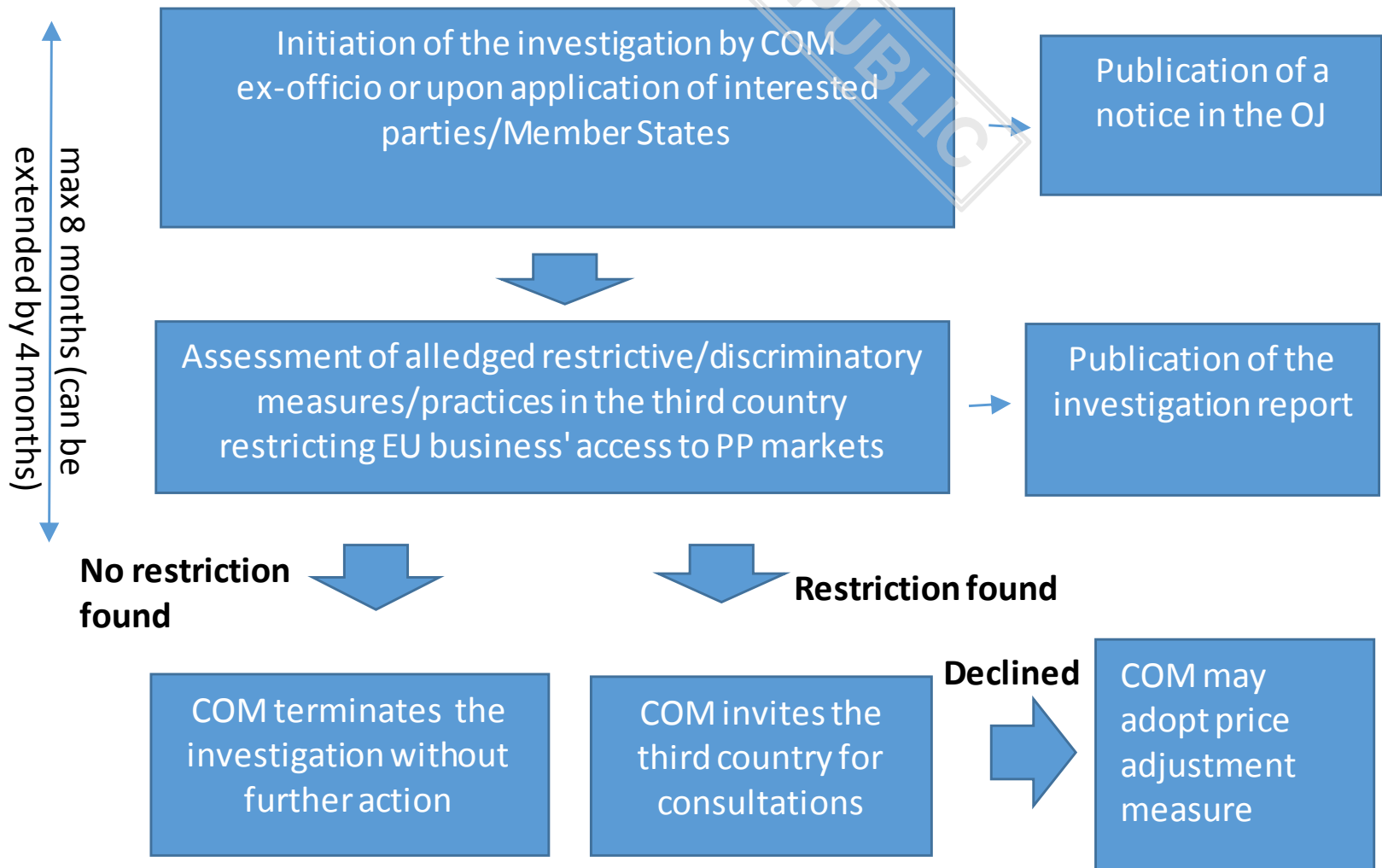
if **economic operator** is a **legal person**

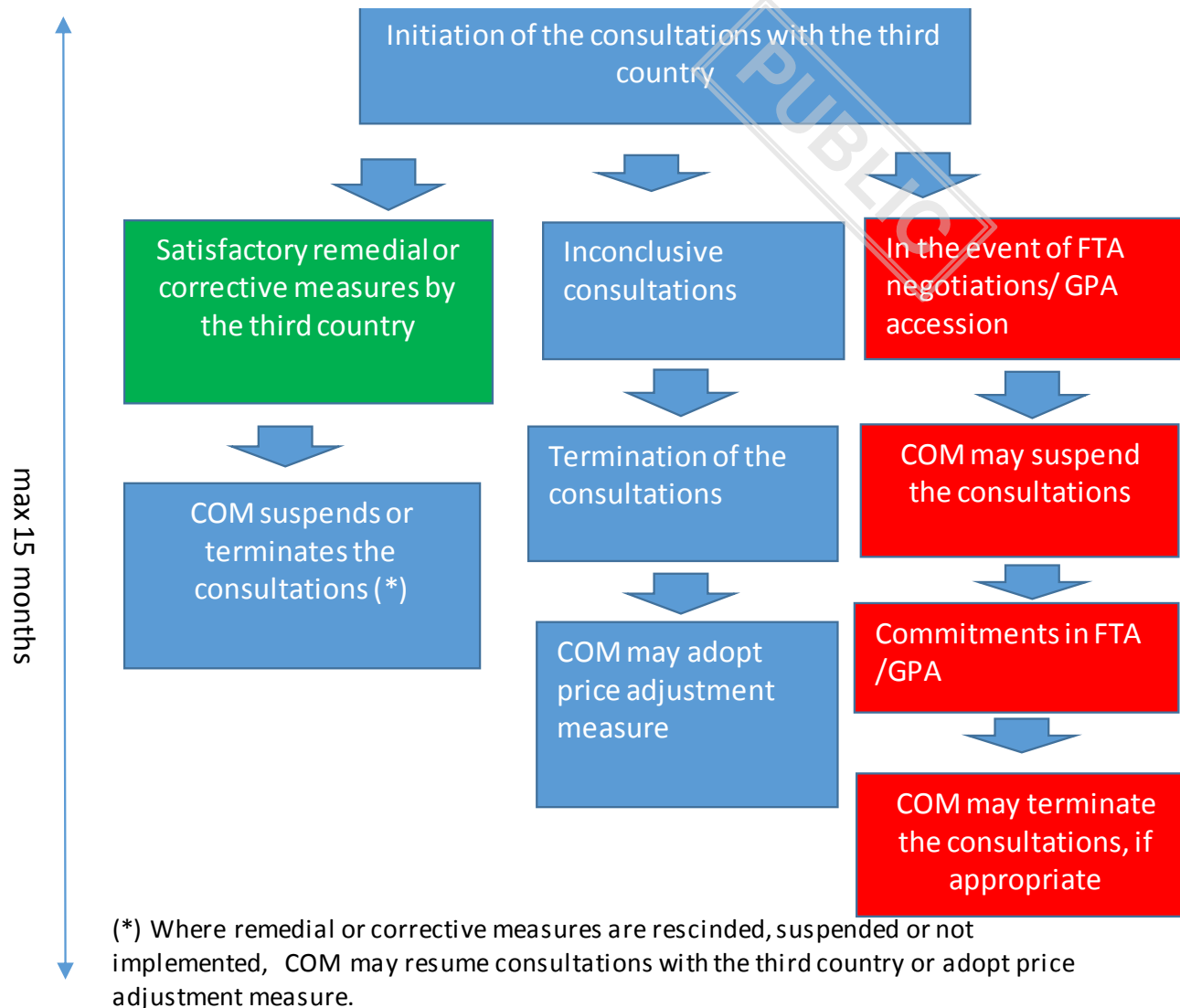
Further elements of the proposal III.

- Implementation in case of misapplication by contracting authorities or contracting entities
- Involvement of Member States in decision making process through Committee procedure
- Links with other policies – e.g. Articles 85 and 86 of Directive 2014/25/EU

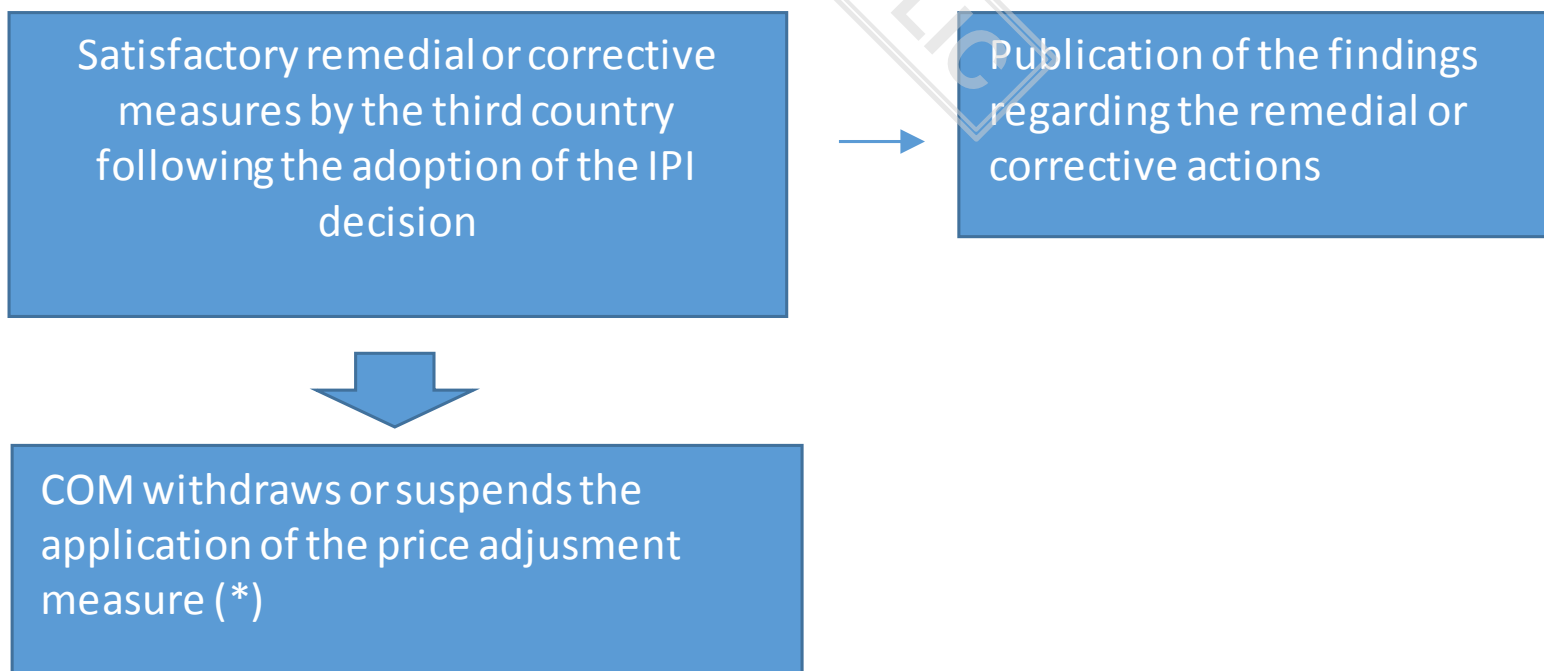
International Procurement Instrument (IPI)

Investigations & consultations





Withdrawal or suspension of the price adjustment measures



(*) Suspension may be preferred if there are doubts as to the effect or continuous application of the remedial or corrective measure. COM may, if needed, reinstate the application of the price adjustment measure.

Main comments of MS on investigations & consultations

- Excessive duration, especially of the consultations.
- Rules on consultations too specific and limiting the EU.
- Lack of clarity in terms of criteria COM bases its decision upon.
- Enhance involvement of MS and businesses.

International Procurement Instrument (IPI)

Price Adjustment Measures (PAM)

Determination of Price Adjustment Measures (PAM)?

- The price adjustment measure is up to 20%
- and exclusively applied for **evaluation purposes**
- PAM **does not** result in **a market closure**
- PAM is **NOT a penalty** imposed on the final price



Example 1: Tender using lowest price

- PAM is in place against country X, specifying a penalty of 10%.
- A company from an EU Member State submits a tender containing an offer of **€10.000.000**.
- A company from country X submits a tender containing an offer of **€ 9.000.000**.
- For evaluation purposes, the 10% penalty is applied to this tender, which is re-calculated at **€9.900.000**.

The contracting authority pays the price quoted in the tender of a company from country X, i.e. **€9.000.000**.

Example 2: Tender using lowest price

- PAM is in place against country X, specifying a penalty of 15%.
- A company from an EU Member State submits a tender containing an offer of **€10.000.000**.
- A company from country X submits a tender containing an offer of **€ 9.000.000**.
- For evaluation purposes, the 15% penalty is applied to this tender, which is re-calculated at **€10.350.000**.

The contract is awarded to the company from the EU Member State and the contracting authority pays €10.000.000.

Example 3: tender using price and non-price related award criteria (weighting 50/50)

- PAM is in place against country X, specifying a penalty of 10%
 - A company from an EU Member State submits a tender containing an offer of **€10.000.000**
 - A company from country X submits a tender containing an offer of **€ 9.000.000**
 - For the price criteria evaluation, the 10% penalty is applied to this tender, which is re-calculated at **€9.900.000.**
- ***The final award of the contract will depend on the non-price related criteria. The higher the weighting of the price criteria, the more impact of PAM.***

Most Economically Advantageous Tender (MEAT)

- MEAT objective is to ensure quality and best value for money by allowing contracting authorities to use award criteria which may include:
 - environmental, innovative and/or social aspects
 - quality
 - price and cost (including life-cycle cost)
 - organisation, qualification and experience of the staff delivering the contract where this can significantly impact the level of performance of the contract

Quality criteria / use of lowest price only

- In contracts above directives thresholds:

Lowest price: 55% of the tenders

MEAT: 45% of the tenders

- In contracts above 5 Million EUR (IPI thresholds):

Lowest price: 34 % of the tenders

MEAT: 66 % of the tenders

Main comments of MS on the PAM

- The implementation of the PAM may lead to an increase in the cost of procurement
- Level of the penalty (20% max) makes the instrument ineffective: need to increase its level or to introduce other type of measures such as exclusion of bids
- PAM does not impact the evaluation on quality criteria
- Risk of circumvention: third country bidders may account for the PAM by lowering the price of their offer
- Administrative burden and risk of litigations
- Need for criteria to set the level of the PAM
- Application of PAM to concessions contracts



International Procurement Instrument (IPI)

Thresholds for application

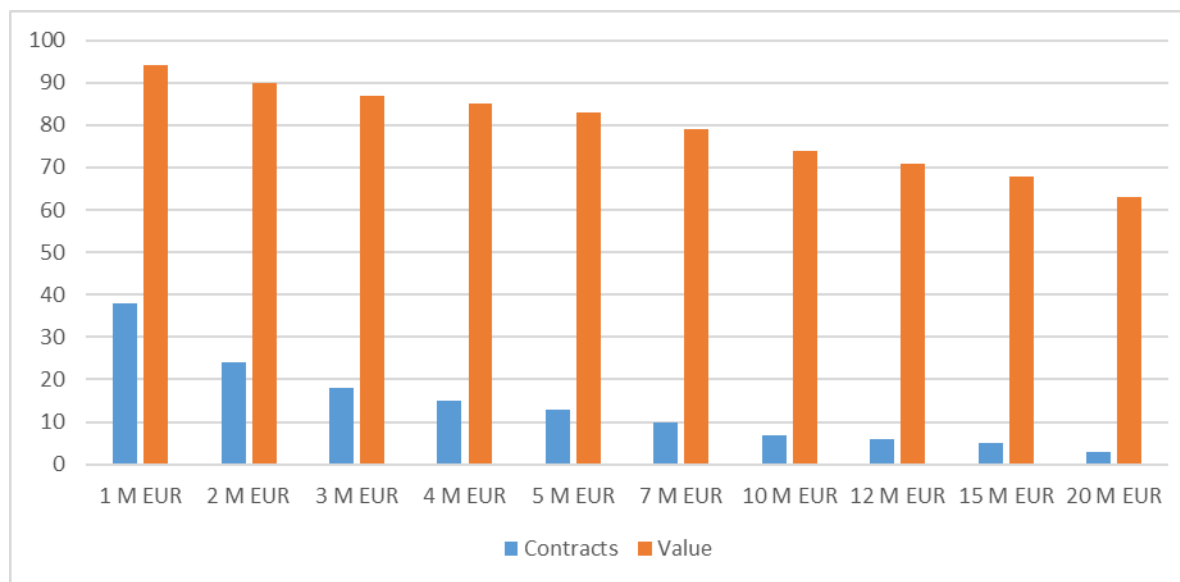
Contracts covered over 5 million EUR

- IPI revised proposal set a uniform threshold of 5 million EUR
- This threshold is calculated according to the valuation rules enshrined in the public procurement directives
- IPI covers 83% of the value of procurement covered by the EU Directives
- IPI covers 13% of the procurement contracts covered by the EU Directives

Main comments by MS on thresholds

- Increase the thresholds in order to reduce administrative burden
- Ensure coherence with the level of EU Directives thresholds
- Reduce the level of the thresholds (goods and services) to increase the effectiveness
- Differentiated thresholds according to the type of contract (goods-services-works)
- Differentiated thresholds according to the level of government (central-subcentral authorities)

IPI coverage / Thresholds value





International Procurement Instrument (IPI)

**Authorities or entities concerned by
IPI measures**

IPI – Authorities or entities concerned by IPI measures

- MS are obliged to provide lists of entities to the Commission
- The Commission has an obligation to ensure both that an appropriate level of action is taken and a balanced burden sharing among MS

IPI – Authorities or entities concerned by IPI measures

- It is therefore the Commission who draws up the list of contracting authorities and entities on the basis of the lists submitted by each MS
- The failure of a MS to comply with its obligation to provide a list does not diminish the Commission's responsibility to draft a balanced EU-wide list

Main comments of MS on authorities or entities concerned by IPI measures

- Need for a uniform application in MS; IPI measures to be applied by all contracting authorities or by a list of key contracting authorities already defined in the IPI Regulation
- Objective criteria for MS to define the list in order to ensure uniform application
- Risk of differences among MS on the basis of individual MS determination of lists of authorities



International Procurement Instrument (IPI)

**Scope and links with other
instruments**



Subject matter

Measures intended to improve the access of Union economic operators, goods and services to the PP markets of third countries (investigation, consultation, price adjustment measures)



The scope

- Contracts covered by procurement directives
- Trigger for the procedure: restrictive and/or discriminatory procurement measures or practices by a third country in the area of non-covered procurement
- Application of the Regulation: without prejudice to any international obligations of the Union

Links with other instruments

- Article 1(5): MS, contracting authorities and contracting entities shall not apply restrictive measures in respect of 3rd country operators, goods and services beyond the IPI Regulation
- Article 17: repealing Articles 85 and 86 of Directive 2014/25/EU

Main comments of MS on the links with other instruments

- Articles 85 and 86 of Directive 2014/25/EU – a safeguard for procurement in sensitive sectors – should be maintained
- Article 1(5) should be deleted and the flexibilities provided by the procurement framework should be maintained
- The IPI proposal needs to ensure a uniform application of IPI throughout MS

International Procurement Instrument (IPI)

Applicable rules of origin

Applicable rules of origin

- Decisions to apply IPI price adjustment measures are based on the determination of the origin of the goods and services to be provided.
- For goods, non-preferential origin rules as set out in the EU Customs Code.
- For services, the origin of the economic operator (substantive business operations; ownership/control).

How to prove the origin

- Contracting authorities to require all bidders to present information on:
 - The origin of the goods/services;
 - The value of the goods/services originating in the targeted third country as a % of the value of the contract.
- Bidders allowed to provide this information via self-declarations.

How to prove the origin

- Contracting authorities allowed to ask for additional documentation at any moment during the procedure.
- Contracting authorities obliged to ask for more information to the successful bidder.

The 50% rule

- Contracting authorities to apply price adjustment measures to tenders in which goods and services originating in the targeted third country account for more than 50% of the total value of the tender.
- A presumption rule exists for the bids submitted by companies originating in the third country targeted (no calculation needed unless the bidder submits information).

Main comments by MS on the rules of origin

- The current origin regime is too complex and could trigger several review proceedings
- Contracting authorities do not have the expertise on rules of origin (as customs authorities do)
- EU companies may not bid for tenders because of the complexity of rules of origin
- The concept of direct and effective link with the economy of a MS lacks more specific criteria
- Self-declarations are not credible enough, as the bidders may not know where they are going to source the goods/services

Main comments by MS on the rules of origin

- Negative impact of the 50% rule for companies in particular with regard to value chains
- Difficulty for companies and contracting authorities alike to calculate the 50% limit at the moment of tendering
- Not possible to combine the origin of a good and the origin of a service to calculate the 50% limit
- Risk of increased number of review procedures stemming from the application of the 50% rule



International Procurement Instrument (IPI)

Exemptions from the scope

Exemption for least-developed countries

- Where more than 50% of the total value of the tender is made up of goods and/or services originating in LDCs and in developing countries considered vulnerable

Exemption for SMEs

- Tenders submitted by SMEs established in the Union and engaged in substantive business operations entailing a direct and effective link with the economy of at least one MS are exempted from the Regulation

Main comments of MS on exemptions

- Big economic operators should be prevented from using the SME exemption for by-passing an IPI measure via an SME subsidiary
- SME exemption reduces the administrative burden
- Questions on the compatibility of the SME exemption with the non-discrimination rule of GPA



International Procurement Instrument (IPI)

Exceptions

Possibility not to apply PAM

- There are no Union and/or covered goods or services available which meet the requirements of the contracting authority/entity.
- The application of PAM would lead to a disproportionate increase in the price or costs of the contract.



Notification

- Indication of the intention:
 - in the contract notice
 - in the concession notice
- Notification to COM: 10 calendar days after the publication of the contract notice
- Negotiated procedure without prior publication:
 - in the contract award notice
 - in the concession award notice
- Notification to COM: 10 calendar days after the publication of the award notice

Main comments of MS on exceptions

- Difficulties in the assessment of the conditions at the stage of publication of the notice.
- The exception related to the disproportionate increase in price creates a risk of circumventing the instrument.
- Questionable application to a negotiated procedure without prior publication.



International Procurement Instrument (IPI)

**Impact on EU companies
(global value chains)**

Applicable provisions



- Global value chains related issues in the context of the 50% limit imposed on any tender on goods and services originating in the targeted third country

Main comments of MS on global value chains

- Strong dependence of EU companies on global supply chains
- SMEs to be adversely affected, as they also participate in public contracts by supplying larger EU companies/consortia
- EU re-sale companies and importers could be particularly affected as they sell imported goods
- Risk of supply disruption in sensitive sectors such as defence and health



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From:	European Commission
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