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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Trade Questions
Subject:	The International Procurement Instrument - Progress Report

The International Procurement Instrument (IPI) – Progress Report

1. Background

This German Presidency report summarizes the discussions on the International Procurement Instrument (hereafter 'IPI') in the Working Party on Trade Questions ('WPTQ'). The report has been drafted under the responsibility of the German Presidency and is transmitted to Delegates of the WPTQ for information and without prejudging the future activities of the incoming Portuguese Presidency.

Due to the Covid-19 pandemic, all meetings of the WPTQ had to be held as informal videoconferences. Nevertheless, these informal meetings have always been very constructive. The German Presidency would like to thank all Delegates, the Council Secretariat and the representatives of the Commission for their valuable input and work, even more under these difficult circumstances!

The Commission originally proposed IPI in 2012, and revised its proposal in January 2016. The European Council called in its conclusions in March 2019 for resuming discussions on IPI and, in October 2020, for accelerating the work.

Under the German Presidency, five out of ten sessions of the WPTQ covered the IPI while Delegates had also to deal intensively with other files, in particular the trilogue regarding the amendment of the Enforcement Regulation. The discussions on the IPI focused on some of the most complex aspects of the instrument and revealed that, while sharing the objective of a market access instrument, Delegates call for a balance between the effectiveness of the instrument on the one hand and a proportionate administrative burden on the other hand.

2. Summary of Discussions

Key focus of the work under the German Presidency was the so-called 'Add-On', a proposed set of contractual performance conditions between the contracting authority and the successful bidder to avoid circumvention of the IPI as a possible result of the discussed focus of the instrument on the origin of the bidder ("bidder-based approach"). As opposed to the mechanism of the revised 2016 proposal, additional information on the origin of the goods and/or services contained in the tender would no longer be required by all tenderers, but only by the successful bidder, and on their respective value. The discussions built on consolidated draft legal text discussed under the Croatian Presidency (Annex A WK 6383/2020 INIT), which covers the 'Add-On' in Art. 8(4b):

Article 8(4): (...) contracting authorities and contracting entities shall:

(...) (b) include, among the conditions of the contract with the successful tenderer:

(i) a prohibition to subcontract the majority of the contract value to economic operators originating in the third country,

(ii) a commitment that, for the duration of the contract, no more than [50%] of the total value of the contract is made of goods and/or services originating in the third country whether such goods and/or services are purchased directly or by a subcontractor,

- (iii) an obligation to provide evidence corresponding to point (ii) to the contracting authority or the contracting entity,
- (iv) a penalty, in case of breach of the commitments referred in points (i), (ii) and (iii), of at least [%] of the total value of the contract.

According to the Commission, as set out in its presentation in July (WK 7362/2020 INIT), the provision intends to avoid circumventions of IPI measures and to ensure a high level of credibility and effectiveness of the IPI, aiming at the removal of procurement barriers in third countries. Successful bidders must prove compliance by declarations of goods imported from outside the EU, for services by sufficient evidence on the origin of the services providers. The contractor would not be obliged to provide evidence for all goods and services, but only for as much as it is necessary to prove the compliance with the 50% value limitation.

In order to make the 'Add-On' "more easily enforceable, understandable and effective" (WK 8457/2020), the Austrian Delegation submitted a proposal including legal drafting and presented it to the WPTQ. Apart from the "add-on", the proposal includes *inter alia* special provisions for dealing with dynamic purchasing systems and framework agreements and limit the applicability of the IPI in these cases. In addition, the proposal contains a list of possible proofs of compliance with the requirements of the 'Add-On'.

The Commission provided Member States with an overview of administrative steps potentially required by public authorities for the implementation of IPI provisions (WK 14123 2020 INIT). In its view, the administrative burden can be seen as proportionate. IPI specific thresholds can be used to limit the scope of application to high-volume contracts while maintaining the effectiveness of the instrument. In addition, common standards of proof reduce the complexity of practical implementation (see above). However, Member States still raised questions and concerns regarding the practical implementation of the instrument and the 'Add-On'. Delegates suggested *inter alia* to include the 'Add-On' clause already in the tender documents and to further elaborate on the handling of consortia and state-owned enterprises.

The discussions continued with a contribution of Ireland (WK 13601 2020 INIT). The presentation of the paper covered key aspects of the previous discussions such as thresholds, the application of the price adjustment mechanism, the 'Add-On', as well as the issue of consortia and letter box companies. Member States held extensive discussions about the proposals, with a number of them supporting the raising of thresholds for works while underlining the objective of designing the instrument as a "market opener".

3. Conclusion and Outlook

Under the German Presidency, the discussions of the most complex and critical aspects of the IPI continued. Member States and the Commission have contributed to a better understanding of the instrument. The German Presidency forwards the file with confidence of further progress to the incoming Portuguese Presidency. Many Member States have

expressed the wish to continue the work with concrete text proposals that take up the progress in the discussions under the previous Presidencies.

