Council of the European Union
General Secretariat

Interinstitutional files:
2012/0060(COD)

Brussels, 26 March 2021

WK 4286/2021 INIT

LIMITE

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From:	DK Delegation
To:	Working Party on Trade Questions
Subject:	International Procurement Instrument - DK comments

Copenhagen, 26 March 2021

International Procurement Instrument – Comments from the Danish Delegation

The Danish delegation reaffirms its intention to contribute to bringing forward the discussions on a proposal for an International Procurement Instrument that aims at preserving the EU's offensive interests and providing the EU with sufficient leverage in negotiations on public procurement with third countries. In the discussions, we have raised a number of issues in an effort to simplify the instrument, to reduce burdens on European companies and public buyers, and to ensure an instrument that is effective in the sense that it should be a targeted instrument. We consider it fundamental that the regulation ensures transparency, legal certainty, uniformity, and balanced implementation of the burden of the instrument for all Member States.

We greatly appreciate the efforts made by the Presidency and the Commission in drafting solutions in the spirit of compromise. We welcome the invitation by the Presidency to provide comments to the Presidency's informal draft text for recitals and other elements of the draft texts put forward by the Presidency.

- **Draft recitals**

We welcome the Presidency's redrafting of recitals to reflect discussions on the draft articles. We note that further additions to the recitals and/or the draft provisions will be be presented by the Presidency, and the following comments should thus be seen as preliminary.

We particularly welcome the redrafting of **recital 27** regarding the contracting authorities and entities exempted from IPI measures, which must go hand in hand with provisions on a voluntary negative-listing option for Member States. We agree with the wording on the need to take into account the diversity of administrative capacity of contracting authorities and entities. We would argue that the notion of ensuring a fair distribution of the burden among Member States, as stated in the 2016 Commission proposal, is still valid and we thus encourage the Presidency to keep such wording in the recital.

We find that the recital and the reference to the Enforcement Regulation in **recital 10** should be updated in order to reflect the latest revision of the Enforcement Regulation.

We appreciate the clarification and guidance on the use of the definition of origin of services in **recital 14**. However, we find that it would contribute to further clarification if the text included situations where the IPI measures do not apply to consortia that is when an operator from a third country covered by an IPI measure constitutes less than 10%.

We strongly welcome the deletion of previous article 1.5, and we agree that the recitals must be amended accordingly. We find that it would provide clarification for contracting authorities and entities if it is stated explicitly in a **new recital** that neither the IPI regulation nor the IPI measures restrict the Member States from their ability to apply restrictive measures in respect to third country economic operators, goods and services beyond those provided for in this Regulation as outlined in the Commission Communication from 24.7.2019 "Guidance on the participation of third country bidders and goods in the EU procurement market", C(2019) 5494.

We must ensure that the regulation is in line with the overall policy objective of the EU to support the economic growth of developing countries and their integration into global value chains, and we therefore welcome the new **recital 18** on Least Developed Countries by the Presidency.

We appreciate that the Presidency has presented a solution in order to minimize the administrative burdens for SMEs. However, we are concerned that the draft text by the Presidency only entails an exemption for SMEs that manufacture goods – not services providers. We find that both the new paragraph to **article 6** as well as the new **recital 24** should be redrafted in order to reflect the reality of European SMEs that constitutes an increasingly large share of service providers (see also our comments to article 6 below).

We suggest that **recital 29** is amended in order to reflect discussions on the proportionality of a penalty in case of infringement of an IPI measure. The penalty shall be proportional with the nature of the infringement.

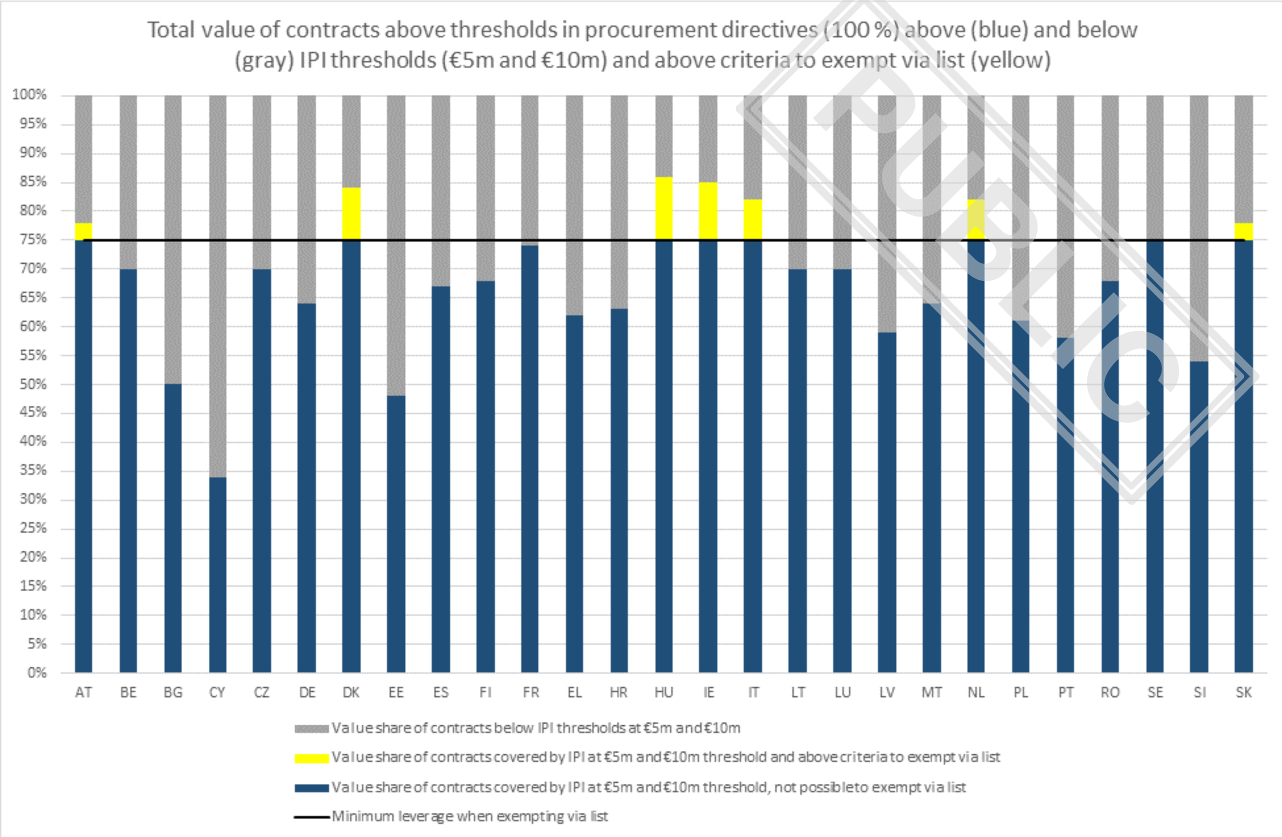
The Presidency has stated its intention to present a new article on the revision of the regulation and we thus reserve the right to provide comments at a later stage to the new article as well as **recital 31**. In general, we find it useful to present a revision clause that intends at evaluating the instrument's effect on negotiations with third countries and that also takes into account any possible negative effects of the instrument on European companies, especially SMEs, as a result of the additional contractual obligations.

- **Additional elements – contracting authorities and entities concerned**

We highly appreciate the Presidency's and the Commission's efforts to re-introduce an article on the contracting authorities and entities concerned. We are strongly committed to see an article along the lines presented by the Presidency at the working party on 17 March. To have such text included in the Presidency's compromise proposal and eventually accepted by all has decisive character for us.

We acknowledge that the original article on positive listing of authorities and entities concerned has been seen as a too burdensome task for some Member States. We understand therefore that these Member States have leaned towards a threshold-only approach. However, according to the threshold analysis presented by the Commission, the share of covered procurement at different thresholds varied greatly amongst Member States. This picture repeated itself at various thresholds. This means that if we are only left with the thresholds to regulate the scope of the IPI measures, it will result in the de facto uneven balance of implementation by Member States. The Commission already pointed out this issue back in its 2016 Proposal. The IPI thresholds should therefore be **supplemented by a limited voluntary negative-listing option addressing subnational authorities and entities.** This way Member States could chose to list contracting authorities and entities **not** covered. If a Member State chooses to do so it should actively request the Commission for a national listing. For all other Member States the thresholds-only would apply. Such a list should be duly justified by a clear set of criteria and should be processed in a transparent manner.

Some Member States may be concerned with potential domestic pressure from subnational authorities to utilize the negative-listing option. However, this will be manageable. Firstly, the “cut off” at 25% would only allow for a small number of Member States to utilize the option. All Member States below the 75% leverage in the illustration below would find it difficult to utilize the option, as exempting subnational authorities and entities would further reduce the leverage. Secondly, additions in the form of criteria for the duly justification with a view to further minimize potential or unwanted domestic side effects could be clarified.



Utilizing the negative listing option would entail an administrative burden on the Member State, which is something the Member State must take upon it. Further clarification to the terminology (e.g. references to directive-terminology) and guidance for the calculation of leverage could be introduced in order to minimize risks of misinterpretations.

On concerns for less uniformity we argue that a threshold only approach does not capture the huge diversity Member States represents at subnational level. De facto uniformity and formal uniformity does not add up with a threshold-only approach. This is due to some Member States having relatively high-value – but strategically less significant - procurements taking place at subnational level. This was also illustrated by the threshold analysis presented by the Commission, which showed a rather uneven distribution of covered procurement among Member States. The value share of covered procurement varied from 38 per cent to 89 per cent among Member States at a €5m threshold and from 26 per cent to 83 per cent at a €10m threshold. We sympathize with Member States that wish diversified and higher thresholds. But the latter would not solve the concrete issue at our hands.

Comments to the articles of Presidency's draft legal text (WK 173/2021)

- **Article 1 - Subject matter and scope of application**

We appreciate the Presidency's redrafting of the article, which we find has brought further clarification and simplification to the text. We fully support the deletion of the previous article 1.5 from the 2016 proposal.

- **Article 2 - Definitions**

We welcome the addition of further definitions, which is an important step to reach a common understanding of the regulation. We note with satisfaction the clarification from the Presidency during discussions on draft article 2 that any IPI measure will only apply to procurement contracts published *after* the adoption of such an IPI measure.

- **Article 3 - Determination of origin**

We appreciate the simplification of the determination of origin imbedded in the text proposal by the Presidency and find that the current text provides a sensible balance between letterbox companies and subsidiaries.

We note with satisfaction that the Commission has confirmed that the use of 'substantive business operation' as indicator to determine the origin of the economic operator does not affect the use of neither incorporation theory or real seat theory in national regulations of company law in Member States.

- **Article 4 - Investigation and consultations**

The Investigation and Consultations phase are an essential part of the regulation. It is not about getting to the measure quickly but instead give time for the pressure of the measure to do its job, consequently leaving no need for the measures at all. In order to ensure further transparency of the proceedings of initiation and the investigation and consultation phase, we would suggest further clarification including the procedure for collecting information and requirements for interested parties to request an initiation of an investigation. It should be further clarified what the notice of initiation shall include. Any IPI measures should be sufficiently justified.

We take note of the fact that the Commission has confirmed that the investigations and consultations with the third country will run in parallel. We note with satisfaction that the consultation phase will be initiated at the same time as the investigation phase thus establishing at least 9 months of consultations, which shall afford the third country in question a reasonable opportunity to continue consultations with a view to clarifying the factual situation and arriving at a mutually agreed solution.

- **Article 5 - IPI measures**

Given the offensive purpose of the instrument, we appreciate that the minimum thresholds determined with an IPI measure have been raised and differentiated between works and concessions and goods and services. We would, however, have preferred to see even higher thresholds.

Regarding art. 5.4, we urge the Presidency to keep the wording "***relevant*** contracting authorities or contracting entities", as this would be in line with the new proposed article on contracting authorities and entities exempted from the regulation. It is the Danish position that it should with duly justification be possible by option for Member States to exempt certain contracting authorities and entities from the instrument in order to ensure a fair burden and balanced implementation between Member States (see above).

Regarding art. 5.6(e) we find the range of the price adjustment measure somewhat arbitrary and too high. We can support a level of "up to 20 per cent" as proposed by the Commission in its 2016 proposal.

We find that art. 5.7 should be further specified so that each IPI measure should have an expiration date, for instance 3 years, to ensure that we at least every third year take a position regarding the specific measure taking into account the development in the negotiations with the targeted third country. We find that this would further support the offensive purpose of the regulation.

- **Article 6 - Additional contractual obligations upon the successful tenderer**

We acknowledge that the introduction of additional contractual obligations ("add-on") for the successful tenderer significantly reduces the potential administrative burden that would have been generated by previous versions of the IPI regulation. Nonetheless, the add-on entails an administrative burden for winning European tenderers, especially SMEs. We appreciate that the Presidency has presented a new paragraph to article 6 in order to minimize the administrative burdens for SMEs. However, we find it highly problematic that the draft text by the Presidency only entails an exemption for SMEs that manufacture goods – not services providers. Introducing the exemption for SMEs as part of the add-on provisions, which will be evaluated on the basis of rule of origin connected to goods, makes is inevitably difficult to exempt service providers. We urge the Presidency to find a solution for European service providers in order to avoid discrimination towards SMEs providing services – companies who contribute to an increasing share of the European economy and is increasingly connected to the delivery of goods.

Furthermore, we find that the penalty in art. 6.1 (d) of "at least 10%" is disproportional, as breach of contract is already regulated in the procurement directives. Breach of contract would thus be sanctioned twice. We find that the penalty should be lower, and further that a maximum level is added to the article (e.g. with inspiration from similar regulations).

- **Article 7 – Exceptions**

We find that there is a potential to strengthen article 7 further in order to ensure that there are sufficient bids to choose from that meet the requirements of the contracting authorities and to ensure value for money. This could be done by extending the exceptions with cases in which there is only one bid from economic operators originating in the European Union and/or from a country with which the Union has concluded an international agreement.

- **Article 8 - Review procedures**

We suggest that the regulation ensures that any penalty in case of infringement of an IPI measure shall be proportional with the nature of the infringement. Only in severe cases should a contract be deemped ineffective.

- **Article 9 – 12 - Committee procedure, Confidentiality, Reporting and Entry into force**

We appreciate the Presidency's redrafting of these articles, which we find has brought further clarification and simplification to the text.

Regarding article 9 on the committee procedure, we find that any IPI measure should only be adopted if a qualified majority of Member States are in favour of such a measure.

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The Danish delegation reserves the right to present further comments at a later stage.