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WORKING DOCUMENT

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

TQWP – Comments AT – Meeting 15th of April, 2021

General comments:

We would like to thank the Presidency for the huge amount of work invested in the text, which we think has been improved significantly.

At the same time, we are disappointed by the statement that only fine-tuning is foreseen for the text, as there remain significant issues, and as there has been new text added which substantially influences the entire Regulation (see in particular the changes in Article 5) and has not been debated yet. To submit a substantially altered text without allowing for its change beyond the margins and without providing additional explanation is inconsistent with the previous work of the Presidency and we therefore cannot give our agreement to this text. Furthermore, the proposal contains a number of provisions which contain serious issues which also lead us to the conclusion that the Regulation is not yet ready to go to the Council: exemption of "nuts and bolts" in text, ineffectiveness in the Remedies system, consortia treatment, lots, thresholds, contact of the Commission with contracting authorities/entities.

Article 1

Paragraph 5a: *„A reference to the application of this Regulation and any applicable IPI measure…"*

Article 2

General comments: The text does not contain any reference which clarifies that the "nuts and bolts" of the procurement procedure are not the aim of an IPI measure; this was neither discussed or agreed upon nor does it represent the position of any Member State. The definitions clarifying this need to be reintroduced (see our extensive suggestions in WK 1055/2021).

Why is the word "respectively" added for the definitions of "contracting authority" and "contracting entity", but not in the definitions of "economic operator" and "estimated value"?

Paragraph 1 (f) – It should say *"serious or recurrent impairment"* (see reasoning in WK 1055/2021).

Paragraph 2: reference to Art. **5 (3) and (7)** needs to be **added** – there are different thresholds for "works" and "services", resp. a different SAM that is to be applied to "goods, services, works or concessions"!

Article 3

Paragraph 3 (3) (c) (ii): Alignment with the terminology of the Public Procurement Directives regarding the definition of control should be undertaken (see text suggestion and explanation in WK 2355/2021). This way, contracting authorities/entities can apply a concept they are already familiar with and that is clear in national law, instead of having to deal with an unclear and new concept of control such as is suggested in the Regulation.

Paragraph 3a: Again, see our comments in WK 2355/2021. A threshold of just 10% is not acceptable; the reference to a contract is incorrect as there is no contract yet at this stage of the procedure; and finally, this consortium measure can be considered to be inapplicable for a participation in a consortium which is not tied to the value of the contract but which may nevertheless be essential (e.g. providing funds for financial suitability but not participating in the execution of the contract).

Article 4

Paragraph 1: It should be clarified in a Recital who the "interested parties" may be.

Paragraph 1a: text "mentioned in Article 10 of this Regulation" is superfluous.

Paragraph 3: "serious <u>or</u> recurrent impairment" (see above Art. 2)

Paragraph 4a (f): "expand" (e.g. of coverage) may capture the intent better than "extend" (purely temporal).

Article 5

Paragraph 2 (p): "any negative impact on contracting authorities or contracting entities" is phrased somewhat too broadly ("any"), "a significant negative impact" could be an alternative text.

Paragraph 3: to reiterate, the thresholds need to be higher both for works and concessions as well as for products and services; especially the former threshold being raised is important in order to avoid incurring the significant administrative burden of IPI to small contracting authorities/entities.

Paragraph 4: as has been exhaustively explained in WK 4236/2021, a reference to "contracts" is incorrect. Furthermore, lots are explicitly a tool to support SME (see for example Recital 78 of Directive 2014/24/EU); to not include a de minimis rule for lots in the text goes directly against the function of the current provision and against the function of lots in general, to support SMEs. To repeat, the suggested text to be added is:

"The IPI measure shall not apply to the award procedure in a framework agreement or a dynamic purchasing system for a contract with an estimated value below the value according to Art. 8 of Directive 2014/23/EU, Art. 4 of Directive 2014/24/EU or Art. 15 of Directive 2014/25/EU. The IPI measure shall also not apply to individual lots awarded according to Art. 5 (10) of Directive 2014/24/EU and Art. 16 (10) of Directive 2014/25/EU."

Paragraph 5 (s): the text suggests that a combination would have to be applied by contracting authorities/entities to one economic operator (that is what the word "combination" suggests). This is impossible, since the bid of an economic operator who is excluded is not assessed any more. Furthermore, we would like to recall that the general consensus has been that contracts will not have to be looked at with all their "nuts and bolts" – this subparagraph seems to point to a different understanding. We would need a detailed explanation including an example of what the aim of this provision is before we can assess its merit.

Paragraph 7 (t): The text *"exceptions, <u>according to the Common Procurement Vocabulary according to Regulation (EC) Nr. 2195/2002</u>"* needs to be added (see also our explanation in WK 1669/20021) or this should be clarified in a Recital. Contracting authorities/entities are required to use CPV codes, and this would also make it far easier for contracting authorities/entities to search IPI measures regarding their applicability to their upcoming public procurement procedures. If the coverage is not set out through the use of CPV codes, instead, it is up to contracting authorities/entities to guess whether a particular IPI measure applies to them; furthermore, they cannot search within the IPI measures, but would have to check in detail all measures which might be at least theoretically applicable; and not having the codes would also reduce searchability on a dedicated IPI measure website as well as on TED.

<u>Article 6</u>

Paragraph 1: the criteria for justification should be listed in the text.

Paragraph 2: Since the data that is to be provided covers the contracting authorities/entities to be exempt, the calculation should also be based on that data provided and not on the data regarding the non-exempt contracting authorities/entities. Also, as pointed out previously, reference should be made to "Directives 2014/23/EU, 2014/24/EU **<u>or</u>** 2014/25/EU" since these markets need to be looked at separately. We suggest the following text which reflects these concerns:

"An exemption may only be granted if the value of contracts above thresholds set in Article 5.3 of this Regulation awarded by the contracting authorities or contracting entities <u>to be exempted is below 25%</u> of the total value of above thresholds contracts falling under the scope of Directives 2014/23/EU, 2014/24/EU <u>or</u> 2014/25/EU awarded in the requesting Member State in the same 3-year period."

It should also be clarified in the text or in a Recital where the data of the procurement within the scope of the Procurement Directives comes from (i.e. TED or to be provided by the Member State).

Paragraph 3: If an exemption is only granted under specific circumstances, why is there a need to limit the "request"? Paragraph 3 should be deleted.

<u>Article 7</u>

Paragraph 1: *"<u>1. In procurement procedures in which an IPI measure is applicable,</u> contracting authorities and contracting entities […]"*

See our explanation in WK 1669/2021.

Paragraph 1 (y): *"[…] not to subcontract more than 50% of the <u>total value of the</u> contract […] to"* – as pointed out before, the phrasing should be the same in letters (y) and (z).

Paragraph 1 (bb): we reiterate our question whether a penalty of <u>at least</u> 10% of the total value of the contract is proportionate according to Art. 49 (3) of the Charter of Fundamental Rights of the European Union. Since the penalty is mandatorily imposed in the sense that the contracting authority/entity has no choice whether to include the add-on or not, this penalty cannot be considered a purely contractual penalty because that would imply a choice on the side of <u>both</u> parties to the contract. The fine is therefore comparable to an administrative fine, to which Art. 49 (3) of the Charter is applicable (see the comparable cases regarding Art. 7 ECHR, 70074/01, VALICO S.R.L. v. ITALY, and 44612/13, GEORGOULEAS AND NESTORAS v. GREECE). We request that this question be **reviewed by the Council Legal Service** since we do not believe that a penalty which is by itself prohibitively large and for which there are no cumulation rules with regard to other penalties or the penalties in relation to each other (the text confusingly refers to "commitments referred [to] in points (a), (b)" – what does the comma imply?). We refer again to our suggestion of a 5% penalty and our suggested text regarding penalty cumulation (see WK 1669/2021).

Paragraph 2: Paragraph 1 (aa) provides that evidence is to be provided "upon request"; paragraph 2 provides that the contracting authority/entity "shall request evidence" in particular cases; finally, paragraph 4 provides that evidence must be provided "upon request" and "at the latest upon completion of the execution of the contract". These provisions are confusing, overlapping and partly contradictory. The second sentence in paragraph 2 is also unclear regarding its necessity since the term "reasonable indications" is vague and the provision regarding the award to a group of economic operators is illegible since it seems to contradict both paragraph 1 (y) as well as the general rules of origin. The second sentence in paragraph 2 should therefore be deleted; the remaining provisions on evidence should be added to paragraph 1 (aa) (also since they are not part of the contract clause otherwise, as we have mentioned before), which should then read as follows:

"(aa) an obligation to provide upon request of the contracting authority or the contracting entity, and at the latest upon completion of the execution of the contract, adequate evidence corresponding to point (b). It is sufficient to provide evidence that more than 50% of the total value of the contract originates in countries other than a third country subject to an applicable IPI measure."

Paragraph 3: This paragraph should be deleted; as it provides very limited added value in contrast with a significant administrative burden.

Paragraph 4: see remarks above regarding paragraph 2.

Paragraph 5: As we have pointed out in WK 1699/2021, the conditions of the contract are part of the procurement documents (see for example the explicit reference to "proposed conditions of contract" in Art. 2 (1) (13) of Directive 2014/24/EU), rendering paragraph 5 superfluous. There is also no such thing as "procurement documents for award procedures" and any documents regarding the award procedure would in any case be the wrong place to put contract clauses. Paragraph 5 should therefore be deleted. If it is deemed necessary to keep the idea of paragraph 5 (a reminder to have a reference regarding the additional IPI related contract conditions in the contract documents), an improved wording could be added to the Recitals.

Article 8

Paragraph 1: We refer to our comments in WK 2355/2021 regarding the rephrasing of the exclusion to refer to "economic operators participating in public procurement procedures" instead of referring to the bids, and the reasoning provided there.

Paragraph 1 (ac) should read, in order to be aligned with Art. 57 (3) of Directive 2014/24/EU:

"(ac) this is justified, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment"

Paragraph 1 (dd): the wording ("demonstrate" – to whom?) is problematic. We propose the following:

"(dd) based on objective criteria taking into account, among others, the estimated value of the contract, the application of the measure would lead to a disproportionate increase in the price or costs of the contract."

We point to the fact that according to the PP Directives (see for ex Art. 84 of Directive 2014/24/EU) CA/CE must document the progress of all procurement procedures. To this end they must keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on communications with economic operators and internal deliberations, preparation of the procurement documents, dialogue or negotiation if any, selection and award of the contract. The proposed "demonstration" is not needed since the reasoning of the CA/CE must be documented anyway.

Paragraph 2 (and Recital 27): As pointed out in detail in WK 2355/2021, a provision foreseeing direct contact between the Commission and the contracting authority/entity, without the Member State meditating this contact, will remain entirely unacceptable for AT. An exchange of information via the Member State is acceptable and would also make sense considering that the Member States are required to provide information to the Commission according to Article 12; having the information regarding the application of exclusions be communicated without involvement of the Member State both deprives the Member State of information necessary to be able to monitor and potentially also inform about the application of exceptions, as well as of information to combine with other available information regarding the application of the IPI Regulation. It must be left to the Member State how the communication with the Commission is organised.

"[…] IPI measure, the Commission shall be notified accordingly by the Member State no later than thirty days after the award of the contract."

And additionally in paragraph 3: "*The Commission may ask the Member State for additional information."*

Article 9 (and Recital 28)

The compromise proposal neither takes account of the issue of 3rd country access (see Art. 1 [3] of Directive 89/665/EEC and our extensive explanations in WK 3056/2021), nor does it address in any way the issue that "violations of IPI measures" can happen in a very wide range (non-application, miscalculation of SAM, wrong exclusion, non-exclusion, miscalculation of % regarding add-on etc.). The term "violation of an IPI measure" would – lege non distinguente - encompass all (minor and major) types of violations (the Recital just repeats this term but does not provide any additional explanation/help). It also does not address that no violation of an IPI measure is comparable to the ineffectiveness foreseen in the Remedies Directives. Furthermore, the suggested text increases legal uncertainty by referring to the application of the Remedies Directives "under the detailed rules which Member States may establish". This seems to be an "opening clause" akin to the GDPR, but it may also be a reference to existing Remedies systems in the Member States. As such, the suggested text fails to address any of the issues we have pointed to and stressed as being essential to AT's position on the entire proposal, while adding further issues.

Since some Member States have voiced issues with including alternative sanctions, and since there is no violation of an IPI measure which warrants ineffectiveness, we suggest the following text:

"Council Directive 89/665/EC and Council Directive 92/13/EEC shall apply to review procedures of EU economic operators having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement in the application of an IPI measure.

These Directives shall also apply to review procedures of economic operators from third countries having a right to access to the respective procurement procedure in the European Union and having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement in the application of an IPI measure."

Article 11

Paragraph 1a: Both Regulation 1049/2001 as well as the Directive provisions referred to in this paragraph apply regardless of the reference in this paragraph; the entire Article is superfluous and should be deleted.

Article 12

We take note of the generalised reference to the “application of measures under this Regulation”. The way that information is collated in the field of public procurement is through structured data, most of all through TED. Not providing for a field in the eForms while requiring Member States to provide “information on the application of measures under this Regulation” will inevitably lead to added administrative burden, the collection of unstructured and incomplete data and its consequent unreliable quality. Member States are not allowed to deviate from eForms, at least when it comes to contract notices (see for example Art. 52 [2] of Directive 2014/24/EU). Furthermore, DG GROW is also working on a Data Strategy – not thinking within that structure when it comes to public procurement data contradicts the aims of the Commission when it comes to data collection.

Recitals:

Recital 19a: As has been pointed out previously, determining that the interest of the Union may be of “any other nature” renders the definition meaningless; this phrase should be removed or replaced with further reasons which may justifiably be in the interest of the Union.

Recital 19b: The words “in principle” should be deleted.

Recital 27: The description of the disproportionate increase in price or costs is insufficient. The estimated value is – as the name clearly suggests – an estimation, and going below or above the estimation is influenced by a broad range of factors, not all of which are under the control of the contracting authority/entity. It may happen often enough that the offers are slightly above the estimated value; allowing for the application of the exemption (as the Recital seems to suggest e contrario), which would make the exemption extremely broad. One option would be to add the word “significantly” before the word “higher”.