

International public procurement instrument

2012/0060(COD) - 29/01/2016 - Legislative proposal

PURPOSE: to establish measures aiming to improve 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.

PROPOSED ACT: Regulation of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: the European Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with the Council.

BACKGROUND: while the EU public procurement market is open to foreign bidders, **the procurement markets for foreign goods and services in third countries remain to a large extent closed *de iure* or *de facto***. The IPI aims at encouraging partners to engage in negotiations and opening participation for EU bidders and goods in third countries' tenders.

Many third countries are reluctant to open their procurement markets to international competition or to open those markets further than what they have already done. The value of US procurement offered to foreign bidders is currently just EUR 178 billion and EUR 27 billion for Japan, whereas only a fraction of the Chinese public procurement market is open to foreign business. The Commission stated that, all in all, more than half of the world's procurement market is currently closed due to protectionist measures and this share is only growing. As a result, **only EUR 10 billion of EU exports (0.08% of EU GDP) currently find their way in global procurement markets**, whereas an estimated EUR 12 billion of further EU exports remains unrealised due to restrictions.

Some **EUR 352 billion** of EU public procurement is open to bidders from member countries of the GPA. However, some important economic players like China, Brazil or India are not yet parties to the agreement and some of the existing parties have limited coverage of procurement in their schedules.

The Commission adopted in March 2012 its initial proposal for an international procurement instrument which sought to encourage partners to engage in negotiations and opening participation for EU bidders and goods in third countries' tenders. This initial proposal was discussed in the European Parliament and in the Council, **without, however, concluding the first reading**.

Since the launch of the IPI proposal in 2012, important trade negotiations have started, with the US (TTIP), Japan (FTA) or continued, such as for China (to join the GPA). The Commission considered that the adoption of the IPI would send a strong signal to these and other partners and would encourage negotiators to accelerate and pursue a substantial opening of their procurement markets.

In view of the fact that there appears to be broad agreement that an imbalance currently exists between the openness of the EU procurement market and third country procurement markets and that European companies should enjoy better access to procurement opportunities abroad, **the Commission decided to review its initial proposal** in order to respond to some of the concerns both legislative organs of the EU have expressed while ensuring that the revised proposal still provides the EU with better leverage in its negotiations to open foreign procurement markets.

IMPACT ASSESSMENT: the Commission's Impact Assessment Board (IAB) has issued two opinions on the impact assessment report. The amendments now put forward aim at making the instrument more targeted and more easily applicable in practice while further limiting the potential negative effects that were identified in the impact assessment report.

As regards effectiveness,

- the amended proposal will still meet the initial objective to clarify the applicable rules, and the Commission will continue having the final say on the use of restrictive measures;
- with the deletion of the decentralised pillar, the application of the rules will be simpler and further harmonised, and the margin of error caused by contracting authorities/entities applying the restrictive measures will be reduced;
- the reduction of time limits for the Commission's investigation will ensure that there is earlier clarity on whether or not restrictive measures will be taken.

As regards efficiency: the proposed amendments reduce the administrative burden:

- the impact assessment estimated the costs in relation to the notification process of the decentralised procedure to amount to EUR3.5 million. The deletion of the decentralised pillar, including its time limits, abolishes all potential risks linked to the notification process identified in the impact assessment;
- the proposed amendments will allow to target those territories of a third country which are actually responsible for the discriminatory measures without the need to target the third country as a whole. This possibility for more targeted and justifiable measures will further reduce the risk for retaliation.

CONTENT: the **revised proposal from the Commission seeks to put in place an International Procurement Instrument (IPI)**. This is the EU response to the lack of level playing field in world procurement markets.

The amendments presented in this proposal aim at increasing the effects of the instrument upon third countries while eliminating the potentially negative consequences of the instrument in its original form, such as the possibility to close the EU procurement market completely to a trading partner, the administrative burden related to the application of the instrument and the risk of fragmentation of the internal market.

At the same time, the proposal focuses on the **role of the Commission** to investigate procurement barriers in third countries and provides the tools to engage with third countries towards their removal.

More specifically, the proposal:

- **deletes the possibility to close the market and to limit possible restrictive measures to price penalties** – now called “price adjustment measures”. Following a Commission investigation, when it is determined that a country applies barriers to EU participation in procurement, a price adjustment would be applied to bidders or products or services from that country. Contrary to the initial proposal, foreign bidders and products and services subject to a price adjustment measure for evaluation purposes could still be awarded the contract, if despite the price adjustment the offer remains competitive in terms of price and quality;
- **eliminates the possibility for contracting authorities to decide autonomously a prohibition on foreign bidders' participation** in their tenders by deleting the decentralised pillar;
- **establishes a presumption that tenders submitted by companies originating in the targeted third country will be targeted by the price penalty**, unless they can demonstrate that less than 50% of the total value of their tender is made up of non-covered goods and services originating in

this third country. While in the original proposal contracting authorities bore the burden of proof, it is now borne by the bidder;

- **reduces the administrative burden** further by allowing Member States to indicate which of their procuring entities will be required to implement the price adjustment measure;
- provide that the price adjustment measure would not be applicable in relation to European small and medium-sized enterprises (SMEs) and **bidders and products originating from developing countries subject to GSP+ treatment**;
- introduce a new provision allowing **targeting territories at regional or local level**, like states, regions or even municipalities;
- **shortens the time for the Commission's investigation** in the centralised procedure;
- **makes public** the findings of the Commission investigations identifying barriers to tenders in third countries;
- clarifies that the instrument will apply to all procurement and concessions which are covered by the [EU procurement](#) and [concession](#) directives adopted in February 2014 (which excludes for example concessions regarding water supply services).