



**2012/0060(COD)**

26.9.2017

## **OPINION**

of the Committee on the Internal Market and Consumer Protection

for the Committee on International Trade

on the amended proposal for a regulation of the European Parliament and of the Council on 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

(COM(2016)0034 – C8-0018/2016 – 2012/0060(COD))

Rapporteur: Ivan Štefanec

PA\_Legam

## SHORT JUSTIFICATION

### Background

In March 2012 the European Commission adopted the first proposal for a Regulation, establishing a so-called International Procurement Instrument in order to increase the leverage of the European Union in international trade negotiations, with a view to achieving improved market access opportunities for European economic operators in third countries' public procurement markets.

In January 2014 the European Parliament adopted in plenary amendments to the proposal and the matter was referred back to the committee responsible for further consideration. The file was blocked in the Council and the Parliament did not engage into trilogue negotiations.

On 29 January 2016 the Commission presented an amended proposal. This amended proposal

- deletes the decentralized procedure initially proposed (which empowered contracting authorities/entities to exclude foreign tenders autonomously) and offers now only a centralised procedure where the Commission investigates and takes action with respect to a third country;
- deletes the possibility to close the market as a response measure and limits the options to applying price penalties, now called "price adjustment measures" (applicable only for the evaluation process and not determining final price). In addition, foreign tenders could still be awarded the contract if despite the price adjustment the offer remains competitive. The provision on abnormally low tenders is deleted;
- narrows the application scope of the instrument in that it should not apply to suppliers from least developed countries or the more vulnerable developing countries or tenders from European SMEs, and application should be limited to contracts above a certain threshold;
- moves the burden of proof to the bidders from the targeted third country that less than 50% of the total value of their tender is made up of non-covered goods/services;
- adds a new possibility to limit application to certain suppliers from the third country concerned and limits implementation to a select group of contracting authorities in each EU Member State;
- clarifies that the instrument will apply to all procurement and concessions covered by the 2014 procurement and concession Directives and that Member States and contracting authorities/entities may not apply restrictive measures beyond those provided by the Regulation;
- refers to "restrictive and discriminatory procurement measures or practices" instead of using the expression "lack of substantive reciprocity".

Since the amended proposal has deleted some provisions of stronger relevance to the internal market rules, especially by deleting the empowering of individual contracting authorities to reject tenders (old Article 6), the IMCO competences are even more limited. However, even in the centralised Commission driven mechanism the legislation affects the behaviour of EU contracting authorities in the tendering procedures and the internal market.

IMCO remains associated committee under RoP 54 on a limited number of issues, including:

A. exclusive competence on

- new Article 11 (2), (3), (4): on the application of the price adjustment measures
- new Article 12 (2), (3), (4): on the exception to price adjustment measures
- new Article 14(3): on the Committee procedure
- new Article 17: on repealing articles 85 and 86 of 2014/25/EU

B. shared competences on

- Article 2: Definitions
- new Article 9: about the authorities or entities concerned by the measures taken under Article 8
- new Article 12 (1): on the exception to price adjustment measures
- new Article 13 on implementation
- new Article 14 (1): Committee procedure
- new Article 15: on confidentiality
- new Article 16: on reporting

At first place, this draft Opinion includes the amendments adopted by the IMCO committee on 17 October 2013, on the provisions that were kept in the amended Commission proposal and fall within IMCO's exclusive or shared competences. Also a number of IMCO amendments are taken over in the Commission's amended 2016 proposal.

## AMENDMENTS

The Committee on the Internal Market and Consumer Protection calls on the Committee on International Trade, as the committee responsible, to take into account the following amendments:

### Amendment 1

#### Proposal for a regulation Title

*Text proposed by the Commission*

REGULATION OF THE EUROPEAN  
PARLIAMENT AND OF THE COUNCIL

on 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

*Amendment*

REGULATION OF THE EUROPEAN  
PARLIAMENT AND OF THE COUNCIL

on the access of third-country goods and services to the Union's internal market in public procurement ***and concessions*** and procedures supporting negotiations on access of Union goods and services to the public procurement ***and concessions*** markets of third countries

## Amendment 2

### Proposal for a regulation

#### Recital 1

##### *Text proposed by the Commission*

(1) In accordance with Article 21 of the Treaty on European Union, the Union is to define and pursue common policies and actions, and improve cooperation in all fields in international relations in order, inter alia, to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.

##### *Amendment*

(1) In accordance with Article 21 of the Treaty on European Union, the Union is to define and pursue common policies and actions, and improve cooperation in all fields in international relations in order, inter alia, to ***safeguard its values, fundamental interests, security, independence and integrity and to*** encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.

## Amendment 3

### Proposal for a regulation

#### Recital 6

##### *Text proposed by the Commission*

(6) Within the context of the WTO and through its bilateral relations, the Union advocates an ambitious opening of international public procurement markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.

##### *Amendment*

(6) Within the context of the WTO and through its bilateral relations, the Union advocates an ambitious opening of international public procurement ***markets and concession*** markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.

## Amendment 4

### Proposal for a regulation

#### Recital 8

##### *Text proposed by the Commission*

(8) Many third countries are reluctant to open their public procurement and their concessions markets to international competition, or to open those markets further than what they have already done.

##### *Amendment*

(8) Many third countries are reluctant to open their public procurement and their concessions markets to international competition, or to open those markets further than what they have already done.

As a result, Union economic operators face restrictive procurement practices in many of the trading partner of the Union. Those restrictive procurement practices result in the loss of substantial trading opportunities.

As a result, Union economic operators face restrictive procurement ***practices and concession*** practices in many of the trading partner of the Union. Those restrictive procurement practices result in the loss of substantial trading opportunities ***and therefore a procedure to prevent imbalances in third-country public procurement markets should exist.***

## Amendment 5

### Proposal for a regulation Recital 11

#### *Text proposed by the Commission*

(11) In the interest of legal certainty for Union and third-country economic operators, contracting authorities and contracting entities, the international market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions should be reflected in the legal order of the EU, thereby ensuring effective application thereof.

#### *Amendment*

(11) In the interest of legal certainty for Union and third-country economic operators ***and consumers***, contracting authorities and contracting entities, the international market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions should be reflected in the legal order of the EU, thereby ensuring effective application thereof.

## Amendment 6

### Proposal for a regulation Recital 12

#### *Text proposed by the Commission*

(12) The objectives of improving the access of Union economic operators to the public procurement and concessions markets of certain third countries protected by restrictive and discriminatory procurement measures or practices and of preserving equal conditions of competition within the internal market require to refer to the non-preferential rules of origin established in the EU customs legislation, so that contracting authorities and contracting entities know whether goods

#### *Amendment*

(12) The objectives of improving the access of Union economic operators to the public procurement and concessions markets of certain third countries protected by restrictive and discriminatory procurement ***measures and concession*** measures or practices and of preserving equal conditions of competition within the internal market require to refer to the non-preferential rules of origin established in the EU customs legislation, so that contracting authorities and contracting

and services are covered by the international commitments of the Union.

entities know whether goods and services are covered by the international commitments of the Union.

## Amendment 7

### Proposal for a regulation Recital 17

#### *Text proposed by the Commission*

(17) When assessing whether restrictive and/or discriminatory procurement measures or practices exist in a third country, the Commission should examine to what degree laws on public procurement and concessions of the country concerned ensure transparency in line with international standards in the field of public procurement and preclude any discrimination against Union goods, services and economic operators. In addition, it should examine to what degree individual contracting authorities or contracting entities maintain or adopt discriminatory practices against Union goods, services and economic operators.

#### *Amendment*

(17) When assessing whether restrictive and/or discriminatory procurement measures or practices exist in a third country, the Commission should examine to what degree **the** laws on public procurement and concessions of the country concerned ensure transparency in line with international standards in the field of public procurement **and concessions** and preclude any discrimination against Union goods, services and economic operators. In addition, it should examine to what degree individual contracting authorities or contracting entities maintain or adopt discriminatory practices against Union goods, services and economic operators.

## Amendment 8

### Proposal for a regulation Recital 18

#### *Text proposed by the Commission*

(18) In view of the fact that the access of third country goods and services to the public procurement market of the Union falls within the scope of the common commercial policy, Member States and their contracting authorities and contracting entities should not be able to restrict the access of third country goods or services to their tendering procedures by any other measure than those provided for

#### *Amendment*

(18) In view of the fact that the access of third country goods and services to the public procurement **market and concession** market of the Union falls within the scope of the common commercial policy, Member States and their contracting authorities and contracting entities should not be able to restrict the access of third country goods or services to their tendering procedures by any other measure than those provided for

in this Regulation.

in this Regulation. *Nonetheless, Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue in various situations where the classic open or restricted procedures without negotiations are unlikely to deliver satisfactory outcomes.*

## Amendment 9

### Proposal for a regulation Recital 18 a (new)

*Text proposed by the Commission*

*Amendment*

*(18a) With a view to an appropriate integration of environmental, social and labour requirements into public procurement and concession award procedures, it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations or administrative provisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law. Equally, obligations stemming from international agreements ratified by all Member States and listed in Annex X to Directive 2014/24/EU of the European Parliament and of the Council<sup>1a</sup>, Annex XIV to Directive 2014/25/EU and Annex X to Directive 2014/23/EU of the European Parliament and of the Council<sup>1b</sup> should apply during contract performance. This is of importance since a number of third countries have not ratified or are not implementing some of the international conventions referred to in these Annexes, while Union economic operators are bound by those conventions.*



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<sup>1a</sup> *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).*

<sup>1b</sup> *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).*

## Amendment 10

### Proposal for a regulation

#### Recital 19

##### *Text proposed by the Commission*

(19) The Commission should be able, on its own initiative or at the application of interested parties or a Member State, to initiate at any time an investigation into restrictive procurement measures or practices allegedly adopted or maintained by a third country. Such investigative procedures should be without prejudice to Regulation (EU) No 654/2014 of the European Parliament and of the Council.

##### *Amendment*

(19) The Commission should be able, on its own initiative or at the application of interested parties or a Member State, to initiate at any time an investigation into restrictive procurement **and concessions** measures or practices allegedly adopted or maintained by a third country. Such investigative procedures should be without prejudice to Regulation (EU) No 654/2014 of the European Parliament and of the Council.

## Amendment 11

### Proposal for a regulation

#### Recital 20

##### *Text proposed by the Commission*

(20) If the existence of a restrictive and/or discriminatory procurement measure or practice in a third country is confirmed, the Commission should invite the country concerned to enter into consultations with a view to improving the tendering opportunities for Union economic operators, goods and services in

##### *Amendment*

(20) If the existence of a restrictive and/or discriminatory procurement **or concessions** measure or practice in a third country is confirmed, the Commission should invite the country concerned to enter into consultations with a view to improving the tendering opportunities for Union economic operators, goods and

respect of public procurement in that country.

services in respect of public procurement in that country.

## **Amendment 12**

### **Proposal for a regulation**

#### **Recital 24**

*Text proposed by the Commission*

(24) Price adjustment measures should not have a negative impact on on-going trade negotiations with the country concerned. Therefore, where a country is engaging in substantive negotiations with the Union concerning market access in the field of public procurement, the Commission may suspend the measures during the negotiations.

Amendment 13

### **Proposal for a regulation**

#### **Recital 26**

*Text proposed by the Commission*

(26) Member States are best placed to identify the contracting authorities or contracting entities, or categories of contracting authorities or contracting entities, which should apply the price adjustment measure. To ensure that an appropriate level of action is taken and that a fair distribution of the burden among Member States is achieved, the Commission should take the final decision, based on a list submitted by each Member State. *Where necessary, the Commission may establish a list on its own initiative.*

## **Amendment 14**

### **Proposal for a regulation**

#### **Recital 27**

*Amendment*

*(Does not affect the English version.)*

*Amendment*

(26) Member States are best placed to identify the contracting authorities or contracting entities, or categories of contracting authorities or contracting entities, which should apply the price adjustment measure. To ensure that an appropriate level of action is taken and that a fair distribution of the burden among Member States is achieved, the Commission should take the final decision, based on a list submitted by each Member State *and based on the discussion with the Member State concerned.*

*Text proposed by the Commission*

(27) It is imperative that contracting authorities and contracting entities have access to a range of high-quality products meeting their purchasing requirements at a competitive price. Therefore contracting authorities and contracting entities should be able not to apply price adjustment measures limiting access of non-covered goods and services in case there are no Union and/or covered goods or services available which meet the requirements of the contracting authority or contracting entity to safeguard essential public needs, for example in the fields of health and public safety, or where the application of the measure would lead to a disproportionate increase in the price or costs of the contract.

*Amendment*

(27) It is imperative that contracting authorities and contracting entities have access to a range of high-quality products ***and services*** meeting their purchasing requirements at a competitive price ***and offering the best value for money***. Therefore contracting authorities and contracting entities should be able not to apply price adjustment measures limiting access of non-covered goods and services in case there are no Union and/or covered goods or services available which meet the requirements of the contracting authority or contracting entity to safeguard essential public needs, for example in the fields of health and public safety, or where the application of the measure would lead to a disproportionate increase in the price or costs of the contract.

**Amendment 15**

**Proposal for a regulation**  
**Recital 28**

*Text proposed by the Commission*

(28) In case of misapplication by contracting authorities or contracting entities of exceptions to price adjustment measures limiting access of non-covered goods and services, the Commission should be able to apply the corrective mechanism of Article 3 of Council Directive 89/665/EEC<sup>20</sup> or Article 8 of Council Directive 92/13/EEC<sup>21</sup>. In addition, contracts concluded with an economic operator by contracting authorities or contracting entities in violation of price adjustment measures limiting access of non-covered goods and services should be ineffective.

*Amendment*

*(Does not affect the English version.)*

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<sup>20</sup>Council Directive 89/665/EEC on the

coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

<sup>21</sup>Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

## Amendment 16

### Proposal for a regulation Recital 29

#### *Text proposed by the Commission*

(29) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>22</sup>.

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<sup>22</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for the control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

#### *Amendment*

(29) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>22</sup>.  
***In the same purpose, all the European Institutions should take into account the changes effected by this Regulation and adjust their own procurement rules accordingly to reflect those changes.***

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<sup>22</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for the control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

## Amendment 17

### Proposal for a regulation Recital 30 a (new)

*Text proposed by the Commission*

*Amendment*

**(30a) It is necessary to introduce transitional provisions on negotiation without publication of a notice where contracts awarded under repealed Directive 2004/17/EC and/or repealed Directive 2004/18/EC are amended.**

## Amendment 18

### Proposal for a regulation Recital 33

*Text proposed by the Commission*

*Amendment*

(33) In accordance with the principle of proportionality, it is necessary and appropriate for achievement of the basic objective of establishing a common external policy in the field of public procurement to lay down common rules on the treatment of tenders which include goods and services not covered by the international commitments of the Union. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the fourth paragraph of Article 5 of the Treaty on European Union,

(33) In accordance with the principle of proportionality, it is necessary and appropriate for achievement of the basic objective of establishing a common external policy in the field of public procurement **and concessions** to lay down common rules on the treatment of tenders which include goods and services not covered by the international commitments of the Union. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the fourth paragraph of Article 5 of the Treaty on European Union,

## Amendment 19

### Proposal for a regulation Article 1 – paragraph 5 a (new)

*Text proposed by the Commission*

*Amendment*

**5a. Member States shall take appropriate measures to ensure that in the performance of public and concession contracts economic operators comply with**

*applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU, Annex XIV to Directive 2014/25/EU and Annex X to Directive 2014/23/EU.*

## **Amendment 20**

### **Proposal for a regulation**

#### **Article 2 – paragraph 1 – point b a (new)**

*Text proposed by the Commission*

*Amendment*

*(ba) ‘tenderer’ means an economic operator that has submitted a tender;*

## **Amendment 21**

### **Proposal for a regulation**

#### **Article 2 – paragraph 1 – point g a (new)**

*Text proposed by the Commission*

*Amendment*

*(ga) ‘satisfactory remedial or corrective measures’ means removal of the restrictive measures targeted by the Commission’s investigation;*

## **Amendment 22**

### **Proposal for a regulation**

#### **Article 9 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

*The* Commission shall determine the contracting authorities or entities or categories of contracting authorities or entities, listed by Member State, whose procurement is concerned by the measure. To provide the basis for this determination, each Member State shall submit a list of

*By ... [six months from the date of entry into force of this Regulation], the* Commission shall determine the contracting authorities or entities or categories of contracting authorities or entities, listed by Member State, whose procurement is concerned by the measure.

appropriate contracting authorities or entities or categories of contracting authorities or entities. The Commission shall ensure that an appropriate level of action is taken and that a fair distribution of the burden among Member States is achieved.

To provide the basis for this determination, each Member State shall submit a list of appropriate contracting authorities or entities or categories of contracting authorities or entities. ***Where necessary, that list may be updated by Member States.*** The Commission shall ensure that an appropriate level of action is taken and that a fair distribution of the burden among Member States is achieved.

## **Amendment 23**

### **Proposal for a regulation Article 15 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

**2. Neither the Commission nor the Council, nor the European Parliament nor Member States, nor their officials shall reveal any information of a confidential nature received pursuant to this Regulation, without specific permission from the supplier of such information.**

***deleted***

## **Amendment 24**

### **Proposal for a regulation Article 15 – paragraph 4 a (new)**

*Text proposed by the Commission*

*Amendment*

**4a. Under no circumstances shall information received pursuant to this Regulation and declared by the provider of the information to be of confidential nature, be revealed, unless the provider gives his specific permission.**

## **Amendment 25**

### **Proposal for a regulation Article 16 – paragraph 1**

**By 31 December 2018** and at least every three years thereafter, the Commission shall submit a report to the European Parliament and the Council on the application of this Regulation and on progress made in international negotiations regarding access for Union economic operators to public contract or concession award procedures in third countries undertaken under this Regulation. To this effect, Member States shall upon request provide the Commission with appropriate information.

**By ... [one year after the date of entry into force of this Regulation]** and at least every three years thereafter, the Commission shall submit a report to the European Parliament and the Council on the application of this Regulation and on progress made in international negotiations regarding access for Union economic operators to public contract or concession award procedures in third countries undertaken under this Regulation. To this effect, Member States shall upon request provide the Commission with appropriate information.

## **Amendment 26**

### **Proposal for a regulation**

#### **Article 16 – paragraph 1 a (new)**

***Member States shall ensure that the application of this Regulation is monitored with a view to detecting threats to the financial interests of the Union and its Member States, to the unity of the single market and/or to the rights of the consumers. Such monitoring shall be used to prevent, detect and adequately report possible instances of procurement fraud, corruption, conflict of interest and other serious irregularities. Where monitoring authorities or structures identify specific violations or systemic problems, they shall be empowered to refer those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or parliamentary committees.***



## PROCEDURE – COMMITTEE ASKED FOR OPINION

<b>Title</b>	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
<b>References</b>	COM(2016)0034 – C8-0018/2016 – COM(2012)0124 – C7-0084/2012 – 2012/0060(COD)
<b>Committee responsible</b> Date announced in plenary	INTA 20.4.2012
<b>Opinion by</b> Date announced in plenary	IMCO 20.4.2012
<b>Associated committees - date announced in plenary</b>	25.10.2012
<b>Rapporteur</b> Date appointed	Ivan Štefanec 5.11.2014
<b>Discussed in committee</b>	8.6.2017                      12.7.2017
<b>Date adopted</b>	25.9.2017
<b>Result of final vote</b>	+:                      17 –:                      7 0:                      1
<b>Members present for the final vote</b>	Pascal Arimont, Carlos Coelho, Daniel Dalton, Nicola Danti, Dennis de Jong, Pascal Durand, Liisa Jaakonsaari, Philippe Juvin, Antonio López-Istúriz White, Eva Maydell, Nosheena Mobarik, Virginie Rozière, Christel Schaldemose, Andreas Schwab, Olga Sehnalová, Jasenko Selimovic, Igor Šoltes, Ivan Štefanec, Róza Gräfin von Thun und Hohenstein, Anneleen Van Bossuyt
<b>Substitutes present for the final vote</b>	Kaja Kallas, Roberta Metsola, Matthijs van Miltenburg
<b>Substitutes under Rule 200(2) present for the final vote</b>	Philippe Loiseau, Marco Zanni

## FINAL VOTE BY ROLL CALL IN COMMITTEE ASKED FOR OPINION

17	+
ECR	Anneleen Van Bossuyt
PPE	Pascal Arimont, Carlos Coelho, Philippe Juvin, Antonio López-Istúriz White, Eva Maydell, Roberta Metsola, Andreas Schwab, Ivan Štefanec, Róza Gräfin von Thun und Hohenstein
S&D	Nicola Danti, Liisa Jaakonsaari, Virginie Rozière, Christel Schaldemose, Olga Sehnalová
Verts/ALE	Pascal Durand, Igor Šoltes

7	-
ALDE	Kaja Kallas, Jasenko Selimovic, Matthijs van Miltenburg
ECR	Daniel Dalton, Nosheena Mobarik
ENF	Philippe Loiseau, Marco Zanni

1	0
GUE/NGL	Dennis de Jong

Key to symbols:

+ : in favour

- : against

0 : abstention