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## PROPOSAL

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	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

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Delegations will find attached document COM(2016) 34 final.

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Brussels, 29.1.2016  
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2012/0060 (COD)

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**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The Commission adopted on 21 March 2012 a proposal for a “REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the access of third-country goods and services to the Union” (COM (2012) 124 final).

The proposal on an International Procurement Instrument (IPI) is the EU response to the lack of level playing field in world procurement markets. While our 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 EUR178 billion and EUR27 billion for Japan, whereas only a fraction of the Chinese public procurement market is open to foreign business. Many countries have also adopted protectionist measures, especially in the wake of the economic crisis. 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 EUR10 billion of EU exports (0.08% of EU GDP) currently find their way in global procurement markets, whereas an estimated EUR12 billion of further EU exports remains unrealised due to restrictions.

In the negotiations on a revised Government Procurement Agreement (GPA) in the context of the World Trade Organization (WTO) and in bilateral negotiations with third countries, the EU has advocated an ambitious opening of international public procurement markets. Some EUR352 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.

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 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. The need for an instrument like the IPI has therefore become even more pressing. Ultimately the objective is to improve, in line with the EU's Europe 2020 strategy for smart, sustainable and inclusive growth (COM(2010)2020), business opportunities for EU firms on a global scale, thereby creating new jobs and promoting innovation.

The initial proposal covered two parts: (a) the so-called "covered procurement" (where the EU has undertaken international commitments on market access); and (b) the "non-covered procurement" (where the EU has not undertaken any market access commitments). For the latter category the initial proposal included two different procedures: (a) a decentralised procedure, whereby a procuring entity would be allowed to exclude a tender after seeking the

Commission's approval; and (b) a centralised procedure, with the Commission playing a central role (investigation, negotiation with the third country, decision to adopt restrictive measures - a market closure or a price penalty - if necessary, which would then be applied by the national authorities in their procurement procedures).

This initial proposal has been discussed in the European Parliament and in the Council, without, however, concluding the first reading.

While a large majority of Member States recognised the current imbalance between on the one hand an open EU procurement market and on the other hand, the serious and persisting problems relating to discriminatory measures and practices that EU operators experience in certain third countries, the Council has not been able to arrive at a formal position on the Commission proposal. During the examination of the proposal in the Trade Questions Working Party a number of Member States have expressed reservations as regards the principle of closing the EU market for goods and services originating in certain third countries, even if only temporarily and in a targeted way, while some Member States gave a strong support to the initiative. Several Member States also underlined concerns regarding the administrative burden imposed by the proposal on contracting authorities and on businesses.

On 15 January 2014, the EP Plenary voted on the amendments to the Commission proposal and endorsed the mandate for trilogue with a large majority together with a list of amendments. The amendments included in particular the establishment of a link between the centralised and the decentralised pillar, providing that the latter could only have been used when a Commission investigation had been launched, expansion of the scope of exceptions for developing countries as well as tightening time limits for the Commission investigations of alleged discriminatory practises and measures by third countries. On 20 October 2014 the current European Parliament confirmed the decision taken under previous legislative term and prepared for trilogue.

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.

The amendments presented in this proposal aim at eliminating, all possible negative consequences of the instrument in its original form, such as in particular the total closure of the EU procurement market, the administrative burden and the risk of an fragmentation of the internal market. At the same time the proposal put focus on the role of the Commission to investigate procurement barriers in third countries and provides the tools to engage with third countries towards its removal. More concretely, the amended proposal eliminates the 'decentralized procedure', while keeping the option to impose under certain conditions a price penalty , it simplifies the procedures, expands the scope of the exemptions as well as provides the tools to further target any possible measures. Last but not least it provides for an increased level of transparency by stipulating that the Commission should make public the findings of the investigations relating to discriminatory measures and practices by third countries as well as any action taken by such countries to eliminate the discriminatory measures and practices.

In the Commission Work Programme (CWP) for 2015, the Commission announced the intention to amend the IPI proposal "in line with the priorities of the new Commission in order to simplify the procedures, shortening timelines of investigation and reducing the number of actors in the implementation". The amended proposal includes all these required elements and should serve as a basis on which it should be possible to find a balanced compromise, between the European Parliament and the Council, while at the same time ensuring that IPI remains an efficient tool for leverage in negotiations.

## **2. LEGAL ELEMENTS OF THE PROPOSAL**

### **• Summary of the amendments to the initial proposal**

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.

The proposals can be summarized as follows:

Firstly, it is proposed to delete 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.

Secondly, the revised proposal eliminates the possibility for contracting authorities to decide autonomously a prohibition on foreign bidders' participation in their tenders by deleting the decentralised pillar.

Thirdly, the revised proposal 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.

Fourthly, it is proposed to reduce the administrative burden further by allowing Member States to indicate which of their procuring entities will be required to implement the price adjustment measure. This proposal follows the model of the Enforcement Regulation<sup>1</sup>. As fifth element, 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, in line with the EU trade and development

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<sup>1</sup> Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 189, 27.6.2014, p. 50–58.

policy towards these countries. The same applies for the exclusion from the instrument of SMEs, which ensures coherence of the IPI also with the wider EU policy in this area.

Sixth, a new provision would allow targeting territories at regional or local level, like states, regions or even municipalities. Seventh, it is proposed to shorten the time for the Commission's investigation in the centralised procedure in addition to eliminating the decentralized pillar, completely. Eighth, in line with the Commission's approach to transparency in trade policy, it is proposed to make public the findings of the Commission investigations identifying barriers to tenders in third countries. Ninth, it has been clarified 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).

All abovementioned amendments are fully in line with the announcement in the CWP 2015 to simplify the procedures, shorten timelines of investigation and reduce the number of actors in implementation.

- **Consistency with existing provisions in the area of the proposal**

The IPI initiative is a new proposal in the area of the European Union's international procurement policy. As their predecessors, the recently adopted new public procurement directives of the European Union<sup>2</sup> do not provide a general framework for dealing with bids containing foreign goods and services on the EU's public procurement market. The only specific rules are set out in Articles 85 and 86 of Directive 2014/25/EU. However, these provisions are limited to procurement by utilities and are too narrow in their scope to make a substantial impact on negotiations on market access. Indeed the EU public procurement for Utilities only stands for around 20% of the total EU public procurement market. In the Commission's amended proposal it is proposed that these two articles will be repealed upon the adoption of the IPI proposal.

- **Consistency with other Union policies and objectives**

The initial initiative, as well as the amended proposal, implement the Europe 2020 strategy and the Europe 2020 Flagship Initiative on Integrated Industrial Policy for the Globalisation Era [COM(2010) 614]. It also implements the Single Market Act [COM(2011) 206] and the Communication on Trade, Growth and World Affairs [COM(2010) 612]. It is a strategic initiative in CWP 2011 strategic initiative (COM(2010) 623 final).

This proposal is also consistent with the developmental policies and objectives of the Union, in particular by generally sheltering goods and services from least-developed countries (LDCs) from action under this instrument. In this regard the amended proposal goes one step further in eliminating from the scope of the IPI not only LDCs but also those developing countries considered vulnerable due to a lack of diversification and insufficient integration within the international trading system and in the world economy. This adjustment aims at ensuring further alinement with overarching EU policies on development.

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<sup>2</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), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ L 94, 28.3.2014, p. 65) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors ( OJ L 94, 28.3.2014, p. 243).

### **3. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

Article 207 of the Treaty on the Functioning of the European Union.

- **Subsidiarity principle**

The proposal falls under the exclusive competence of the European Union. The subsidiarity principle therefore does not apply.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons:

Already the initial proposal struck a careful balance between the interests of all relevant stakeholders and the interest in having an instrument like the IPI to support EU trade policy. The amended proposal has further limited possible negative consequences of the initial proposal without deleting so much of the key aspects of the proposal as to make it lose its effect as a tool for leverage in international negotiations.

- **Choice of the instrument**

The proposed instrument is a regulation.

Other means would not be adequate, since only a regulation can sufficiently ensure uniform action by the European Union in the field of common commercial policy. Moreover, since this instrument entrusts the Commission with certain tasks, it would not be appropriate to propose an instrument that requires transposition into the legal orders of the Member States.

### **4. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Stakeholder consultations**

To gather the views of stakeholders, the Commission organized in preparation of the initial proposal, in addition to individual meetings, a series of consultations and outreach activities. Since the stakeholder consultation took place, extensive contacts have taken place with different Member State representatives in order to elaborate a revised proposal that would stand a better chance of being adopted.

The main reasons put forward by stakeholders in favour or against one or the other policy option included the risk of retaliation by the EU's trading partners, the administrative burden that could be attached to such an initiative and the fact that the initiative could endanger the status of the EU as an adherent of open markets.<sup>3</sup> In addition, a large majority of stakeholders took the view that should any market access restrictions be taken, this should be decided on the level of the EU rather than by Member States or contracting authorities/entities.<sup>4</sup> The

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<sup>3</sup> Impact Assessment Report, Annex 2 (Summary of the contributions to the public consultation), section 3.3, p.9.

<sup>4</sup> Impact Assessment Report, Annex 2 (Summary of the contributions to the public consultation), section 3.3, p.8

amended proposal now clearly confirms this principle in Article 1(5) which prohibits restrictive measures beyond those provided for in the Regulation.

On administrative burden, stakeholders were in particular of the view that the delays caused by the notification process under the decentralised pillar would be very burdensome<sup>5</sup>, a risk which will be fully mitigated by the deletion of former Article 6.

The amended proposal further accommodates all these concerns by creating a more targeted tool which should reduce administrative burden and the risk of retaliation to a minimum while putting the emphasis even more on the principle of general openness of EU public procurement markets by eliminating the possibility for market closure.

- **Impact assessment**

The Commission's Impact Assessment Board (IAB) has issued two opinions on the impact assessment report. The final impact assessment report has integrated to the extent possible the Board's recommendations. While its findings remain valid, 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.

- The limitation of possible restrictive measures to price penalties accommodates concerns that the total closure of the EU procurement market, as originally foreseen, would risk giving the wrong signals to third countries and would be incompatible with the economic interests of the EU at large. Since the price adjustment would only apply to the evaluation process and it would not determine the final price, it will not be detrimental to the interests of the contracting authorities.
- The deletion of the decentralised pillar will completely eliminate the administrative burden on procuring entities requesting permission to exclude foreign bids. This amendment also safeguards the integrity of the internal market and avoids any fragmentation.
- The presumption that tenders submitted by companies originating in the targeted third country will be affected by the restrictive measure, unless the bidder provides evidence to the contrary, will further reduce the administrative burden for contracting authorities while enhancing the effectiveness of the measure as the decision of the contracting authority is much less prone to legal review. The obligation for contracting authorities to accept self-declarations regarding the origin of goods and services during in the bidding, should also work in this direction.
- Giving Member States a role in selecting the contracting authorities/entities having to apply the measure will ensure that implementation will not fall on the smallest entities with limited administrative capacity and resources. This amendment does not risk compromising the effectiveness of the measure as small contracting authorities are less likely to manage procurement on the scale targeted by the IPI. In the event no entity list is submitted, or the list submitted

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<sup>5</sup> Impact Assessment Report, Annex 2 (Summary of the contributions to the public consultation), section 4.4, p.13.



does not correspond to the price measure adopted, the Commission may on its own initiative establish such a list.

- The exclusion of the most vulnerable developing countries from the scope of the instrument is not supposed to have an impact on leverage as the instrument was never targeted at these countries. To exempt these countries from the scope of application will further clarify that the purpose of the instrument is to put pressure on major trading partners to further open up their procurement markets to EU operators. The non-application to European SMEs will further reduce the administrative burden for those economic operators, in line with the general SME policy of the EU.
- The possibility to target territories at regional or local level aims to differentiate territories and enable a proportionate response in case the discriminatory measures are only at the sub-central level (i.e. state authorities, regional and municipal governments), with the purpose of making them open their tenders to EU bidders.
- The shortening of time limits for Commission investigations responds to the concern about lengthy procedures raised in particular relating to the decentralised pillar under which procedure the contracting authorities would, during an ongoing procurement procedure, have had to await the Commission's investigation and decision. The adjustment of the timeline for the remaining centralised procedure should help accelerate the investigation phase of the procedure.
- The publication of Commission findings regarding trade barriers in third countries should help to create new dynamics towards the elimination of these barriers.
- As foreseen already in the initial proposal the IPI will cover also concessions to the extent these are covered by the new directive on concessions. The Concession rules do not determine whether certain activities are to be conducted by public or private entities, but focus on the disciplines which public entities have to apply when they procure goods and services.

### **Effectiveness**

The proposed amendments will make the instrument more effective.

**Rules clarification:** The impact assessment report highlighted the effectiveness of the initially proposed solutions regarding the objective to clarify the rules of access to the EU's public procurement market for non-EU tenders. However, it also pointed to a number of weaknesses associated with the optional nature of the decentralised pillar, which might result in diverse patterns of use and a fragmentation of the internal market.<sup>6</sup> 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. In addition, 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

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<sup>6</sup> Impact Assessment Report, section 6.6.2(4), p. 33.

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.

**Leverage:** The deletion of the decentralised pillar and the limitation to price penalties entails a certain risk of decrease in leverage. However, the main leverage of the initial proposal derived from the centralised pillar, which is maintained. The Commission will still be in a position to use its capacity to limit market access as a threat and to start an enquiry into discriminatory behaviour at any moment. What is more, the amended proposal will allow for more targeted measures *inter alia* by foreseeing the possibility to limit restrictive measures to the territories of certain sub-central levels of government. The limitation to price penalties as a less extreme form of market closure, which has already been assessed in the original impact assessment, ensures that the EU markets will remain open in principle while allowing for targeted measures where necessary.

### **Efficiency**

The proposed amendments will increase the instrument's efficiency.

**Administrative burden:** 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.<sup>7</sup> 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 authorisation of Member States to pre-select the contracting authorities/entities that will be required to apply the measure will help ensuring that entities with limited administrative capacities will not have to apply the measure. Insofar as the impact assessment report identified a potential risk of increased administrative burden for contracting authorities/entities from the provisions on abnormally low tenders<sup>8</sup>, the deletion of the original Article 7 will eliminate this risk. Because of their size and limited capacity, SMEs often face particular problems because of burdensome procedures. Whereas the high value threshold makes it already unlikely that smaller companies will be concerned by the instrument, its non-application to European SMEs will further reduce the administrative burden for those economic operators, in line with the general SME policy of the EU.

**Risk of retaliation:** 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.

**Public finances:** As stated in the impact assessment, the overall impact of the instrument on public finances is negligible.<sup>9</sup> However, the further reduction in scope will further limit this impact.

### **Coherence**

The impact assessment report stressed that the consistency of EU trade policy and the EU internal market is better preserved where decisions are taken at EU level i.e. in full knowledge of all the legal, economic and political consequences, without allowing varying practices in

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<sup>7</sup> Impact Assessment Report, section 6.6.2(6), p. 34.

<sup>8</sup> Impact Assessment Report, section 6.9, p. 36.

<sup>9</sup> Impact Assessment Report, section 6.6.2, p. 34.

the treatment of foreign goods and services in the EU.<sup>10</sup> With the deletion of the decentralised pillar, the Commission increases its control over the application of restrictive measures and thus reduces the risks of erroneous application of the rules. The amended proposal will therefore improve the consistency of EU trade policy and of the EU internal market and the respect of the EU's international commitments.

The requirement regarding impact assessment is therefore fulfilled.

## 5. BUDGETARY IMPLICATIONS

The proposal in itself does not have budgetary implications. The additional tasks for the Commission can be met with existing resources.

## 6. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The proposal includes a review clause.

## 7. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS OF THE PROPOSAL

**Article 1** defines the subject matter and the scope of application. The text in the initial proposal has been adjusted to reflect the deletion of the decentralized pillar. The provision has also gone through some linguistic adjustments to increase its readability. Furthermore, the provision includes a clarification, stipulating that the Member States may not further restrict access of foreign economic operators beyond what is provided on the basis of this Regulation. As foreseen already in the initial proposal the IPI will cover also concessions to the extent these are covered by the new directive on concessions. It deserves to be noted that the Concession rules do not determine whether certain activities are to be conducted by public or private entities but focus on the disciplines which public entities have to apply when they turn to the market to procure goods and services.

**Article 2** contains relevant definitions, most of which are taken over from the EU public procurement Directives. Some expressions that are no longer used in the draft Regulation have been deleted. The amended proposal does not use the expression “lack of substantive reciprocity” but refers to “restrictive and discriminatory procurement measures or practices”.

**Article 3** sets out, for the purpose of this Regulation, the applicable rules of origin, for goods and services, procured by contracting authorities/entities. In compliance with the EU international commitments, rules of origin for goods and services are in line with the non-preferential rules of origin as defined in the EU Customs Code<sup>11</sup>. The origin of a service is defined on the basis of the relevant rules under the Treaty on the Functioning of the European Union on the right of establishment and on the definitions that the General Agreement on Trade and Services (GATS) provides in its Article XXVIII. Some adjustments in the initial text have been done with the purpose of increasing its readability.

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<sup>10</sup> Impact Assessment Report, section 7.1.1.3, p. 40.

<sup>11</sup> Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p.1).

**Article 4** spells out the exemption from application of the instrument in relation to goods and services originating in the LDCs. The amended proposal expands the exemption to cover goods and services originating in those developing countries, which are considered vulnerable due to lack of diversification and insufficient integration within the international trading system and in the world economy, as defined in Annex VII to the GSP Regulation<sup>12</sup>.

Article 5 in the initial proposal is redundant in the context of the amended proposal, and is therefore deleted. The amended proposal includes a **new Article 5** on the exemption from the application of the instrument to European SMEs as defined in the Commission recommendation 2003/361/EC<sup>13</sup>. In order to avoid circumvention by so called letter box companies, the provision makes explicit refers to the level of business activities within the internal market.

The original Article 6 setting up a decentralised procedure is deleted. The **new Article 6** lays down rules regarding the Commission's investigation and the time lines to be respected. The amended proposal has shortened the first part of the investigation period and instead prolonged the possible additional period, in order to make the main rule on time lines stricter. The article makes it clear that the Commission's findings shall be made publicly available. Article 7 in the initial proposal stipulated an obligation for contracting authorities to inform tenderers and the Commission in the cases it would accept an abnormally low tender. With the deletion of the decentralised pillar this provision lost its relevance in the Regulation, and is therefore also deleted. The **new Article 7** provides for rules on consultations with third countries, and possible action by the Commission, after having concluded on the basis of a procurement investigation that the third country in question has adopted or maintains restrictive and discriminatory procurement measures or practices.

Article 8 in the initial proposal provided for the rules governing the centralised pillar, which in the amended proposal have been moved to Article 9. The **new Article 8** introduces the price adjustment measure and stipulates in relation to which third countries such a measure may be applied.

Article 9 in the initial proposal regulated the mechanism for consultation with third countries in cases of proven restrictive procurement practice, a provision now in Article 7 of the amended proposal. The **new Article 9** stipulates that the Member States shall suggest the contracting authorities which are to implement the price adjustment measure. In order to ensure that an appropriate level of action is taken and that the implementation is made in a between Member States balanced way, the Commission shall determine the entities concerned. In the event no entity list is submitted, or the list submitted does not correspond to the price measure adopted, the Commission may on its own initiative establish such a list.

The **new Article 10** regulates the withdrawal and suspension of measures. The Article also stipulates that the Commission shall make publicly available its findings regarding remedial or corrective measures taken by the third country concerned.

Article 11 in the initial proposal provided for rules governing the withdrawal or suspension of restrictive measures adopted. The **new Article 11** describes the rules on the application of the

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<sup>12</sup> Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences (OJ L 303, 31.10.2012.p.1)

<sup>13</sup> Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.05.2003.p.36)

price adjustment measure. The price penalty applies only to the evaluation procedure and not to the final price.

Article 12 in the initial proposal laid down the rules for the provision of information of tenderers on the application of restrictive measures adopted by the Commission in the context of individual public procurement procedures. The **new Article 12** stipulates the possible exceptions from the application of the price adjustment measures, which in the initial proposal were mentioned in Article 13. Those exceptions remain unchanged.

Article 13 in the initial proposal described the circumstances under which the contracting authorities/entities are authorised to set aside measures adopted pursuant to this Regulation. The **new Articles 13 and 14** set out the rules regarding remedies in case of violation of the provisions in the Regulation and the Committee procedure for the decision making, which in the initial proposal were set out in Articles 16 and 17.

Article 14 and 15 in the original proposal conferred on the Commission the power to adopt delegated acts in order to update an Annex to the Regulation that was intended to reflect the conclusion of new international agreements by the Union in the field of public procurement. Given that the decentralized pillar is deleted there is no longer a need for any Annex identifying the relevant trade agreements in force. The decisions adopted by the Commission applying price adjustment measures will contain the necessary information regarding the scope of EU commitments towards third countries.

Article 18 and 19 in the initial proposal related to confidentiality and an obligation for the Commission to report to the European Parliament and the Council on the application of the Regulation. These provisions are now in **Articles 15 and 16** of the amended proposal.

The original Article 20 is now **Article 17** of the amended proposal, It provides for the repeal of Articles 85 (former Article 58) and 86 (former Article 59) of the Utilities Directive 2014/25/EU (former 2004/17/EC). Former Article 21 and **new Article 18** determine the entry into force of the Regulation.

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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>14</sup>,

Having regard to the opinion of the Committee of the Regions<sup>15</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) **In accordance with** Article 21 of the Treaty on European Union, ~~provides that~~ the Union is to define and pursue common policies and actions, and ~~work for a high degree of~~ **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.
- (2) Pursuant to Article 206 of the Treaty on the Functioning of the European Union, ~~(TFEU)~~ the Union, by establishing a customs union, is to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.
- (3) In accordance with Article 26 of the **Treaty on the Functioning of the European Union** ~~TFEU~~ the Union is to adopt measures with the aim of establishing or ensuring the functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

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<sup>14</sup> OJ C

<sup>15</sup> OJ C

- (4) Article III:8 of the General Agreement on Tariffs and Trade 1994 and Article XIII of the General Agreement on Trade in Services exclude government procurement from the main multilateral World Trade Organization (WTO) disciplines.
- (5) The revised plurilateral WTO Agreement on Government Procurement provides only for limited market access for Union companies to the public procurement markets of third countries and applies only to a limited number of WTO Members, which are parties to that Agreement. The revised Agreement on Government Procurement was concluded by the Union in December 2013.**
- (56) Within the context of the ~~World Trade Organisation~~ 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.
- (7) If the country concerned is a Party to the WTO Agreement on Government Procurement or has concluded a trade agreement with the EU that includes provisions on public procurement, the Commission should follow the consultation mechanisms and/or dispute settlement procedures set out in that agreement when the restrictive practices relate to procurement covered by market access commitments undertaken by the country concerned towards the Union.**
- (68) 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.
- ~~(79) Directive s 2004/17/EC of the European Parliament and of the Council of 31 March 2004~~ **2014/25/EU** of the European Parliament and of the Council<sup>16</sup> ~~of 26 February 2014 on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts~~ contains only a few provisions concerning the external dimension of the public procurement policy of the Union, in particular Articles ~~5885~~ and ~~5986~~ of Directive ~~2004/17/EC~~. These provisions however only have a limited scope and due to a lack of guidance they are not much applied by contracting entities **should be replaced.**
- ~~(8) In accordance with Article 207 TFEU the common commercial policy in the field of public procurement is to be based on uniform principles.~~
- (10) Regulation (EU) No 654/2014 of the European Parliament and of the Council<sup>17</sup> lays down rules and procedures in order to ensure the exercise of the Union's**

<sup>16</sup> Directive 2014/25/EU of the European Parliament and of the Council, of February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 94, 28.3.2014, p. 243).

<sup>17</sup> Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50.)

**rights under international trade agreements concluded by the Union. No rules and procedures exist for the treatment of goods and services not covered by such international agreements.**

- (911) In the interest of legal certainty for Union and third-country economic operators, ~~and~~ contracting authorities **and contracting** entities, the international market access commitments undertaken by the Union vis-à-vis **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. ~~The Commission should issue guidance on the application of the existing international market access commitments of the European Union. This guidance should be updated on a regular basis and provide easy to use information.~~
- (102) The objectives of improving the access of **Union** EU-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 European Single **internal m**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** ~~that the treatment of third country goods and services **are** not covered by the international commitments of the Union, be harmonised throughout the European Union.~~
- (113) ~~For this purpose rules of origin should be established so that contracting authorities/entities know whether goods and services are covered by the international commitments of the European Union. The origin of a good should be determined in accordance with Article 22 to 26 of Council Regulation (EEC) No 2913/1992<sup>18</sup>; of the European Parliament and of the Council of 12 October 1992 establishing the Community Customs Code. According to this Regulation goods should be considered to be Union goods when they are wholly obtained or produced in the Union. Goods whose production involved one or more third countries should be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.~~
- (14) ~~The origin of a service should be determined on the basis of the origin of the natural or legal person providing it. The guidance referred to in recital 9 should cover the application in practice of the rules of origin.~~
- (15) **In the light of the overall policy objective of the Union to support the economic growth of developing countries and their integration into the global value chain, which is the basis for the establishment by the Union of a generalised system of preferences as outlined in Regulation (EU) No 978/2012 of the European Parliament and of the Council<sup>19</sup>, this Regulation should not apply to tenders where more than 50% of the total value of the tender is made up of goods and services originating, in accordance with the Union's non-preferential rules of origin, in least-developed countries benefitting from the "Everything But Arms"**

<sup>18</sup> Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 9.10.1992, p. 1)

<sup>19</sup> Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).



arrangement or in developing countries considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system as defined respectively in Annexes IV and VII to Regulation (EU) No 978/2012.

(167) In the light of the overall policy objective of the Union to support small and medium-sized enterprises, this Regulation should also not apply to tenders submitted by SMEs established in the Union and in engaged in substantive business operations entailing a direct and effective link with the economy of at least one Member State.

~~(12) — The Commission should assess whether to approve that contracting authorities/entities within the meaning of Directives [2004/17/EC, 2004/18/EC and Directive [...] of the European Parliament and the Council of [...]...on the award of concession contracts] exclude, for contracts with an estimated value equal or above EUR 5.000.000 from procedures for the award of contracts goods and services not covered by the international commitments undertaken by the European Union.~~

~~(13) — For the sake of transparency, contracting authorities/entities intending to make use of their power in accordance with this Regulation to exclude tenders comprising goods and/or services originating outside the European Union, in which the value of the non-covered goods or services exceeds 50 % of the total value of these goods or services from procedures for the award of contracts should inform economic operators thereof in the contract notice published in the Official Journal of the European Union.~~

~~(14) — In order to enable the Commission to decide on any exclusion of third country goods and services not covered by the international commitments of the Union, contracting authorities/entities should notify the Commission of their intention to exclude such goods and services, using a standard form that contains sufficient information to enable the Commission to decide.~~

~~(15) — For contracts with an estimated value equal or above EUR 5.000.000 the Commission should approve the intended exclusion if the international agreement concerning market access in the field of public procurement between the Union and the country where the goods and/or services originate contains, for the goods and/or services for which the exclusion is proposed, explicit market access reservations taken by the Union. Where such an agreement does not exist, the Commission should approve the exclusion where the third country maintains restrictive procurement measures leading to a lack of substantial reciprocity in market opening between the Union and the third country concerned. A lack of substantial reciprocity should be presumed where restrictive procurement measures result in serious and recurring discriminations of EU economic operators, goods and services.~~

~~(1617) When assessing whether restrictive and/or discriminatory procurement measures or practices a lack of substantial reciprocity exists in a third country, the Commission should examine to what degree public procurement 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 public authorities or individual~~

procuring **contracting** entities maintain or adopt discriminatory practices against Union goods, services and economic operators.

- ~~(15)~~**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~~ ~~or~~ 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 ~~the~~ose ones provided for in this Regulation.
- ~~(19)~~ — In view of the greater difficulty for contracting authorities/entities to assess, in the context of tenders comprising goods and/or services originating outside the European Union, in which the value of the non-covered goods or services exceeds 50 % of the total value of these goods or services, the explanations of tenderers it is appropriate to provide for an increased transparency in the treatment of abnormally low tenders. In addition to the rules provided by Article 69 of the Directive on public procurement and Article 79 of the Directive on procurement by entities operating in the water, energy, transport and postal services sectors the contracting authority/entity that intends to accept such an abnormally low tender, should inform the other tenderers of this in writing including the reasons for the abnormally low character of the price or costs charged. This allows these tenderers to contribute to a more accurate assessment as to whether the successful tenderer will be able to fully perform the contract under the conditions spelled out in the tender documentation. Therefore, this additional information would achieve a more level playing field on the EU public procurement market.
- ~~(20)~~**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 external procurement investigation into restrictive procurement **measures or** practices allegedly **adopted or** maintained by a third country. In particular it shall take into account the fact that the Commission has approved a number of intended exclusions concerning a third country pursuant to Article 6(2) of this Regulation. Such investigative procedures should be without prejudice to Regulation (EUC) No 3286/94 of 22 December 1994 **654/2014 of the European Parliament and of the Council** laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization.
- ~~(21)~~**20**Where the Commission has, on the basis of information available to it, reason to believe that a third country has adopted or maintains a restrictive procurement practice, it should be able to start an investigation. 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 **respect of** public procurement in that country.
- ~~(18)~~**21**It is of the utmost importance that the investigation is carried out in a transparent manner. A report on the main findings of the investigation should therefore be publicly available.

- (19) ~~If the existence of a restrictive procurement 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 economic operators, goods and services in public procurement in that country.~~
- (22) ~~If the consultations with the country concerned do not lead to sufficient improvements in to the tendering opportunities for EU-Union economic operators, goods and services within a reasonable timeframe, the Commission should be able to adopt, where ~~should take appropriate, price adjustment~~ restrictive measures applying to tenders submitted by economic operators originating in that country and/or including goods and services originating in that country.~~
- (23) Such measures should be applied only for the purpose of ~~may entail the mandatory exclusion of certain third-country goods and services from public procurement procedures in the European Union, or may subject~~ the evaluation of tenders comprising goods or services originating in ~~than~~ the country to a mandatory price concerned. ~~penalty.~~ To avoid circumvention of these measures, it may also be necessary to target ~~exclude~~ certain foreign-controlled or owned ~~judicial~~ legal persons that, although established in the European Union, ~~that~~ are not engaged in substantive business operations ~~such that it has~~ ve a direct and effective link with the economy of at least one Member State ~~concerned~~. Appropriate measures should not be disproportionate to the restrictive procurement practices to which they respond.
- (24) ~~The Commission should be able to prevent the possible~~ Price adjustment measures should not have a negative impact of ~~an intended exclusion on on-going trade negotiations with the country concerned. Therefore, the Commission may,~~ where a country is engaging in substantive negotiations with the Union concerning market access in the field of public procurement, the Commission may suspend and the measures during the negotiations. ~~the Commission considers that there is a reasonable prospect of removing the restrictive procurement practices in the near future, it should be able to adopt a implementing act providing that goods and services from that country should not be excluded from procedures for the award of contracts for a period of one year.~~
- (26) ~~In the light of the overall policy of the Union with regard to least developed countries as provided for, inter alia, in Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences from 1 January 2009, it is appropriate to assimilate goods and services from these countries to Union goods and services.~~
- (25) In order to simplify the application of a price adjustment measure by contracting authorities or contracting entities, there should be a presumption that all economic operators originating in a targeted third country with which there is no agreement on procurement will be subject to the measure, unless they can demonstrate that less than 50% of the total value of their tender is made up of goods or services originating in the third country concerned.
- (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.**

- (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** set-aside **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.
- (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> ~~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~~ or Article 8 of Council Directive 92/13/EEC<sup>21</sup> ~~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. For the same purpose,~~ **In addition,** contracts concluded with an economic operator in violation of Commission's decisions on intended exclusions notified by contracting authorities **or contracting** entities or in violation of **price adjustment** measures limiting access of non-covered goods and services should be declared ineffective, ~~within the meaning of Directive 2007/66/EC of the European Parliament and Council.~~
- ~~(2731) In order to reflect in the legal order of the European Union the international market access commitments undertaken in the field of public procurement after the adoption of this Regulation, the Commission should be empowered to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union amendments to the list of international agreements annexed to this Regulation. It is of particular importance that the Commission should carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.~~
- ~~(3029) 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> of 16 February 2011 laying down the rules and~~

<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).

<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).

general principles concerning mechanisms for the control by the Member States of the Commission's exercise of implementing powers.

(30) **The examination procedure should be used for the adoption of implementing acts regarding the adoption, withdrawal, or suspension or reinstatement of a price adjustment measure.**

~~(2931)~~ The advisory procedure should be used for the adoption of implementing acts **adapting** for the drawing up of the standard forms for the publication of **contract or concession** notices, the submission of notifications to the Commission and the origin of goods or services. These decisions do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Regulation. On the contrary, these acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Regulation.

~~(302)~~ **Regular reporting by the**The Commission should make it possible **to monitor** report at least every three years on **the** application **and efficiency of the procedures established by** of this Regulation.

~~(313)~~ 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** ~~including~~**which include** goods and services not covered by the international commitments of the European Union. This Regulation ~~on the access of third country economic operators, goods and services~~ does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with the ~~third~~ **fourth** paragraph of Article 5 of the Treaty on European Union,

HAVE ADOPTED THIS REGULATION:

## Chapter I GENERAL PROVISIONS

### Article 1

#### Subject matter and scope of application

1. This Regulation ~~lays down rules on~~ **establishes measures intended to improve** the access of **Union economic operators, goods and services to the public procurement and concessions markets of third countries. It lays down procedures for the Commission to undertake investigations into alleged restrictive and discriminatory procurement measures or practices adopted or maintained by third countries** ~~third country goods and services to the award of~~ **against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.**

**It provides for the possibility of applying price adjustment measures to certain tenders for** contracts for the execution of works or a work, **for** the supply of goods and **or** the provision of services **and for concessions,** by Union contracting authorities/entities, and ~~establishes procedures supporting negotiations on access of~~

Union on the basis of the origin of the economic operators, goods and or services concerned, to the public procurement markets of third countries.

2. This Regulation shall apply to contracts covered by the following acts:
  - (a) Directive 2014/23/EU<sup>23</sup> [2004/17/EC];
  - (b) Directive 2014/24/EU [2004/18/EC];<sup>24</sup>
  - (c) Directive 2014/25/EU [2014/25/EU] ~~on the award of concession contracts~~.
3. This Regulation shall apply to the award of contracts for the supply of goods and/or services and to the award of works and services concessions. It shall only apply where the goods or services are procured for governmental purposes. It shall not apply where the goods are purchased and ~~not~~ with a view to commercial resale or with a view to use in the production of goods ~~or in the provision of services~~ for commercial sale. It shall not apply where the services are purchased with a view to commercial resale or with a view to use in the supply of services for commercial sale.
4. This Regulation shall apply only with regard to restrictive and/or discriminatory procurement measures or practices implemented by a third country in respect of purchases of non-covered goods and services. The application of this Regulation shall be without prejudice to any international obligations of the Union.
5. Member States and their contracting authorities and contracting entities shall not apply restrictive measures in respect of third country economic operators, goods and services beyond those provided for in this Regulation.

## Article 2

### Definitions

1. For the purposes of this Regulation, the following definitions shall apply.
  - (a) 'economic operator' ~~'supplier'~~ means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which submits a tender for the execution of works and/or a work, the supply of goods or the provision of services on the market; ~~which offers on the market goods;~~
  - (b) ~~'service provider'~~ means any natural or legal person ~~which offers on the market the execution of works or a work, or services;~~

<sup>23</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).

<sup>24</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).

- (be) 'contracting authority/entity' means 'contracting authority' as defined in ~~[Article 1 (9) of Directive 2004/18/EC,~~ **Article 2(1) of Directive 2014/24/EU;**
- (c) ~~and 'contracting entity'~~ **means 'contracting entity'** as defined in **Article 4(1) of Directive 2014/25/EU and Article 7 of Directive 2014/23/EU** ~~Article 2 of Directive 2004/17/EC and Articles 3 and 4 of Directive 20...~~ ~~on the award of concession contracts];~~
- (d) 'covered goods or services' means a goodss or servicess originating in a country with which the Union has concluded an international agreement in the field of public procurement **and/or concessions** including market access commitments and in respect of which the relevant agreement applies; ~~Annex I to this Regulation contains a list of relevant agreements;~~
- (e) 'non-covered goods or services' means a goodss or servicess originating in a country with which the Union has not concluded an international agreement in the field of public procurement **or concessions** including market access commitments, **as well as** goods or services originating in a country with which the Union has concluded such an agreement but ~~and~~ in respect of which the relevant agreement does not applyapplies.
- (f) ~~'measure' means any law, regulation, or practice, or combination thereof;~~
- (g) ~~"interested parties" means a company or firm formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the Union, directly concerned by the production of goods or the provision of services which are the subject of restrictive procurement measures of third countries.~~

2. ~~For the purposes of this Regulation~~

- (f) **'restrictive and/or discriminatory procurement measure or practice' means any legislative, regulatory or administrative measure, procedure or practice, or combination thereof, adopted or maintained by public authorities or individual contracting authorities or contracting entities in a third country, that result in a serious and recurrent impairment of access of Union goods, services and/or economic operators to the public procurement or concession market of that country.**
- (ga) ~~the term "country" means~~ may refer to any State or separate customs territory, without such nomenclature **term** having implications for sovereignty;
- (b) ~~the term 'economic operator' shall cover equally the concepts of supplier and service provider;~~
- (c) ~~an economic operator who has submitted a tender shall be designated a 'tenderer';~~
- (d) ~~the execution of works and/or a work within the meaning of Directives (2004/17/EC, 2004/18/EC and Directive 201../. on the award of concession contracts) shall for the purposes of this Regulation be considered as the provision of a service;~~

(e) ~~a ‘mandatory price penalty’ shall refer to an obligation for contracting entities to increase, subject to certain exceptions, the price of services and/or goods originating in certain third countries that have been offered in contract award procedures.~~

**(h) SME means SME as defined in Commission Recommendation 2003/361/EC<sup>25</sup>.**

**2. For the purpose of this Regulation,** the execution of works and/or a work within the meaning of Directives ~~[2004/17/EC, 2004/18/EC and Directive 2010/25/EU, 2010/24/EU and Directive 2010/23/EU on the award of concession contracts]~~ shall for the purposes of this Regulation be considered as the provision of a service.

### Article 3

#### Rules of origin

1. The origin of a good shall be determined in accordance with Article 22 to 26 of **Council Regulation (EEC) No 2913/1992** ~~of the European Parliament and of the Council<sup>26</sup> of 12 October 1992 establishing the Community Customs Code.~~
2. The origin of a service shall be determined on the basis of the origin of the ~~natural or legal person~~ **economic operator** providing it.
- 3.** ~~The origin of the service provider~~ **an economic operator** shall be deemed to be:
  - (a) in the case of a natural person, the country of which the person is a national or where he has a right of permanent residence;
  - (b) in the case of a legal person **either** any of the following:
    - (i) if the service is **not** provided ~~other than~~ through a commercial presence within the Union, the country **under the laws of which the legal** ~~where the judicial~~ person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations;
    - ~~(2ii)~~ if the service is provided through a commercial presence within the Union, the Member State where the legal person is established and in which territory it is engaged in substantive business operations ~~such that it has a direct and~~ **entailing a direct and** effective link with the economy of a **the** Member State concerned.

For the purposes of point **(b) (ii) of the first subparagraph** ~~(2)~~ if the legal person is not engaged in substantive business operations ~~such that it has~~

<sup>25</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

<sup>26</sup> Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1).



entailing a direct and effective link with the economy of a Member State concerned, the origin of the natural or legal person ~~shall~~ will be that of the persons ~~or which own~~, persons which own or control the ~~judicial~~ legal person providing the service.

~~A~~The legal person shall be considered to be ~~providing the service shall be considered to be~~ "owned" by persons of a given country whereif ~~whereif~~ more than 50% of the equity interest in it is beneficially owned by persons of that country.

A legal person shall be considered to be ~~and~~ "controlled" by persons of a given country whereif ~~whereif~~ such persons have the power to ~~name~~ appoint a majority of its directors or otherwise to legally direct its actions.

~~3. For the purpose of this Regulation, goods or services originating in the countries of the European Economic Area other than the Member States shall be treated like those originating in the Member States.~~

## Chapter II

*Treatment of covered and non-covered goods and services, abnormally low tenders*

### Exemptions

#### Article 4

*Treatment of covered goods and services* Exemption for goods and services originating in least-developed and certain developing countries

~~When awarding contracts for the execution of works and/or a work, the supply of goods or the provision of services, contracting authorities/entities shall treat covered goods and services equally to goods and services originating in the European Union.~~

Tenders shall be exempted from this Regulation where more than 50% of the total value of the tender is made up of ~~g~~Goods or and/or services originating in least-developed countries listed in Annex IV to Regulation (EU) No 978/2012<sup>27</sup>, and in developing countries considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system as defined in Annex VII to Regulation (EU) No 978/2012. ~~(EC) No 732/2008 shall be treated as covered goods and services.~~

#### Article 5

*Rules of access for non-covered goods and services* Exemption for tenders submitted by SMEs

~~Non-covered goods and services may be subject to restrictive measures taken by the Commission:~~

<sup>27</sup> Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).

- (a) upon request of individual contracting entities according to the rules set out in Article 6;
- (b) according to the rules set out in Articles 10 and 11.

**Tenders submitted by SMEs<sup>28</sup> established in the Union and engaged in substantive business operations entailing a direct and effective link with the economy of at least one Member State, shall be exempted from this Regulation.**

#### *Article 6*

##### *Empowerment of contracting authorities/entities to exclude tenders comprising non-covered goods and services*

1. Upon request of contracting authorities/entities the Commission shall assess whether to approve, for contracts with an estimated value equal or above EUR 5.000.000 exclusive of value added tax (VAT) the exclusion from procedures for the award of contracts tenders comprising goods or services originating outside the Union, if the value of the non-covered goods or services exceeds 50 % of the total value of the goods or services constituting the tender, under the following conditions.
2. Where contracting authorities/entities intend to request the exclusion from procedures for the award of contracts on the basis of paragraph 1 they shall indicate this in the contract notice they publish pursuant to Article 35 of Directive 2004/18/EC or pursuant to Article 42 of Directive 2004/17/EC or Article 26 of the Directive on the award of concession contracts.

Contracting authorities/entities shall require tenderers to provide information on the origin of the goods and/or services contained in the tender, and their value. They shall accept self-declarations as preliminary evidence that tenders cannot be excluded pursuant to paragraph 1. A contracting authority may ask a tenderer at any moment during the procedure to submit all or parts of the required documentation where this appears necessary to ensure the proper conduct of the procedure. The Commission may adopt implementing acts establishing standard forms for declarations concerning the origin of goods and services. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 17 (3).

Where contracting authorities/entities receive tenders that meet the conditions of paragraph 1 for which they intend to request the exclusion for that reason, they shall notify the Commission. During the notification procedure the contracting authority/entity may continue its analysis of the tenders.

The notification shall be sent by electronic means using a standard form. The Commission shall adopt implementing acts establishing the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 17 (3). That standard form shall contain the following information:

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<sup>28</sup> As defined in the Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

- ~~(a) — the name and contact details of the contracting authority/entity;~~
- ~~(b) — a description of the object of the contract;~~
- ~~(c) — the name and contact details of the economic operator whose tender would be excluded;~~
- ~~(d) — information on the origin of the economic operator, the goods and/or services and their value.~~

~~The Commission may ask the contracting authority/entity for additional information.~~

~~That information shall be provided within eight working days, commencing on the first working day following the date on which it receives the request for additional information. If the Commission receives no information within this period the period established in paragraph 3 shall be suspended, until the Commission receives the requested information.~~

- ~~3. — For contracts referred to in paragraph 1, the Commission shall adopt an implementing act concerning the approval of the intended exclusion within a period of two months commencing on the first working day following the date on which it receives the notification. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17 (2). This period may be extended once by a maximum of two months in duly justified cases, in particular if the information contained in the notification or in the documents annexed thereto is incomplete or inexact or if the facts as reported undergo any substantive changes. If, at the end of this two month period, or the extended period the Commission has not adopted a decision approving or disapproving the exclusion, the exclusion shall be deemed to have been disapproved by the Commission.~~
- ~~4. — When adopting implementing acts pursuant to paragraph 3, the Commission shall approve the intended exclusion in the following cases:
  - ~~(a) — if the international agreement concerning market access in the field of public procurement between the Union and the country where the goods and/or services originate contains, for the goods and/or services for which the exclusion is proposed, explicit market access reservations taken by the Union;~~
  - ~~(b) — where an agreement referred to in point (a) does not exist and the third country maintains restrictive procurement measures leading to a lack of substantial reciprocity in market opening between the Union and the third country concerned.~~~~

~~For the purposes of point (b), a lack of substantial reciprocity is presumed where restrictive procurement measures result in serious and recurring discriminations of Union economic operators, goods and services.~~

~~When adopting implementing acts pursuant to paragraph 3, the Commission shall not approve an intended exclusion where it would violate market access commitments entered into by the Union in its international agreements.~~

- ~~5. When assessing whether a lack of substantial reciprocity exists, the Commission shall examine the following:~~
- ~~(a) to what degree public procurement laws 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;~~
  - ~~(b) to what degree public authorities and/or individual procuring entities maintain or adopt discriminatory practices against Union goods, services and economic operators.~~
- ~~6. Before the Commission takes a decision pursuant to paragraph 3 it shall hear the tenderer or tenderers concerned.~~
- ~~7. Contracting authorities/entities which have excluded tenders pursuant to paragraph 1 shall indicate this in the contract award notice they publish pursuant to Article 35 of Directive 2004/18/EC, Article 42 of Directive 2004/17/EC, or Article 27 of the Directive on the award of concession contracts. The Commission shall adopt implementing acts establishing the standard forms for contract award notices. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 17 (3).~~
- ~~8. Paragraph 1 shall not apply where the Commission has adopted the implementing act on temporary access of the goods and services from a country engaged in substantive negotiations with the Union as set out in Article 9(4).~~

### **Chapter III**

#### *Rules on abnormally low tenders*

#### **Investigations, consultations and price adjustment measures**

##### *Article 7*

##### *Abnormally low tenders*

~~Where the contracting authority/entity intends, under Article 69 of the Directive on public procurement or under Article 79 of the Directive on procurement by entities operating in the water, energy, transport and postal services sectors, after verifying the explanations of the tenderer, to accept an abnormally low tender comprising goods and/or services originating outside the Union, in which the value of the non-covered goods or services exceeds 50 % of the total value of the goods or services constituting the tender, it shall inform the other tenderers of this in writing, including the reasons for the abnormally low character of the price or costs charged.~~

~~A contracting authority/entity may withhold any information release of it would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.~~

## Chapter IV

### ~~Commission investigation, consultation and measures temporarily limiting access of non-covered goods and services to the EU Public procurement market~~

#### Article 8 6

#### **Investigations** relating to the access of EU economic operators, goods and services to the public procurement markets of third countries

1. Where the Commission considers it to be in the interest of the Union, it may at any time, on its own initiative or upon application of interested parties or a Member State, ~~may~~ initiate an ~~external procurement~~ investigation into alleged restrictive **and/or discriminatory** procurement measures **or practices**.

~~In particular, the Commission shall take into account whether a number of intended exclusions have been approved pursuant to Article 6(3) of this Regulation.~~

~~If~~ ~~should~~ an investigation ~~is~~ ~~be~~ initiated, the Commission shall publish a notice in the *Official Journal of the **European** Union*, inviting interested parties and Member States to provide all relevant information to the Commission within a specified period of time.

- ~~2. The investigation referred to in paragraph 1 is conducted on the basis of the criteria laid down in Article 6.~~

- ~~3.2.~~ The assessment by the Commission of whether **the alleged** restrictive **and/or discriminatory** procurement measures **or practices have been adopted or** are maintained by the third country concerned shall be made on the basis of the information supplied by interested parties and Member States, ~~and/or~~ ~~of~~ facts collected by the Commission during its investigation, **or both. The assessment** ~~and~~ shall be concluded within a period of ~~nine~~ **eight** months after the initiation of the investigation. In duly justified cases, this period may be extended by ~~three~~ **four** months.

- ~~4.3.~~ **Where** ~~When~~ the Commission concludes as a result of the ~~external procurement~~ ~~its~~ investigation that the alleged restrictive ~~and/or~~ **discriminatory** procurement measures **or practices** are not maintained **or that they do not result in restrictions to access by Union economic operators or Union goods and services to the public procurement or concession markets of** the third country concerned, ~~by the third country concerned,~~ the Commission shall **terminate** ~~adopt a decision terminating the~~ investigation. ~~Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17.~~

- ~~4.~~ **When the Commission has concluded its investigation, it shall make publicly available a report recording its main findings.**

**Consultations of with a third countries and Commission action**

1. ~~Where~~When it is found as a result of an investigation that restrictive **and/or discriminatory** procurement measures **or practices have been adopted or** ~~are~~ maintained by a third country and the Commission considers it to be ~~justified by~~ **in** the **Union** EU interest, the Commission shall invite ~~the country in question~~ to enter into consultations. **Those consultations shall aim at** ~~a view to~~ ensuring that Union economic operators, goods and services can participate in tendering procedures for the award of public procurement **or concession** contracts in that country on ~~the~~ conditions no less favourable than those accorded to national economic operators, goods and services of that country and also with a view ~~also~~ to ensuring the application of the principles of transparency and equal treatment.

~~In the event that~~If the **third** country concerned declines the invitation to enter into consultations, the Commission shall **take appropriate action, on the basis of the facts available**, ~~when adopting implementing acts under Article 10 to limit the access of goods and services originating in that third country, decide on the basis of the facts available.~~

- ~~2. If the country concerned is a Party to the WTO Agreement on Government Procurement or has concluded a trade agreement with the EU that includes provisions on public procurement, the Commission should follow the consultation mechanisms and/or dispute settlement procedures set out in that agreement when the restrictive practices relate to procurement covered by market access commitments undertaken by the country concerned towards the Union.~~

2. When, after the initiation of ~~a~~ consultations, the country concerned takes satisfactory remedial/ **or** corrective measures, but without undertaking new market access commitments, the Commission may suspend or terminate the consultations.

The Commission shall monitor the application of those remedial **or** /corrective measures, where appropriate on the basis of information supplied at intervals, which it may request from the third country concerned.

- 3.** Where the remedial **or** /corrective measures taken by the third country concerned are rescinded, suspended or improperly implemented, the Commission may **take the following steps:**

(i) resume ~~or restart~~ the consultations with the third country concerned, and/or

(ii) ~~act under Article 10 to adopt~~**decide, by** implementing acts ~~to limit the access of goods and services originating in a third country~~ **act, to impose a price adjustment measure pursuant to Article 8.**

The implementing acts referred to in **point (ii) of the first sub** ~~this~~ paragraph shall be adopted in accordance with the examination procedure referred to in Article 17**4**(2).

4. Where, after the initiation of ~~a~~ consultations, it appears that the most appropriate means to end a restrictive **and/or discriminatory** procurement **measure or** practice

is the conclusion of an international agreement, negotiations shall be carried out in accordance with ~~the provisions of~~ Articles 207 and 218 of the Treaty on the Functioning of the European Union. ~~If a country has engaged in substantive negotiations with the European Union concerning market access in the field of public procurement, the Commission may adopt an implementing act providing that goods and services from that country cannot be excluded from procedures for the award of contracts pursuant to Article 6.~~ **While such negotiations are ongoing, the investigation shall may be suspended.**

5. The Commission may terminate ~~the~~ consultations if the country concerned undertakes international commitments agreed with the Union in any of the following frameworks:

- (a) Accession to the WTO Agreement on Government Procurement;
- (b) Conclusion of a bilateral agreement with the Union which includes market access commitments in the field of public procurement **and/or concessions**; or
- (c) Expansion of its market access commitments undertaken under the WTO Agreement on Government **Procurement** or under a bilateral agreement concluded with the Union, ~~in that framework,~~

The consultations may also be terminated in cases where the restrictive **and/or discriminatory** procurement measures **or practices** are still in place at the time these commitments are undertaken, as long as they include detailed provisions relating to the phasing-out of **such** ~~those~~ **measures or practices within a reasonable period of time.**

6. In the event that a consultations with a third country does not lead to satisfactory results within 15 months from the day ~~thosethe~~ consultations with the third country started, the Commission shall terminate the consultations and ~~consider acting under Article 10 to adopt implementing acts to limit the access of goods and services originating in a~~ **shall take appropriate action. In particular, the Commission may decide, by means of an implementing act, to impose a price adjustment measure, pursuant to Article 8. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 14(2).**

#### *Article 108*

#### **Price adjustment measures** *limiting access of non-covered goods and services to the EU public procurement market*

1. ~~Where it is found in an investigation pursuant to Article 8, and after following the procedure foreseen in Article 9, that restrictive procurement measures adopted or maintained by that third country leads to an lack of substantial reciprocity in market opening between the Union and the third country as referred to in Article 6, the Commission may adopt implementing acts to temporarily limit the access of non-covered goods and services originating in a third country. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 17(2).~~ **Tenders more than 50 % of the total value of which is made of goods**

and/or services originating in a third country, may be subject to a price adjustment measure where the third country concerned adopts or maintains restrictive and/or discriminatory procurement measures or practices.

Price adjustment measures shall only apply to contracts with an estimated value equal to or above EUR 5.000.000 exclusive of value-added tax.

2. ~~The measures adopted pursuant to paragraph 1 may take any of the following forms:~~  
The price adjustment measure shall specify the penalty of up to 20% to be calculated on the price of the tenders concerned. It shall also specify any restrictions to the scope of application of the measure, such as those related to:

~~(a) the exclusion of tenders of which more than 50 % of the total value is made up of non-covered goods or services originating in the country adopting or maintaining a restrictive procurement practice; and/or~~

(a) public procurement ~~of~~ by specific ~~certain defined~~ categories of contracting authorities or contracting entities;

(b) public procurement of specific ~~certain defined~~ categories of goods or services or tenders submitted by specific categories of economic operators;

(c) public procurement above or within certain ~~defined~~ thresholds;

(d) tenders submitted for specific categories of concessions;

(e) the territories of certain subcentral levels of government.

~~(b) a mandatory price penalty on that part of the tender consisting of non-covered goods or services which originate in the country adopting or maintaining a restrictive procurement practice~~

3. ~~Measures adopted pursuant to paragraph 1 may in particular be limited to:~~  
Contracting authorities and contracting entities on the list adopted pursuant to Article 9 shall apply the price adjustment measure to the following:

(a) to tenders submitted by economic operators originating in the third country concerned, unless these economic operators can demonstrate that less than 50 % of the total value of their tender is made up of goods or services originating in the third country concerned; and

(b) to any tenders offering goods and services originating in the country concerned, where the value of these goods and services accounts for more than 50 % of the total value of the tender.

#### Article 9

#### Authorities or entities concerned

4.



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 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.

*Article 10*

**Withdrawal or suspension of price adjustment measures**

1. ~~Where the Commission considers that the reasons justifying the measures adopted pursuant to Articles 9 (4) and 10 no longer apply, The Commission may **decide, by** adopt an implementing act to:~~
  - (a) ~~repeal the measures; or~~
  - (b) ~~suspend the application of the measures for a period of up to one year.~~

For the purposes of point (b), the application of the measures may, at any moment in time, be reinstated by the Commission, **to withdraw the price adjustment measure or suspend its application for a period of time if the country concerned takes satisfactory remedial or corrective actions.**

**Where the remedial or corrective actions taken by the third country concerned are rescinded, suspended or improperly implemented, the Commission may reinstate the application of the price adjustment measure, at any time,** by means of an implementing act.

2. **The Commission shall make publicly available its findings regarding the remedial or corrective actions taken by the third country concerned.**
23. The implementing acts referred to in this Article shall be adopted in accordance with the examination procedure referred to in Article 174(2).

*Article 11*

**Application of price adjustment measures***Information to tenderers*

1. **Contracting authorities and contracting entities on the list adopted pursuant to Article 9 shall apply price adjustment measures to the following:**
  - (a) **tenders submitted by economic operators originating in the third country concerned, or**
  - (b) **tenders offering goods and services originating in the third country concerned, where the value of those goods and services accounts for more than 50 % of the total value of the tender.**

**Contracting authorities and contracting entities shall not apply price adjustment measures to tenders referred to in point (a) where the tenderers can demonstrate that less than 50 % of the total value of their tender is made of goods and services originating in the third country concerned.**

**The price adjustment measure shall apply only for the purpose of the evaluation and ranking of the price component of the tenders. It shall not affect the price due to be paid under the contract which will be concluded with the successful tenderer.**

2. When contracting authorities **and contracting** entities conduct a procurement **or a concession** procedure **that is** subject to restrictive measures a **price adjustment measure** adopted pursuant to Article 10 or reinstated pursuant to Article 11, they shall **include that information** indicate this in the contract notice they publish pursuant to Article 35~~49~~ of Directive 2004/18/EC **Directive 2014/24/EU** or Article 42 of Directive 2004/17/EC **Article 69 of Directive 2014/25/EU** or in the **concession notice they publish pursuant to Article 31 of Directive 2014/23/EU.** The Commission shall ~~may~~ adopt implementing acts **in accordance with the advisory procedure referred to in Article 14(3) adapting** establishing the standard forms **for contract or concession notices adopted under Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU,** in accordance with the advisory procedure referred to in Article 174 (3).

**3.2** Where the exclusion of a tender is based on the application of measures adopted pursuant to or reinstated pursuant to Article 11, ~~e~~Contracting authorities **and contracting** entities shall inform unsuccessful tenderers **of the award of a contract or a concession based on the application of a price adjustment measure adopted or reinstated pursuant to this Regulation.**

**4.** Where a price adjustment measure is applied, contracting authorities and contracting entities shall require tenderers to provide information on the origin of the goods and/or services contained in the tender, and on the value of the goods and services originating in the third country concerned as a percentage of the total value of the tender. They shall accept self-declarations from tenderers.

**A contracting authority may ask a tenderer at any moment during the procedure to submit additional documentation where necessary, in order to ensure the proper conduct of the procedure. The successful tenderer shall always be asked to submit more detailed information on the origin of the goods and services to be provided.**

## *Article 12*

### **Exceptions**

1. Contracting authorities **and contracting** entities may decide not to apply the **price adjustment** measures pursuant to Article 10 with respect to a procurement **or a concession** procedure if:

(a) there are no Union and/or covered goods or services available which meet the requirements of the contracting **authority or contracting** entity; or

(b) the application of the measure would lead to a disproportionate increase in the price or costs of the contract.

2. Where a contracting authority or contracting entity intends not to apply a price adjustment measures adopted pursuant to Article 10 of this Regulation, or reinstated pursuant to Article 11, it shall indicate its intention in the contract notice that it shall publishes pursuant to Article 3549 of Directive 2004/18/EC or Article 42 of Directive 2004/17/EC. 2014/24/EU or Article 69 of Directive 2014/25/EU or in the concession notice pursuant to Article 31 of Directive 2014/23/EU. It shall notify the Commission no later than ten calendar days after the publication of the contract notice.

~~This notification shall be sent by electronic using a standard form. The Commission shall adopt implementing acts establishing the standard forms for contract notices and notification in accordance with the advisory procedure referred to in Article 17 (3).~~

3. The notification shall contain the following information:

- (a) the name and contact details of the contracting authority and/or contracting entity;
- (b) a description of the object of the contract;
- (c) information on the origin of the economic operators, the goods and/or services to be admitted;
- (d) the ground on which the decision not to apply the ~~restrictive measures~~ price adjustment measure is based, and a detailed justification for the use of the exception;
- (e) where appropriate, any other information deemed useful by the contracting authority and/or contracting entity.

The Commission may ask the contracting authority or contracting entity concerned for additional information.

43. In the event that a contracting authority or contracting entity conducts a negotiated procedure without prior publication, under Article 312 of Directive 2004/18/EC or under Article 40 (3) 2 of Directive 2004/17/EC Directive 2014/24/EU or under Article 50 of Directive 2014/25/EU and decides not to apply a price adjustment measure adopted pursuant to Article 10 of this Regulation, or reinstated pursuant to Article 11, it shall indicate this use in the contract award notice it publishes pursuant to Article 3550 of Directive 2004/18/EC 2014/24/EU or Article 4370 of Directive 2004/17/EC 2014/25/EU or in the concession award notice it publishes pursuant to Article 32 of Directive 2014/23/EU and notify the Commission no later than ten calendar days after the publication of the contract award notice.

~~This notification shall be sent by electronic means using a standard form. The Commission shall adopt implementing acts establishing the standard forms for contract notices and notifications in accordance with the advisory procedure referred to in Article 17 (2). The notification shall contain the following information:~~

- (a) the name and contact details of the contracting authority **or contracting** entity;
- (b) a description of the object of the contract **or the concession**;
- (c) information on the origin of the economic operators, the goods and/or services admitted;
- (d) ~~the ground on which the decision not to apply the restrictive measures is based, and a detailed justification for the use of the exception;~~
- (e) where appropriate, any other information deemed useful by the contracting **authority or contracting** entity.

### *Article 163*

### **Implementation**

1. In case of misapplication by contracting authorities **or contracting** entities of exceptions laid down in Article 132, the Commission may apply the corrective mechanism of Article 3 of Directive 89/665/EEC<sup>29</sup> or Article 8 of Directive 92/13/EEC<sup>30</sup>.
2. Contracts concluded with an economic operator in violation of **price adjustment measures** ~~Commission implementing acts adopted~~ **or reinstated by the Commission** pursuant to Article 6 **this Regulation** ~~upon intended exclusion notified by contracting authorities/ entities or measures adopted pursuant to Article 10 or reinstated pursuant to Article 11 shall be declared ineffective, within the meaning of Directive 2007/66/EC.~~

### **Chapter IV**

#### *Delegated and* **IMPLEMENTING POWERS, REPORTING AND FINAL PROVISIONS**

### *Article 143*

#### *Amendments to the Annex*

~~The Commission shall be empowered to adopt delegated acts in accordance with Article 14 concerning amendments to the Annex to reflect the conclusion of new international agreements by the Union in the field of public procurement.~~

<sup>29</sup> Council Directive 89/665/EEC of 21 December 1989 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>30</sup> Council Directive 92/13/EEC of 25 February 1992 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).

## Article 15

### *Exercise of the delegation of powers*

- ~~1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.~~
- ~~2. The delegation of power referred to in Article 14 shall be conferred on the Commission for an indeterminate period of time from the [date of entry into force of this Regulation].~~
- ~~3. The delegation of power referred to in Article 14 may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect on the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.~~
- ~~4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.~~
- ~~5. A delegated act adopted pursuant to this Article shall enter into force only where no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.~~

## Article 17~~4~~

### Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC<sup>31</sup> and by the Committee set up by Article 7 of the **Council Regulation (EU) 2015/1843 (Trade Barriers Regulation)**<sup>32</sup>. These committees shall be committees within the meaning of Article 3 of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply and the competent committee shall be the Committee set up by the Trade Barriers Regulation.

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<sup>31</sup> Council Decision (71/306/EEC) of 26 July 1971 setting up an Advisory Committee for Public Works Contracts (OJ L 185, 16.8.1971, p. 15).

<sup>32</sup> Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (Trade Barriers Regulation), (OJ L 349, 31.12.1994 272, 16.10.2015, p. 1).

3. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply and the competent committee shall be the Committee established by Council Decision 71/306/EEC.

#### *Article 185*

### **Confidentiality**

1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.
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.
3. The supplier of information may request to treat information submitted as confidential. **The request for confidentiality** and shall be accompanied by a non-confidential summary of the information or a statement of the reasons why the information cannot be summarised.
4. ~~If it appears that~~ a request for confidentiality is not justified and if the supplier is unwilling either to make the information public or to authorise its disclosure in generalised or summary form, the information in question may be disregarded.
5. Paragraphs 1 to ~~4~~ shall not preclude the disclosure of general information by the Union authorities. Such disclosure must take into account the legitimate interest of the parties concerned in not having their business secrets divulged.

#### *Article 196*

### **Reporting**

By ~~31 December~~ **1 January 2017** and at least every three years ~~thereafter the entry into force of this Regulation~~, 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 **EU 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.

#### *Article 2017*

### **Amendment of Directive 2014/25/EU *Repeals***

Articles ~~58 and 59 of Directive 2004/17/EC~~ **85 and 86 of Directive 2014/25/EU** shall be ~~repealed~~ **deleted** with effect from the entry into force of this Regulation.

*Article ~~21~~18*

**Entry into force**

This Regulation shall enter into force on the 60th day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament  
The President*

*For the Council  
The President*

## ANNEX

~~List of international agreements that the Union has concluded in the field of public procurement including market access commitments~~

~~Plurilateral agreement:~~

~~—Agreement on Government procurement (OJ L, 336, 23.12.1994)~~

~~Bilateral agreements:~~

~~—Free Trade Agreement between the European Community and Mexico (OJ L 276, 28.10.2000, L 157/30.6.2000)~~

~~—Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement (OJ L. 114, 30.04.2002)~~

~~—Free Trade Agreement between the European Community and Chile (OJ L352, 30.12.2002)~~

~~—Stabilisation and Association Agreement between the European Community and its Member States and Former Yugoslav Republic of Macedonia (OJ L 87, 20.03.2004)~~

~~—Stabilisation and Association Agreement concluded between the European Community and Croatia (OJ L 26, 28.1.2005)~~

~~—Stabilisation and Association Agreement concluded between the European Community and its Member States and Montenegro (OJ L 345 of 28.12.2007)~~

~~—Stabilisation and Association Agreement concluded between the European Community and Albania (OJ L 107, 28.4.2009)~~

~~—Free Trade Agreement by the European Union and South Korea (OJ L 127/14.5.2011)~~