

A New EU International Procurement Instrument (IPI)

By Rhodri Williams

On 14 December 2021, the European Parliament adopted amendments proposed by its International Trade (INTA) Committee to an original proposal for a regulation creating an International Procurement Instrument¹, first made by the European Commission as long ago as 2012² and then amended in 2016³.

Background

The EU's stated aim has long been to open its public procurement markets to a significant degree to competitors from third countries and it has frequently advocated the need for more open public procurement markets, both within the context of the revised WTO Agreement on Public Procurement (GPA) and in its bilateral trade negotiations. Many non-EU countries, however, are reluctant to open their public procurement markets to the EU. According to the Commission, while the EU opened some €352 billion of EU public procurement to bidders that came from member countries to the GPA in 2012, foreign bidders only had access to €178 billion of US procurement and €27 billion of Japanese procurement in that same year. In addition, only a fraction of Chinese

¹ Regulation of the European Parliament and of the Council on the access of third country economic operators, goods and services to the Union's procurement market and procedures supporting negotiations on the access of Union economic operators, goods and services to the procurement markets of third countries (OJEU C-9/0018/2016)

² COD (2012) 0060

³ COD (2016) 0034

procurement is open to foreign bidders. In 2012, the Commission therefore proposed the creation of an International Procurement Instrument (IPI). After a legislative deadlock, the Commission presented a revised proposal in 2016. In March 2019, in the context of a review of relations with China, the Commission called on the Council and Parliament to revive the trilogue discussions based on the revised proposal and to adopt the IPI before the end of 2019. In June 2021, the EU Member States reached agreement for a mandate to negotiate with the European Parliament on the IPI.

The Commission first proposed an IPI in 2012. This proposal made a distinction between ‘covered procurement’, which corresponds to international commitments that the EU has undertaken in this area, and ‘non-covered procurement’, which is not subject to the EU’s international commitments. For non-covered procurement, the proposal introduced a new procedure to restrict access of foreign products to the EU procurement market whenever there was a substantial lack of reciprocal opening of public procurement access in the originating country.

The Commission then proposed two distinct procedures for the introduction of restrictive measures. The first was the ‘decentralised procedure’ in which the procuring entity would request the Commission’s approval in order to exclude a foreign tender. The second procedure was the ‘centralised procedure’ in which the Commission directly investigated the situation in the foreign market and negotiated with the third country. If necessary, the Commission could adopt a restrictive measure in the centralised procedure, namely either market closure or a price penalty (also called ‘price adjustment measure’), which would then be applied by procuring authorities to the foreign product originating from the investigated country.

Due to the deadlock in the negotiations on the 2012 proposal, the Commission presented a revised proposal on 29 January 2016. A key change was that the new proposal only retained the centralised procedure and for this the Commission also decided to shorten

the time for country investigations. In addition, the Commission only retained the possibility of introducing a price adjustment measure as a restrictive measure, in cases where the total value of the contract is at least €5 million excluding VAT and at least 50 % or more of that total value is made up of non-covered goods originating in the targeted country. Thirdly, the proposal introduced exceptions for Least Developed Countries (LDCs) and European SMEs. The proposed procedure would accordingly consist of the following basic steps:

1. In cases of alleged discrimination by a third country of EU companies in foreign procurement markets, the Commission would initiate a public investigation.
2. When this investigation finds discriminatory restrictions vis-à-vis EU goods, services and/or suppliers, the Commission will invite the country concerned to consult on the opening of its procurement market. Such consultations can also take place in the form of negotiations on an international agreement.
3. As a last resort, the Commission can, after consultation with Member States, apply a price penalty to bids from the targeted country with a total value of at least €5 million of which at least 50 % consists of goods and services originating from the targeted country. In concrete terms, this would mean that bids from that country would, compared to other bids, be considered to offer a higher price of up to 20 % of the actual price put forward. This would give EU and non-targeted countries' bids a competitive advantage on EU public procurement markets.

In June 2021, the Portuguese Presidency of the Parliament introduced key amendments to the legislative texts, including shorter deadlines for investigations and consultations; simplified determination of origin based on bidders rather than bids; adjustment measures as well as possibility of exclusion of bidder; use of quality criteria in addition to price; and differentiated thresholds for goods and services. The European Parliament debated the

original IPI proposal both in its Committee on International Trade (INTA) and in plenary session.

Amendments now adopted by the European Parliament

In November 2021, INTA adopted its report on the IPI drafted by rapporteur Daniel Caspary (EPP, Germany). The Members of the Parliament voted in favour of the report in December 2021 plenary session by a large majority of 590. The Parliament supported giving the Commission power to determine the application of the IPI and authorising exceptions to it. The IPI is primarily to cover third countries which are not part of the GPA or do not have an FTA with procurement commitments with the EU. However, GPA/FTA countries which have no reciprocal commitments to the EU in specific areas of procurement may also be subjected to IPI in those specific areas.

The EP mandate set the new thresholds for the application of IPI measures to procurement procedures which have an estimated value of at least €10 million net for works and concessions, and of at least €5 million net of goods and services. The Parliament also shortened the time required for investigation and consultations with the third countries from eight to six months with one possible extension of three months.

If the negotiations with the third country do not lead to satisfactory outcome, the Commission may then apply one of the two remedies by means of implementing acts: (i) excluding the company from the bidding process or (ii) adjusting the score of bidders in the evaluation process. The latter remedy would mean that the score used in evaluation would be diminished by certain percentage. The EP mandate provided that that percentage was to be set up to as much as 100% of the evaluation score of the tender.

In addition, Parliament proposed to narrow to two the number of exceptions allowing the contracting authorities not to apply the IPI measures: (i) when all bidders originate

from the country subject to the IPI measures; or (ii) when there are overriding reasons relating to the public interest, such as public health or protection of the environment.

- I. Furthermore, the Parliament supported exempting the least developed countries from the IPI as well as the developing countries covered by the General Scheme of Preferences unless the economy of such countries is considered to be competitive in the sectors concerned. The Commission, Council and European Parliament entered into trilogue negotiations in mid-December 2021. The current inter-institutional negotiations with the French Presidency were aimed at reaching an agreement by mid-March 2022.

Final Agreement with the European Council

Then on 14 March 2022, Parliament and Council negotiators announced that they had agreed on setting up the **international procurement instrument (IPI)**. The IPI tool will empower the European Commission to determine whether and to what extent companies from a third country must be subject to an IPI measure, depending on the extent of the trade barriers. The agreement reached amended the design and the scope of the instrument as well as member states' discretionary powers in its application.

Negotiators agreed that the IPI measures will now apply to tenders worth at least €15 million for works and concessions and €5 million for goods and services. It was concluded that this would ensure that the administrative burden was low while the scope of the instrument remained wide. It will therefore now be mandatory to take social, environmental and labour requirements into consideration when evaluating all tenders covered by the IPI.

As a result of the negotiations, it was agreed that that the number of exceptions, whereby contracting authorities seeking tenders in Member States could opt out of IPI measures,

should be reduced to two, therefore widening the scope of the Instrument. Exceptions based on a “disproportionate increase in price”, a concept which was difficult to define, were therefore removed from the proposal. Similarly, it was agreed that large contracting authorities, such as large municipalities or central government, should always have to apply the new rules. To this end, contracting authorities will only be exempt from the IPI if they represent fewer than 50,000 people and the percentage of annual overall tender value, for which contracting authorities must apply the IPI, is set at 80%.

It was also agreed that if the European Commission finds that barriers exist in the public procurement market of a third country from which a bid originates, IPI measures can take the form of a price penalty of this bid or a reduced score for it, depending on certain criteria. The adjustment can reach 50% for score adjustment measures and 100% when only price is taken into account. Finally, it was agreed that bidders from the least developed countries would not be subject to IPI measures.

The agreement reached between the Parliament and the Council negotiators now has to be formally approved by both institutions.

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