



The International Procurement Instrument: a new trade policy tool promoting reciprocity in access to international public procurement and concession markets

Access of Union economic operators, goods or services to public procurement and concession markets from third countries as well as the elimination of restrictive public procurement practices in third countries remains an important policy objective of the European Union (*Union*).

On 23 June 2022, the Union therefore adopted the **International Procurement Instrument (IPI)**.¹ The general objective of the IPI is achieving reciprocity by opening third-country public procurement and concession markets and improving market access opportunities for Union economic operators, goods or services.

Adoption of this instrument has long been considered a priority by the Commission given that many third countries are reluctant to open their public procurement or concession markets to international competition or to improve access to these markets. [According to the Global Trade Analysis Project, quoted by the Commission](#), in 2012, EUR 352 billion of the EUR 420 billion (approximately 85%) EU public procurement budget was open to member countries of the WTO Agreement on Government Procurement which contrasts with the corresponding figures for the USA (approximately EUR 178 billion of EUR 556.25 billion or merely 32%) and Japan (approximately EUR 27 billion of EUR 96.4 billion or only 28%).

The present newsflash provides a synopsis of the set of rules of the IPI that shall soon enter into force.

1. SUBJECT MATTER AND SCOPE OF APPLICATION

The IPI has as subject matter the establishment of measures regarding **non-covered procurement**, this is public procurement procedures for goods, services or concessions regarding which the Union has not undertaken market access commitments in an international agreement in the field of public procurement or concessions (e.g. bilateral or multilateral trade agreements).

The scope of application of the IPI is linked to the Union public procurement directives 2014/23/EU, 2014/24/EU and 2014/25/EU: the regulation applies to contracting authorities and contracting entities (hereinafter together referred to as contracting authorities) and economic operators as defined in the Union public procurement directives.²

The public procurement procedures to which the IPI applies are also those covered by the Union public procurement directives. Public procurement procedures applicable to public contracts awarded by Union institutions on their own account fall, however, outside the scope of the IPI. These procedures are set out in the Financial Regulation³, which is based on the Union public procurement directives⁴.

1 Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI), OJ L 173/1 of 30 June 2022.

2 Nonetheless, upon a justified request by a Member State and under strict conditions, the Commission may adopt a list of local contracting authorities in that Member State within administrative units with population below 50 000 inhabitants that are exempted from the application of the IPI. This with a view to a fair distribution among Member States of the public procurement procedures subject to IPI measures.

3 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, OJ L 193/1 of 30 July 2018.

4 Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU.

2. COMMISSION'S INVESTIGATIONS

The IPI lays down procedures for the Commission to undertake investigations into alleged third-country measures or practices against Union economic operators, goods and services. A third-country measure or practice is defined as *“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, at any level, that results in a serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of that third country”*.

An **important exemption** is that the Commission shall not initiate investigations in respect of least developed countries⁵, unless there is evidence of circumvention of any IPI measure imputable to such third country or their economic operators.

The **procedure** for the Commission to undertake investigations into alleged third-country measures or practices against Union economic operators, goods and services is as follows:

- The Commission may initiate, **on its own initiative or upon a substantiated complaint** of a Union interested party or a Member State (for which an online tool will be made available on the Commission's website), an investigation;
- A **notice shall be published** in the *Official Journal of the European Union (OJ of the EU)*, indicating the Commission's preliminary assessment of the third-country measure or practice and inviting interested parties and Member States to provide relevant information within a specified period of time;
- Upon publication of the notice, the Commission shall **invite the third country** concerned to submit its views, provide relevant information, and **enter into consultations** with the Commission in order to eliminate or remedy the alleged third-country measure or practice;
- A third country under investigation can **suspend the investigation** where it takes satisfactory corrective actions or undertakes commitments towards the Union to end or phase out the third-country measure or practice within a reasonable period of time and no later than 6 months after undertaking such commitments. Nonetheless, the Commission can resume the investigation at any time if it concludes that the reasons for the suspension are no longer valid;
- If the alleged third-country measure or practice is not maintained or if it does not result in a serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of the third country, the Commission shall **terminate the investigation** and publish a notice of termination in the *OJ of the EU*;
- The Commission has **a period of 9 months** after the date of its initiation to conclude the investigation and consultations. In justified cases, this period **may be extended by 5 months**. Upon conclusion of the investigation and the consultations, the Commission shall (i) make publicly available a report setting out the main findings of the investigation and a proposed course of action and (ii) present that report to the European Parliament and to the Council.

⁵ These are the countries listed in Annex IV to Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences (coordinated version of 1 January 2022).

3. IPI MEASURES

Following an investigation where the Commission finds that a third-country measure or practice exists, and if it considers it to be in the interest of the Union, the Commission shall adopt **an IPI measure**: a measure limiting the access of economic operators, goods or services originating in third countries to the Union public procurement or concession markets in the area of non-covered procurement.

An IPI measure can require contracting authorities or contracting entities to:

- impose a **score adjustment** on tenders submitted by economic operators originating in the third country concerned; or
- **exclude tenders** submitted by economic operators originating in the third country concerned.

An IPI measure shall apply only to public procurement procedures which are covered by the IPI measure and have been launched between the entry into force of that IPI measure and its expiry, withdrawal or suspension. However, an IPI measure shall **not apply** to public procurement procedures for the award of **contracts based on a framework agreement** or to **contracts for individual lots**.

It is important to flag that an IPI measure shall only apply to public procurement procedures with an **estimated value above a threshold** to be determined by the Commission. In any case, that estimated value should be:

- for works and concessions: equal to or above **EUR 15 million** (excl. VAT);
- for goods and services: equal to or above **EUR 5 million** (excl. VAT).

If an IPI measure is applicable, contracting authorities shall include in the public procurement documents for procedures falling within the scope of an IPI measure, a reference to both the application of the IPI and the applicable IPI measure.

In general, an IPI measure shall expire **5 years** from its entry into force. The Commission may, nonetheless, initiate a review of the IPI measure no later than 9 months before the date of expiry and decide, within 6 months, to (i) **extend the duration** of the IPI measure for another 5 years, (ii) **adjust it** appropriately or (iii) **replace it** with a different IPI measure.

4. OBLIGATIONS UPON SUCCESSFUL TENDERERS IN THE CONTEXT OF AN IPI MEASURE

A successful tenderer in the context of a public procurement procedure which is subject to an IPI measure, must comply with the **following obligations** (these obligations shall also be included by the contracting authorities in the public procurement documents):

- a tenderer is **not allowed to subcontract more than 50%** of the total value of the contract to economic operators originating in a third country which is subject to an IPI measure;
- for contracts whose subject matter covers the supply of goods: for the duration of the contract, **goods or services supplied or provided in the execution of the contract and originating in a third country that is subject to the IPI measure may represent no more than 50%** of the total value of the contract, irrespective of whether such goods or services

are supplied or provided directly by the successful tenderer or by a subcontractor;

- the successful tenderer must provide to the contracting authority upon its request **adequate evidence** corresponding to the two aforementioned points, at the latest upon completion of the execution of the contract;
- in the event of non-observance of the obligations referred in the two first mentioned points, a charge of between 10% and 30% of the total value of the contract may be imposed.

5. EXCEPTIONS

Even when an IPI measure is applicable, contracting authorities may **on an exceptional basis** decide not to apply this IPI measure with respect to a public procurement procedure.

This **exception** is however limited to (i) a situation where only tenders from economic operators originating in a third country subject to an IPI measure meet the tender requirements, or (ii) when the decision not to apply the IPI measure is justified for overriding reasons relating to the public interest, such as public health or protection of the environment.

Where a contracting authority decides to invoke one of these exceptions and thus decides not to apply an IPI measure it shall provide specific information to the Commission.

6. ENTRY INTO FORCE

The IPI has been signed on 23 June 2022 and published in the *OJ* of the EU on 30 June 2022. The new trade policy tool will enter into force on the 60th day following that of its publication, *i.e.* on 29 August 2022.

VBB would be pleased to assist you with any queries you may have regarding the IPI.

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