

20 May 2020

BusinessEurope's views on an International Procurement Instrument

KEY MESSAGES



- 1** Public procurement is an important engine for growth in the EU economy. While considered one of the most open procurement markets in the world, this is often not reciprocated by the EU's trading partners. The core objective of the International Procurement Instrument (IPI) should be to give leverage to the European Commission to open up third-country public procurement markets.
- 2** To become an efficient tool, the IPI investigations and consultations with third countries should take place in a timely manner. The instrument should also ensure in an effective way that bidders from locked-up third countries which are often heavily relying on subsidies do not distort the EU's public procurement market.
- 3** The efforts of the EU Institutions should be concentrated in making sure that no additional burden is created for EU companies. This applies in particular in the most technically complex areas of the Regulation, such as provisions of the IPI referring to the origin of goods, the shaping of foreseen penalties and agreeing on a threshold for the IPI.



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BUSINESSEUROPE'S VIEWS ON AN INTERNATIONAL PROCUREMENT INSTRUMENT

The importance of international public procurement

Public procurement is of high importance to the European economy. Over 250.000 public authorities around the EU purchase goods, services, works and supplies amounting to around EUR 2 trillion every year, accounting for approximately 14% of EU GDP in 2017.¹ Public procurement is a strong lever for growth, investment and employment.

A strong global advocate for the opening of public procurement markets, the EU is a party to the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO) and makes use of its ambitious bilateral trade agenda to open global procurement markets. For instance, significant results were achieved in the area of public procurement in the EU's trade agreements with Canada and Japan. Furthermore, it is widely recognised that the EU's public procurement market is transparent and comparatively open to foreign bidders in practice².

However, it is estimated that more than half of the EUR 8 trillion worldwide procurement market is closed to European companies. Our businesses only win a minuscule fraction – EUR 10 billion – of global procurement contracts.³

Discriminatory measures in third countries

When attempting to access procurement markets in third countries, European companies face a substantial number of discriminatory measures, crystallised in *de jure* and *de facto* barriers. *De jure* barriers include amongst others national establishment requirements, 'buy national' provisions, the exclusion of certain projects from government procurement rules, implementing price advantage measures for domestic bidders or imposing import bans on foreign goods for public procurement

¹ European Commission, "[Public Procurement](#)".

² According to experience, foreign bidders from third countries that have neither signed the GPA nor a bilateral FTA with the EU are *de facto* very often allowed to bid on public contracts in the EU. However, *de jure*, they do not have secured access to procurement procedures in the EU and may be excluded (cf. the Communication of the Commission: Guidance on the participation of third country bidders, and goods in the EU procurement market, dated 24.07.2019, page 6). Furthermore, with a view to procurement in utilities sectors within the scope of Directive 2014/25/EU, bidders from third countries can also be excluded according to the special provision of Article 85 of Directive 2014/25/EU Directive 2014/25/EU.

³ European Commission, "[Factsheet on the International Procurement Instrument](#)", 2019.



purposes. *De facto* barriers include, for example, a lack of transparency, unpredictable enforcement of regulation and corruption. The European Commission estimates that European companies are amongst the most affected worldwide by discriminatory measures in public procurement.⁴

Moreover, recent years have seen a worrying trend towards closing access in third countries' public procurement markets. This is clear, for example, in the railway sector. As an example, accessibility to China's rail market has fallen from 63% in 2009 to barely 19% in 2017.⁵

On the other hand, we see an increasingly vigorous competition of third-country bidders in the EU's public procurement market. While an open procurement market can stimulate the competitiveness of domestic companies, lower prices and trigger investments, we also need to take into account that, as business operates in global value chains, it is often the case that third-country bids have European components. However, in this context, it is equally important to point out that our companies face increasingly unfair competition from state-owned enterprises (SOEs), particularly from China, in domestic procurement markets. Those companies' heavy reliance on subsidies creates fundamental distortions in our Single Market. Examples of such practices abound: from the construction of motorway A2 in Poland⁶, the Peljesac Bridge in Croatia, one of the EU's major infrastructure projects, with the European Commission committed to paying €357m⁷, the construction of the Budapest-Belgrade railway⁸, to the selection of CRRC (China Railway Rolling Stock Corporation) as best bidder for a major rolling stock tender (40 to 80 electric regional trains) in Romania, where CRRC offered a price 25% lower than its competitors.

The EU should address unfair practices in third countries

The lack of reciprocity in access to public procurement markets together with the growth of market-distortive practices created by SOEs and other heavily subsidised companies from third countries in our own market are deeply alarming to the European business community.

BusinessEurope is therefore supportive of the conclusions from the European Council held on the 21st and 22nd of March 2019, which stated that “the EU must also safeguard its interests in the light of unfair practices of third countries, making full use (...) our public procurement rules, as well as ensuring effective reciprocity for public procurement with third countries.”⁹

⁴ *Ibidem*.

⁵ UNIFE and Roland Berger, “*World Rail Market Study*”, 2018/.

⁶ https://www.ispionline.it/sites/default/files/media/pdf/infrastructure_study.pdf

⁷ <http://www.globalconstructionreview.com/news/strabag-tries-stop-chinese-work-big-croatian-bridg/>

⁸ <https://www.railjournal.com/financial/loan-agreed-for-us-1-78bn-budapest-belgrade-upgrade/>

⁹ European Council, “[Conclusions – 21 and 22 March 2019](#)”, 2019, p. 3.



A comprehensive EU approach to public procurement

It is essential that all the instruments at the EU's disposal in the area of public procurement work together in a complementary and mutually reinforcing manner. This is important in order to achieve the objectives described in the introduction of this paper: using the IPI as a leverage to open up procurement markets that are currently closed for European companies, without however neglecting the changing situation within the EU's procurement market.

To this end, it is crucial that there is sufficient coordination and alignment between the respective arms of the European Commission and EU Member States authorities on the implementation of the IPI Regulation, once adopted, and with the EU's existing Directives in public procurement (Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and Directive 2014/23/EU relating to concessions), or with already existing guidance provided by the European Commission on the participation of third country bidders and goods in the EU procurement market¹⁰. Also, public procurement rules should be enforced forcefully within the EU, in the sense that behaviours and strategies aimed at countervailing these rules should be avoided. Furthermore, we urge EU Institutions and Member States to also coordinate subsidiary policies and instruments, such as external financial assistance, to ensure that this support, including in cases where it is destined to promote public procurement bids also follows EU rules.

Whereas according to the current "*acquis communautaire*" bidders from countries, which have neither signed the GPA nor joined bilateral agreements on public procurement with the European Union, do not have secured access to procurement procedures in the EU and may be excluded¹¹, the IPI should kick-in, either by the exclusion of such third-country heavily subsidised SOE bidders, or by the implementation of a price adjustment measure, if the European Commission's assessment has come to the conclusion that a severe disturbance exists in view of problems regarding market access to such countries and/or unacceptable performance by enterprises from such countries in European markets.

Furthermore, we urge EU Institutions and Member States to coordinate subsidiary policies and instruments, such as external financial assistance, to ensure that this support, including in cases where it is destined to promote public procurement bids, also follows EU rules. Furthermore, the IPI should be accompanied by appropriate policies of a more general character, providing incentives to open-up international public procurement markets, especially calling on additional third countries to join the GPA or sign bilateral trade agreements including procurement chapters with the EU. In order to increase pressure on locked-up third countries without any agreement with the EU on public procurement, it should be considered whether European funds might only

¹⁰ Communication from the European Commission on Guidance on the participation of third country bidders and goods in the EU procurement market, C(2019) 5494 final dated 24 July 2019 (see also footnote 2).

¹¹ See footnotes 2 and 10.



be granted to projects, which are awarded to enterprises from the EU, the European Economic Area or countries which have signed the GPA or a bilateral agreement on public procurement with the EU. Thereby it would be avoided that EU tax payer's money contributes to projects in which businesses or SOEs from lock-up third countries finally profit from EU funds although their anti-competitive behaviour fundamentally damages the interests of EU businesses.

Besides the importance of avoiding discrepancies between the IPI and the existing EU Directives, it is also important to focus on how existing Directives can be better implemented, for example by stricter implementation and practical use of the rules on abnormally low tenders and by encouraging the use of the Most Economically Advantageous Tender (MEAT) in the award criteria, to ensure that strategic underbidding by foreign entities does not drive EU companies out of their home market.

We urge the new European Commission to develop a comprehensive and ambitious strategy with a view to improving access for our companies to public procurement markets in third countries while addressing unfair competition in EU markets, in order to ensure a level playing field. Only a coherent EU strategy – drawing on all resources from the European Commission (from DG Trade to DG GROW, and from DG COMP to the EEAS), the European Parliament and the EU Member States – can address the common challenges that European firms face with regard to global public procurement.

International Procurement Instrument proposal

To address the discriminatory measures against European companies in third countries and the lack of reciprocity in access to public procurement markets, the European Commission proposed a regulation for the adoption of an International Procurement Instrument (IPI) in 2012. The aim of this instrument is to clarify the legal situation for foreign bidders participating in the EU market, and to encourage the EU's trade partners to engage in negotiations with a view to opening their procurement markets. In this context, it would also be important to have the most recent and comprehensive data publicly available. For instance, the International Public Procurement Initiative (IPPI) launched by the European Commission should become a regular exercise and its results should be published.

In 2016, the European Commission published an amended version of the proposal which is the basis for discussions taking place today. In March 2019, the European Council called for negotiations on an IPI to be resumed,¹² and the Commission urged the Parliament and Council to adopt the regulation before the end of 2019.¹³ In her mission letters to Commissioners Phil Hogan and Thierry Breton, President Ursula von

¹² *Ibidem*.

¹³ European Commission, "[EU-China – A strategic outlook](#)", 2019, p. 7.



der Leyen asked them to seek “a level playing field in procurement” and to address “the distortive effects of foreign subsidies, in particular in relation to procurement”.¹⁴

BusinessEurope supports the general objectives of the IPI. European companies have long advocated for a strengthened EU toolbox that ensures a fairer playing field in the area of public procurement, enforces the principle of balanced market access enshrined in the WTO GPA and creates leverage to encourage partners to open their public procurement markets.

However, the 2016 IPI proposal is still lacking in effectiveness and efficiency and could generate undesirable side effects for many EU businesses and public purchasers, especially by creating considerable new administrative burden, legal uncertainties and risks in view of the proposed system of penalties (cf. section c in more detail). BusinessEurope welcomes the fact that the European Commission has been working closely with Member States to improve the proposal and we would like to contribute to these efforts through this position paper.

In order to be efficient, the IPI needs to be balanced, non-protectionist and compatible with the rules and principles enshrined in the GPA. The instrument should avoid creating a higher bureaucratic burden for contracting entities and companies, provide legal certainty for EU businesses, include special provisions on SOEs and subsidised entities and take into account the specificities of European companies with international supply chains. It should be conceived so as to strengthen unity within the EU.

Furthermore, the EU needs to ensure that the IPI does not result in a worsening of relations with partner countries. In order for the IPI to serve its purpose, it should be combined with efforts to encourage more countries to join the GPA as well as with an ambitious bilateral trade agenda, giving primacy to dialogue and consultation.

In terms of technical detail, BusinessEurope would advance the following comments.

a) Scope of the IPI

Distinction between covered and non-covered goods and services

- **Current proposal:** The 2016 proposal makes a distinction between “covered” and “non-covered” goods and services (Article 1(4) in conjunction with Article 2(1)(d) and (e)). Covered goods and services originate in a country with which the EU has concluded an international agreement in the field of public procurement. The current IPI proposal only applies to non-covered goods and services.
- **Our concern:** Being party to the GPA or having a trade agreement with the EU is no guarantee that a third country’s public procurement market is *de facto* open. Experience has shown that even countries which are parties to the GPA may not provide satisfactory access to procurement markets. Furthermore, recent rhetoric by the U.S. that they may withdraw from the GPA is not

¹⁴ Ursula von der Leyen, “[Mission Letter to Phil Hogan](#)” and “[Mission Letter to Thierry Breton](#)”, 2019, p. 5.



contributing to a favourable situation for EU companies. Additionally, countries such as China whose market is closed and whose subsidies distort our market are meanwhile urgently asked to join the GPA.¹⁵ The crisis of the WTO's dispute settlement system could put at risk the ability of the EU to enforce its rights ensuring that third countries respect their market access commitments.

- **Our suggestion:** The scope of the IPI Regulation should not be expanded beyond the current proposal; therefore, it should continue to apply to all “non-covered” goods and services. However, improving the conditions for and ensuring real market access in countries with which we have international agreements on public procurement (“covered” goods and services) should also be a priority for the EU, even if this is not addressed in the context of the IPI Regulation. In such cases, the relevant provisions of international agreements on public procurement need to be strictly applied. For instance, in an approach similar to the country reports delivered in the context of anti-dumping investigations, European authorities should be able to conduct in-depth investigations on whether European companies are affected by discriminatory measures both in covered and non-covered areas. These country reports should be made public. If the investigation concludes that in a third market European companies are being discriminated against, the type of action that follows should depend on whether that country is *de jure* covered by an international agreement or not.
 - For “non-covered” goods and services, the relevant provisions provided in the context of the IPI Regulation shall apply. By this, we mean any further investigation that may be necessary under Article 6 and consultation with the third country under Article 7.
 - For “covered” goods and services, the EU should not be afraid to resort to the dispute resolution measures within the scope of the applicable international agreement¹⁶. If cases are pursued in the WTO, it is important that alternative solutions apply, should the current blockage of access to the Appellate Body persist¹⁷.

Moreover, the European Commission should publish a list of countries covered by international agreements with provisions on public procurement to clarify the type of action to be taken. Least-developed countries should be exempted from the regulation as is currently stipulated in Article 4 of the 2016 proposal,

¹⁵ China has submitted another [revised offer](#) for joining the GPA in October 2019, after earlier offers were deemed not sufficient by the community of the GPA member countries.

¹⁶ For parties to the GPA: the Agreement foresees two independent mechanisms for settling disputes: (1) So-called “domestic review mechanisms, which are established at national level. (2) The WTO Dispute Settlement mechanism. Only a few times has the latter been used. (source: WTO, https://www.wto.org/english/tratop_e/gproc_e/disput_e.htm)

For partners with which the EU has concluded FTAs with Public Procurement chapters: Provisions on public procurement are usually covered by the State-to-State Dispute Settlement provisions of the FTAs. This dispute settlement option has never been used so far by the EU.

¹⁷ In this regard, we welcome the entering into force of the Interim appeal arrangement for WTO disputes (<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143>).



although it should be ensured that the risk of circumvention (by a targeted country) is eliminated.

Further restrictive measures going beyond the IPI

- **Current proposal:** Article 1(5) stipulates that Member States or contracting authorities cannot apply restrictive measures towards foreign bidders beyond those provided for in the IPI regulation.
- **Our concern:** There is discrepancy between Article 1(5) of the proposed Regulation and the European Commission Communication of 24 July 2019 on “*Guidance on the participation of third country bidders and goods in the EU procurement market*”. In this context, it is stated that “... economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded”¹⁸. Furthermore, this article is incompatible with the emphasis on the principle of reciprocity laid down in the EU’s General Notes under the GPA in the area of utilities sectors, which were transposed into EU law through Articles 85 and 86 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors¹⁹. It is also incompatible with a special note on annex 6 of the same agreement, which provides for reciprocal market opening on an individual basis at the Member State level for the construction industry.
- **Our suggestion:** Article 1(5) should be deleted from the proposed Regulation.

List of contracting authorities

- **Current proposal:** Article 9 establishes that Member States would provide a list of appropriate contracting authorities to the European Commission. The Commission would then determine which entities are concerned by action taken in the context of the IPI.
- **Our concern:** While it may eventually be laudable to guarantee that smaller contracting authorities – with less procurement resources and experience – will not be impacted by the IPI, a potentially higher threshold on the value of contracts than the one proposed in the draft Regulation may limit negative consequences. In addition, Article 9 can lead to market fragmentation, in that each Member State would have discretion on choosing which contracting entities to include in the list.
- **Our suggestion:** The article should not lead to a fragmentation of the European market or to loopholes in the implementation of the IPI and should therefore be reconsidered. For instance, national legislators may look at the possibility to subject to the IPI Regulation only those EU contracting authorities

¹⁸ <https://ec.europa.eu/docsroom/documents/36601>, also footnotes 2 and 11.

¹⁹ Cf. General Notes of the EU, Appendix I Annex 7 number 2 of the GPA; see also dedicated section later in the document.



that are regularly dealing with contracts equal or above the agreed threshold under the IPI Regulation.

Further comments

There has been debate about limiting the scope of application to certain sectors of activity or to municipalities above a certain population level. Even though the 2016 proposal does not include such provisions, we call on the European Commission not to include such measures in a future revised proposal. Such measures would create unnecessary loopholes, increase the complexity of the Regulation, and could result in higher administrative burden for companies and public authorities alike.

b) Investigation and consultation procedures

Length

- **Current proposal:** According to Articles 6(2) and 7(6), the investigation and consultation procedures could take up to 27 months in total. The investigation stage could take 12 months (8 months plus 4 months extension) and the subsequent consultation could take 15 months.
- **Our concern:** These periods are considerably lengthy and they are not adapted to the reality of procurement timelines.
- **Our suggestion:** Reducing the investigation and consultation procedures is crucial. However, this should not take place at the expense of the quality of the investigation and consultation processes. Regarding the investigation stage, the European Commission should make use of publicly-available data on barriers to public procurement – in particular, the database it acquired with the International Public Procurement Initiative. Additionally, there are already exhaustive studies documenting these barriers. Therefore, the investigation period should last up to 6 months (a basic 3 months period, plus a 3 months' extension, if necessary).

Regarding the consultation stage, the European Commission may follow a differentiated approach: (1) If the country in question is unable or unwilling to launch negotiations on market access, the consultation should be terminated within 3 months. (2) However, if the country wishes to engage, the timeframe should be maximum 3 months to define the scope of negotiations and 6 months to negotiate, arriving at a total of 9 months.

Further comments

Article 7(2) references “satisfactory remedial and corrective measures” which are different from market access commitments. We would appreciate further clarification on the meaning of the term “satisfactory” under this article.



c) Penalties

Rules of Origin

- **Current proposal:** The 2016 IPI proposal determines the origin of a good or a service in Article 3, combined with Article 8(1). This process, according to many experts and business operators can be very complex. The penalties are triggered if more than 50% of the total value of the goods in the tender originates from the targeted third country. The origin of a service, on the other hand, is determined by the country of origin of the economic operator providing for it.
- **Our concern:** The proposed rules of origin method will often lead to complex investigations and could cause new bureaucratic burden and new legal uncertainties for EU businesses and contracting authorities²⁰. During the tendering stage, businesses may not have full visibility on the origin of 100% of the goods that they will use during the execution of the contract. Furthermore, such a rule implies that contracting authorities and bidders would have to undergo a cumbersome verification of origin during the evaluation of the tenders and the execution of the project. This poses a considerable risk in case of erroneous assessment. It is not clear what would happen if an economic operator declared compliance at the tendering stage but then failed to meet the 50% threshold during the execution of the contract. Calculating the share of the content is difficult and so is evaluating an entire supply chain. This provision could also have the unintended effect of negatively impacting European companies with international supply chains. Under the current proposal, a tender comprised of 51% of products originating from the targeted third country and 49% from the EU would be subject to the price penalty - thereby hurting European companies and jobs.
- **Our suggestion:** Shifting the focus from the origin of the goods to the bidding entity instead, we suggest to apply Article 8 as follows:

- Ex ante verification:

(1) if the bidding entity is legally established in (or controlled²¹ by a company from) a closed third country without an agreement with the EU on public procurement; (2) if the bidding entity is an SOE from a closed third country, or a foreign subsidiary controlled by an SOE of such a country, following the investigation and consultation processes foreseen in the IPI Regulation. In those two situations, the penalty (price adjustment measure or exclusion) should be directly applied (cf. more details under section price adjustment measure/automatic exclusion below).

- Ex post verification:

²⁰ In this regard, framework agreements should also not be negatively impacted.

²¹ "Controlled" means to be controlled by a majority of shares of a company or a majority of voting rights or of powers of decision.



It should be ensured that the Regulation is not circumvented. As a solution, we propose that the winning bidders commit in the contractual obligations that they do not source from targeted countries more than 50% of the value of the goods used in the execution of the contract. In cases where winning bidders do not respect this obligation, appropriate measures shall be in place²².

An exception to the duty to commit to the provision described above should be granted to European bidders who can prove that their company is not controlled²³ by stakeholders from targeted third countries. The condition for granting this exception should be that the company of the winning bidder is not directly or indirectly controlled by stakeholders from third countries which have not signed an agreement with the EU on public procurement and which have been identified as countries locking up their own markets according to the investigation of the European Commission.

It is our view that such an ex post verification is less burdensome both for companies and public authorities, who could use for instance customs declarations to verify the origin of goods and/or services. Furthermore, it would be limited to the winners of bids.

No changes to the 2016 proposal are required regarding the determination of the origin of a service.

Note on SOEs: Our proposal in the context of the draft IPI Regulation attempts to address the concern that European companies face increasingly unfair competition from SOEs and other subsidised entities. The inclusion of specific provisions in this context should not lead to additional burden for European companies and should avoid affecting negatively subsidiary entities or consortia that operate in the EU and in accordance with EU law. Besides, there are currently on-going discussions at EU level to develop EU rules to address distortions caused by third-country SOEs in the EU Single Market and specific proposals of the European Commission are expected in the course of 2020. These proposals, as well as the approach that the EU follows on SOEs in the context of its most recent trade agreements²⁴, should be taken into account when developing specific provisions on SOEs in the IPI Regulation.

²² A remedial measure that can be proposed in this case is the introduction of a fine, representing a percentage of the value of the contract. As seeking damages in cases of alleged breaches of contract can be a long and costly process and taking into account that these processes are not harmonised among the EU Member States, the Regulation has to introduce a clear measure that all EU Member States will abide by and implement in the context of the IPI.

²³ "Controlled"- means to be controlled by a majority of shares or voting rights/powers of decision by a company, public entity, legal or private person seated in the respective third country.

²⁴ For instance, Chapter 13 of the EU-Japan Economic Partnership Agreement on "State-Owned Enterprises, Enterprises granted special rights or privileges and designated monopolies": http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf#page=348.



Threshold

- **Current proposal:** Penalties under the current IPI proposal shall only apply to tenders equal to or above EUR 5 million exclusive of value-added tax (VAT).
- **Our concern:** Although the value may be considered low, the risk that the public procurement market may be seriously undermined in this particular segment by the distortive practices of companies from third countries remains very high.
- **Our suggestion:** The threshold for the application of penalties could be increased from EUR 5 million to EUR 10 million maximum. However, a potential increase of the threshold should be carefully assessed by the European Commission in order to avoid that it may have a negative impact in procurement markets, taking into account the characteristics of the different sectors, as well as considering the alignment with the Public Procurement Directive. To offer an example, it is often the case that contracting authorities split their projects into smaller tenders to enable SMEs to bid and compete. This increases the risk of bidders from countries targeted by the IPI Regulation to get around a higher threshold. In this regard, an option would be to increase the threshold for a limited number of sectors, while maintaining the threshold at the EUR 5 million-level for others. Moreover, a review clause could be included in the Regulation, allowing for the potential reassessment of the threshold after a reasonable period of time following the entering into force of the Regulation.

Price adjustment measure / automatic exclusion

- **Current proposal:** The price adjustment measure consists of a penalty of up to 20% to be calculated on the price of the tender concerned.
- **Our concern:** This mechanism should meet three conditions:
 1. It must be a deterrent, a credible tool to ensure that IPI is effective in achieving the removal of barriers in procurement markets in third countries.
 2. It should not create additional administrative burden for EU companies.
 3. It must be used in cases of minor offenses only, and determined by the European Commission in its initial investigation. The penalty of exclusion of the European market must be the one to be applied in cases of major offenses (when third countries' markets are closed to European enterprises, or in cases of severe disturbance in view of unacceptable performance by enterprises from such countries in European markets).

If the price adjustment measure is applied at the tendering stage, then its added-value is not clear. SOEs or other subsidised companies are often interested in gaining market share and not just turning a profit, which would make them bid in a tender regardless of price penalties. Since they benefit from distortive subsidies, the price penalty of up to 20% would still allow them to compete on price vis-à-vis other offers. As long as anti-subsidy rules for goods at WTO remain ineffective, and in the absence of anti-dumping and anti-subsidy rules for services in the WTO as well as the EU, SOEs and subsidised entities



would still not be deterred from applying aggressive market penetration strategies. For instance, the price adjustment measure, as is currently proposed, could incentivise third countries targeted by the IPI to focus their market penetration strategies where the measure could be more easily overcome. This would also contribute to the fragmentation of EU market and would play against the unity among EU Member States.

Our suggestion: We propose different actions depending on whether the bidder is an SOE from a third country or not. If the bidder is an SOE or a subsidiary of an SOE, its offer should be automatically rejected following the investigation and consultation procedures. This should also apply to SOEs bidding as part of a consortium. The European Commission could resort to already agreed upon definitions of SOEs as laid out in recent trade agreements²⁵ and also support EU Member States by providing further information on identified barriers linked to SOEs. If the bidder is not an SOE from a third country relevant to the IPI Regulation or controlled by such an SOE, a price adjustment measure should be applied, except in cases of major offenses, for instance when third countries' markets are closed to European enterprises or in cases of severe disturbance in view of unacceptable performance by enterprises from such countries in European markets.

Nevertheless, the price adjustment should be higher than 20% which has been proposed in the Commission's amended proposal of 2016. Given that underbidding reaches different levels between sectors, this price adjustment measure should be flexible and easily reviewed. At the same time, as businesses would like to avoid that the percentage of the price adjustment measure varies considerably among different EU Member States, we would like to propose that the European Commission proposes a percentage, depending on the extent of the barriers and distortions.

Derogations

- **Current proposal:** Article 12(1) determines that the penalty shall not apply to a given procurement procedure if its application “would lead to a disproportionate increase in the price or costs of the contract.”
- **Our concern:** This provision is too far-reaching, leaving too much room for interpretation. Given that there is a tendency for contracting authorities to award contracts based on price alone, it would be likely that they could easily

²⁵ See, for example, [chapter 13](#) of the EU-Japan Economic Partnership Agreement:

An enterprise that is engaged in commercial activities in which a Party:

- (i) directly owns more than 50 per cent of the share capital;
- (ii) controls, directly or indirectly through ownership interests, the exercise of more than 50 per cent of the voting rights;
- (iii) holds the power to appoint a majority of members of the board of directors or any other equivalent management body; or
- (iv) has the power to legally direct the actions of the enterprise or otherwise exercises an equivalent degree of control in accordance with its laws and regulations.



opt for this provision. The IPI would therefore be weakened, and the EU would fail to address distortions in competitions and dumping practices.

- **Our suggestion:** This article should be deleted. However, it should be stressed that provisions guaranteeing that the bidder affected by a penalty is granted legal protection and can appeal the decision exist at national level.

Existing penalty framework at national level

- **Current proposal:** Article 17 of the proposed regulation determines that articles 85 and 86 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors shall be deleted. These articles provide the possibility for procuring entities to reject any offers where the proportion of the goods originating in third countries exceeds 50% of the total value of the tender.
- **Our concern:** These provisions already form part of the EU public procurement framework, and they are an already actionable safeguard. They send a clear signal to third countries which have not yet made market access commitments. Removing them would weaken the EU's toolbox.
- **Our suggestion:** Article 17 should be deleted from the proposed Regulation. Hence, articles 85 and 86 of Directive 2014/25/EU should be maintained. We do understand that verification of origin of goods is cumbersome and that these provisions have rarely been used in practice. A review clause could be added to assess, for instance 4 years after the entry into force of the IPI, the efficiency of the Regulation to open new procurement markets and, in case the results would not be satisfactory, as a last resort, make Articles 85 and 86 of Directive 2014/25/EU mandatory for EU-funded projects in order to reinforce the leverage on third countries that are not willing to cooperate.