



European Economic and Social Committee

REX/465
International Procurement
Instrument

Brussels, 27 April 2016

OPINION

of the
European Economic and Social Committee
on the

Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries
(COM(2016) 34 final – 2012/0060 (COD)).

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Rapporteur: **Mário Soares**
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On 29 January and 4 February 2016 respectively, the European Commission and the European Parliament decided to consult the European Economic and Social Committee, under Articles 207 and 304 of the Treaty on the Functioning of the European Union, on the

Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM(2016) 34 final – 2012/0060 (COD)).

The Section for External Relations, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 19 April 2016.

At its 516th plenary session, held on 27 and 28 April 2016 (meeting of 27 April 2016), the European Economic and Social Committee adopted the following opinion by 223 votes to three, with seven abstentions.

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1. Conclusions and recommendations

- 1.1 The EU carried out a more ambitious integration and liberalisation of European public procurement in connection with the revision of the Government Procurement Agreement (GPA), trade negotiations with third countries and recently concluded trade agreements. These reforms have resulted in European public procurement being more open to companies from developed and emerging countries, but these countries have not responded to this opening with equivalent action and EU companies still encounter restrictive and discriminatory practices in third countries. This openness is particularly necessary given that public procurement represents approximately 20% of global GDP and that, in the context of the current crisis, public infrastructure investment and works and supply contracts in developed and emerging economies will be key drivers of economic growth in the coming years.
- 1.2 In several of its opinions, the European Economic and Social Committee (EESC) has endorsed the European Union's goal of opening up public procurement in all countries to international competition. The Committee has also stressed the need to simplify the rules on public purchasing, particularly for SMEs, but also the need to ensure compliance with the principles of transparency, non-discrimination and equal treatment. It has also called on several occasions for the social and environmental dimensions as well as respect for fundamental human rights and consumer protection to be duly strengthened in the conduct of European trade policy, in accordance with Article 207 of the Treaty on the Functioning of the

European Union, which calls for greater coherence with the principles and objectives of the Union.

- 1.3 The Committee understands the Commission's concern to ensure greater openness of public procurement to EU companies in third countries, and it recognises the leverage potential of the amended proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement, which is the subject of this opinion.
- 1.4 The Committee considers that the proposal for a Regulation can be a first step towards achieving greater openness of public procurement, for example in the current negotiations in the context of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA, and in the negotiations for a trade agreement with Japan or the negotiations for China's accession to the World Trade Organization (WTO) Government Procurement Agreement, as public procurement in these countries is less open than in the European Union, but also vis à vis countries which are not signatories to the GPA, like Russia, Brazil and Argentina.
- 1.5 However, the Committee is aware that there are profound disagreements in the Council and the European Parliament on the relevance and effectiveness of the proposal for a Regulation.
- 1.6 The Committee stresses the absolute need to ensure that competition with third-country businesses in the context of public procurement is free and undistorted. The EESC doubts, however, that the current proposal for a Regulation can achieve the objective of the balanced opening-up public procurement in third countries. The Committee believes that the new proposal for a Regulation is unambitious, its scope being limited to a price adjustment for contracts of a value equal to or greater than EUR 5 000 000, and points out that only 7% of public purchasing contracts exceed EUR 5 000 000 in value. It also considers that the maximum penalty of 20% of the price of the tender is insufficient and should be examined on a case-by-case basis. The Committee suggests applying adjustment measures to prices for contracts whose estimated value is equal to or greater than EUR 2 500 000.
- 1.7 The Committee also wonders whether the prohibition on Member States applying restrictive measures going beyond those laid down in the Regulation is not equivalent to *de facto* liberalisation of access for non-EU companies to public procurement below the threshold of EUR 5 000 000, without reciprocal access for EU companies. The Committee therefore stresses the urgent need for balanced opening of, and reciprocal access to, public purchasing between the EU and third countries.
- 1.8 The Committee also deplores the fact that the proposal for a Regulation contains no reference to the objective of sustainable development, although the Commission highlights this objective as a key element of its Trade for All Communication, and although it has stated on

several occasions that it will take account of sustainable development in all relevant areas of free trade agreements (energy, raw materials and public procurement)¹.

- 1.9 The Committee regrets the abolition of Articles 85 and 86 of Directive 2014/25 by the new Regulation because these provisions are more ambitious and more in tune with the objective of taking sustainable development into account, since they include a social dimension relating to the difficulty for European companies of winning public procurement contracts in third countries as a result of non-compliance with international labour law provisions in these countries. The Committee also believes that it would be useful to reflect further on the possible inclusion of some of their elements in the current proposal for a Regulation.
- 1.10 The Committee therefore believes that the Regulation should develop a more ambitious approach to promoting the objectives of sustainable development, respect for fundamental rights and consumer protection in public procurement procedures in third countries. In the Committee's view, the failure to comply with these fundamental rules could have a negative impact on the competitiveness of European enterprises, and it considers that the definition of restrictive measures or practices in Article 2 of the proposal should include failure to comply with these fundamental rules. The Committee also believes that the report to be submitted by the Commission by 31 December 2018 at the latest, and at least every three years thereafter (Article 16 of the proposal), should relate not only to economic operators' access to procurement procedures in third countries but also to compliance in procurement procedures in third countries with social and environmental rules, respect for fundamental human rights and consumer protection; the Commission's reports on the implementation of the Regulation should also take account of these factors.
- 1.11 The EESC expects the current proposal for a Regulation to stress that companies from third countries participating in public procurement procedures in the EU are required to comply with provisions promoting respect for sustainable development and the strengthening of the social and environmental dimensions as well as fundamental human rights, consumer protection, and the social and professional integration or reintegration of people with disabilities, as set out in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on public procurement. This respect is essential for free, undistorted competition in the internal market.
- 1.12 The Committee strongly supports the non-application of the Regulation to least developed and more vulnerable countries within the meaning of the GSP Regulation, but reminds the Commission that further steps should be taken to promote the participation of the least developed and more vulnerable countries in EU public procurement.
- 1.13 The Committee also endorses the non-application of the Regulation to European SMEs. However, it wishes to remind the Commission that SMEs need special assistance for access to both cross-border markets in the EU and public procurement in third countries.

¹ See [COM\(2015\) 497 final](#).

2. Context

- 2.1 The Committee has been asked by both the Commission and the European Parliament to adopt an opinion on the Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries.
- 2.2 Public procurement spending is generally estimated at around 20% of global GDP. In the context of the current crisis, public infrastructure investment and works and supply contracts in developed and emerging economies are likely to be a key driver of economic growth in the coming years.
- 2.3 The EU has progressively integrated and opened up its public procurement through greater liberalisation in connection with the revision of the WTO's Government Procurement Agreement, which entered into force in April 2014, and trade negotiations with third countries [in particular recently concluded trade agreements (for example the EU-Korea, EU-Central America, EU-Colombia/Peru, EU/Moldova, EU-Georgia and EU-Ukraine agreements)].
- 2.4 However, European companies still encounter restrictive and discriminatory practices in third countries. These are due to a number of factors:
- certain other countries that are signatories to the GPA (signed by 43 WTO members) have not entered into commitments as significant as the EU's. Thus, the EU has opened up 80% of its public procurement, while the other developed countries have opened up only 20%. The EU has opened up public procurement for an amount of around EUR 352 billion to tenderers from countries which are parties to the GPA, whereas more than 50% of global public procurement by value is closed to competition, which means that the EU's exports are limited to EUR 10 billion, a loss of around EUR 12 billion;
 - China is still negotiating its accession to the Agreement, even though it undertook to join the Agreement on its accession to the WTO in 2001. Russia also undertook to begin negotiations to accede to the Agreement within four years of its accession to the WTO in 2012. Russia's integration into the GPA may take even longer than China's;
 - a number of major actors which are members of the G20 (Brazil, India, Argentina) do not wish to join the GPA, and bilateral negotiations with these countries are unlikely to be completed in the near future.
- 2.5 It should also be noted that many of the EU's trade partners maintain preference for their national producers or products, or preference for SMEs (e.g. the Buy American Act in the USA, the Buy Chinese policy in China, preferential margins imposed by law in Brazil and

regional preferences in Australia), which effectively prevents EU companies from participating in this public procurement².

- 2.6 European companies are often unable to participate effectively in public purchasing in third countries by cross-border barriers (such as different certification and standardisation rules, licensing procedures, non-transparent or discriminatory procedures etc.) which are all the more technically complex and problematic, the longer the process of identifying, analysing and eliminating them and the more restrictive the relevant standards and practices. This has already been pointed out in a previous Committee opinion.
- 2.7 The situation is complicated by the EU's lack of leverage for obtaining a substantial opening-up of public procurement in third countries; for several years the EU has been trying to develop an instrument making it possible to introduce restrictions in the absence of reciprocity or in the event of discriminatory and restrictive measures being imposed on European companies by third countries.
- 2.8 It should be noted, however, that the EU has been and is able to restrict access to EU public procurement for companies from countries which do not grant EU companies the same treatment that their companies enjoy in the EU in relation to public procurement in the water, energy, transport and postal services sectors. This facility has, however, never been used. **Directive 2004/17** (as amended by **Directive 2014/25 which enters into force on 18 April 2016**) made it possible to reject tenders containing more than 50% of products originating in third countries with which the EU has not concluded international agreements (Article 58), and for the Commission (Article 59) to propose that the Council decide to suspend or restrict, for a specific period, access to public procurement in the European Union for companies from countries which do not grant the same treatment as that enjoyed by their companies in the EU, or for countries where these difficulties arise from non-compliance with international labour standards. These provisions are taken over in Articles 85 and 86 of Directive 2014/25.
- 2.9 The general directive on public contracts **2004/18** (as revised by **Directive 2014/24**) does not contain any comparable provisions; as a result, different practices existed and still exist in the various Member States with regard to foreign tenderers and bids containing products or services originating in third countries. Some Member States practised equal treatment, while in others this depended on the existence of international obligations arising from the WTO's GPA or bilateral treaties.
- 2.10 To remedy the lack of provisions in the general directive on public contracts and the fact that some third countries do not want to open their public procurement to international competition, but benefit from relatively easy access to the European market, in 2012 the

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Opinion of the European Economic and Social Committee on Third country state-owned enterprises in EU public procurement markets, [OJ C 218, 23.7.2011, p. 31](#).

Commission submitted a proposal for a Regulation introducing some reciprocity into access to public procurement.

- 2.11 The Commission's first 2012 proposal reiterated the general principle that foreign goods and services benefiting from EU market access commitments are treated in the same way in procurement procedures as goods and services originating in the EU; it also extended this treatment to goods and services originating in the least developed countries.

For goods and services not benefiting from market access commitments, the proposal was based on two pillars:

- **The decentralised pillar (Article 6)** which allowed the contracting entity to notify the Commission of its intention to reject a tender where the value of goods and services not covered by international commitments exceeded 50% of the total value of goods and services included in the tender. The Commission could give its consent if there was a lack of substantial reciprocity between the EU and the country from which the goods and services originated. The Commission would also approve the exclusion where the goods and services concerned fell within the scope of a market access reservation expressed by the EU in the context of an international agreement.
- **The centralised mechanism (Article 8 to 13)**, which allowed the Commission to initiate an investigation. An investigation could be initiated by the Commission on its own initiative or at the request of a Member State or an interested party, in order to verify the existence of restrictive procurement practices in third countries. The Commission was allowed to consult with the country concerned in order to resolve the problem and improve the conditions for EU companies' access to the market of that country or, in the event of failure, to impose temporary restrictive measures. Such restrictive measures could in principle consist of the exclusion of tenders where more than 50% of the goods or services originated in the third country concerned (closure of the European market) or the application of a mandatory price penalty to tendered goods and services originating in the third country concerned. The investigation by the Commission had to be concluded within a period of nine months. In duly justified cases, the period could be extended by three months.

- 2.12 In 2014 the Parliament adopted a report³ expressing some opposition to the decentralised procedure. According to the Parliament, only the Commission, and not local authorities, can decide to exclude a tender, as international trade is an exclusive competence of the EU. It has therefore proposed that the decentralised procedure be integrated into the centralised procedure. Other points of disagreement were also raised, such as the lack of reciprocity regarding compliance with social and environmental rules and core ILO standards and the non-definition of lack of substantial reciprocity. Parliament also proposed a presumption of lack of reciprocity in the event of failure to comply with international labour law provisions.

³ P7_TA (2014)0027.

Parliament is also concerned that the Regulation does not defend European environmental and social rules.

- 2.13 The first reading in the Council did not result in a decision. Some fifteen Member States did not fully agree with the proposal and formed a blocking minority. The main countries involved were Germany, the United Kingdom, the Netherlands and Sweden, as well as certain Eastern European countries. They expressed a concern that such an instrument could be seen as protectionist at global level. The countries supporting the proposal, led by France, obtained a technical discussion in 2014, and it was hoped that a consensus could be reached during the Italian presidency (in the second half of 2014). Unfortunately, however, this did not happen and the Commission adopted a revised proposal in January⁴ in the hope of breaking the deadlock in the Council.

3. General comments

- 3.1 The Commission is presenting the new proposal in order to correct certain negative effects of the previous proposal. In the new proposal, the Commission is abolishing the decentralised procedure, which was criticised for imposing a heavy administrative burden and promoting a degree of fragmentation of the internal market. It is also abolishing the option of total closure of the European market, while retaining the option to impose, following a Commission investigation, 20% price penalties on tenders consisting of more than 50% goods and services originating in countries applying restrictive or discriminatory practices. This price adjustment measure only applies to contracts with an estimated value equal to or greater than EUR 5 million, which the Commission believes would reduce the risk of retaliation by third countries. The proposal also provides that the price adjustment measure will not apply to European small and medium-sized enterprises (SMEs) or to bidders or products originating in the least developed and more vulnerable countries, as defined by the Regulation on the generalised system of preferences (GSP)⁵.
- 3.2 On various occasions, the EESC has endorsed the European Union's goal of greater openness of public procurement in all countries to international competition, but the Committee has also stressed the need to ensure compliance with the principles of simplification of rules on public procurement, transparency, non-discrimination, equal treatment, social and environmental responsibility and respect for fundamental rights⁶.
- 3.3 The Committee understands the Commission's concern to ensure greater openness of public procurement to EU companies in third countries. The Committee also shares the view that a

4 [COM\(2016\) 34 final](#).

5 [Regulation 978/2012](#).

6 Opinion of the European Economic and Social Committee on International public procurement, adopted on 28 May 2008, rapporteur Mr Malosse, [OJ C 224, 30.8.2008 p. 32](#); and Opinion of the European Economic and Social Committee on Third country state-owned enterprises in EU public procurement markets, [OJ C 218, 23.7.2011, p. 31](#).

proposal for a Regulation of this kind can be a first step in the public procurement negotiations in the context of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA, in the trade negotiations with Japan and the negotiations for China's accession to the GPA, as public procurement in these countries is less open than in the European Union, but also vis à vis countries which are not signatories to the GPA, like Russia, Brazil and Argentina.

- 3.4 The EESC doubts, however, that, once adopted, the Regulation can achieve the objective of opening up public procurement in third countries. The Committee believes that the new proposal for a Regulation is unambitious, its scope being limited; its impact on the openness of public procurement in third countries is very uncertain and could also be very limited.
- 3.5 According to the Commission itself, only 7% of all public procurement procedures are for an amount of more than EUR 5 000 000. However, they represent 61% of EU public procurement procedures by value. However, given that the Regulation will apply only to those contracts not covered by EU international commitments, it is worth asking what proportion of public procurement which will be covered, in particular after the possible accession of China to the GPA and the possible finalisation of the negotiations with the USA and Japan. It may apply only to a very small number of contracts and a very small number of countries, which would significantly reduce the benefit of the Regulation. The Committee suggests applying price adjustment measures to contracts with an estimated value equal to or above EUR 2 500 000.
- 3.6 It is also regrettable that, in the proposal for a Regulation, there is no reference to sustainable development, which the Commission nevertheless highlighted in its Trade for All Communication, in which it says that it will take account of sustainable development considerations in all relevant areas of free trade agreements (e.g. energy, raw materials and public procurement)⁷. The social and environmental dimensions as well as respect for fundamental human rights and consumer protection need to be duly strengthened in the conduct of European trade policy, in accordance with Article 207 of the Treaty on the Functioning of the European Union, which calls for greater coherence with the principles and objectives of the Union.
- 3.7 The new Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on public procurement and concessions aim to promote respect for sustainable development and the strengthening of the social and environmental dimensions as well as fundamental human rights, consumer protection, and the social and professional integration or reintegration of people with disabilities. This respect is essential for free, undistorted competition in the internal market. The EESC thinks that it will be helpful if the current proposal for a Regulation stresses that companies from third countries participating in public procurement procedures in the EU are bound to comply with these provisions.

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See [COM\(2015\) 497 final](#).

- 3.8 The Commission indeed speaks of restrictive measures or practices but makes no reference to the difficulty of winning public contracts in third countries as a result of non-compliance by competitors with social and environmental rules, and with fundamental human rights and consumer protection rights. In the Committee's view, the failure to comply with these fundamental rules could have a negative impact on the competitiveness of European enterprises, and it considers that the definition of restrictive measures or practices in Article 2 of the proposal should include failure to comply with these fundamental rules. The Committee also believes that the report to be submitted by the Commission by 31 December 2018 at the latest, and at least every three years thereafter (Article 16 of the proposal), should relate not only to economic operators' access to procurement procedures in third countries but also to compliance in procurement procedures in third countries with social and environmental rules, respect for fundamental human rights and consumer protection; the Commission's reports on the implementation of the Regulation should also take account of these factors.
- 3.9 The success of the new Regulation seems doubtful in view of the divisions in the Council which are the source of the deadlock. Indeed, the removal of the decentralised pillar could lead to a new deadlock, particularly in view of the other changes.

4. **Specific comments**

- 4.1 The Committee welcomes the clarification provided by Article 1(5) of the proposal for a Regulation that Member States may not apply restrictive measures in respect of third country economic operators, goods and services beyond those provided for in the Regulation. This has the advantage of bringing greater uniformity to the application of EU public procurement rules to foreign operators. The Committee wonders, however, whether this prohibition does not amount to *de facto* liberalisation of European public procurement, without any *quid pro quo*, for third-country businesses below the EUR 5 000 000 threshold. Currently, some Member States apply restrictions on public procurement not covered by international obligations, and Article 85 of Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors expressly provides for the possibility of rejecting tenders where more than 50% of the value of products originates in countries with which the EU has not concluded international commitments. This article will be deleted by the proposal for a Regulation.
- 4.2 The Committee fully endorses the non-application of the Regulation to the least developed and more vulnerable countries within the meaning of the GSP Regulation (Article 4) and, so that this exclusion can be effective and can benefit the least developed countries and their businesses, it calls on the Commission to include explanations on public procurement in the European Union and a link to the Official Journal (TED) publications in the *Export Helpdesk* for developing countries, in order to ensure the necessary technical assistance to enterprises in developing countries wishing to obtain information on the operation of public procurement rules in the European Union.

- 4.3 The Committee also endorses the non-application of the Regulation to European SMEs (Article 5). However, it wishes to remind the Commission that SMEs need special assistance for access to both cross-border markets in the EU and public procurement in third countries. This approach is compatible with the particular attention paid to SMEs in the Commission's Trade for All Communication. The goal of improving SMEs' access to public procurement should be stipulated in the SME chapter of the TTIP in particular, as well as in future trade agreements incorporating such chapters. The EESC has already spoken out against the establishment of quotas for SMEs in public procurement, on the model of the US *Small Business Act*, but calls for a proactive policy to support the participation of SMEs in order to enable them to access a larger number of public procurement contracts⁸. The Committee has also highlighted the need to improve the Commission's Market Access Database to ensure that, on the one hand, it contains reliable and accessible information on invitations to tender, the formalities and the technical specifications which effectively prevent participation in third countries and, on the other hand, provides statistics and indicators of the impact of distortions⁹.
- 4.4 The Committee understands the Commission's concern regarding the absence of a legal instrument enabling it to ensure effective access for European businesses to public procurement contracts in third countries, as Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules does not apply in the absence of an international agreement. However, the investigation procedure laid down in Articles 6 to 8 of the Regulation seems to be particularly slow and inefficient. First, the Committee expresses its doubts on the Commission's broad discretionary power to decide whether or not to carry out an investigation. Furthermore, contrary to Commission claims, the duration of the investigation has not been reduced in the new proposal and the possible total duration remains 12 months. This seems particularly long, since in many cases, especially in cases where the Commission initiates an investigation on its own initiative, it will already have some of the information needed and will often have already raised the issue in the forum for dialogue with third countries. The Committee also understands that the investigation will be suspended during any trade negotiations. However, given the duration of trade negotiations and their implementation, it would be desirable to define the period of suspension, which should not exceed two years.
- 4.5 The Committee considers that the fact that the investigation may lead only to a 20% price adjustment for contracts of more than EUR 5 000 000, a provision which is moreover subject to a large number of exceptions, is insufficient and deprives the Regulation of its effectiveness.

⁸ Opinion of the European Economic and Social Committee opinion on International public procurement, adopted on 28 May 2008, rapporteur Mr Malosse, [OJ C 224, 30.8.2008, p. 32](#).

⁹ Opinion of the European Economic and Social Committee on Third country state-owned enterprises in EU public procurement markets, [OJ C 218, 23.7.2011, p. 31](#).

4.6 The Committee regrets the abolition of Articles 85 and 86 of Directive 2014/25 by the new Regulation because these provisions are more ambitious and more in tune with the objective of taking sustainable development into account, since they include social and environmental dimensions. The Committee also believes that it would be useful to reflect further on the possible inclusion of some of their elements in the current proposal for a Regulation.

Brussels, 27 April 2016.

The President
of the
European Economic and Social Committee

Georges Dassis
