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INTERNATIONAL PROCUREMENT DEVELOPMENTS IN 2016—PART V: POSSIBLE RISE OF EU PROTECTIONISM—A 2016 (POST BREXIT) UPDATE

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Although the EU's international obligations under the WTO Government Procurement Agreement (GPA) are contingent upon the existence of reciprocal commitments by other GPA member states, the EU has so far refrained from requiring reciprocity in its own legislative acts.

In January 2016, the European Commission presented an 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, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0034&from=DE>, hereinafter the “Amended Proposal”). Seeking to further open up international procurement markets, the proposed Regulation provides the Commission with a price adjustment tool to sanction foreign bidders participating in EU procurement whose home states are reluctant to grant comparable market access to EU bidders.

Given that the EU will need to rethink its stance on what privileges it is going to grant to non-members in the wake of Brexit, the proposed Regulation might play an increasingly important role as leverage to ensure reciprocity in trade negotiations between the EU and third countries, in particular the UK. It is not without a certain irony that the Regulation itself resorts to trade-restrictive measures in the pursuit of more trade liberalization. Yet this could be the first precursor of a general shift in EU trade policy towards less unilateral openness and more protectionism where reciprocal commitments cannot be agreed upon.

I. GENESIS OF THE AMENDED PROPOSAL

Historically, the EU has played an active role in promoting free access to worldwide procurement markets. In particular, it has sought to shape the WTO GPA and Revised GPA which are partially based on key features of the EU's own regulatory framework on public procurement (see Kamala Dawar, *The 2016 European Union International Procurement Instrument's Amendments to the 2012 Buy European Proposal: A Retrospective Assessment of Its Prospects*, 50(5) *Journal of World Trade* 845 (2016)).

Despite its footprint on the WTO agreements, the EU has not been satisfied with the pace at which the plurilateral liberalization of public procurement markets under the Revised GPA proceeded. The Commission claims that some EUR 352 billion of EU public procurement is open to bidders from GPA member countries while only a small fraction of that amount is open to EU bidders in foreign procurement markets.

As of now, there are no restrictions on the access of foreign goods and services into the EU's public procurement market except under the circumstances provided for in Articles 85 and 86 of the Utilities Directive (Directive 2014/25/EU). These provisions, however, are limited to procurement by utilities which concern public and certain private entities operating in the water, energy, transport, and postal services sectors. This only covers 20% of the total EU public procurement market. Moreover, the provisions only allow the Commission to propose that the Council adopt an implementing act to suspend or restrict the award of service contracts to bidders from third countries that do not grant EU bidders effective access to their own procurement markets. The Commission is thus not entitled to take any remedies itself. It is for these reasons that the Commission itself considers Articles 85, 86 of the Utilities Directive too narrow in their scope to make a substantial impact on negotiations on market access.

Furthermore, the Commission reports that several member states have already taken measures – or informed the Commission of their intention – to autonomously regulate access to their public procurement market. This runs contrary to the EU's exclusive legislative competence for the common commercial policy.

It is against this backdrop that the Commission adopted a First Proposal for a “Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union” on 21 March 2012 and suggested implementing the EU International Procurement Instrument (IPI) (COM(2012) 124 final, available at http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149243.pdf; see e.g. Rhodri Williams, *Commission proposals in relation to third country access*, 2012 Pub. Proc. L. Rev. NA169 for an overview of the First Proposal).

This First Proposal was met with criticism both by member states and commentators (see Dawar (2016) for a detailed account of the member states' various criticisms; for a business perspective, see e.g. the position paper of the International Chamber of Commerce at <http://www.icc.nl/docman-standpunten/docman-commissies/docman-commercieel-recht-praktijk/53-icc-statement-access-to-eu-internal-procurement-market/file>). In particular, three issues were identified. First, it was criticized that the Proposal would impose unreasonable administrative burden on contracting authorities and businesses. Second, reservations were expressed about the total closure of the EU public procurement market for bidders originating in non-compliant third states, even if only temporarily and in a targeted way. This might result in tit-for-tat protectionism. Finally, the distinction between a centralized and a decentralized pillar was rejected as creating the risk of fragmentation within the EU's internal market. Under the Commission's First Proposal, not only the Commission but also national procuring entities would have been entitled to exclude foreign tenders after seeking the Commission's approval.

As a consequence, the Council was unable to reach agreement on the First Proposal. After the European Parliament Plenary had endorsed the mandate for trilogue together with a list of amendments in January and October 2014, the Commission revised its First Proposal and presented its Amended Proposal on 29 January 2016.

II. PRICE ADJUSTMENT AT THE CORE OF THE AMENDED PROPOSAL

The Amended Proposal addresses these issues. In particular, it has renounced the distinction between a centralized and a decentralized pillar.

National contracting authorities can no longer autonomously ban foreign bidders from participating in their tenders. What is more, the Amended Proposal has mitigated the negative consequences for third countries that are found to impose barriers on EU participation in public procurement. Instead of fully excluding bidders originating in non-compliant countries, a price adjustment in the form of a surcharge of up to 20% would be applied to such offers (Article 8(2) Amended Proposal). The surcharge is only applied for the purposes of evaluating the different offers (Article 11(1)).

Before price adjustment measures can be taken, several conditions need to be fulfilled, the most salient of which are outlined hereinafter:

1. The Regulation would only apply to non-covered goods and services procured for governmental (i.e. non-commercial) purposes and would remain without prejudice to any international obligations of the EU, in particular under any bilateral free trade agreement or the WTO GPA (Article 1(3)-(4)).
2. There is an exemption for goods and services originating in least-developed and certain developing countries (Article 4) and for tenders submitted by small and medium-sized enterprises (Article 5).
3. The Commission's investigation must reach the conclusion that the concerned third country maintains restrictive and/or discriminatory procurement measures or practices that result in restrictions to access by EU bidders (Article 6).
4. Put simply, the third country must have failed to take satisfactory remedial or corrective measures within a certain time frame upon invitation to enter into consultations with the Commission (Article 7).
5. More than 50% of the total value of the tender must be made of goods and/or services originating in the third country that is found to impose undue barriers (Article 8(1)).
6. No adjustment measures may be taken if there are no suitable EU or covered goods or services available, or the measure would lead to a disproportionate increase in the price or costs of the contract (Article 12(1)).

It should be noted that the Amended Proposal imposes an extremely high threshold for any adjustment measure to be taken. In particular, the Commission's duty to perform an investigation into the third country's trade restrictions and to invite the concerned country to enter into consultations before taking any action will result in a process that requires a high degree of political coordination and is likely to take several years. While it remains to be seen what role the IPI will play in practice, it seems rather unlikely that the IPI will dramatically shift the balance of power in EU public procurement in the near future.

III. ECONOMIC IMPLICATIONS OF PRICE ADJUSTMENTS

According to the Commission's introductory remarks, the "IPI aims at encouraging partners to engage in negotiations and opening participation for EU bidders and goods in third countries' tenders". Interestingly, the Amended Proposal does not invoke a classical "buy national" argument as similar legislation in other countries, such as the Buy American provisions of the 2009 American Recovery and Reinvestment Act (Recovery Act), does.

Yet the Amended Proposal's international outlook and its objective of further trade liberalization cannot distract from the fact that the Proposal relies on the very kind of protectionist measures in the pursuit of its objectives that it actually seeks to extinguish. This risks distorting the European public procurement market to the disadvantage of both internal and external bidders – should price adjustment measures indeed be applied.

Economic theory suggests that unilateral trade liberalization serves a country's own interest as it increases the competitiveness of domestic industries regardless of what other countries do. The insistence on reciprocity, as widespread as it may be, is not based on sound economics but is only politically motivated (see e.g. Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 *Journal of Economic Literature* 113 (1997)). By insisting on reciprocal commitments and imposing price adjustments on foreign bidders, the EU risks departing from its "value for money" principle.

In the long term, if applied consistently, price adjustments could not only leave European procurement authorities with less value for their money but also lower the competitiveness of European suppliers that are awarded contracts not as a result of their efficiency but of the distorted market. It is against this background that the price adjustment mechanism should, if at all, only be triggered under exceptional circumstances and for a limited amount of time.

IV. POLITICAL IMPLICATIONS FOR BREXIT NEGOTIATIONS

On a political level, the price adjustment mechanism provides the Commission with leverage to facilitate further liberalization of public procurement markets or to prevent the introduction of new trade barriers at a bilateral or multilateral level.

At least in the case of the US Recovery Act, this has provided the necessary stimulus for Canada and the US to conclude a bilateral agreement on mutual access to their procurement markets at the sub-federal level (see the press release of the Canadian government, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng>). Section 1605 of the Recovery Act required all iron, steel, and manufactured goods used as construction material in the projects funded by the Act to be produced or manufactured in the US. Concerned that Canadian producers would no longer be eligible to participate in such infrastructure projects given the lack of international obligations at the sub-federal level, the Canadian government sought an exemption under the Recovery Act. As a result of the bilateral negotiations, the 2010 Canada-US Agreement on Government Procurement grants suppliers of both countries access to the other country's sub-federal markets under the respective GPA commitments.

Likewise, the EU IPI could provide an impetus for third countries to grant EU suppliers access to their own procurement markets in exchange for maintaining access to the EU market. This leverage could prove particularly valuable during the upcoming Brexit negotiations (see also Fenella Morris and Rose Grogan, *The Implications of Brexit for Public Procurement*, available at http://www.39essex.com/content/wp-content/uploads/2016/11/PP17_39-Essex-Chambers_ver3.pdf).

Unlike in other areas of law, WTO rules do not provide a fallback position with regard to public procurement. As of now, the UK is a member of the WTO GPA only by virtue of its EU membership but not in its own right. If the UK

intends to retain membership in the GPA, it would have to apply separately to join the GPA. Article XXII(2) of the Revised GPA requires a WTO member wishing to accede to the GPA to agree on the terms of accession with all current GPA members. This means that the EU will have to consent to the UK becoming a member of the GPA (see e.g. Sue Arrowsmith, *The implications of Brexit for the law on public and utilities procurement* (2016), available at http://www.nohr-con.com/uploads/documents/artikler/sue_arrowsmith_brexit_whitepaper.pdf for a more detailed analysis).

The IPI might therefore add yet another incentive for the UK to rapidly seek accession to the GPA. Any attempt of the UK legislator to promote “buying British” in public procurement in the wake of Brexit would bring the UK within the scope of application of the price adjustment measures. While it is difficult to imagine that the EU would indeed impose a surcharge on British bids participating in EU procurement, the mere threat of doing so might suffice to arrive at a mutually satisfactory agreement.

V. CONCLUSION

After many years of silence, the Commission has come back with an Amended Proposal for an International Procurement Instrument that would allow the Commission to restrict access of foreign bidders to the EU public procurement market. The Amended Proposal addresses some key points of criticism by abolishing the decentralized pillar that would have allowed member states to individually ban foreign bidders, and by introducing a price adjustment mechanism instead of completely excluding foreign bidders from the bidding process.

Given the strict and elaborate criteria that must be fulfilled before any remedy can be taken, it remains to be seen what role the IPI will play in practice. From an economic perspective, it is regrettable that the IPI resorts to the very kind of protectionist measures (with all its negative effects for external and internal bidders) that it actually seeks to extinguish.

From a political point of view, the IPI could provide the Commission with additional leverage in the upcoming Brexit negotiations. At the same time, it might be an early indication of an impending shift in EU trade policy. It is yet to be seen how much longer the Commission can resist the strong anti-globalization and anti-trade protests in many member states. They could induce the Commission to steer away from its current role as an advocate of free trade and unilateral liberalization towards a more protectionist trade agenda that denies foreign firms access to EU markets for a lack of reciprocity.