THIRD COUNTRY ACCESS TO EUROPEAN AND UK PUBLIC PROCUREMENT MARKETS – THE IPI AND OTHER REGULATORY DEVELOPMENTS

In this briefing we explore recent regulatory developments in the EU and UK, and how they may affect suppliers from third countries seeking to access these public procurement markets.

New EU-wide legislation will enter into force on 29 August 2022, giving the European Commission new investigative powers, and the power to impose countermeasures where non-EU countries do not provide reciprocal access to public procurement markets.

The International Procurement Instrument (IPI) provides a mechanism for restricting access to the EU public procurement market to suppliers from countries that do not provide reciprocal access to their own public procurement markets.

This briefing also considers third-country access conditions under the UK’s proposed new procurement regime and other upcoming developments affecting access to other EU and UK markets.

HOW THE IPI OPERATES

The IPI operates by allowing the European Commission to investigate (on its own initiative, or upon an application by an EU Member State or interested EU firm) any third-country measure which is alleged to result in a "serious and recurrent impairment of access" to that country's public procurement market for EU companies.

The European Commission has the power to impose an IPI measure if it determines that a third-country's measure impairs market access, and the IPI measure is in the interest of the Union.

An IPI measure may take the form of either:

(a) a score adjustment on tenders from the target country up to a maximum of 50%; or

(b) the exclusion of some or all companies from the target country from participation in certain procurement procedures.

IPI measures can only be applied to procurement procedures (including the establishment of framework agreements and dynamic

Key takeaways:

- The European Commission has new powers to restrict access to the EU public procurement market by foreign companies.
- Companies that participate in EU public procurement, and are not from countries with protected access to the EU public procurement market under the WTO Government Procurement Agreement or an FTA, have the potential to be affected by the new regime.
- IPI measures can be applied to both restrict non-EU suppliers of services, as well as to limit the use of goods originating in non-EU countries.
- The IPI imposes limits on companies that are not subject to IPI measures (including EU companies) subcontracting to, or supplying goods originating from, companies in jurisdictions that are subject to an IPI measure.
- In the UK, suppliers from certain third countries do not have secure and assured access to the UK procurement market.
purchasing systems) with an estimated value of over EUR 15m (net of VAT) for works and concessions; and over EUR 5m (net of VAT) for goods and services. IPI measures cannot be applied to contracts awarded pursuant to framework agreements.

The European Commission must ensure that the IPI measure is proportionate with regard to the third-country measure or practice in question and can limit the scope of the IPI measure (e.g. to specific sectors; goods, works or services; categories of contracting authority; or categories of supplier).

An IPI measure lasts for five years unless extended (for a duration of up to a further five years), and could be challenged by suppliers or third-countries through the General Court of the European Union on the basis that, for example, the IPI measure is disproportionate or not in the interest of the Union.

A successful tenderer in a procurement procedure that is subject to an IPI measure is prohibited from (a) subcontracting more than 50% of the value of the contract to a company in a country that is subject to an IPI measure; and (b) supplying goods or services originating from a third country subject to the IPI measure that are worth more than 50% of the value of the contract. Penalties apply in the event that these requirements are not complied with.

WHO CAN BE CAUGHT BY POTENTIAL IPI MEASURES?

IPI measures can only be applied to procurement procedures which are not covered by the WTO Government Procurement Agreement (GPA) or EU free trade agreements containing reciprocal procurement access conditions (FTAs). In practice, this means that a company could fall within scope of an IPI measure and face restrictions when participating in EU procurement procedures if it is:

- not located in a GPA member state, nor party to an FTA with the EU covering public procurement (e.g. China, Russia and India).
- located in a GPA member state, or a state with an EU FTA in place, that has excluded the subject matter of the procurement procedure from the scope of goods, services or works offered to the EU under the GPA or the applicable FTA.

The IPI provides detailed rules for the determination of a tenderer's country of origin, including in respect of group companies.

- The 'origin' of a tenderer for the purposes of the IPI is determined by the location of the company's incorporation (provided the company has substantive business operations in that jurisdiction). Where a company does not have substantive business operations in its jurisdiction of incorporation, its country of origin is deemed to

1 The 21 Parties to the GPA are: Armenia, Australia, Canada, the European Union (and its 27 Member States -- Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, and Sweden), Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, the Republic of Moldova, Montenegro, the Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Taiwan (Chinese Taipei), Ukraine, the United Kingdom, and the United States.

be the country in which persons exercise “dominant influence” over the tenderer (which is (non-exclusively) presumed to be the country of origin of those persons that hold the majority of shares, voting rights, or the power to appoint more than half of the company’s board or supervisory body).

- This means that where a tenderer is both incorporated in, and has substantive business operations in, the EU (or another jurisdiction not subject to an IPI measure), that tenderer will generally not be subject to the IPI measure (even if it is a subsidiary of a non-EU company that is subject to a countermeasure). Moreover, if a tenderer is comprised of a group of entities (e.g. a consortium), an IPI measure will not apply to that group in circumstances where less than 15% of the value of that tender is attributable to an entity (or entities) subject to an IPI countermeasure.

**HOW TO PREPARE**

Companies from non-GPA members should monitor investigations initiated by the European Commission, and consider participating in these investigations (either directly, or through engagement with Government or industry bodies) as they arise.

The European Commission is required to publish details of any IPI investigation it initiates in the Official Journal of the European Union, and interested parties (and countries) have the ability to participate in such an investigation by providing relevant information. The European Commission must also consult with the Government of the country subject to the IPI investigation – which will be given the opportunity to remedy the alleged market access impairment prior to the imposition of any IPI measure.

**THE UK POSITION**

Following the UK’s departure from the EU, the UK is no longer obliged to follow EU procurement law and policy, including the IPI, and it is not clear at this stage whether the UK intends to introduce similar measures.

UK public bodies cannot currently discriminate on grounds of nationality during regulated procurement procedures. However, procurement remedies are only available to bidders located in the UK and bidders located in GPA member states or states with a UK FTA in place. This means that other bidders have no effective remedy if they are unfairly treated or excluded from UK public procurements, and therefore do not have secured and assured access to UK procurement markets.

The UK Parliament is currently considering draft legislation which, if passed, would replace the current statutory procurement regime (derived from EU-law). Under the draft rules, the principle of non-discrimination has been narrowed to cover domestic and bidders

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3  PCR, Regulations 89, 90A, 90B and 91.
4  See here: [https://bills.parliament.uk/bills/3159](https://bills.parliament.uk/bills/3159).
located in GPA member states or states with a UK FTA in place. As such, it would be lawful under the draft rules for a UK public authority to discriminate against bidders not based in treaty states. That said, UK public bodies have historically tended to prefer to have a wide choice of supplier, and the focus on cost efficiency under the new rules is likely to incentivise public bodies to prioritise price considerations over nationality, absent geo-political or other commercial factors.

OTHER UPCOMING DEVELOPMENTS TO WATCH

The IPI is part of a broader suite of proposed EU measures designed to restrict access to the EU market in circumstances where the EU considers there to be a lack of reciprocity of access to foreign markets for EU companies, or distortions to the EU market caused by foreign countries / firms. These proposals include:

The Foreign Subsidies Regulation: The EU reached political agreement on a Foreign Subsidies Regulation, which is expected to be formally adopted during this fall. It requires non-EU companies engaging in an EU public procurement of over EUR 250m to disclose to the European Commission financial contributions of at least EUR 4 million received from non-EU countries globally in the previous three financial years. It also provides the ability for the European Commission to impose redressive measures to remedy distortions it considers exist as a consequence of the foreign entity receiving subsidies from non-EU countries. A briefing on the original iteration of this proposal is available here.

The Carbon Border Adjustment Mechanism: The EU recently reached political agreement on a Carbon Border Adjustment Mechanism, which will impose increased duties on imports of cement, aluminium, fertilisers, electric energy production, iron and steel based on the carbon emissions associated with their production. The mechanism is designed to prevent ‘carbon leakage’ resulting from emissions intensive production in the EU being replaced by similarly (or greater) emissions intensive production overseas. Our briefings on the original iterations of this proposal are available here and here.

The Anti-coercion Instrument: The European Commission has proposed a new mechanism enabling it to use trade countermeasures (including tariffs and other restrictions) against instances of perceived economic or political coercion by other / non-EU States. The instrument remains in the early stages of the legislative process, but would allow the EU to impose countermeasures against countries engaging in alleged economic or political coercion.
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