Tightening the Common External Trade Policy on 'Uncovered Procurement': A Populist Move or Well-Thought-Out Measure?

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Tightening the Common External Trade Policy on “Uncovered Procurement”: A Populist Move or Well-thought-out Measure?

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Driven by the severe concerns about the lack of reciprocity in mutual procurement market access between Member States and third countries, the Commission has taken legislative steps to tighten the common external trade policy of the EU on “uncovered procurement.” So far, Member States have enjoyed a wide autonomy in dealing with contractors/goods/services from third countries. Under the Commission’s proposal, the Commission could exclude tenders consisting of uncovered goods or services either by: (i) accepting individual requests by contracting authorities or (ii) temporarily limiting market access of countries which glaringly discriminate against suppliers, goods and services from the EU and do not promise better market access in negotiations. However, the detailed review of the proposal gives rise to doubt on whether its provisions can actually improve the EU’s leverage in international negotiations. As of late May 2014, the position of the Commission on the outcome of the first parliamentary reading held in January 2014 has not yet been published and the second parliamentary reading has not yet been officially scheduled.

I. Introduction

As a part of the current public procurement reform in the EU, the Commission has taken legislative steps to tighten the common external trade policy of the EU on uncovered procurement, meaning procurement not covered with international commitments of the EU.¹ The Commission’s efforts have resulted in the Proposal for a Regulation 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 revealed in March 2012 (“Proposal”). The report on the Proposal prepared by the parliamentary Committee on International Trade was tabled in December 2013 for the first plenary reading in the Parliament,³ which was held in January 2014.⁴ As of late May 2014, the position of the Commission on the outcome of the first reading has not yet been published and the second reading has not yet been scheduled.⁵

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¹ That is mostly WTO Government Procurement Agreement and a number of free trade agreement covering the area of public procurement entered into with Chile, Mexico, Switzerland and CAROFORUM. The list has been retrieved from: http://ec.europa.eu/internal_market/publicprocurement/rules/free_trade_agreements/index_en.htm last accessed on 18 November 2013.


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Severe concerns within the Commission about the lack of reciprocity in mutual procurement market access between Member States and third countries were the primary driver behind the Proposal. The issue was formally raised by the Commission back in 2012 in the Memorandum on the External Procurement Initiative stating that “Many countries are reluctant to open their procurement markets to international competition. This limits business opportunities for EU companies in these markets” and emphasizing in the context of the economic downturn that “some countries have introduced protectionist measures relating to procurement contracts which have hit EU companies. Examples of these measures are Buy America, Buy Brazil, Buy China, domestic preferences in Turkey, Russia, certain States in Australia, etc.”

The public discussion was initiated by the Commission in a press release that criticized “repeated and serious discrimination against European suppliers in non-EU countries”. Referring to opinions expressed by Michel Barnier and Karel De Gucht, the press release also called for vesting the Commission with a discretionary power “to restrict access to the EU market, if the country outside the EU does not engage in negotiations to address market access imbalances (...) for example by excluding tenders originating in a non-EU country or imposing a price penalty.”

Michel Barnier, the Internal Market and Services Commissioner, argued that “The EU should no longer be naïve and should aim for fairness and reciprocity in world trade. Our initiative builds on Europe’s belief that the opening up of public procurement generates benefits at global and European levels. We are open for business and we are ready to open up more, but only if companies can compete on an equal footing with their competitors. The Commission will remain vigilant in the defence of European interests and European companies and jobs.”

In a similar vein, Karel De Gucht, the Trade Commissioner expressed the view that: “I am a firm believer in making sure trade flows freely and government procurement must be an essential part of open trade markets worldwide. It’s good for business, good for consumers and brings value for money for taxpayers. This proposal will increase the leverage of the European Union in international negotiations and with our partners to open up their procurement markets for European companies. I am confident that they will then get a fair opportunity at winning government contracts overseas and so generate jobs.”

The two Commissioners also often referred to a €300 million general contractor agreement for the construction of a 49-kilometers stretch of Poland’s A2 motorway from Warsaw to the German border entrusted in 2009 to the China Overseas Engineering Group Co. Ltd. (“COVEC”), a subsidiary of the partly State-owned China Railway Engineering Corp. The contract for the A2 motorway was a thorn in the Commission’s flesh for two reasons.

Firstly, at that time, the Polish government looked overtly and hopefully at the chance of employing foreign contractors of any origin to effectively spend €67.3 billion from the EU’s 2007-2013 budget financed in principle by the so-called old Members States. A common belief somehow emerged that the old members generally continued to limit market access for non-EU suppliers and goods, while new members in principle did not and their discretion, in this regard, should be limited.

Secondly, the contract with COVEC was rescinded in June 2011, providing the two Commissioners with further strong arguments for the Proposal. After COVEC had exceeded the project budget without carrying out construction works within the planned timeframe, the General Directorate for National Roads and Motorways (the contracting authority) asked COVEC to leave the construction site. As of early 2014, the disputes as to drawn and unpaid guarantees securing good performance of the contract

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7 See: ibid.
9 See: ibid.
10 See: ibid.
11 See: ibid.
issued by Bank of China and Export-Import Bank of China were still pending before Chinese courts. Underbidding was believed to be the main cause of the problems as COVEC outbid 87 other tenderers by offering a price constituting less than a 50% of the contracting authority’s own preliminary cost assessment. The contracting authority did not, however, reject such abnormally low offer. COVEC would later admit that, in order to complete the project, it would have to exceed its preliminary budget by over two-thirds, citing an unexpected increase in price of building materials as a reason. In spite of that failure, COVEC has continued to win some minor public contracts in Poland by outbidding competitors. Therefore, the Proposal – definitely fuelled by that particular case – was also designed to specifically address the problem of abnormally low tenders submitted by uncovered suppliers/contractors.

The aim of this article is to present the current regulation of trade policy in the area of procurement and briefly discuss the solutions offered by the Proposal as originally submitted by the Commission to the Parliament, as well as to ponder on whether the goals of the Proposal will likely be advanced by the solution it offers.

II. Current Regulatory Background

Member States have always enjoyed a wide autonomy in regulating procurement of goods and services from third countries. The choice to liberalise the uncovered procurement market or keeping it closed has rested essentially with them.

This was a result of the Tokyo Round, during which a first discussion on the GPA took place. Then, for the first time, the Commission negotiated international commitments on procurement on behalf of all Member States. Previously, Member States had been reaching reciprocal concessions to the benefit of their domestic businesses in bilateral talks.

In that context, the Council passed two resolutions stating that because “the Community must aim at achieving a satisfactory degree of reciprocity during the negotiations in which it is participating within the GATT and the OECD and must, under the most favourable conditions, use all suitable means of ensuring that this objective is attained (…) Member States may continue to apply, in accordance with the provisions of the Treaty, existing commercial policy measures in respect of public supply contracts concerning certain products and categories of products originating in non-member countries”.

Christopher Bovis explained the rationale of those Resolutions, observing that reciprocity between all Member States and third countries was a very unlikely scenario because reciprocity in the area of procurement had then been a bilateral phenomenon. Thus the Council intended to protect concessions that third countries had already made on a bilateral basis. This could have been best done by allowing Member States to exclude from procurement those goods that originated in third countries and were already in free circulation in other Member States. The Resolutions have never been repealed, leaving it for Member States whether to discriminate foreign uncovered content of tenders or not.

In the field of utilities, some harmonized discriminatory measures were first provided with the adoption of the second generation of procurement direc-

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15 See: note 1 above.
16 Christopher Bovis, EU public procurement law (Elgar European law, Edward Elgar, Cheltenham, UK; Northampton, MA 2007) 488 at p. 36.
17 See: Council Resolution of 21 December 1976 concerning access to Community public supply contracts for products originating in non-member countries OJ 1977 C 11/1-2 last paragraph of the preamble and point 1. This language was repeated in the: Council Resolution of 22 July 1980 concerning access to Community public supply contracts for products originating in third countries OJ 1980 C 211/2.
18 See note 17 above.
19 By way of digression, Bovis observed that autonomy granted to Member States under those resolutions created a kind of intra-community barrier to trade. See: ibid.
20 Those were actually sui generis acts passed without specific legal basis and have not even been mentioned in the Proposal. See: note 2 above, Explanatory Memorandum: Existing provisions in the area of the proposal at 2.
tatives in 1990. The rationale was to encourage opening utilities procurement markets by third countries in the course of negotiations on the coverage of GPA during the Uruguay Round. The idea was that if those markets were to be liberalized within the EU between Member States, then some “preference should be given to an offer of Community origin where there are equivalent offers of third country origin.” If a third country had offered mutual concessions, then by a decision of the Council, discriminatory measures would have been waived in respect of tenders originating from such third country.

Details of those measures were last set forth in the Directive 2004/17. Similarly to previous acts, the Directive 2004/17 has stipulated that contracting authorities subject to international commitments could, but did not have to, reject tenders where more than 50% of the total value of the products constituting the tender originated in third countries. Moreover, if tenders were equivalent in the light of the award criteria, the contracting entity would have to prefer tenders that cannot be so rejected (domestic tenders and tenders “covered” with international commitments). With regard to services, the Directive 2004/17 has provided for a different mechanism. On proposal of the Commission, the Council could pass a decision suspending or restricting awarding service contracts to contractors from a given third country if contractors from Members States encountered difficulties in securing awards of service contracts in such country. Authors of the Proposal discerned two major flaws of that model. First, they assessed that “the provisions are limited to procurement by utilities and are too narrow in their scope to make a substantial impact on negotiations on market access. Indeed the EU public procurement for Utilities only stands for around 20% of the total EU public procurement market.” Second, they observed that even in the field of utilities the model was itself inefficient because it was only based on optional use by individual contracting entities, and it could not have significantly improved the EU’s leverage in international negotiations.

It is also worth mentioning that harmonized discriminatory measures specifically targeting tenders of US origin were in force between 1993 and 2006. Tenders for low value projects made by suppliers, contractors and service providers established in and operating from the US should have been then rejected by public authorities. It was a response to similar US measures targeting tenders of the EU origin which, in turn, had been introduced in response to


22 See the Preamble of the Directive 90/531. See also: note 17 above at 37.

23 See: ibid.

24 See: ibid.


27 Tenders were to be considered equivalent if the price difference had not exceeded 3%. See: Directive 2004/17, Article 58(3).

28 The contractor from a third country has been defined as “(a) undertakings governed by the law of the third country in question; (b) undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Community but having no direct and effective link with the economy of a Member State; (c) undertakings submitting tenders which have as their subject-matter services originating in the third country in question.” See: Directive 2004/17, Article 59(5).

29 Difficulties in securing award of service contracts in such country have been defined as “(a) does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country; or (b) does not grant Community undertakings national treatment or the same competitive opportunities as are available to national undertakings; or (c) grants undertakings from other third countries more favourable treatment than Community undertakings.” See: Directive 2004/17, Article 59(5).

30 See: note 21 above.

31 See: note 2 above Legal Elements of the Proposal: Summary of the proposed action at p. 6.


33 In case of supplies contracts less than the threshold applicable to the GPA, then ECU 1 25 576. In case of public service contract less than the threshold applicable to the GPA, then ECU 200 000. In case of public works contract less than the threshold applicable to the GPA, then ECU 5 000,000. See 1461/93, Article 1.

34 In May 1993, the US Government under Title VII of the 1988 Omnibus Trade and Competitiveness Act banned business from EU from competing for supplies and services contracts below USD 176 000 and construction contracts below USD 6,500 000. See: Proposal for a Council Regulation repealing Council Regulation (EEC) No 1461/93 concerning access to public contracts for tenderers from the United States of America /COM/2006/0060 final.
mentioned discriminatory measures in the utilities sectors then incorporated in the Directive 93/38. According to the US government, the EU measures were particularly discriminatory against US telecom equipment suppliers. Sanctions had not been mutually repealed until the Directive 2004/17 specifically excluded telecom operators from its scope. Importantly, Member States could permit their contracting authorities to accept tenders of the US origin in order to, among others, (i) avoid single sourcing, (ii) ensure continuity of supply or service provision, (iii) avoid disproportionate cost, (iv) and protect national security. The Commission had to be notified on these deviations but it could not block them. 

In conclusion, the common commercial policy in the area of uncovered procurement has so far been fragmentary if not virtually non-existent. The decision-making process as to application of very limited existing measures has been strongly decentralized, which has been criticized by the authors of the Proposal.

III. The Proposal

1. General

The Proposal has been based on Article 207 TFEU, granting the Parliament and the Council a right to adopt measures defining the framework for implementing the common commercial policy by means of regulations. The Commission explained that only a regulation would ensure sufficient uniformity of the EU’s common commercial policy and also noticed that transposition of the Proposal into national legislations would not be required because the Proposal gives powers to the Commission.

Under the Proposal, it would now be up to the Commission to exclude tenders consisting of uncovered goods or services either by (i) accepting individual requests of contacting authorities or by (ii) temporarily limiting market access only to those countries which glaringly discriminate against suppliers, goods and services from the EU and do not promise better market access in negotiations. Restrictive measures shall never be imposed on covered goods or services. Goods or services originating in least-developed countries shall be treated as covered ones and shall not be discriminated against.

2. Individual Restrictive Measures

Under the first mechanism, both contracting authorities operating in the public sector and entities operating in the utilities sector may want to exclude tenders comprising goods or services originating outside the EU on condition that the value of the uncovered goods or services exceeds 50% of the total value of the goods or services constituting the tender and that the estimated contract value is not less than € 5,000,000. The authorities/entities need to state their intention in the contract notice published in the Official Journal of the Union. When at least one tender that could be excluded is submitted, the authorities/entities need to notify the Commission for approval of the exclusion but in the meanwhile can proceed with analysing received tenders.

35 See: note 22 above.
36 See: note 35 above.
37 See: the Preamble of the Directive 2004/17 paragraph 5. Moreover for the purposes of the 50 per cent EU content, software used in telecommunications network equipment shall always be regarded as domestic products regardless of their origin. See: Directive 2004/17, Article 58(2).
38 See: note 33, Article 2.
40 See: Consolidated version of the Treaty on the Functioning of the European Union OJ 2010 C 83/47.
41 See: Article 207(2) TFEU.
42 If transposition were required, then a directive instead of a regulation would be the appropriate measure. See: note 2 above. Legal Elements of the Proposal: Legal basis at p. 7.
43 See: note 2 above, Articles 5 and 6.
44 See: note 2 above, Articles 5 and 6.
45 See: note 2 above, Article 4(1).
47 See: note 2 above, Article 4(2).
48 Like in the case of Directive 2004/17 the origin of goods shall be assessed pursuant to the Regulation 2913/92 (see: note 27 above). On the determination of the origin of services see: section 1.5 below.
49 See: note 2 above, Article 6(1).
50 See: note 2 above, Article 6(2), paragraph 1.
51 See: note 2 above, Article 6(2), paragraphs 3 and 4.
mission shall first go through *comitology* by consulting the Advisory Committee for Public Contracts and the Committee set up under Article 7 of the Trade Barriers Regulation and hear the tenderer concerned. After that, the Commission can approve or reject the motion for exclusion in principle within 8 weeks in the form of an implementing act.

As to the criteria of exclusion, the Proposal mandates that the Commission shall approve authorities/entities’ motions if (i) there is a substantial lack of reciprocity in the market access between the EU and the country from which the goods and/or services originate, or (ii) the goods and services concerned fall within the scope of a market reservation by the EU in an international agreement. It also specifies that the Commission, while assessing the lack of reciprocity, should examine “to what degree public procurement laws of the country concerned ensure transparency in line with international standards in the field of public procurement and preclude any discrimination against Union goods, services and economic operators [...] [and] to what degree public authorities and/or individual procuring entities maintain or adopt discriminatory practices against Union goods, services and economic operators.”

### 3. General Restrictive Measures

Under the second mechanism, the Commission is empowered to adopt implementing acts to temporarily limit the access of uncovered goods and services originating in a third country. It can either (i) disqualify certain tenders made up for more than 50% of goods or services originating in the country concerned, (ii) impose price penalties on such goods or services. Such restrictive measures might be limited to (i) specific categories contracting authorities/entities, (ii) specific categories of goods or services, or (iii) contracts of certain value. Hence, unlike under the Directive 2004/17, the general measures do not only pertain to the procurement of services.

Before adopting restrictive measures upon request by interested stakeholders or on its own initiative, the Commission needs to conduct an investigation in order to confirm the existence of discriminatory practices in a third country and to consult the country concerned thereafter. Investigation should be initiated inviting interested Member States and parties to provide any information that might be relevant for the investigation, by publishing a Commission’s notice in the Official Journal of the Union. Likewise in the case of the first mechanism, the Commission needs to go through *comitology*. It shall also base its decision on the same criteria and, in particular, take into account a number of exclusions that previously have been approved within the framework of the first mechanism. The Commission should make up its mind within 9 months of that notice.

If the Commission intends to impose restrictive measures, consultations with the third country concerned can still prevent the adoption of the relevant implementing act. If the restrictive measures of a third country relate to procurement covered by market access commitments undertaken by the country concerned towards the EU under GPA or other agreements including provisions on procurement, then

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53 See: note 40 above.


55 See: note 2 above, Article 6(6).

56 See: note 2 above, Article 6(1).

57 See: note 2 above, Article 6(4)(b).

58 See: note 2 above, Article 6(4)(a).

59 See: note 2 above, Article 6(5).

60 See: note 2 above, Article 6(5).

61 See: note 2 above, Article 10(2)(a).

62 The mandatory price penalty has been defined in the Proposal as “an obligation for contracting entities to increase, subject to certain exceptions, the price of services and/or goods originating in certain third countries that have been offered in contract award procedures.” See: note 2 above, Article 2(2)(e).

63 See: note 2 above, Article 10(2)(b).

64 See: note 2 above, Article 10(3)(a).

65 See: note 2 above, Article 10(3)(b).

66 See: note 2 above, Article 10(3)(c).

67 See: note 2 above, Article 8(1) paragraph 1.

68 See: note 2 above, Article 9(1).

69 See: note 2 above, Article 8(1) paragraph 3.

70 See: note 2 above, Article 8(6); notes 53, 54, 55, 56 above.

71 See: note 2 above, Article 8(2).

72 See: note 2 above, Article 8(1) paragraph 1.

73 See: note 2 above, Article 8(3).
the Commission should follow consultation procedures provided for in such agreements. If the country concerned declines the invitation to enter into consultation or if consultation does not lead to satisfactory results within 15 months the Commission should impose restrictive measures. Adopted measures can be repealed or suspended for the period of up to one year in the same form of an implementing measure after going through comitology again.

Restrictive measures shall not be imposed and consultation shall be suspended if the country concerned (i) takes satisfactory remedial/corrective measures, or (ii) undertakes international commitments agreed with the EU by either accessing the GPA or concluding other trade agreements including commitments on procurement, or by the expansion of market access commitments under already concluded agreements. The application of the corrective measures shall be monitored by the Commission to ascertain whether those have not been rescinded, suspended or improperly implemented. If this is the case, the Commission shall resume consultations or impose restrictive measures.

4. Exceptions

Even if restrictive measures are adopted by the Commission, the Proposal still allows contracting authorities/entities to deviate from them because “It is imperative that contracting authorities/entities have access to a range of high quality products meeting their purchasing requirements at a competitive price.” Authorities/entities can do so if (i) available EU and/or covered goods or services do not meet requirements of the contracting entity, or (ii) a disproportionate increase in the price or costs of the contract would result from the application of the measure.

 Authorities/entities need to state their intent in the contract notice published in the Official Journal of the Union and further notify the Commission within 10 days of the notice indicating, among others, information on (i) the origin of the economic operators, the goods and/or services to be admitted, and on (ii) the ground on which the decision not to apply the restrictive measures is based. Although the Commission can ask for more information, the Proposal actually does not vest the Commission with the right to refuse or accept the notification. Instead if prior to a contract being concluded the Commission considers that the above criteria have been clearly and manifestly misapplied, it can apply corrective measures set out in the Directive 89/665 for the public sector and in the Directive 92/13 for the utilities sector. In turn, if the contract concerned has already been concluded, it shall be declared ineffective.

5. Rules of origin

Compared with the fragmentary provisions of the Directive 2004/17, the Proposal has refined rules of origin of services conforming them to both relevant rules of the TFEU on the right of establishment and to the terminological framework provided for in the GATS. Another premise was that “it may also be necessary to exclude certain foreign-controlled or owned juridical persons established in the EU, that are

74 See: note 2 above, Article 9(1).
75 See: note 2 above, Article 9 respectively point (1) paragraph 2 and point (6).
76 See: note 2 above, Article 11.
77 See: note 2 above, Article 9(3) paragraph 1.
78 See: note 2 above, Article 9(5).
79 See: 2 above, Article 9(3) paragraph 2.
80 See: note 2 above, Article 9(3) paragraph 3.
81 See: note 2 above, preamble, recital 24.
82 See: note 2 above, Article 13(1)(a).
83 See: note 2 above, Article 13(1)(b).
84 See: note 2 above, Article 13(2)(c).
85 See: note 2 above, Article 13(2)(d).
86 See: note 2 above, Article 13(2) in fine.
89 See: note 2 above, Article 16(1).
90 See: note 2 above, Article 16(2). Ineffectiveness and is results have been set out in Article 2d.
91 See: note 29 above; see also: note 49 above.
92 See: note 41 above, Articles 56–62.
93 See: General Agreement on Trade in Services, Annex 1B to the Agreement Establishing the World Trade Organization 1994 1869 UNTS 183 (signed in Marrakesh on 15 April 1994), Article XXVIII.
94 See: note 2 above, Detailed explanation of the proposal, Article 3, p. 8.
not engaged in substantive business operations such that it has a direct and effective link with the economy of a Member State concerned.”
95 Hence, the origin of services provided by a natural person shall be assessed based on his nationality or right of abode. 96 The origin of services provided by a legal person shall be deemed outside the EU if: (i) it does not provide services through a commercial presence within the EU because it is registered and is engaged in substantive business operations elsewhere, 97 or (ii) even though it is registered in a Member State, the legal person is owned and/or controlled by natural or legal persons of non-EU origin, and is not engaged in substantive business operations having a direct and effective link with the economy of any Member State. 98 The authors of the Proposal, apparently predicting interpretative difficulties, proposed in advance that the Commission would further explain these provisions in the guidance that will accompany the regulation when passed. 99

6. Abnormally Low Tenders

The Proposal also addressed the problem of under-bidding by foreign tenderers, which might be seen as a direct consequence of the COVEC case. While the basic rules of dealing with abnormally low tenders, regardless of their origin, have been modified in the proposals of amendments to current procurement directives, 100 the Proposal imposes further requirements on dealing with tenders in which the value of uncovered goods or services exceeds 50%. If a contracting authority/entity intends to accept such an abnormally low tender it is obliged to inform the other tenderers about this and justify why it still decides to accept this low price. In the opinion of the authors of the Proposal, such a solution is dictated by the “the greater difficulty for contracting authorities/entities to assess, in the context of tenders comprising goods and/or services originating outside the EU” 101 and would allow “these tenderers to contribute to a more accurate assessment as to whether the successful tenderer will be able to fully perform the contract under the conditions spelled out in the tender documentation.” 102

IV. Assessment

A belief in the advantages of freeing the procurement markets between Member States has blinded the EU to free-riding by some third countries, turning the EU into a victim of its own convictions. The Proposal has been advertised as a cure, but it only ostensibly solves the problem.

A comparison between the Proposal’s rationale and its provisions gives rise to doubts as to whether the Proposal can actually improve the EU’s leverage in international negotiations. The Proposal has been based on the premise that uncovered procurement market cannot be fully closed as it “gives rise to serious concerns as to its impact in terms of retaliation and the costs involved for individual contracting authorities/entities and the competitiveness of the EU.” 103 As a result, uncovered procurement markets would remain in principle open to worldwide competition and proposed solutions might not work as an effective psychological tool in international negotiation.

Contracting authorities/entities are actually less likely than contracting entities under the Directive 204/17 to apply individual restrictive measures. Firstly, the € 5,000,000 threshold – above which a consent for exclusion of a foreign tender can be sought from the Commission – embraces approximately 61% of the whole EU procurement market, but the soundness of its adoption is disputable. An a contrario interpretation of the Proposal suggests that while contracting authorities can apply some restrictive measures in the area of uncovered procurement above the threshold, they cannot do anything below it. 104 This defies the basic logics of procurement regula-

95 See: note 2 above, preamble, recital 23.
96 See: note 2 above, Article 3(2)(a).
97 See: note 2 above, Article 3(2)(b).
98 See: note 2 above, Article 3(2)(b)(2) and two last paragraphs of point (2).
99 See: note 2 above, preamble, recitals 9 and 12.
100 Particularly, it has eventually been defined that a tender shall be presumed to be abnormally low if the price or cost charged is (i) more than 50% lower than the average price or costs of the remaining tenders, and (ii) more than 20% lower than the price or costs of the second lowest tender, and (iii) at least five tenders have been submitted – subject to where for contracting authorities/entities a tender seems to be abnormally low or other reasons. See: Proposal for a Directive of the European Parliament and of the Council on public procurement COM(2011)3896 final – 2011/0438 (COD) (replacing the Directive 2004/18), Article 79.
101 See: note 2 above, preamble, recital 19.
102 See: ibid.
103 See: note 32 above.
104 See especially: note 2 above Article 6.
tion where the smaller the value of the contract, the greater discretion of the contracting authority. The rigid threshold is also inconsistent with the provisions on general restrictive measures, which offer the Commission a lot of flexibility as to the value of contracts that the Commission might want to impose such measures on.\footnote{105}

Secondly, the authors of the Proposal admitted that only 35 to 45 requests are expected to be filed each year.\footnote{106} Not all of them will have to be approved by the Commission. Obviously, if the Commission is reluctant to grant its consent to individual exclusions, the approval procedure can only result in a lower number of exclusions of foreign tenders than intended by authorities/entities. The explanation that “[t]he supervision by the Commission is carefully designed to ensure uniformity and proportionality”\footnote{107} is neither clear nor compelling. Under a pessimistic scenario, a will to improve negotiation climate and achieve mutual concession between the whole EU and a third country may lead the Commission to impede the adoption of retaliatory measures against the third-country by some Member States. Some other Member States would then primarily benefit from such decision. This scenario will likely become reality since the Commission makes in concreto decisions with regard to a tender originating from a specific third country, rather than in abstracto decisions with regard to an award procedure concerned.

As far as general restrictive measures are concerned, what their nature and scope of application will be based on future discretionary decisions of the Commission remains a great unknown.\footnote{108} If predominantly price penalties were applied, these might not contribute to a better leverage, because their primary function is to improve domestic welfare.\footnote{109} If the margin of price penalties is below the margin of the cost disadvantage of a domestic tenderer against its foreign competitor, the latter should offer a lower price because of the penalty in order to still win the contract, allowing the contracting authority to spend less.\footnote{110}

In turn, if general disqualifications of foreign tenders were primarily applied, their impact could be undermined by contracting authorities/entities making use of exceptions to the general restrictive measures. That might especially be the case given the present budgetary constraints in Western countries. The Proposal’s authors seem to have reasonably realized that, especially in times of austerity, depriving Members States and their contracting authorities/entities of savings flowing from unilateral procurement liberalization would not be feasible. When the spending axe comes into play, politicians would favour maintaining a well-established welfare state over shielding domestic suppliers against their foreign competitors.\footnote{111}

Indeed, while the EU may have some problems with its leverage in negotiations on procurement, one should bear in mind that protectionism adversely affects the national welfare\footnote{112} whereas even the unilateral freeing up of PP markets improves it.\footnote{113} However, in the post-COVÈC context, the Proposal can, to some extent, be defended by Albert Breton’s and Pierre Salmon’s theory dealing with incomplete contracts, the performance of which is unverifiable in advance because the cost of verification is high.\footnote{114} It costs more to gather such information if the pool of tenderers is larger. Thus, if governments tend to limit the pool – because bidders outside their jurisdictions cost more to verify – they become the first victims of constraints on the size of the pool.\footnote{115}

\footnote{105} See: note 57 above.
\footnote{106} See: note 2 above. Detailed explanation of the Proposal at p. 8.
\footnote{107} See: note 2 above Proportionality Principle at p. 7.
\footnote{108} See: notes 62 and 63 above.
\footnote{109} See: note 109 above, Evenett and Hoekman at 155.
\footnote{115} See: note 114 at p. 264-265.