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SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Strengthening the Public Procurement Act to ease burdens, boost competition and deliver taxpayer value

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American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 56, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive summary

The Public Procurement Act (PPA) can make European public procurement simpler and fairer and give better value for taxpayers by helping buyers overcome limited financial and human resources. The PPA can provide enough structure and detail to deliver on its ambitions if it:

- **Simplifies while waiting for digitalisation.** 'Report once, use many times' depends on digital infrastructure that will not exist when the act first applies. A published roadmap and interim procedures, including a self-declaration fallback and a day-one reporting template, would stop more than 1,000 buyers from improvising.
- **Gives buyers a usable 'what to buy' framework.** Buyers need clarity on how to use strategic objective criteria while being free to use them without litigation risk. Each strategic criterion should follow a standard structure (objective, specific, verifiable and relevant) described clearly in the text, with common evidence and a published method for scoring price-quality ratios.
- **Puts risk-based exclusions on a sound legal footing.** Buyers should be able to adapt to real security risks posed by bidders with proper legal footing. Member States should appoint independent bodies to screen bids for risks, if referred by a buyer, based upon standard risk criteria and with opportunities for mitigation. This avoids fragmentation and maximises effectiveness.
- **Makes European preference risk based and consistent.** Buyers know best when European preference restrictions make sense and how they can fit their needs. The PPA should reinforce the reciprocal market access built by the EU's public procurement agreements. The PPA should require buyers to conduct a contract-specific risk assessment before activating European preference and align origin verification with customs procedures.
- **Strengthens legal certainty for European Commission restrictions.** Before imposing across-the-board European preference restrictions, the Commission should pursue dispute resolution, carry out a risk assessment and consult stakeholders.
- **Protects resilience and open markets together.** The EU's trade policy has built integrated, resilient supply chains with trusted partners. The PPA should reward market-driven measures and ensure that restrictions do not create more dependencies.
- **Make the innovation procedure work.** The PPA should specify when and how the innovation procedure can be used to help governments work directly with leading companies on solutions to unique needs.

Without more clarity around employing non-price considerations in procurement, buyers may face more barriers to bringing quality solutions to procurement markets and increased litigation.

Introduction

The PPA is an important step for establishing a public procurement framework that supports the Single Market, reinforces the procurement markets built through the EU's international agreements and minimises barriers to accessing public tenders.

However, public buyers often operate with limited human and financial resources, and a value-focused framework inherently requires more of them to administer.

For the EU to make the most of the 15% of gross domestic product spent on public procurement annually, the PPA's criteria must be well designed and consistent enough for buyers to use easily, without creating unintentional barriers for firms complying with them. The co-legislators should:

- Maximise the market access and consistency gains achieved through the 'how to buy' simplification measures; and
- Minimise divergence and contestability linked to the broader 'what to buy' framework.

The expanded 'what to buy' framework can only succeed in driving buyers to make value-driven decisions if it addresses the capacity, uncertainty and inconsistency issues that keep them from incorporating strategic objective criteria into auctions today.

Likewise, the risk-based exclusions and European preference mechanisms are workable only if they reconcile fundamental freedoms and international obligations with resilience goals. Built correctly, they let buyers address legitimate, contract-specific risks efficiently while capitalising on markets built through the EU's trade agreements. Built incorrectly, they invite litigation, distortion and incompatibility with those agreements, reducing competition and access to innovative solutions.

This position paper builds on the American Chamber of Commerce to the EU's (AmCham EU) previous input into the revision of the Public Procurement Directives and provides actionable recommendations to ensure that the PPA delivers on its objectives. It is divided into 'how to buy' and 'what to buy' sections with comments on the PPA's main chapters.

How to buy framework

The simplification of procedures ('how to buy') is coupled with a natural increase in complexity related to auction criteria ('what to buy'). Although a shift away from price-based auctions would create significant value for Europe if done right, the PPA's procedural rules must promote transparency, predictability and a level playing field for all tenderers to prevent decreased competition resulting from expanded auction criteria. It can do this through auction procedures, specific procedures, and digitalisation and transparency.

Auction procedures

The PPA's consolidation of the Public Procurement Directives' existing frameworks into fewer, more flexible procedures could support consistency across the EU for both complex tenders and more routine off-the-shelf procedures.

However, the consolidated procedures must reflect the added administrative burden that the expanded 'what to buy' framework places on buyers and economic operators. Without sufficient certainty around how procurement is conducted, excessive divergence and unpredictability may limit the pool of suppliers able to bid and increase the risk of litigation.

The PPA can create certainty through several areas:

- **Framework agreements**. Framework agreements, dynamic purchasing systems and longer contracts can accelerate procurement and efficiently reduce duplication of efforts without compromising on value. Framework agreements and longer-term contracts should permit equivalent or improved replacement products when tendered products reach end of life, together with reasonable updates to associated origin, security and sustainability documentation.

- **Adjustment periods**. Contracts should also provide appropriate adjustment mechanisms where material changes in supply or market conditions make the original commercial assumptions unsustainable.

- **Division into lots**. Division into lots should remain flexible and proportionate to the market and solution. Lots can broaden participation, but excessive fragmentation increases administrative burden and undermines the cohesion of integrated solutions. In some cases, division into lots can be used to increase resilience against supply chain disruptions.

- **Market dialogue**. Market dialogue is necessary for public buyers to promote a value-driven framework. The PPA should provide guidance and support for it, while ensuring that preliminary engagement is transparent and does not produce specifications, criteria or weightings that unnecessarily favour solutions discussed with particular suppliers. Buyers should be able to explain the contract-relevant rationale for material technical criteria and non-price criteria (NPC).

- **Expression of interest timelines.** A value-driven framework requires more time for bidders to assemble documentation, particularly when origin documentation or NPC documentation is required**.** The PPA should impose a minimum expression of interest timeline of 30 days.

- **Procurement timelines**. Procurement timelines can vary by project depending on the realities of manufacturing, regulatory compliance and supply chain planning. The PPA should require buyers to publish procurement timelines while advertising a bid.

Specific procedures

Innovation procedure

The innovation procedure may help governments use procurement as a catalyst for innovation and work directly with leading companies on solutions to unique needs. As drafted, it is a strong start but may be too abstract to be actionable. The definition of a 'societal challenge' (Article 6[23]) – 'a development or situation that has implications for the effective and efficient delivery of public tasks, impacting the function of the public buyer or buyers concerned, or the persons who rely on those

services' – has potentially limitless applicability. It is not clarified in the recitals or operable text, and divergent interpretation may lead to disparity between Member States.

To encourage its effective use, the co-legislators should either further refine the definition of the 'societal challenge' in the primary text or impose a clearer structure for public buyers to describe the 'societal challenge' in question during the market consultation phase (Article 42). This may also be done through guidelines or other soft law.

Similarly, the innovation procedure largely limits transfer of intellectual property rights (IPR) to public buyers. One of the most valuable parts of the innovation challenge procedure for economic operators would be to develop new IPR with a guaranteed buyer. A balanced approach to IP would help governments obtain the rights necessary to use and maintain solutions, encouraging participation and supporting innovation that can benefit the wider European market. This could be done in two ways:

- **Limit derogations to IPR ownership transfer (Article 64[4]).** The PPA should either provide intermediate steps beyond IPR ownership transfer to mitigate any public interest or security concerns, or give clearer indications that this should be a last resort.

- **Allow for software reuse (Article 63).** Article 63 does not expressly protect the ability to use previously purchased software on alternative infrastructure without repurchasing it or additional charges.

Digitalisation and transparency

A more robust, centralised digital public procurement marketplace would improve access to markets, consistency and transparency. The creation of a single, centralised eProcurement portal coupled with the 'report once, use many times' principle would remove barriers to entry and reduce administrative burdens for buyers and sellers.

A single-entry point with a reusable document library is the quickest way to increase the accessibility of public procurement, while stimulating consistency around auction design and documentation. Coupled with re-use of documentation (including origin, cybersecurity, sustainability and contract-reporting evidence), it could significantly reduce costs affiliated with developing bespoke documentation for each auction, including when they relate to the same products.

Providing access to all types of procedures and simplifying the submission and monitoring of offers across the EU would significantly improve market access for bidders of all sizes, including small and medium-sized enterprises (SMEs). It might also help consolidate public procurement filings made under the Foreign Subsidies Regulation (FSR), which are currently made through contracting authorities (CAs).

Likewise, publicising complaint and review decisions and providing public buyers with information about an economic operator from previous tenders could discourage unmeritorious challenges to public authorities' bids.

However, the digitalisation components would require: investment from the Commission and Member States; significant interface with other digitalisation and legislative processes; and vendors of procurement and contract management software to adapt to new EU-wide systems. The

Commission should design these processes to ensure that buyers and economic operators can benefit from increased consistency before the implementation of the PPA's digitalisation elements.

This section provides several recommendations on how to design a digital ecosystem to best support the PPA's goals.

Clear roadmap for implementation

Much of the PPA is dependent on digital infrastructure mandated by the text (including the interoperability network, National Public Procurement Data Spaces, Commission platform and Electronic Eligibility Service [EES]) and on digital transformation outside of the PPA (including the European Business Wallet, European Product Passport and elements of the Union Customs Code for Made in Europe verification). Consequentially, it would also require commercial software products to adapt to new EU-wide procurement systems.

Economic operators and public buyers would need to prepare their systems and organisations for the launch of various services. Public and private parties invest early in compliance to limit long-term costs and often absorb unnecessary costs due to unanticipated inconsistencies or delays in implementation. Likewise, interlinkages between various files would likely create incompatibilities that may make certain processes impossible. The co-legislators should prevent these issues during the legislative process when the primary text can be adapted by:

- **Mandating a roadmap for implementation.** The roadmap should consider dependent processes in external EU and national legislation to address all potential points of failure in the primary text. It should be released when the PPA is adopted, designed with stakeholder consultation and updated periodically throughout implementation.

- **Requiring frequent stakeholder consultation during implementation.** Private sector stakeholders should be consulted through structured dialogue throughout implementation.

Procedures for interim period

Public buyers would not wait until the completion of these digitalisation initiatives to start applying criteria related to them. This would create immediate operational issues where exclusion or award criteria verification is linked to digital infrastructure or where transparency is necessary to monitor the update of NPC in auctions.

The PPA should build in interim procedures to ensure consistency and predictability during its phase-in period, including:

- **Phase-in clauses for the EES.** The EES-dependent provisions should apply only once the Commission publishes a notice that the service is operational. Absent an explicit transitional regime, contracting authorities would be left to develop their own interim verification practices during this gap, recreating the fragmentation the EES was designed to solve. The co-legislators should require the Commission to publish interim guidance – including an acceptable fallback documentary standard or self-declaration regime – for the period between the PPA's application date and full register connectivity.

- **Digital Product Passport (DPP) as a pre-condition for European preference.** To avoid immediate challenges relating to verifying the origin of goods, European preference provisions requiring parties to verify the origin of goods should be suspended until the DPP comes online. The DPP would allow for relevant origin verification data to be provided and verified in a harmonised and reliable manner across the EU. This could be included in Article 28(4).

- **Day-one data collection.** Until the National Public Procurement Data Spaces (Article 134) can carry the relevant fields, buyers should report their use of NPC, European preference and security measures (including risk-based exclusion) through a standardised template, set by implementing act under Article 143(2) and submitted to the national coordinating authority (Article 138). The Commission should publish a sufficiently anonymised, aggregated dataset at least every six months.

Data governance and allocation of responsibilities

As procurement is digitalised, the PPA should clarify the allocation of data protection responsibilities between buyers and economic operators. Suppliers often independently determine key elements of processing and may act as independent controllers. Consistent with the General Data Protection Regulation's risk-based approach, buyers should not be required to impose one-size-fits-all controller-processor arrangements that do not reflect the factual allocation of responsibilities.

Foreign ownership and control participation in eProcurement systems

The ownership and control restriction on the eProcurement service provider as specified in Article 131(4) might trigger restrictions even for European-based companies that cooperate with non-EU software or infrastructure providers.

Any exclusion of non-EU elements should respect the principles of Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972 and repealing Directive (EU) 2016/1148 (NIS 2 Directive) and the Cybersecurity Act, as well as international standards, technical controls and approved certification schemes. It should be justified by auditable requirements, such as verifiable technical and operational controls and independently audited assurances, rather than provider nationality alone.

What to buy

The PPA's 'what to buy' provisions require public buyers to take strategic objectives into account when spending taxpayer money while minimising divergence in the application of value and strategic objective-related criteria. If done correctly, this would not only increase return-on-investment for taxpayers but prevent an excessive increase in administrative burden.

The PPA needs to overcome several difficulties that keep public buyers from pursuing value-driven procurement:

- **Lack of resources**. The uptake of these provisions relies on public buyers being able to direct limited resources to compliance with a broader array of requirements than they may be used to.

- **Lack of familiarity with technical frameworks.** Public buyers have varying levels of expertise and capacity to assess increasingly complex considerations, such as security, resilience and sustainability.

- **Gap between frameworks and realities**. The text proposes several new frameworks – such as European preference and risk-based exclusion screening – that lack the sophistication needed to align with commercial realities, consumers' freedom of choice and fundamental freedoms.

Simplification and value-driven procurement requires more than a consolidation of legislative references and mandate for Best Quality for Money (BQM) procurement. Common methodologies, standardised evidence and appropriate capacity-building (including guidance) can help contracting authorities apply such criteria consistently while limiting unnecessary administrative burdens.

This section provides recommendations on improving the 'what to buy' framework. It begins with several observations on specific components of the framework, including the risk-based exclusions framework, design of the award criteria, BQM and abnormally low tenders, before moving to comments on certain strategic objectives and finally, the European preference mechanism.

Exclusions framework

Optional exclusions framework

The mandatory exclusion grounds consist of decisions that could be linked to a tenderer's EES profile at the point of expression of interest. However, the vast majority of the optional exclusion grounds are based around findings by the contracting authority itself that would be issued later in the procurement process.

Only two of the optional exclusion grounds would be immediately verifiable through the EES:

- **Bankruptcy (Article 26[1][b])**. This is already applied as a selection criterion.

- **Prejudice from a recent FSR finding** (Article 26[1][h]). This would undermine the primacy of EU law, operators' fundamental freedoms and effective enforcement of the FSR. The FSR already allows the Commission to impose remedies proportionate to the harm, and it has used these powers to disqualify specific sub-contractors from auctions.[1] Allowing Member States to impose additional restrictions on entities based upon the mere finding of a foreign subsidy would undermine the primacy of the FSR in controlling distortive foreign subsidies.

  FSR assessments concern only the entity engaged in a particular bid, so extending restrictions

[1] See the Commission's recent actions in relation to Portugal CRRC Tangshan Rolling Stock Unipessoal LDA (CRRC Portugal). A legal summary can be found here.

to other group entities in different contracts would misrepresent the assessment and violate the operator's fundamental freedoms.

The co-legislators should remove or redesign optional exclusion criteria *unless they relate* to specific indictments under policy objectives that can be integrated into the EES.

Any exclusion criteria should be transparent, challengeable and notified as early as possible in the procurement process. Any exclusions of individual bidders should be at the earliest possible point, to avoid bidders wasting time and resources, and be subject to the basic principles of EU law, including proportionality and non-discrimination.

Risk-based exclusions framework

The PPA proposes a framework for examining security and public order concerns affiliated with certain tenders and excluding them if the risks are sufficiently material. While establishing these types of systems across the EU may require significant investment up front, it could help prevent a fragmented public procurement screening landscape – a similar phenomenon that created significant Single Market barriers in relation to investment screening.[2]

As drafted, the PPA builds the risk-based exclusion mechanism into the optional exclusion ground framework, limiting the effectiveness of both mechanisms on two accounts.

First, it would create **a misalignment with the EES** by superimposing a screening framework onto the expression of interest process. As designed, the first step for participating in a tender would be to submit an EES profile as part of an 'expression of interest'. The EES, connected to national tax, criminal and administrative databases, would indicate whether a tenderer is disqualified on the basis of administrative outcomes linked to the mandatory exclusion grounds listed in Article 25.

Unlike the mandatory exclusion criteria, a risk-based exclusion would take place after the expression of interest and therefore, be incompatible with the EES process. Tangibly, while the EES could be used to show a lack of indictments on corruption offences (Article 25[1][b]) before the start of a competitive process, it could not be used to show that the public buyer in question has determined that they raise security considerations after the point of expressing interest.

Second, this approach would be **incompatible with EU fundamental freedoms**. Allowing buyers to exclude companies through a mechanism that lacks full protection of those freedoms would invite frequent litigation, slowing procurement and discouraging participation in sensitive tenders.

These issues are currently under scrutiny in the Court of Justice of the European Union, where Advocate General Andrea Biondi has issued an opinion in Joined Cases C-271/25 Autovici and C-334/25 Skinest Baltija. The opinion emphasises four key principles:

[2] More information on the driving factors leading to divergent investment screening mechanisms can be found in the European Court of Auditors report on the matter.

- First, national security does not render EU law inapplicable. Member States retain discretion in defining national security measures but remain bound by the EU principles of proportionality, non-discrimination, transparency and the right to an effective remedy.
- Second, a body competent to carry out a national security assessment may issue binding opinions resulting in automatic exclusion from public procurement, provided that the body itself complies with fundamental EU law requirements.
- Third, exclusion decisions must rest on a specific, individual assessment establishing a real, present and sufficiently serious security threat. The assessment must be based on up-to-date information, consider the threat's relevance to the specific contract and set an individually determined duration of exclusion, subject to periodic review.
- Last, excluded undertakings must be afforded the opportunity to present evidence and receive reasoned decisions. Their exclusion must be subject to comprehensive and effective judicial review, including independent examination of classified materials.

At the same time, procedural safeguards should not prevent contracting authorities from applying legitimate, proportionate and contract-relevant cybersecurity, resilience or supply chain-security requirements.

The co-legislators should build on the skeleton of a compliant risk-based exclusion system by separating it from the optional exclusion framework, setting up independent screening bodies, providing for mitigation before exclusion and ensuring due process and effective judicial review.

Separating security exclusion screening from the optional exclusion framework

If a public buyer were to suspect that a tenderer poses a risk to security and order, it should refer it to an independent entity for review. The independent entity should conduct an investigation, while the procurement timelines are suspended, and reach a decision on its own. If it finds that a tender would be likely to pose a risk to security and order, it should pursue mitigation and if mitigation is not sufficient, issue a finding to exclude the tender. The buyer should only then be able to exclude the tenderer.

To that end, references to security-related exclusions should be removed from other areas of the text, including the professional ability exclusion mechanism in Article 27(6) paragraph 3(b). Point (a) of that paragraph should clarify what a 'conflicting interest' means to prevent its misuse.

Establishing independent screening bodies

The PPA should require Member States to establish competent authorities for public procurement risk screening that can:

- **Access sufficient resources**. Member States should ensure these teams have enough staff to conduct investigations quickly and can access information held in different ministries and levels of government.

- **Conduct independent investigations**. The competent authorities should operate separately from the public buyer or in an independent capacity within the same organisation to ensure proper and effective scrutiny.

These competent authorities should follow a **concise and harmonised procedural rulebook**. Historically, divergent procedures between national authorities in other screening mechanisms (like investment screening) has led to confusion and delay, which could prevent public buyers from accessing services they may urgently need.

These rules should protect the speed and integrity of investigations and the rights of economic operators. They should include:

- **Appropriate timelines.** These should include timelines for reaching an initial decision, negotiating mitigating measures and allowing for responses from the investigated party during each phase.

- **Suspension clauses.** The initiation of an investigation should suspend progression of the public procurement process to not prejudice the involved tenderer.

- **Communication with investigated parties.** Points of contact and methods of communication should be communicated ahead of time, with opportunities and timeframes for economic operators to provide input established before the investigation.

- **Clear access to recourse.** Opportunities to appeal to the competent authority and to the relevant courts should be clarified procedurally in the PPA and in its implementation at the national level.

Appropriate evidentiary and substantive standards

The PPA should contain evidentiary and substantive standards commensurate with other security-based restriction laws, like investment screening.

Decisions should be made using a sufficiently robust corpus of recent and relevant information, aligning with the evidentiary standards for merger control and those proposed by Advocate General Biondi.

The legal standard for authorities to propose restrictions should be raised to 'likely to negatively affect security or order' to align with the standards imposed by Regulation (EU) 2026/1386 of the European Parliament and of the Council of 17 June 2026 on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 (the 'Foreign Investment Screening Regulation' ['FISR']).

The risk assessment framework proposed in Article 66 would help ensure consistent assessment of security concerns but could go further to complement the FISR. While the PPA's framework distinguishes between contract-related risks, economic operator-related risks and subject-matter related risks, the co-legislators should add additional nuance to two specific risk criteria:

- **Foreign ownership, control, financing and influence (Article 66[3][b]).** Foreign ownership, control and influence (FOCI) should not constitute an excludable security risk of its own, particularly absent clarity around what degree and type of influence is excludable. The FISR

explains that FOCI are only relevant when they translate into demonstrable security or governance risks. The FISR does not prejudice FOCI but instead differentiates FOCI risk into owner-based and investment target-based risk. For instance, Article 19(2)(a) of the FISR clarifies that FOCI become risk when they translate into an ability to pursue a third country's policy objectives or pursue criminal activities. Likewise, Article 19(2)(b)-(c) clarifies that foreign owners can create concern if they originate in a country with a high risk of money laundering or are subject to sanctions.

- **Exposure to third-country legislation requiring data disclosure or presenting contract interference risks (Article 66[b][iv]).** The PPA should align this risk criterion with the FISR's approach, which applies differentiated treatment to laws that allow for due process or oversight, and those who do not. Given the global proliferation of data-sharing obligations and technology controls, many economic operators (including most European ones) could suffer from exposure to these rules.

  Article 66(d) of the FISR clarifies that third-country obligations create risks when they lack 'due process or oversight mechanisms'. The PPA should align with this standard.

Competent authorities should balance the risk of a specific party winning a contract with the risks of excluding a party from a contract, including impact on consumers and continuality of supply. This risk is particularly high in situations where exclusion could reduce access to vital solutions, such as the pharmaceutical and medical technology industries, where patients could lose access to treatments or receive treatments with poorer clinical outcomes. Exclusion decisions should also account for regulatory requalification where a change of supplier or site is required.

Opportunities for mitigation before exclusion

Finally, the independent body, in collaboration with the tenderer and public buyer, should be required to discuss mitigation measures in line with the EU principle of proportionality. The PPA should include initial options for these mitigation measures.

For example, the US Foreign Ownership, Control and Influence Framework (US FOCI), which is required to obtain a Facility Security Clearance to participate in certain classified services, provides for three tiers of intervention if a risk is found:

- **Less restrictive.** A **board resolution** to exclude the foreign owner in question from access and influence over classified work.
- **Moderately restrictive, requiring oversight/reporting to the relevant administration.**
  - A **security control agreement** where the foreign interest holds board representation but does not effectively control the bidding entity.
  - A **special security agreement** permitting foreign ownership while insulating classified work through cleared outside directors who are US citizens.
- **Most restrictive, requiring oversight/reporting.**

- A **proxy agreement/voting trust** where the foreign owner's voting rights are vested in cleared US citizens who exercise them independently, so the owner only retains financial interests.

These mitigation measures are listed in the operable legal text driving the FOCI framework and complemented by guidance.[3] They can serve as an example of how mitigation options can be clearly laid out in primary public procurement legislation.

Award criteria

As the proposal recognises, the EU's diffuse public procurement rules lead to divergence in how buyers apply policy-related criteria, creating costs and unpredictability for tenderers. While putting these provisions in one text may help buyers and sellers predict what could apply, the PPA cannot simplify procurement unless it mandates convergence around how these criteria are applied.

The PPA should describe how criteria linked to specific strategic objectives should be designed, based on existing practice, the referenced legislation and EU case law. The text can only be so specific without infringing on Member States' freedom to structure their own criteria, but it should at least standardise how criteria are designed, to integrate with standardisation elsewhere in the PPA and provide a basis to challenge inappropriate criteria. Vitally, where sectoral legislation already sets rules on quality, safety, supply or origin, the PPA should not widen their scope. This can be done by:

- **Standardising and operationalising strategic objective chapters**. The co-legislators should include common language on how specific strategic objective criteria can be designed and employed, and what documentation can be used to support them.
- **Clarifying exclusion of defence workloads**. While the PPA stipulates that defence contracts are out of scope of the PPA, it should also recognise specific public procurement rules applied within the context of North Atlantic Treaty Organisation (NATO) countries. NATO workloads should be excluded from the PPA for consistency with the NATO Support and Procurement Agency.
- **Requiring proportionate evidence and traceability.** Evidence and traceability requirements should also remain proportionate to the objective pursued and include appropriate safeguards for commercially sensitive supplier, manufacturing and supply chain information. Where detailed disclosure is not necessary to demonstrate compliance, contracting authorities should accept appropriate certifications, declarations or aggregated evidence.

BQM framework

The proposed BQM framework consists of a best price-quality ratio (BPQR) assessment and a minimum NPC weight to factor in strategic objectives.

The 30% (50% for labour-intensive projects) minimum NPC weighting is a start. The EU should give quality more weight as criteria become easier to design and apply, and reduce opportunities for derogation from value-driven auction procedures. Higher NPC floors with tighter Article 98

[3] The DoD includes a classification of risk here, where it treats the EU as a "Close U.S. all[y]".

exemptions would help buyers access more innovative solutions and send a signal to put higher quality products on the market.

BQM should, in turn, ensure that quality considerations receive sufficient weight to materially influence procurement outcomes. Performance, cybersecurity, resilience and security of supply, sustainability, lifecycle value, reliability and service/support can all represent substantive dimensions of the quality and value of a solution. BQM should consider these criteria when they are relevant to the subject matter of the contract. The PPA should, however, ensure that all criteria are objective, transparent, verifiable and proportionate.

The co-legislators should improve the application of the BQM framework by:

- **Proposing clearer definitions and methodologies for BPQR.** The PPA should require the Commission to issue guidance on BPQR design and engage in capacity-building activities to develop best practices and convergence. Without clearer definitions and standardised methodologies, public buyers and bidders face legal uncertainty, opening the door to lengthy litigation ahead of Court of Justice of the European Union rulings.

- **Mandating proportionate contractual requirements.** Contractual requirements should be proportionate to the nature, value and risk profile of the procurement. Excessively burdensome contractual provisions may reduce competition, increase costs and discourage participation, particularly from innovative companies and SMEs.

Abnormally low tenders

Competition remains the cornerstone of effective public procurement, but the PPA should distinguish competitive pricing from economically unsustainable pricing that undermines long-term market functioning. Procurement focused predominantly on price can weaken competition, reduce supply flexibility, accelerate market exits and increase vulnerability to shortages. Contracting authorities should robustly assess abnormally low tenders and verify that bids remain sustainable for the life of the contract, taking into account manufacturing realities, regulatory obligations, inflation, input costs and continuity of supply. The PPA should go further by:

- **Issuing harmonised guidance on abnormally low tenders.** The Commission should provide harmonised guidance on the identification and assessment of abnormally low tenders, including methodologies that help procurers evaluate the long-term sustainability of bids and their potential impact on market participation and security of supply.

- **Permitting contract review and adjustment.** In addition, procurement frameworks should allow appropriate contract review and price-adjustment mechanisms to account for significant changes in economic conditions, including inflation, energy costs, logistics costs and other major input cost increases, particularly in longer-term contracts.

Strategic objectives

Public procurement of innovation

The PPA's chapter on Public Procurement of Innovation (PPI) may help encourage auctions that attract best-in-class solutions to EU public markets.

Intellectual property rights

Notably, protecting IPR is not listed as a general principle of procurement alongside environment, social and labour obligations. Still, the PPI section protects suppliers' IPR, as the risk of forfeiting or losing IPR during the public procurement process is sufficient to turn many potential market participants away. However, the PPA could go farther by:

- **Requiring evidence of IPR licensing and ownership for tendered products** as selection criteria affiliated with PPI.
- **Making authenticity a contract condition and a quality factor**. Buyers should be able to require operators to warrant that supplied goods are genuine and do not infringe third-party rights, supported by proportionate documentation on request. Where goods are found to be counterfeit or infringing, buyers should be able to require replacement, terminate the contract and recover demonstrable losses. Provenance and traceability evidence can also be assessed as a quality criterion.
- **Adding an exclusion ground limited to final decisions.** Counterfeiting or IP infringement established by a final judicial or administrative decision should be an optional exclusion ground (Articles 25 and 26) with a proportionate duration. Because it rests on a decision that already exists, it can be verified through the EES at the expression of interest, without a buyer-led investigation.
- **Recognising counterfeits in the recitals as a risk to security** alongside the risk assessment in Article 66, health and safety, and as a possible explanation for abnormally low prices.

These requirements should be drafted as a general obligation to respect IPR and not infringe on third-party rights. They should not require bidders to be authorised resellers, which could restrict competition.

Security and resilience

Security and resilience contribute to the value of a tender, particularly when the quality and dependability of a product requires strong security standards. While the PPA connects across EU policy, it should go further in crystalising the role that security and resilience can play as award criteria.

As a general principle, public buyers should not assess resilience solely on the basis of geographic proximity or manufacturing location. Procurement frameworks should distinguish between excessive dependence on a single supplier or geography and sourcing through diversified networks of manufacturing sites, suppliers and trusted trading partners. Strategic partnerships with reliable international partners can contribute significantly to supply security and resilience.

Likewise, the PPA should not create highly concentrated pools of suppliers unnecessarily. Where appropriate, contracting authorities could make greater use of multi-winner framework agreements, split awards and volume allocation mechanisms that support supplier diversification and continuity of

supply. Buyers should avoid single-winner procurement models when they create avoidable concentration risks or increase dependency on a single supplier.

The PPA can create an effective security and resilience framework by:

- **Rewarding market-driven resilience instruments.** The PPA should list measures companies already use as evidence that satisfies resilience criteria: inventory management and stockholding measures, supply disruption mitigation plans, business continuity and risk management measures, ability to reallocate supply within the EU, diversified sourcing and manufacturing networks, and delivery track record.

- **Limiting award criteria to performance-related elements.** Criteria should be limited to elements such as those in Article 66(4)(b) – like security management systems, compliance standards, incident response and supply chain security – so buyers need not assess a wide range of security certifications.

- **Designing tenders for supply resilience.** Buyers should provide realistic timelines, adequate lead times between award and first delivery, and predictable volumes, particularly for medicines with complex manufacturing processes.

Green public procurement

Environmental procurement criteria should be objective, evidence based, proportionate and harmonised across the EU. The co-legislators improve this framework by:

- **Aligning evidentiary and substantive requirements with existing rules.** The PPA should align with the criteria, methodologies and evidence developed under relevant EU frameworks, including the Eco-design for Sustainable Products Regulation, and applicable repair and circular economy legislation. Contracting authorities should recognise existing compliance evidence, certifications and ecolabels rather than creating parallel tender-specific proof requirements.

- **Support the use of company-level commitments:** The PPA should support buyers in rewarding measurable and verifiable company-level actions and commitments, including climate disclosures, greenhouse gas reduction strategies, responsible water management practices, participation in recognised sustainability initiatives and responsible manufacturing standards, where relevant. Product-specific requirements should be used where they can contribute to a meaningful reduction in environmental impact and where scientifically robust, internationally harmonised and fully validated methodologies exist.

- **Making green public procurement considerations outcome based and technology neutral.**

Made in Europe

The PPA's proposed approach to European preference would recognise the global public procurement markets developed through the EU's trade agenda and incentivise the EU's trading partners, current and potential, to invest more deeply in the success of public procurement agreements.

The EU's public procurement agreements – including the World Trade Organization Agreement on Government Procurement (GPA) and its bilateral arrangements included in free trade agreements (FTAs) and other tools like customs unions – contain carefully negotiated reciprocity on market access between two parties. Accordingly, these agreements do not give full access to EU procurement markets; partners can access EU markets only to the extent the EU has deemed comparable to the conditions EU companies face in their markets. These agreements underpin the globally integrated supply networks that companies optimise for client needs and security of supply. Policies that favour local production as a proxy for resilience risk creating new vulnerabilities, higher costs and less flexibility during disruptions.

As more countries adopt domestic preference regimes, scoping market access around the EU's public procurement agreements would make them even more valuable. Existing trading partners would have a commercial advantage against non-GPA/FTA members in Europe. Non-GPA/FTA members would be under more pressure to pursue a public procurement agreement with the EU.

The PPA's optional approach to European preference would preserve buyers' freedom of choice and reflect the costs of a domestic preference regime. Public buyers are best placed to assess which solutions deliver the required performance, security, innovation and long-term value. Deviating from this approach would create risks related to contestation and protectionism. Inadvertently violating the EU's international obligations at the tender level could leave public buyers open to contestation from bidders, delaying the delivery of a service. Consistent violations of the EU's international commitments by enough buyers could lead trading partners to seek renegotiation or respond with other measures. Retaliation leading to a reduction of concessions made under a public procurement agreement could undermine the powerful market access gains made through the EU's trade agenda, reduce competition, risk technological lock-in and limit public authorities' access to innovative solutions.

Likewise, the EU has already adopted sector-specific legislation imposing origin-based criteria and conditions for procurement. When sectoral legislation sets a separate scope for European preference, those should remain the limit, and the PPA's European preference requirements should not apply to those sectors.

The PPA's approach is generally strong. However, to be as effective as possible, it requires refinements related to methods for activation, origin verification and the Commission's unilateral powers to override public procurement agreements.

Method for activation

European preference in any form creates costs, logistical challenges and compliance burdens for both European and non-European headquartered firms. Public buyers should retain sufficient flexibility to design the European preference restriction that works for their products, while not creating disproportionate restrictions or uncertainties for public buyers.

For both buyers and sellers, an assessment of exposure alone would require a multi-step examination of contract size, the contracting authority's coverage under the applicable public procurement agreement and the subject matter's coverage under the applicable agreement. If a company, its products, services or subcontractors are exposed to a European preference restriction, origin verification would create additional burdens. Companies operating with large and diverse portfolios

of products may struggle to identify the origin of all their products in time, potentially impacting their ability to participate in tenders.

Likewise, activating European preference may qualify as a security-related restriction that would likely require case-by-case assessments in order to not violate parties' fundamental freedoms.

In view of the costs of European preference and the difficulty in protecting fundamental freedoms, the PPA should mandate that public buyers conduct risk assessments based upon clear European preference criteria established in the primary legislation.

The contract-based risk assessment criteria used in Article 66(3)(a) could provide a starting point for a risk assessment matrix. Once a risk is identified, the buyer should provide a reason for why a specific European preference restriction is proportionate to the risk at hand and publish a summary of this assessment along with the tender.

Additionally, the risk assessment methodology should examine several facets of European preference:

- **Impact on competition**. Risk assessments should evaluate not only dependency risks but also the potential impact on supply resilience, supplier participation, competition and continuity of supply. Such assessments should consider whether restrictions could inadvertently increase concentration and market power by limiting the supplier base or discouraging participation from manufacturers operating diversified global production networks.

- **Impact on complexity**. Any requirement based on a specified proportion of EU or covered content would create further complexity unless the PPA clearly defines whether the assessment concerns the finished good, component or value content, the overall composition of the tender, or a combination of these elements. A flexible but effective risk assessment framework would recognise that there is no one-size-fits-all approach that would work for all sectors.

- **Regulatory overlap**. Risk assessments should also examine the impact of other legislation as countervailing factors as well as the risk of complexity and contradiction.

European preference as NPC

The PPA allows contracting authorities to satisfy the entire 30% NPC quota within the BQM mechanism with European preference criteria, disregarding other strategic objectives that may make a stronger contribution to the selection of a product. The co-legislators should require that if a buyer employs European preference as quality criteria, they not count towards the minimum 30% NPC but instead stand separate. This would ensure a stronger balance between origin requirements and performance-oriented NPC.

Origin verification

The PPA provides two types of origin verification:

- **For goods,** non-preferential rules of origin (NP RoO); and

- **For economic operators and services,** the substance-based test present under the International Procurement Instrument (IPI).

Both types risk divergent implementation and discretionary application by individual contracting authorities. Similarly, both types create their own challenges in application. The Commission should address both issues in the PPA and in guidance to prevent divergent application.

Verification of goods

While the EU's NP RoO are the most appropriate route for origin verification at present, they include several structural issues that could create excessive costs, market access barriers and litigation.

Namely, imports under NP RoO lack common, accepted methods of verification between trading partners, are inconsistently applied and rely on evolving Commission guidance. Requiring each contracting authority to apply NP RoO when activating European preference creates an immediate risk of divergence between Member States and with customs authorities. Most companies active in Europe have reliable origin verification methods for the countries they import from, but contracting authorities may take different approaches.

NP RoO verification should, to the greatest degree possible, align with the new Union Customs Code's (nUCC) focus on digitalisation and trust to prevent duplicative compliance and divergent implementation. Taking into account the misalignment between the PPA's implementation timeframe and the nUCC, the co-legislators could:

- **Develop an advanced ruling mechanism**, potentially through binding origin information decisions as sufficient proof of origin. This would convert a subjective, buyer-level determination into a single ruling that would travel with the economic operator across all tenders in the EU, consistent with the 'prove once, reuse many times' logic already built into the EES for exclusion grounds and selection criteria.

- **Integrate electronic certificates of origin** directly into the EES, rather than requiring a separate, procurement-specific submission of the same underlying origin evidence.

- **Establish a joint interpretive framework** between DG TAXUD and DG GROW on the application of the 'last substantial transformation' test to ensure that customs authorities (administering the test for duty purposes) and contracting authorities (administering the same test for procurement eligibility) apply a single, shared reading.

- **Recognise existing reliable manufacturer and supplier documentation**. In addition to customs rulings and electronic customs certificates, the interim and permanent framework should permit the use of manufacturer statements or certificates of origin and other reliable supply chain records where these substantiate the applicable non-preferential origin determination.

The co-legislators should also:

- **Include a DPP-based non-availability exception** for products whose passports have not yet been populated with origin data, particularly during the DPP's own phased rollout.

- **Not require verification at expression of interest**.

- **Allow for adjustment to origin documentation throughout a contract**. Valid changes in origin often occur as products reach end of life, successor products are introduced or normal manufacturing and sourcing arrangements change. Economic operators should be able to update origin documentation through a standardised process without requiring an otherwise equivalent or improved replacement product to undergo a new procedure.

As the Commission supports public buyers in applying NP RoO, it should not undermine companies' legitimate steps to improve security of supply through diversified and globally integrated supply chains. For instance, manufacturing processes in highly regulated sectors, like pharmaceuticals, often involve multiple production, testing and release stages across jurisdictions to improve quality and ensure resilience.

Verification of services and economic operators

The PPA links the verification of services and economic operators to the substance-based test established under Article 3(1) of the IPI. While the Explanatory Memorandum presents this as building on an existing, proven tool, the PPA in fact imports the IPI's least-tested element – the 'substantive business operations' and 'dominant influence' test – without importing the Commission-led investigatory process that generates precedent and interpretive clarity. Applying this test in a high-volume, decentralised procurement environment without central guidance would create severe legal uncertainty and risk years of costly tender disputes.

An oversimplified or rigid service origin test would also threaten the operations of modern global technology providers. European preference for services should credit an enterprise's aggregate European presence, investment and infrastructure, rather than impose binary exclusions on individual offerings based solely on where specific elements (development, hosting or support) are located. Providers maintain diverse portfolios: some solutions are developed, hosted and operated entirely in the EU, while others use global infrastructure or multi-region teams. A rigid, line-by-line test would stop established European employers from offering their full suite to public buyers, even where they maintain substantial operations, workforces and research and development centres in the EU.

To ensure legal certainty and maintain a balanced European preference framework, the co-legislators should:

- Allow economic operators with a demonstrable, substantive operational footprint in the EU to qualify for European preference across their broader portfolio, recognising European corporate presence, infrastructure investment and employment rather than enforcing inflexible, item-by-item service origin restrictions.

- Create a formal administrative mechanism enabling economic operators to apply for and receive a pre-bidding, determinative 'European status' ruling for their corporate entity and core service lines.

- Mandate the Commission publish detailed, practical guidance on how the substance test applies to various categories of companies, including digital, hosted and globalised services. This should be updated continuously as administrative decisions accumulate to ensure uniform application across all Member States.

The Commission should also publish guidance on how origin and value are determined for services delivered jointly by group entities, particularly when the contracting entity is established in the EU and remains fully responsible for performance (Article 24[6]).

Commission powers

The PPA lets the Commission unilaterally impose European preference restrictions on entities, goods or services where an international agreement protecting against European preference is violated, where there is a risk of dependency or on other grounds laid out in an international agreement. These powers should be made objective and consistent with the EU's broader trade toolkit. The text should clarify the process the Commission must follow and the rights of interested parties to intervene, including:

- **Dispute resolution first**. Where the country is party to an agreement listed in Article 70(1), the Commission should first attempt to resolve the concern bilaterally through dispute resolution or renegotiation of concessions. It should initiate an Article 72 process only if those attempts have failed or not progressed in a reasonable time.

- **Risk assessment.** The Commission should start with a risk assessment based on pre-defined, measurable criteria in the primary legislation, which could be adapted from those used for security and resilience exclusions. The 'interest of the Union' test in Article 75 is an extremely broad power that lacks substantive and procedural safeguards.

- **Balancing test**. The Commission should weigh the mitigating effect of other EU and national legislation, including the Industrial Accelerator Act, the Cybersecurity Act 2, the Cloud and AI Development Act, NIS2 and the Critical Entities Resilience Directive.

- **Stakeholder engagement**. The Commission should also solicit input from interested parties to fully understand the operational impact of restrictions, pursuant to the rules applicable to delegated acts.

- **Review.** The Commission should review the restriction annually or bi-annually to incentivise the country or party the Commission is considering imposing a European preference restriction on to correct the behaviour that led to the restriction.

These safeguards are necessary for buyers and businesses to operate with certainty, keep the instrument consistent with the EU's trade and economic security toolkit and stop European preference from evolving into a broad protectionist tool.

Dependency restrictions

Although diversification away from single-origin dependencies is a priority for both companies and the EU, 'dependency' lacks the certainty needed to serve as the legal basis for a restriction and should be amended or deleted. Resilience should be assessed through objective indicators of supply continuity and risk mitigation (diversification, multi-sourcing, alternative suppliers, business-continuity planning and demonstrated delivery capability) rather than production geography alone. In

highly regulated sectors such as pharmaceuticals, diversified global manufacturing networks often represent the most resilient supply model.

As drafted, the undefined concept of 'dependency' does not provide a basis for measurement or contestation. This creates an immediate risk that any economic operator that sources components that are subject to high market or geographic concentration could be excluded from contracts on the basis that a theoretical application of a dependency restriction could interfere with contract performance. This would not only apply to operators using components originating in an individual country due to industrial policy but to operators using cutting-edge technologies that lack alternatives due to their complex nature or the novelty of the specific technology. Absent a clearer definition of 'dependency', a public buyer could not discount a disruption risk stemming from Article 72, and an economic operator could not refute an assertation of disruption risk.

Similarly, it is not clear whether revoking GPA/FTA concessions on the basis of 'dependency' would satisfy the conditions to qualify as a national security exception under the relevant agreement.

If this provision is retained, the co-legislators should refine the language to provide a specific metric for measuring dependency, as well as limiting principles to ensure it remains proportionate.

Exceptions

Given the disruptions that broad-based European preference restrictions could create, the Commission should expand the exceptions to provide for several other categories:

- **National security, defence or public order.**
- **Protection of public health, continuity of supply and patient access**. Contracting authorities should be permitted to waive or modify European preference requirements if they could negatively affect patient access, continuity of treatment, security of supply or procurement of essential medicines and healthcare products. This should include cases where changes to components or manufacturing sites would require regulatory review, recertification or revalidation
- **Lack of competition.** This could be substantiated after a market dialogue or lack of expressions of interest.

The PPA could also consider providing a route for exempting operators with documented records of reliable supply to the EU.

Conclusion

The PPA could become a model for how a modern public buyer works. Buyers would gain tools they can use with confidence and without fear of litigation. Bidders of all sizes, including SMEs, would find tenders easier to enter, more predictable and less costly to prepare. Taxpayers would see more competition, better quality and stronger value for the same budget. Finally, Europe would keep its access to the best technology and the supply chains that make its services reliable and resilient.

Getting the PPA right would also protect what Europe has already built. Open markets, trusted partnerships and the EU's international agreements give European firms access abroad, and the PPA is a chance to strengthen that position rather than put it at risk. It would also provide a foundation for positive incentives – investment support, state aid, infrastructure investment and manufacturing modernisation programmes – to help build European capacity without the costs and retaliation risks of restricting access.