

FIEC is the European Construction Industry Federation, representing via its 32 National Member Federations in 28 countries (25 EU, Norway, Ukraine & Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as “global players”, carrying out all forms of building and civil engineering activities.



FIEC Comments on the White Paper on levelling the playing field as regards foreign subsidies COM(2020) 253 final – Module 3

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Key messages

- ✦ FIEC welcomes the initiative of the European Commission and considers it to be, together with the forthcoming International Procurement Instrument (IPI), a decisive step towards ensuring fair competition in public procurement procedures.
- ✦ To avoid the instrument from being too burdensome for companies and public authorities the notification obligation should be limited to the key players of a work contract.
- ✦ A threshold should be aligned with those in the Procurement Directives to ensure coherence and capture all relevant cases.
- ✦ The European Commission should conduct an impact assessment of the potential administrative burden and the effect on the length of procedures.
- ✦ The decision on the distortive character of a subsidy should be taken by the national supervisory authority based on a binding methodology and interested parties should be entitled to challenge this decision before the European Commission.
- ✦ The award of projects in the context of EU funding should be guided by the principle of reciprocity.
- ✦ In EU funding procedures, the European Commission should be the single supervisory authority.

Introduction

Having advocated for several years for legislative action addressing the problem of subsidised bidding in public procurement procedures, FIEC welcomes the initiative taken by the European Commission. The growing number of cases in recent years where potentially subsidised companies (mainly Chinese State-owned companies) have been awarded large construction projects at prices which no European private company could realistically match and the current level of interest of such companies in upcoming infrastructure projects underline the need for rigorous legal action.¹

¹ A list of construction projects with Chinese participation or for which Chinese companies expressed their interest can be found on page 49 of the following policy paper: https://chinaobservers.eu/wp-content/uploads/2020/04/CHOICE_Empty-shell-no-more.pdf. In line with this, companies report that they face competition from such companies in nearly all the large infrastructure projects in Central- and Eastern Europe.

The list not being exhaustive we want to add that the works on three tunnels for the extension of the Stockholm metro have been awarded to the subsidiary of a Chinese SOE in autumn 2019 with the company in question largely underbidding its competitors.

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At this point, we want to stress that this initiative has to be seen as one part of a whole package to address the issue of unfair competition in public procurement procedures. The forthcoming International Procurement Instrument (IPI) will also be a cornerstone when it comes to ensuring reciprocity regarding access to public procurement markets. In line with the European Commission’s Guidance on the access of third-country bidders, the IPI should foster a restricted access for economic operators originating from a country with which the European Union has not concluded an agreement providing for the opening of the EU procurement markets.

The initiative in question in the White Paper is an important step towards ensuring fair competition in the Single Market. This is particularly relevant as the recovery from the crisis will be driven to a large extent by public investments. However, there appear to be some shortcomings and lack of clarity that should be resolved to make the eventual instrument an effective tool.

Comments on the White Paper

1. Distortions in the context of public procurement procedures

The existence of the foreign subsidy would be determined pursuant to the same principles as those described in Annex 1 of the White Paper. The absence or presence of the effect of the foreign subsidy would be assessed in relation to a specific procurement procedure, i.e. whether the subsidy enables the benefiting company to participate in the procedure to the detriment of unsubsidised companies. A distortion can result from either a direct link between a given procurement project and a subsidy or de facto by increasing financial strength. According to the White Paper, a distortion exists when a subsidy enables a company to submit an offer that would otherwise be economically less sustainable, especially when an offer is below market price or cost.

FIEC comments

There is a lack of clarity over whether a subsidy is checked, regarding a potential benefit in a specific procedure or regarding compliance with Single Market State Aid rules. In the latter, the principle is that any state aid is forbidden except under certain conditions whereas in the former subsidies are in principle tolerated and their distortive effects are assessed on a case by case basis. In the first case, could there be a case where a subsidy is non-compliant with State Aid rules but does not lead, according to a contracting authority, to a benefit in a specific procurement project and would thus be accepted? Such a possibility should be ruled out. The basic principle should be that foreign subsidies granted to bidders are by nature distortive and thus forbidden and exceptions should be interpreted in a restrictive manner.

2. Notification & investigation

Economic operators participating in public procurement procedures, would have to notify to the contracting authority when submitting their bid whether they, including any of their consortium members, or subcontractors and suppliers have received a foreign “financial contribution” within the last three years or expect one during the execution of the contract.

A complete notification will have to contain at least the following information:

- legal information, including ownership and governance of the tenderer, any consortium member and those subcontractors and suppliers having received foreign financial contributions
- main sources of overall financing of the tender
- total amount of foreign financial contributions received in the past 3 years

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- foreign financial contributions received specifically for the purpose of participation in the public procurement procedure
- foreign financial contributions that will be received during the expected execution of the contract

Strict and deterrent tools should be put in place to deal with failure to comply with the notification obligation or incorrect information.

FIEC comments

In the White Paper it is not entirely clear whether there is a general obligation to submit a notification or whether a notification must only be submitted if the company has received a foreign financial contribution. In order to avoid the forthcoming instrument from being too burdensome for companies and contracting authorities, we propose that, at the early stage of the procurement process, this notification is limited to “yes or no” questions and does not cover all subcontractors² and suppliers but only those which have a key role in the project. The significance of a subcontractor or a supplier will depend on the nature of the project.³ Complete documentation should only be requested from the company to which the contract would be awarded.

Moreover, it should be elaborated whether a definition or a threshold for detecting an abnormally low tender (ALT) can be established as an automatic trigger to launch an in-depth investigation.

We support the proposal to put in place strict and deterrent tools to deal with failure to comply with the notification obligation. This should also cover the notification of deliberately false information.

Thresholds and additional conditions for notification could be introduced to limit the administrative burden and to focus the instrument on the most relevant cases.

FIEC comments

A threshold according to the foreign financial contribution could lead to fraudulent behaviour. An obligation for the company that is being awarded the contract to prove the above listed information is preferable, regardless of the level/amount of a foreign financial contribution.

There should not be a higher threshold than in the Procurement Directives. First, coherence between the several instruments (General Procurement Directive, IPI and initiative in question) needs to be ensured. Second, the instrument in question should capture all cases and also protect smaller companies. As a way of illustration: In the case of the tunnel contracts in Stockholm, the value of each of the contracts was about €10 million which illustrates the interest of Chinese companies (and their European subsidiaries) in smaller contracts. Smaller contracts are attractive for such companies insofar as they could serve as a useful reference in other procurement procedures. Also, increasing the threshold could result in contracting authorities splitting the call for tenders to circumvent the notification obligation.

² Here, we would also like to put forward that when a tender is being submitted it is not always clear which subcontractor or which supplier will be used.

³ As a way of illustration, in case of the construction of a steel bridge, especially the steel suppliers will have to be investigated.

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The European Commission should conduct an impact assessment of the potential administrative burden for the supervisory authorities and the effect on the length of procedures. We very much welcome that Module 3 proposes to introduce time limits. The award of works contracts especially, is subject to lengthy procedures.

We welcome the large scope of Module 1 to address subsidies not covered by Module 3. However, the scope of a potential legal instrument in line with Module 3 should be designed in a way that Module 1 only serves as a safety net regarding subsidies in public procurement.

3. Redressive measures

If the supervisory authority confirms the receipt of a foreign subsidy, the contracting authority will determine (following guidance to ensure a uniform practice of assessment of distortion throughout the EU) whether that subsidy has distorted the public procurement procedure.

If a subsidy is deemed distortive, the bidder would be excluded from the ongoing procedure and potentially from future procedures initiated by that authority during a given period.

During this period, the company can demonstrate that it no longer benefits from the subsidy.

The decision can be subject to remedies.

FIEC comments

There must not be any discretion for the contracting authority. This would make the entire instrument completely ineffective. This problem is also recognised in the gap analysis of the White Paper.⁴ There are concrete examples in which contracting authorities have accepted tenders that seem to be abnormally low, thereby generating unfair competition. One should bear in mind that a third country could also exert political influence on Member States' authorities which could be reflected in the decisions of contracting authorities. Moreover, contracting authorities might lack the human resources and the knowledge to take such decisions in the complex area of competition law. Therefore, this assessment should be done by the supervisory authority and its decision should be binding for the contracting authority. The assessment should be based on a common methodology as proposed in the White Paper and it needs to be ensured that this methodology has a binding character. The basic principle should be that foreign subsidies granted to bidders are by nature distortive and thus forbidden. Exceptions should be interpreted in a restrictive manner. Interested parties (including associations) should be entitled to challenge the decision of the supervisory authority in front of the European Commission, which would take the final and binding decision.

The exclusion from future procedures should not be automatic and companies should be given the possibility for self-cleaning.

If there was a decision to exclude a company for several years, this should not only be the case with regards to one contracting authority but all contracting authorities as the bidder could simply “transfer” its benefit to another project. To this end, the European Commission should establish a European Database.

⁴ Description of the wide margin of discretion for contracting authorities at page 10.

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4. EU Funding

FIEC comments

With regard to EU Funding, be it under direct, shared or indirect management, FIEC calls on the European Commission to ensure that projects which are co-funded by the European Union are only awarded to economic operators originating from the European Union or from a country with which the European Union has concluded an agreement providing for the opening of the EU procurement markets.

In EU funding procedures, be it under direct, shared or indirect management, the European Commission should be the single supervisory authority to establish whether economic operators have benefited from distortive foreign subsidies.