EUROPEAN CONSTRUCTION INDUSTRY FEDERATION

EUROPEAN INTERNATIONAL CONTRACTORS

FIEC / EIC Memo

Council General Approach on the International Procurement Instrument (IPI)

(07 May 2021)

FIEC and EIC call upon the EU institutions to draft an effective tool for achieving reciprocal access to public procurement markets

Through its 33 national member federations in 29 European countries (25 EU & Norway, Switzerland, Ukraine, Turkey), FIEC represents construction enterprises of all sizes (from one person craftsmen and SMEs through to large international firms), from all building and civil engineering specialties, engaged in all kinds of working methods.

EIC has as its members construction industry trade associations from fifteen European countries and represents the interests of the European construction industry in all questions related to its international construction activities. The international turnover of companies associated with EIC's Member Federations amounts to around 170 billion € per year.

Policy background

Internationalisation has a long tradition in the European construction industry, and construction projects and services provided by European international contractors are key factors in the economic and social development in countries in all regions over the globe. FIEC and EIC wish to recall that some of the largest construction markets on the globe remain closed or restricted for European international contractors because the respective WTO members refuse to sign up to the plurilateral Agreement on Government Procurement (GPA), established under the auspices of the WTO, on equal terms. At the same time, third country companies operate freely in the majority of the EU Member States and we observe an increase in their activities since 2019.

Main observation

FIEC and EIC firmly welcome the commitment of the EU Institutions to adopt the International Procurement Instrument (IPI). The IPI has the potential to complement the EU's trade toolbox by providing the necessary leverage for a better access of EU businesses to third countries' procurement markets. However, we would like to express our concerns that the Regulation, once adopted, risks being ineffective. We are convinced **that the IPI will only be successful if it entails clear, resolute and practicable restrictive measures which are applied coherently and consistently by contracting authorities / entities across the EU**. As it currently stands, the IPI will miss its main purpose of being an offensive instrument which aims at ensuring reciprocal access to public procurement markets.

EIC, European International Contractors e.V.
EU Transparency Register No. 60857724758-68
Kurfürstenstrasse 129, D-10785 Berlin, Germany
Tel +49 (30)-2 12 86-244, Fax +49 (30)-2 12 86-285
info@eic-federation.de
Contact: **Frank Kehlenbach, Director,**
Frank.Kehlenbach@bauindustrie.de

FIEC, European Construction Industry Federation aisbl
EU Transparency Register No. 92221016212-42
Tel +32 2 514 55 35, Fax +32 2 511 02 76
info@fiec.eu, www.fiec.eu
Contact: **Domenico Campogrande, Director General,**
d.campogrande@fiec.eu

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EUROPEAN INTERNATIONAL CONTRACTORS

Detailed comments

FIEC and EIC call upon the EU Institutions to draft an effective tool for enforcing reciprocal access for EU economic operators in public procurement and to reduce potential loopholes and exemptions to a minimum in order to ensure a uniform application across EU Member States in practice. We would in particular point to the following elements:

Inter-relation of IPI Measures with the EU Procurement Directives

The IPI Regulation must not annul, overrule or rescind in any way the European Commission's Communication C(2019) 5494 final. The European Commission has already given detailed guidance with the above Communication, dated 24 July 2019, on the participation of third country bidders and goods in the EU procurement market. It emphasises that economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded. Therefore, the IPI Regulation must clarify that its measures apply on top of the application of measures adopted in accordance with Article 25 of Directive 2014/24/EU and Articles 43 and 85 and 86 of Directive 2014/25/EU.

Origin of economic operators

The IPI Regulation must ensure that the determination of origin of economic operators cannot be circumvented, for instance by establishing letterbox companies in the EU. By definition, IPI measures can only apply to third-country economic operators and, therefore, the determination of the nationality of economic operators is of crucial importance. In order to avoid a circumvention of the IPI Regulation, the corresponding rules must prevent that a company registered in a Member State is recognised as EU economic operator when its substantive economic activity takes place outside of the European Union or when it is ultimately by parent companies established in an IPI-targeted country. Therefore, contracting authorities and entities must be obliged to go beyond pure formalities and scrutinise in detail whether an economic operator has a direct and effective link with the economy of one of the EU Member States. There exist cases where contracting authorities and entities have classified a third-country economic operator as an EU operator even though there was no direct and no effective link with the economy of the respective Member State. At the same time, we would like to stress the risk of circumvention by subcontracting important parts of the contract to companies that would otherwise be targeted by IPI measures; for works contracts there should be contractual obligations imposed on successful bidders that contain a commitment not to subcontract to a company from a country targeted by IPI measures.

Investigation and consultations

The IPI Regulation must not vest the European Commission with a discretionary power whether or not to launch an investigation following a substantiated complaint. Such 'carte blanche' for the European Commission is not consistent with the Anti-Dumping Regulation (Regulation (EU) 2016/1036) nor with the Regulation on safeguarding competition in air transport (Regulation (EU) 2019/712) under which the Commission may well scrutinise a 'Union interest' in relation to the adoption of redressive measures but *not* related to the launch of an investigation. In fact, the Commission must be obliged to carry out an investigation if there is credible prima facie evidence of the existence of a measure or practice, adopted by a third country or a third-country entity, preventing EU economic operators from entering the procurement market of a third country.
Building on the **2016 IPI proposal, the Commission should only be able to suspend the investigation and consultations when the country concerned actually takes satisfactory remedial or corrective measures** but not simply on the basis of 'commitments' to end such discriminatory practices.

EUROPEAN CONSTRUCTION INDUSTRY FEDERATION

EUROPEAN INTERNATIONAL CONTRACTORS

IPI measures and additional contractual obligations

The IPI Regulation must comprise an empowerment of contracting authorities and entities to exclude tenders submitted by economic operators originating in a third country which applies discriminatory measurers against EU economic operators. Such option would significantly strengthen the European Commission's negotiating position during the consultations with the third country by being able to announce more effective and more powerful measures then (only) price penalties. Furthermore, price penalties risk being ineffective in the construction sector in the light of several examples in the recent past showing that state-owned enterprises from a third country have the capability to offer abnormally low tender prices which are below the actual cost incurred by a privately-run competitor. Hence, **FIEC and EIC consider the option to exclude tenders submitted by third-country economic operators to be the adequate and proportionate method of choice in case of discriminatory practices in the third country affecting EU economic operators in the construction sector.**

The IPI Regulation must establish the same thresholds as those obliging contracting authorities and entities in the EU to advertise and competitively tender contracts with a value in excess of the relevant threshold in accordance with the EU Procurement Directives. If the EU legislator provides for an EU-wide competition above these thresholds, FIEC and EIC cannot find any reason why these thresholds should not be relevant with respect to the question of the applicability of the IPI Regulation.

The IPI Regulation must contain a provision defining the relevant criteria for establishing the 'interest of the Union' as well as procedural rules to come to such decision. We ask for the insertion of a dedicated provision, similar to Article 21 of the Anti-Dumping Regulation (Regulation (EU) 2016/1036) and Article 3 of the Regulation on safeguarding competition in air transport (Regulation (EU) 2019/712). Given the nature of the IPI Regulation, the 'Union's interest' must take into consideration in particular the need to eliminate the practice of distorting competition, to restore effective and fair competition, and to avoid any distortion to the internal market.

Building on the **2016 IPI proposal, the Commission should only be able to suspend the IPI measures when the country concerned actually takes satisfactory remedial or corrective measures** but not simply on the basis of 'commitments' to end such discriminatory practices.

Exemptions and Exceptions

The IPI Regulation must apply per se to all contracting authorities and entities within the European Union, at least in the case of works and concessions. For such contracts, the administrative burden of contracting authorities is expected to be limited as the majority of procedures will have tenderers for which IPI measures would not apply. FIEC and EIC do not see any reason for a positive or negative list of exempted government bodies because if a contracting authority or entity has the competence to launch an EU-wide tender for works or concessions, which is heavily regulated already, it must have also the administrative capacity to apply the IPI Regulation.

The IPI Regulation must not entitle contracting authorities and entities to bypass the application of an IPI measure with respect to its procurement activities under the pretext that the application of such measure would lead to a disproportionate increase in the price or costs of the contract. Such provision has the potential to reverse the exception into consistent practice given that several examples in the recent past have shown that state-owned enterprises from a third country have the capability to offer abnormally low tender prices for a construction projects which are below the actual cost incurred by a privately-run competitor.

As far as efforts are undertaken to 'objectivise' the use of this exception by adding a reference to the estimated contract value indicated in the contract notice, we do not consider such criterion as appropriate for the following reasons: First, some contract notices do not mention an estimated contract value; second, we are aware of contract notices which substantially over- or underestimate the contract value and third, such criterion may be subject to manipulation and abuse, as contracting authorities could artificially lower the estimated value of contracts to make use of the exception and favour a certain bidder.

Building on the **2016 IPI proposal, where a contracting authority or contracting entity intends not to apply an IPI measure, it shall duly justify the use of the exception.** We recall that the requirements listed in the 2016 IPI proposal were: (a) the name and contact details of the contracting authority / entity; (b) a description of the object of the contract; (c) information on the origin of the economic operators, the goods and/or services to be admitted; (d) the ground on which the decision not to apply the restrictive measures price adjustment measure is based, and a detailed justification for the use of the exception; (e) where appropriate, any other information.

Conclusion

Public procurement represents a substantial part of the EU economy and the economies of many countries around the world. Whereas the EU has opened its public procurement markets to a significant degree to competitors from third countries, many non-EU countries are reluctant to open their public procurement markets to the EU. China in particular has opened only a fraction of its domestic procurement to foreign bidders whilst, at the same time, Chinese state-owned enterprises participate in public tenders inside the European Union and submit prices, which are often below production cost and noticeably far below that of the European bidders. The European Council on Foreign Relations found recently in a policy brief titled *'Home advantage: How China's protected market threatens Europe's economic power'* that the sheer scale of China's market combined with restrictions on foreign participation can cause lasting damage to foreign firms and markets. **The IPI Regulation should be designed as an effective tool for enforcing reciprocal access for EU economic operators in public procurement and ensuring a level playing field.**