

China challenge – new developments

FIEC and EIC welcome the beginning of an EU strategy towards China and remain concerned about unfair and unhealthy competition

Following a decade of lobbying, the European construction industry appreciates that at least some of its arguments and requests can be found both in the European Commission's "Strategic Outlook" of 12/3/2019 (<https://bit.ly/2J7AwRd>) and in the Council conclusions of 22/3/2019 (<https://bit.ly/2VwGpcv>). From the point of view of the construction industry, some actions are particularly interesting.

Please note: the very important aspects linked to international trade and governed by the rules of WTO, GPA, OECD etc. are not covered in this article, because it is focused on the EU Internal Market.

THE EUROPEAN COMMISSION

ACTION 6: Promote reciprocity and open up procurement opportunities in China.

FIEC/ EIC comment:

Most regrettably, the text seems to be limited to the adoption of the International Procurement Instrument which the European construction industry has always considered as insufficient for the intended purpose, namely to ensure reciprocity in practice.

ACTION 7: To ensure that not only price but also high levels of labour and environmental standards are taken into account, the Commission will publish guidance by mid-2019 on the participation of foreign bidders and goods in the EU procurement market.

FIEC/ EIC comment:

This is a good first step, but it needs more than just "guidance", to ensure that contracting



authorities do not award contracts to abnormally low tenders (ALT) based on unfair competition by third country state aid. In the last revision of the procurement directives, the Commission had proposed an obligation to check details if the preferred bidder was at least 20% cheaper than the second ranking. This proposal did not survive the legislative process. Consequently, it seems necessary to adapt the public procurement rules to these developments, for example by ...

- mandatory verification (not automatic exclusion), if the difference between the preferred bidder and the second offer amounts to 20% or more,
- obligation for real, thorough analysis, transparent for verification by courts, if necessary,
- obligation to exclude any tender which cannot prove not to be an ALT,
- application of EU state aid rules to any contractor wishing to work in the EU Internal Market,
- the assumption of the existence of illegal state aid in any case of SOE participation.

This assumption can be lifted by proving the contrary. Otherwise, there should be mandatory exclusion of this tender/ SOE.

The construction industry will give its input to the efforts of Commission and Member States to identify gaps and shortcomings in the current legal framework.

ACTION 8: To fully address the distortive effects of foreign state ownership and state financing in the internal market, the Commission will identify before the end of 2019 how to fill existing gaps in EU law.

FIEC/ EIC comment:

Very good intentions! There is no reason to presume that third-country state aid has a less damaging impact on the competition in the Internal Market than that of Member States. The mandatory state aid test mentioned above might be a way forward, ensuring respect of EU law in the Internal Market and avoiding discrimination. The construction industry will assist in the Commission's work.

THE COUNCIL

The Council conclusions are, of course, less specific, but fundamental elements of the strategy described by the Commission can be found in item 3 of the chapter "JOBS, GROWTH AND COMPETITIVENESS":

(p. 2) "Fair competition should be ensured within the Single Market and globally, both to protect consumers and to foster economic growth and competitiveness, in line with the long-term strategic interests of the Union. We will continue to update our European competition framework to new technological and global market developments."

(p. 3) "The EU must also

safeguard its interests in the light of unfair practices of third countries, making full use of trade defence instruments and our public procurement rules, as well as ensuring effective reciprocity for public procurement with third countries. The European Council calls for resuming discussions on the EU's international procurement instrument;"

FIEC/ EIC comment:

These Council conclusions are more than "guidance" for the Commission and increase its chances to propose measures which will ultimately receive the agreement of the EU co-legislators. Hopefully, this results in tackling this challenge.

OVERALL

This is more promising than any earlier publication by European institutions. The construction industry, together with other sectors directly concerned, will contribute to all these actions, in order to ensure that the EU will have a realistic strategy in favour of fair competition on open markets, both in the internal market and worldwide. **ce**



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