

<p><b>International Procurement Instrument</b> <b>AEGIS Europe updated position paper – March 2021</b></p>
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As emphasised by AEGIS Europe in previous position papers, European businesses cannot always get equal access to procurement markets outside the EU due to several public procurement-related barriers (lack of transparency or discrimination in tendering procedures, local content requirements...), or, if access is granted, it comes with conditions which increase the risk in further investment from EU companies.

In spite of the significant benefits of opening public procurement markets, many countries are indeed increasingly restricting access to their markets. As a result, more than half of the world's procurement market is currently closed *de jure* or *de facto* to outside bidders and this share is growing. This situation is expected to worsen in the wake of the COVID-19 crisis, which could accentuate protectionist tendencies.

**Against this background, AEGIS Europe calls on the European Union and Member States to take a strong stance on reciprocity in the field of public procurement in order to support the opening of international procurement markets while creating a robust and actionable leverage. Furthermore, AEGIS Europe strongly supports the European Commission's recent call for "*the Council to finalise its work as a matter of urgency*".**

In view of ongoing discussions, AEGIS Europe's important messages and proposed changes to the 2016 revised draft Regulation are listed below.

<p><b>Link with other instruments (Article 1)</b></p>
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Article 1.5<sup>2</sup> of the revised proposal stands in contradiction with provisions of the EU public procurement framework related to the treatment of foreign bidders with which the EU has no bilateral or plurilateral agreement on government procurement, which have been clarified by the *Guidance on the participation of third country bidders in the EU procurement market*. While the IPI should indeed provide a common minimum frame for Member States, it is crucial to maintain flexibility as long as Member States are compliant with EU rules and international commitments made by the EU.

Article 17 of the revised proposal suggests to remove Articles 85 and 86 of Directive 2014/25/EU, which allow in particular contracting authorities to reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender. These Articles have been enshrined in the EU public procurement framework since 2004; they constitute an essential – and already actionable – safeguard. The interest in these Articles can be further expected to grow as competition from non-European companies is rapidly increasing and EU manufacturing jobs are threatened.

**AEGIS Europe calls for:**

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<sup>1</sup> *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy.*

<sup>2</sup> "Member States and their contracting authorities and contracting entities shall not apply restrictive measures in respect of third country economic operators, goods and services beyond those provided for in this Regulation".

- The deletion of Article 1.5.
- The deletion of Article 17.

### Rules of origin (Article 3)

Article 8(1) of the revised proposal provides that penalties will apply to tenders '*more than 50 % of the total value of which is made of goods and/or services originating in a third country*'. These complex rules of origin could represent significant administrative burden for contracting authorities, which would have to verify the origin during the tender evaluation, while the potential consequences of non-compliance in project execution are unclear. Furthermore, these rules could create obstacles for businesses.

**AEGIS Europe supports a shift of the focus of IPI measures from the origin of the goods to the origin of the bidding entity, with important requests:**

- The definition of the origin of the bidding entity should be based on a clear and substantiated definition of 'substantive business operations'.
- The notion of control should be maintained in order to deal with acquisitions of a majority of the shares of an entity by an economic operator originating from the third country concerned by the investigation.
- Consortia including an entity as defined by the Regulation should be included, unless this entity represents a negligible portion of the contract value.

However, without further guarantees to the system, EU companies winning bids could easily subcontract or resort to suppliers originating from the targeted third country. Therefore, a safety net request winning bidders to commit that the majority of the goods/services will not be provided by the country targeted by IPI measures is necessary to prevent easy circumvention of the instrument. The system would be much less burdensome than the 2016 proposal insofar as it would only apply to winning bidders, and as *ex post* verification for one specific country is easier to achieve than *ex ante* (e.g. use of customs declarations).

**AEGIS Europe:**

- Supports an 'add-on' requesting winning bidders to commit that the majority (i.e. more than 50%) of the goods/services will not be provided by the country targeted by IPI measures.
- Calls for clear guidelines from the European Commission to on how to prove compliance, in order to provide legal certainty to contracting authorities and businesses.
- Calls on contracting authorities to verify *ex post* if bidders have lived up to their commitments and to apply deterrent financial penalties in case of non-compliance.

### Investigations and consultations (Articles 6-7)

The revised proposal determines that the investigation stage could take up to 12 months (8 months plus 4 months extension) and the subsequent consultation stage up to 15 months. Therefore, the procedure could take up to 27 months in total. This period is extremely long, not fit for the reality of business and procurement processes and would reduce the EU leverage.

**AEGIS Europe:**

- **Supports a procedure which total maximum duration would be up to 14 months** (investigation and third country consultations held in parallel).
- **Opposes the possibility to suspend the investigation during negotiations with third countries when they are engaged with the EU in trade negotiations.** The procedure should follow its course regardless of potential trade negotiations, otherwise third countries might engage in lengthy negotiations with the sole objective of avoiding EU measures.

### **Price adjustment measures and exclusion (Article 8)**

Article 8(2) of the revised proposal suggests a *'penalty of up to 20% to be calculated on the price of the tenders concerned'*. While AEGIS Europe supports the concept of a price adjustment measure, it should be strengthened and measures expended in order to ensure the deterrence of the instrument.

#### **General remarks**

##### **AEGIS Europe:**

- **Supports a double-sided system of price adjustment measures on the one hand and exclusion on the other hand.** The decision on the type of measure should be made by the European Commission on the basis of the investigation and consultations with the concerned third country.
- **Supports the introduction of a review clause,** allowing for potential reassessment of the Regulation after a reasonable period of time following the entering into force. This would enable to correct the potential inefficiencies related to the IPI measures, e.g. by rendering exclusion automatic and/or by making Article 85 of Directive 2014/25/EU mandatory for EU-funded projects in order to reinforce the leverage on third countries that are not willing to cooperate.

#### **Exclusion**

**AEGIS Europe supports exclusion as a truly available option to the European Commission, based on several criteria:**

- a) the gravity and recurrence of the procurement restrictions;
- b) non-cooperative behaviour of the third country;
- c) presence on the EU procurement market of third country bidders from the sector under investigation. A proven foothold on the European market without reciprocal openness of the market should be sanctioned with exclusion of these bidders.

#### **Price adjustment measures**

##### **AEGIS Europe:**

- **Supports a strengthening of the price penalty of at least 20% and up to 50% depending on the cases** (in view also of price differences or distortions observed in the EU) and based on the decision from the European Commission.
- **Expresses concerns regarding the possibility to take into account quality criteria in IPI measures.** AEGIS Europe strongly supports the integration of the Most Economically Advantageous Tender (MEAT) principle across European procurement to put an end to the dominance of the lowest price, but the integration of such criteria in the IPI raises several questions. First of all, the aim of

IPI measures is to create a clear advantage for European companies vis-à-vis competitors from the concerned third country, but criteria other than a price penalty might not have that desired effect. Furthermore, the importance of criteria other than price vary from one sector to another, so there would be no 'one size fits all' solution in defining which criteria could be used. Last but not least, this would introduce subjectivity in procurement and create complexity for contracting authorities, while a major aim of ongoing discussions is to simplify the instrument and reduce the administrative burden.

- **Supports the idea to set a clear and deterrent duration for IPI measures** (e.g. 5 years), with the possibility for the European Commission to extend these measures after a review period and exchanges with the concerned third country.
- **Supports the maintaining of the proposed threshold of application of EUR 5.000.000 for goods and services.** Lowering this threshold would exclude important sectors from the scope of the application of the IPI.

#### Authorities or entities concerned (Article 9)

Article 9 stipulates that Member States will provide '*a list of appropriate contracting authorities*' to the European Commission. The Commission would then determine which entities are concerned by action taken in the context of the IPI. This system would lead to a fragmented European internal market and could considerably reduce the overall credibility of the instrument, while thresholds will already provide a 'screening' effect on concerned entities.

**AEGIS Europe believes that Article 9 of the revised proposal should be deleted to make sure that the Commission invites all contracting authorities procuring goods or services in accordance with the rules of the 2014 Directives (and above the agreed thresholds) to apply measures.**

**Should this provision be maintained, it should be legally and operationally framed:**

- **Member States should provide list of entities on a voluntary basis and in duly justified cases (case-by-case approach);**
- **Member States resorting to a list of entities should have the obligation to cover a very substantial part (at least 90%) of procurement in the sector concerned;**
- **The European Commission should be able to reject the proposed list of entities if it believes that the coverage is insufficient or that major public buyers are out of the scope.**

#### Exceptions (Article 12)

Article 12(1)(b) stipulates that the penalty shall not apply to a given procurement procedure if its application '*would lead to a disproportionate increase in the price or costs of the contract*'. Many contracting authorities tend to award contracts based on (the lowest) price alone, and there are no appropriate tools at EU level to determine what is an abnormally low tender (based on foreign subsidies) and oblige contracting authorities to reject them. Such a wide provision could be used extensively and without justification, creating a major flaw in the mechanism and a risk of circumvention.

**AEGIS Europe calls on the deletion of Article 12(1)(b), which provides a too wide exception without appropriate safeguards.**

**Should this exception be maintained, it should be legally and operationally framed so that the exceptional nature of the provision is guaranteed. In particular:**

- **It should be specified that if other submitted bids fall within the budget limits of the project, Article 12(1)(b) cannot be used. Any specific definition with a percentage of price difference should be based on best practices from Member States in the transposition of the EU public procurement framework and provisions on abnormally low tenders<sup>3</sup>.**
- **Member States should systematically notify the use of exceptions to the Commission. In order to guarantee the uniform application of the Regulation and deter any abusive use, the Commission should be able to start an infringement proceeding if exception possibilities have been misused repeatedly.**

#### **About AEGIS Europe**

AEGIS Europe is an industry alliance that brings together more than 20 European manufacturing associations from metals and ceramics to energy and transportation industries committed to manufacturing in the EU on a truly level playing field ensured by a rules-based free and fair international trade. Our members account for more than €500 billion in annual turnover, as well as for millions of jobs across the EU.

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<sup>3</sup> Inspiration could be taken from the Luxembourg law on public procurement and Article 88 of its implementing Regulation from April 2018 (<http://legilux.public.lu/eli/etat/leg/rgd/2018/04/08/a244/jo>).