PUBLIC PROCUREMENT

Reforms needed to achieve reciprocity and a level-playing field

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ABOUT AEGIS EUROPE

AEGIS Europe is an industry alliance that brings together 22 European manufacturing associations committed to free and fair international trade ensured by an effective international level-playing field.

Our members account for more than €500 billion in annual turnover, as well as for millions of jobs across the EU.

AEGIS Members include the following European industry sector associations:

- Association of European ferro-alloy producers (EUROALLIAGES)
- Association of European Wheel Manufacturers (EUWA)
- European Aluminium
- European Association of Technical Fabrics Producers (TECH-FAB Europe)
- European Bicycle Manufacturers Association (EBMA)
- European Ceramic Industry Association (Cerame-Unie)
- European Container Glass Federation (FEVE)
- European Domestic Glass (EDG)
- European Federation of Rope, Twine & Netting Industries (EUROCORD)
- European Federation of Steel Wire Rope Industries (EWRIS)
- European Glass Fibre Producers Association (GLASS FIBRE EUROPE)
- European Industrial Fasteners Institute (EIFI)
- European Man-made Fibres Association (CIRFS)
- European Non-ferrous Metals Association (Eurometaux)
- European Organisation of the Sawmill Industry (EOS)
- European Rail Industry (UNIFE) – Associated Member
- European Steel Association (EUROFER)
- European Steel Tube Association (ESTA)
- Fertilizers Europe
- European Shipbuilding and Maritime Equipment Manufacturers (SEAEUROPE)
- Medicines for Europe
- Sustainable Solar Energy Initiative (EU PRO SUN)

EXECUTIVE SUMMARY

Although the EU public procurement market for goods and services is transparent and open to foreign bidders, there is growing lack of level-playing field in world procurement markets. Third countries are increasingly restricting access to their markets while their companies are winning significant contracts abroad – sometimes on unfair pricing terms or by challenging EU public procurement rules. This poses a threat to growth and employment in the EU, as it represents missed opportunities for exports but also increasingly in the domestic market.

Against this background, AEGIS Europe calls on the European Union to take a strong stance on reciprocity and other reforms needed in the field of public procurement. This is key to support the opening of international procurement markets while guaranteeing an adequate level of protection of the EU public procurement market against non-reciprocal and/or unfair competition. This should materialise through three essential dimensions.

1. ***The international dimension***

Removing public procurement-related barriers faced by European companies on international markets is of crucial importance. Several tools should be used in this respect:

- **An ambitious 'International Procurement Instrument'** to foster reciprocity and provide leverage to push third countries to open their markets. AEGIS Europe stresses the need for this instrument to be credible, with strong price adjustment measures, a specific treatment for third country State-owned Enterprises while preserving existing provisions of the EU public procurement rules (Articles 85 and 86 of Directive 2014/25/EU);
- **A stronger WTO Agreement on Government Procurement (GPA)**, with further work to support the accession of third countries on a strictly reciprocal basis while aiming at the greatest possible extension of the coverage among all parties;
- **Ambitious Free Trade Agreements (FTAs) with respect to public procurement**, going beyond GPA commitments at all levels and avoiding bad precedents, while ensuring a solid monitoring process for newly agreed deals.

2. ***The European dimension***

AEGIS Europe fully supports a more strategic approach to the EU procurement framework and the identification and removal of obstacles that impede a level-playing field between European companies and their competitors from third countries. Gaps identified by the industry and requiring actions to strengthen existing provisions include in particular:

- **International agreements**, to ensure that no exceptions to the EU public procurement procedures are allowed and that monitoring by the European Commission is reinforced;
- **Contract award criteria**, for contracting authorities to operate a shift with the technical assistance of the European Commission in order to avoid the award of contracts based on price only;
- **Abnormally low tenders**, to streamline its definition at European level and strengthen existing provisions (evaluation and treatment of these tenders) with the support of the European commission;
- **Tenders comprising products originating in third countries**, to ensure that these provisions (and their operational consequences) are known by European contracting authorities, and

that they become mandatory for EU-funded projects of critical or strategic infrastructure or technology, or that would allow access to sensitive EU information or key EU expertise.

3. Financing

Long-term financing under fair and transparent conditions is crucial given that global competition within many industrial sectors is very often driven by access to finance and not only by the strength of the manufactured products or technical competencies of the bidder. Therefore, a level-playing field in financing conditions must be ensured to stimulate global fair competition. In particular, AEGIS Europe calls on European institutions to address the following points:

- **Level playing field and transparency in the use of State-supported Export Credits.** New international disciplines are urgently needed to ensure that OECD and non-OECD exporters can compete on the price and quality of their goods and services, while work towards the harmonisation of national export finance support mechanisms within the EU is needed;
- **Long-term financing for European companies abroad coupled with stronger conditionality and added value criteria for investments within the EU.** EU long-term financing tools should be strengthened and due diligence requirements introduced for all EU public funding/financing programmes with regard to the participation of third country companies, with the possibility of withdrawing credit lines or co-funding grants.
- **The Belt and Road Initiative**, which so far has fallen short of providing significant business opportunities to European companies. In this context, there should be full reciprocity in the exchanges and activities of the EU-China Connectivity Platform and a level-playing field in BRI projects with concrete measures from China on transparency and non-discrimination.

THE NEED FOR REFORMS TO ACHIEVE RECIPROCITY AND A LEVEL-PLAYING FIELD IN PUBLIC PROCUREMENT

From upstream industrial sectors such as steel or ceramics, to downstream industries such as ship-building or rail supply, AEGIS Europe members consider public procurement as an essential tool for business to thrive, but also to promote a more sustainable and innovative economy.

It is widely acknowledged that the EU public procurement market for goods and services is transparent and open to foreign bidders, according to the rules set out in the Government Procurement Agreement (GPA) in of the World Trade Organization (WTO) – of which the EU is a party. To date, the EU has committed about EUR 352 billion of EU public procurement to bidders from the 18 other member countries of the GPA. Furthermore, the EU has always advocated the widest opening of international public procurement markets in the context of the GPA or in bilateral negotiations with third countries.

However, it cannot be denied that there is an increasing lack of level-playing field in world procurement markets. Many third countries are reluctant to open their procurement markets to international competition or to open them further than what they have already done. For example, the value of US procurement offered to foreign bidders only amounts to EUR 178 billion, and other GPA parties have limited coverage of procurement in their schedules. Large growing economies like China, Brazil or India are not yet parties to the GPA and do not grant legally secured access to their procurement markets. This situation has worsened in the wake of the economic crisis, with many countries adopting protectionist measures in relation to public procurement. 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. Only EUR 10 billion of EU exports (0.08% of EU GDP) can reach global procurement markets, while an estimated EUR 12 billion of further EU exports remains untapped due to restrictions.

This situation is all the more worrying as companies based in third countries that are partially or fully closed are bidding in the EU and winning significant contracts – sometimes on unfair terms based on subsidisation and artificially low prices, or by challenging EU public procurement rules.

This unfairness poses a threat to growth and employment in the EU, as it represents missed opportunities for exports but also increasingly in the domestic market. AEGIS Europe members therefore voice their urgent claim for the European Union to take a strong stance on reciprocity and other reforms needed in the field of public procurement in order to support the opening of international procurement markets while guaranteeing an adequate level of protection of the EU public procurement market against non-reciprocal and/or unfair competition.

AEGIS Europe members fully support the conclusions from the European Council held on 21-22 March 2019 which stated that '*the EU must also safeguard its interests in the light of unfair practices of third countries, making full use of (…) our public procurement rules, as well as ensuring effective reciprocity for public procurement with third countries*', as well as the March 2019 Joint Communication '*EU-China – A Strategic Outlook*' which proposes several concrete actions on public procurement.

Only a coherent and comprehensive EU strategy can rebalance access to public procurement markets. The EU approach should draw on all the resources in the European Commission (EEAS, GROW, TRADE…), the European Parliament and – critically – Member States. AEGIS Europe believes that a coherent strategy must address the range of issues outlined in this paper.

THE INTERNATIONAL DIMENSION: WHAT LEVERAGE ON THIRD COUNTRIES?

In spite of the significant benefits of opening public procurement markets, many countries have procurement policies designed to promote domestic industry. Therefore, European businesses cannot always get equal access to procurement markets outside the EU, or, if access is granted, it comes with conditions which increase the risk in further investment from EU companies.

The main public procurement-related barriers faced by European companies on international markets are:

- Domestic content requirements (requirements to include local goods/services or to subcontract locally) – especially in the US, China, India, South Africa, Russia, Brazil and Turkey;
- Price advantages of subsidised bidders or State-owned enterprises;
- Lack of transparency or discrimination in the information given on procurement opportunities, on the applicable rules/procedures, technical specifications and evaluation criteria for tenders (this is particularly the case in China);
- Difficult access to sub-central level (States/provinces/local authorities…) or to State-owned enterprises/public undertakings (public buyers).

Removing these obstacles is of vital importance for the European industry, and AEGIS Europe calls on the EU to use several tools to address them on world procurement markets.

International Procurement Instrument (IPI)

The proposal for an International Procurement Instrument (IPI) aims at opening international procurement markets and respond to the absence of a level-playing field in world procurement markets. An earlier proposal from 2012 was supported by the European Parliament but was unable to gain the support of the Council. Therefore, the European Commission made a revised proposal in 2016[1], modifying the possible consequences for third countries, which is still on the table today. The European Political Strategy Centre, in a document entitled '*EU industrial policy after Siemens-Alstom*' released in March 2019, confirms that the current Commission proposal is '*a balanced, non-protectionist instrument, beneficial to the EU economy and compatible with the 'best value for money' principle that is key to efficient procurement*'.

AEGIS Europe calls on Member States to pursue and accelerate negotiations on the International Procurement Instrument, in the wake of the European Council held on 21-22 March 2019 ('*The European Council calls for resuming discussions on the EU's international procurement* instrument'). This will be key for the new European Parliament to resume its work and for an ambitious agreement to be found that will truly incentivise third countries to open their procurement markets.

[1] The 2016 revised proposal essentially proposes to: a) delete the so-called 'decentralised pillar' of the procedure, which allowed contracting authorities to decree autonomously a prohibition on foreign bidders' participation in their tenders; b) replace the closing of the EU public procurement market as last resort measure against a third country by a 'price adjustment measure' (financial penalty in the tender evaluation phase).

AEGIS Europe also would like to highlight the following points:

- ***The scope of application of the instrument needs to be clarified***

It is essential to clarify the definition of 'non-covered goods or services' as provided in Article 2, (1), (e). In particular, the European Commission should publish a list of countries concerned by an international agreement in the field of public procurement, and it should be explicitly mentioned that countries with which the EU has already concluded an international agreement, but which retains market reservations towards European companies, are considered 'non-covered'.

- ***Existing provisions of the EU public procurement rules must be safeguarded***

Today, the EU public procurement framework (Articles 85 and 86 of Directive 2014/25/EU) allows contracting authorities to respond to non-reciprocity or any other issues related to the access to third countries markets faced by European companies. Particularly, under Article 85, contracting authorities are allowed 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, as the recent *Guidance on the participation of third country bidders in the EU procurement market* has shown.
In the Article 17 of the revised proposal, however, the European Commission proposes to delete these Articles. AEGIS Europe members strongly oppose this idea and therefore call for the deletion of Article 1786.

- ***'Price adjustment measures' should be strengthened while minimising the administrative burden for contracting authorities and companies***

AEGIS Europe members support the concept of a price adjustment measure to complement the rules laid down in Articles 85 and 86 of Directive 2014/25/EU. The European Commission should however impose a price adjustment of <u>at least</u> 20% – a (theoretical) threshold under which such measures would be inefficient given the increasing competition with State-owned enterprises based on price.
The instrument has to be credible, but it should also minimize the administrative burden for contracting authorities and companies in order to limit operational and legal risks. In this respect, price adjustment measures could apply to legal entities established in or controlled by a legal entity based in the third country at stake – removing any difficulty linked to the calculation of the share of content from this third country (Article 8, (1)).
Finally, the Commission should invite <u>all</u> contracting authorities procuring goods or services in accordance with the rules of the 2014 Directives to apply cost adjustment measures, without exception (a list of 'appropriate contracting authorities' provided by Member States, as suggested in Article 9 of the 2016 Commission's proposal, would considerably reduce the overall credibility of the instrument). The revised proposal already provides that price adjustment measures shall only apply to contracts with an estimated value equal to or above EUR 5.000.000 exclusive of value-added tax, which guarantees that smaller contracting authorities – with less procurement resources and knowledge – will not be impacted.

- ***Specific treatment for State-owned enterprises***

Competition from non-European State-owned enterprises (SoEs) creates distortions. This is particularly true in public procurement, for which the strong pressure on price and the dominance of the latter in award criteria unavoidably leads to a competitive advantage for SoEs and unfair competition with EU players abiding market rules. AEGIS Europe believes that the price adjustment measure system, even reinforced, will not be sufficient to counterbalance these distortions on the European market; indeed, the logic of these companies is not profit but size at any cost.
Therefore, at the end of the investigation led by the European Commission, and in case of refusal of a third country to open its market to EU undertakings, SoEs from that third country should be

automatically excluded from tendering procedures either for a specific sector (based on HS codes) or for all entities procuring in accordance with the rules of the 2014 Directives, until the respective governments provide remedy to the non-tariff barriers at the root of the investigation.
In practical terms, the European Commission would be in charge of establishing the list of all the relevant SoEs depending on the scope of investigation. The burden of proof should not be borne by EU contracting authorities but by the government of the third country in question. The draft Regulation could use the definition of 'State-owned enterprise' from an already implemented agreement, such as the EU-Japan Economic Partnership Agreement (Chapter 13)[2].

- ***Towards a more business-friendly procedure***

Commission investigations should last a maximum of 3 months; this seems highly feasible as in many cases, the Commission will already be aware of existing practices in third countries, and might even have already raised the issue bilaterally. The consultation with the third country should last a maximum of 9 months. Furthermore, the possibility to suspend the investigation during negotiations with third countries when they are engaged with the EU in trade negotiations should not be allowed. 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.

Agreement on Government Procurement (GPA) of the WTO

The WTO GPA is in force since 1994 and was revised in 2014. Its aim is to mutually open government procurement markets among its 20 parties covering 48 WTO members. In spite of the many achievements of this agreement, it remains imperfect as:

- Major EU trading partners are not signatories (e.g. China, Russia, South Africa, India) and incentives to join are limited as companies from these countries can already do business in Europe;
- Members of the GPA have maintained, to different extents, discriminatory measures against other GPA members through negotiated carve-outs in the market access schedules of commitments.

In the context of the ongoing discussions on the reform of the WTO, AEGIS Europe calls on the European Commission to:

- Continue to support the accession of third countries to the WTO GPA Agreement, especially the acceleration of China's accession, on a strictly reciprocal basis;
- Intensify work with the GPA parties on to eliminate discriminatory measures and achieving the greatest possible extension of its coverage among all parties on the basis of mutual reciprocity;
- Call for a stronger role of the WTO Secretariat in the monitoring and enforcement (with penalties for non-compliance) of the WTO GPA rules, and in building more structured interactions with the business community;

[2] '*an enterprise that is engaged in commercial activities in which a Party:*

(i) directly owns more than 50 per cent of the share capital;
(ii) controls, directly or indirectly through ownership interests, the exercise of more than 50 per cent of the voting rights;
(iii) holds the power to appoint a majority of members of the board of directors or any other equivalent management body; or
(iv) has the power to legally direct the actions of the enterprise or otherwise exercises an equivalent degree of control in accordance with its laws and regulations.'

- Kick off discussions on a future revision of the GPA to reinforce existing disciplines, question the possibility for parties to unilaterally delist entities and have a common definition of government-controlled entities.

Free Trade Agreements (FTAs)

In the current context of difficult plurilateral negotiations and few developments regarding the WTO GPA, and in the absence – as of yet – of an EU instrument to open international procurement markets, bilateral trade negotiations between the EU and major third countries remain the main instrument at the disposal of the EU to open procurement markets.

In recent years, there have been significant achievements in the public procurement chapters of the 'next generation' trade agreements concluded by the EU. For instance, the Comprehensive Economic and Trade Agreement (CETA) with Canada has disciplined local content and replaced it by the concept of 'local value', which is easier for manufacturers to meet. The EU-Japan Economic Partnership Agreement (EPA) could also lead to positive developments. On the contrary, the EU-South Korea agreement has led to few, if none, improvements regarding public procurement market access for European companies.

AEGIS Europe states that:

- Agreements under negotiations (e.g. Mercosur FTA) should have high ambitions on public procurement (going beyond GPA commitments) and avoid setting bad precedents. Negotiations should aim at addressing identified barriers and at opening procurement at all levels (central and sub-central). This second point is critical given that many third countries have decentralised systems and authorities (States/provinces/local authorities…) playing a key role in procurement for various products.
- Newly agreed trade deals should have a solid monitoring process for the public procurement chapters. This should include a clearly identified path to raise the profile of issues should third countries not properly enforce their commitments.

THE EUROPEAN DIMENSION: A FLAWED EU PUBLIC PROCUREMENT FRAMEWORK?

Many industrial sectors are increasingly experiencing issues in the field of public procurement on the EU market. These issues are linked to rising competition from State-owned and subsidised enterprises from third countries and to legal challenges to the EU public procurement framework (Directives 2014/23/EU, 2014/24/EU and 2014/25/EU), revealing its flaws.

AEGIS Europe fully supports a more strategic approach to the EU procurement framework and the identification and removal of obstacles that impede a level-playing field between European companies and their competitors from third countries. In particular, AEGIS Europe welcomes the publication, in July 2019, of the *Guidance on the participation of foreign bidders in the EU procurement market*. This document clarifies that economic operators from third countries which do not have any plurilateral or bilateral agreement on government procurement with the EU or whose goods, services and works are not covered by such an agreement, do not have secured access to EU procurement procedures and may be excluded. This is, however, only a first step in the right direction as the European Commission is also tasked to carry out an overview of the implementation of the current framework to identify shortcomings before the end of 2019[3] . Other important points are listed below.

International agreements (Article 20, Directive 2014/25)

Article 20 of Directive 2014/25/EU on Utilities provides that EU public procurement rules do not apply in certain cases. For instance, international agreements concluded between a Member State and one or more third countries can contain specific procurement rules; in this case, the EU procurement instruments are not applicable. This has created worrying precedents in major infrastructure projects, especially in the context of the '16+1[4]' platform gathering EU Central and Eastern European countries, Western Balkans countries and China.

AEGIS Europe calls on:

- European institutions to either revise the rules or at least strengthen their application to ensure that no exceptions to the EU public procurement procedures are allowed, even in the case of international agreements between Member States and third countries;
- The European Commission should reinforce monitoring of the implementation of EU public procurement Directives and impose penalties through infringement procedures whenever applicable, even in the case of international agreements between Member States and third countries;
- The European Commission and Member States to ensure that these projects also guarantee a high standard of quality, security, sustainability and social responsibility.

[3] As stated in the March 2019 Joint Communication *'EU-China – A Strategic Outlook'*.

[4] The number has even reached 17 since Greece officially joined the platform on the occasion of the April 2019 meeting in Dubrovnik.

Contract award criteria (Article 82, Directive 2014/25 and Article 67, Directive 2014/24)

Contract award criteria are described in the 2014 public procurement framework: '*contracting entities shall base the award of contracts on the Most Economically Advantageous Tender*' (MEAT), which '*shall be identified on the basis of the price or cost, using a cost-effectiveness approach*'.

A procurement approach based on the best-price quality ratio over the lifetime of the products and services indeed provides benefits to contracting authorities such as:

- Maximisation of procurement value;
- Improvement of business conduct through a shift from a 'one-size-fits-all' approach and advancement of sustainable policy objectives;
- Reduced obsolescence thanks to more advanced products likely to be maintainable longer;
- Increased and fair competition between all bidders, irrespective of their nature (i.e. private or State-owned companies).

However, and depending on the transposition of these Articles in national law, contracting authorities might assess the MEAT in different ways. The current formulation of the Directives even allows contracting authorities to still define MEAT contracts based on price only.

AEGIS Europe calls on:

- European institutions to change the current definition of MEAT – on the occasion of a future review of the EU public procurement framework – to avoid the award of contracts on the basis of price only;
- European contracting authorities, in the meantime, to already base the award of contracts (especially when they concern significant projects such as infrastructure projects) on the MEAT principle defined as the best price-quality ratio;
- Contracting authorities to request bidders to provide goods or services that contribute to sustainable procurement and EU policy goals in terms of sustainability (circular economy, CO2 reduction etc.);
- Contracting authorities to strictly request the use of EU mandatory standards and to use EU voluntary standards as an incentivisation to reward bidders;
- European institutions to establish MEAT defined as the best price-quality ratio as a pre-condition to obtain EU financial support in the forthcoming Multiannual Financial Framework (e.g. Connecting Europe Facility, Structural Funds, European Fund for Strategic Investments, EIB instruments);
- The European Commission to provide technical assistance to Member States (seminars, guidance on MEAT…) to operate the shift towards more sustainable procurement.

Abnormally low tenders (Article 84, Directive 2014/25 and Article 69, Directive 2014/24)

The European public procurement market is increasingly confronted with abnormally low bids, in particular from non-European State-owned enterprises are shielded from normal market competition. For example, a recent tender for railway infrastructure upgrade in Bulgaria – co-funded by the EU – was awarded to a consortium having made an offer 40% cheaper than the next. Other examples exist, such as the Pelješac bridge in Croatia. These bids distort competition and can have disastrous long-term effects on companies and jobs in Europe, and although they may appear to be attractive for contracting authorities, they often result in costs increase, low quality and contract delays.

The EU public procurement framework provides for a mechanism allowing contracting authorities to reject, under specific conditions, abnormally low tenders. However, this tool is left unexploited by EU Member States and contracting authorities, and the level of protection of European suppliers facing unfair competition on costs in EU tenders is currently insufficient. First of all, Directive 2014/25 does not provide a definition of an abnormally low tender, but only a list of possible explanations for the low prices. Furthermore, rejection of abnormally low tenders is only mandatory whereby the abnormally low price or costs proposed results from non-compliance with mandatory EU law or national law in the fields of social, labour or environmental law or international labour law provisions. Finally, there is no specific mentioning of third country subsidies, the focus being on state aids as defined by Article 107 TFEU (i.e. EU Member States' State aids).

AEGIS Europe calls on:

- European institutions to make it compulsory to release the final price of winning tenders;
- European institutions to revise Directive 2014/25 in order to provide a definition of abnormally low tenders, in order to streamline the situation at EU level. Inspiration could be taken from the Luxemburg law on public procurement and its implementing Regulation from April 2018[5];
- European institutions to strengthen obligations of contracting authorities to check fully and transparently the reasons for low price with bidders. There should be a specific provision and treatment related to subsidies from non-EU state aids: When a company fails to solidly establish that it has not benefited from these, the tender shall be automatically rejected by the contracting authority[6];
- European institutions to place the burden of proof on: (i) the bidding candidate whose offer has been rejected as abnormally low (according to the newly-established definition of abnormally low tenders); or on (ii) the winning bidder, whose offer is alleged to be abnormally low by other bidding candidates;
- The European Commission to support Member States in their understanding and evaluation of abnormally low bids, so that Member States can raise awareness of their contracting authorities. A service could be established in the Trade Defence Directorate of DG TRADE, in close cooperation and synergy with DG GROW. Finally, guidelines could be published on the model of the World Bank[7].

Tenders comprising products originating in third countries (Article 85, Directive 2014/25)

As explained before, Article 85 of Directive 2014/25/EU allows 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[8]. This is a concrete, already actionable way to promote growth and secure jobs in the EU – as many third countries already do.

[5] Article 88 of the implementing Regulation of 8 April 2018 (http://legilux.public.lu/eli/etat/leg/rgd/2018/04/08/a244/jo) states the following: '*La remise d'une analyse de prix doit être demandée par le pouvoir adjudicateur aux soumissionnaires dont les offres sont de plus de 15 pour cent inférieures à la moyenne arithmétique des prix de toutes les offres conformes aux exigences formelles de la procédure de passation reçues, y non compris l'offre la plus chère et l'offre la moins chère.*'

[6] Article 38, para (4) (and 146 §4) of the Luxemburgish Law of 8 April 2018 on Public Procurement (http://legilux.public.lu/eli/etat/leg/loi/2018/04/08/a243/jo)

[7] http://pubdocs.worldbank.org/en/780841478724671583/Guidance-on-ALB-FINAL.pdf

[8] It applies only to tenders covering products originating in third countries with which the EU has not concluded, be it multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries.

However, it should be noted that this provision is still unknown to many contracting authorities, and there are questions (legal implications, exact scope, operational uncertainty) related to its use. Furthermore, the use of this article remains completely voluntary.

AEGIS Europe calls on:

- European institutions to make mandatory the possibility set out in Article 85 of Directive 2014/25/EU for EU-funded projects of critical or strategic infrastructure or technology, or that would allow access to sensitive EU information or key EU expertise (e.g. new Information & Communication Technologies (ICT), industrial robotics, aerospace, ships & maritime engineering, advanced rail equipment, new energy vehicles, renewables, high-tech materials, artificial intelligence, cybersecurity, defence, etc.);
- The European Commission to draft guidelines for contracting authorities regarding the implementation of Article 85 of Directive 2014/25/EU.

FINANCING: A KEY DIMENSION TO ACHIEVE RECIPROCITY

Long-term financing under fair and transparent conditions is crucial given that global competition within many industrial sectors is very often driven by access to finance and not only by the strength of the manufactured products or technical competencies of the bidder. Several viable projects from European companies suffer from a structural financing deficit in Europe, although the products are highly competitive vis-à-vis third countries, while advanced State-backed financing packages proliferate in certain non-EU jurisdictions. Access to finance is often the single most important factor in competing for international contracts, particularly in the case of industrial assets with high upfront capital costs and long tenors needed. Therefore, a level-playing field in financing conditions must be ensured to stimulate global fair competition.

Level playing field and transparency in the use of State-supported Export Credits

State-backed export credit agencies (ECAs) play a major role in financing large projects across the globe and in support of national exporters competing for overseas sales. Export credit support can take the form either of 'official financing support', such as direct credits to foreign buyers, refinancing or interest-rate support, or of 'pure cover support', such as export credits insurance or guarantee cover for credits provided by private financial institutions.

The Organisation for Economic Co-operation and Development (OECD) has a long tradition of rulemaking in the area of officially supported export credits, dating back to 1963. It is the key multilateral negotiating forum where international disciplines for officially supported export credits are agreed, implemented and monitored[9]. However, the failure to cover the large and growing volume of export credit provided by the emerging powers (including China) which are not subject to the existing OECD instruments represents a major gap in the established system of governance for export credit.

In order to pursue the target of a global agreement on export credits (between both OECD-countries and non-OECD countries), the International Working Group (hereinafter referred to as 'IWG') on Export Credits was created in 2012 as an international – global – negotiating forum, following a high level political initiative from the US and China. Since then, discussions within the IWG have been addressing both horizontal and sector specific issues with the final aim to reach an agreement on export credit terms and conditions ('IWG Understanding'). However, the discussions have so far failed to make tangible progress and as a result, the prospect of an international discipline seems quite remote.

AEGIS Europe calls on European institutions to:

- Step up the negotiating efforts with a view to achieving a meaningful and ambitious international agreement on the provision of export credits able to foster transparency and level playing field. New international disciplines are urgently needed to effectively ensure that both OECD and non-OECD exporters can compete on the price and quality of their goods and services, and not on the support they receive from their governments;

[9] See '*OECD Arrangement on Officially Supported Export Credits*' and the 6 Sector Understandings.

- Work with other OECD members to ensure that the current OECD export credit rules are well adapted to the needs of the EU's exporting industries and reflect market developments;
- Work with the WTO, in the context of WTO reform, to set new rules for clarity and transparency of export credits, to make sure that they are not used as disguised subsidies;
- Work towards the harmonisation of national export finance support mechanisms within the EU in order to reinforce overall efficiency of resource allocation amidst growing competition on financing.

Long-term financing for European companies abroad coupled with stronger conditionality and added value criteria for investments within the EU

The European Investment Bank (EIB) should play a greater role in supporting EU enterprises who want to do business abroad, e.g. in the context of international infrastructural projects, within the context of an ambitious and vigorous European economic diplomacy framework. More specifically, the mandate of the EIB should be amended or renewed to equip it with more resources and tools to boost the long-term competitiveness of EU enterprises on global markets. This includes the provision of direct financing in support of the outward and cross-border investments of EU companies and their participation in projects outside the EU as suppliers or contractors. Operations serving this objective have only constituted a minor portion of the Bank's lending portfolio in the recent years.

Within the EU, investments financed by the EIB or co-funded by European programmes should be guided by strong criteria focusing on creation of EU employment and added-value, including through the full European manufacturing and supply chains, and conditionality aimed at prioritizing investments in European economy. The provision of EIB credit line or EU co-funding grants to projects involving third country suppliers or providers of goods and services should be conditional upon the enforcement of rigorous due diligence assessment. In this regard, the current EIB transport lending policy criteria relating to the specific situation of shipbuilding is a best practice that could be widely promoted and extended mutatis mutandis across all European public support programmes and financing tools[10].

AEGIS Europe calls on European institutions to:

- Promote mutual exchange of information with foreign governments on planned projects and foster transparency on bidding opportunities in order to facilitate the participation of EU manufacturers in foreign tenders;
- Promote the creation of a stronger European financial institution that can provide long-term credits to the European private sector for international projects, by reforming or creating a new mandate for EIB;
- Ensure that European taxpayer's money focus on projects of real European added value, especially in terms of EU employment and investments, ultimately favouring home-grown technology development (rather than oversea competitors), and concentrate efforts on improving EU's competitiveness in order to boost long-term growth;

[10] Points 96 and 97 of the EIB Transport Lending Policy relating to the specific situation of ship-building mention that the EIB '*will check (…) for the existence of any outstanding issues concerning (i) Intellectual Property Rights, (ii) potential breaches of trade agreements and, (iii) as far as possible, the risk of distortions caused by anti-competitive practices (including, inter alia, state aid, direct subsidisation, injuries or below-cost pricing (…)) in the producer country or in the shipyard concerned. The Bank will not finance shipping projects where such satisfaction cannot reasonably be obtained.*'

- Promote the use of EU standards as a commercial vehicle to increase the share of EU products in EU-funded projects in foreign countries;
- Introduce a due diligence requirement across all EU public funding and financing programmes with regard to the participation of third country suppliers or providers, along the lines of the European Investment Bank Transport Lending Policy Point 96 and 97, and consider the possibility to withdraw credit lines or grants benefitting third countries that refuse to grant reciprocal access to EU companies in their tenders.

The Belt and Road Initiative: An industrial strategy with limited opportunities?

The Belt and Road Initiative (BRI, and formerly One Belt, One Road) was launched by President Xi Jinping in 2013. It is China's most important foreign policy tool aiming at connecting China to Europe, and it represents the foundation of China's current 'opening up' strategy. The initiative has focused primarily on land and maritime infrastructure projects.

Although the volume of funds committed to date could present opportunities for businesses, the lack of openness of the initiative has grown more obvious since its launch. A 2018 survey amongst European businesses in China concluded that 45% of the businesses do not see any opportunities in participating in the BRI. Many European companies also confirmed being excluded from participating in projects because of insufficient information available regarding potential projects and a lack of transparency in public procurement and tendering[11]. 89% of BRI contracts are carried out by Chinese companies (while 29% of contractors participating in projects funded by the multilateral development banks are Chinese)[12].

Indeed, one of the key objectives of the BRI is to open new markets abroad as a way to compensate for the slowing down of domestic growth and for existing overcapacities in key sectors. The current financing of BRI projects[13] follows a debt-led model that ties up loan financing and project execution. This model goes against open and transparent tenders allowing fair competition. Instead of using transparent public tenders and allowing fair competition for projects, China concludes government to government (G2G) agreements with loans conditioned on the use of Chinese companies for at least 70% of the contract value. In many cases, projects that are financed are part of larger 'packages' involving various sectors. In spite of a recent pushback of this model (e.g. Malaysia, Pakistan, Myanmar in the railway sector), many countries rely on these offers due to the lack of other available sources of funding.

Against this background, the EU engaged in the EU-China Connectivity Platform in 2015, with the objectives to 'strengthen information exchange, promote seamless transport connections and transport facilitation, synergize related policies and projects, create cooperation opportunities for Chinese and European enterprises, and an open, and transparent environment and a level playing field for investment in transport and other fields'. However, results are still lagging behind regarding reciprocal exchanges and the promotion of a level-playing field and equal opportunities for companies to participate in respective infrastructure projects.

[11] '*Business Confidence Survey 2018*', European Chambre of Commerce in China.

[12] Jonathan E. Hillman, '*China's Belt and Road Initiative: Five Years Later*', Center for Strategic and International Studies, 25 January 2018.

[13] Mostly through China Development Bank and Exim Bank; the percentage of projects financed by multilateral development banks is still extremely low.

In fact, several projects have already been launched in Europe in the context of the BRI without the involvement of European companies. This was the case for instance in Greece, Portugal, Hungary and Croatia, where Chinese companies systematically won tenders or investments in several key sectors projects (transport, energy, telecommunication, health, insurance), sometimes even financed by EU[14], at the expense of European companies. In several cases, these opportunities have opened up after the signature of agreements with China (such as Memorandums of Understanding or MoU, but not only); however, this is impossible to verify due to the lack of transparency and the non-access to these agreements.

AEGIS Europe calls on the European Institutions to:

- Ensure full reciprocity in the exchanges and activities of the EU-China Connectivity Platform;
- Request a level-playing field in BRI projects with concrete measures from China on transparency (e.g. a database of BRI projects to find open and transparent information) and non-discrimination (e.g. shift from the model tying up financing and project execution), hence ensuring access to BRI projects to EU companies;
- Promote market rules, EU and international standards in projects, and economic, fiscal and environmental sustainability as key criteria when assessing infrastructure projects.
- Request transparency in agreements signed between China and Member State to ensure that EU rules will be respected and not circumvented.

[14] This was the case in Croatia in 2017, for the construction of a bridge, considered as an important infrastructure project. The EU granted €357 million to Croatia, i.e. 85% of the estimated total amount of the project, benefiting a Chinese consortium.

ANNEX: CASE STUDIES FROM DIFFERENT SECTORS

European shipbuilding and maritime supply industry

1. Introduction

The European shipbuilding and maritime equipment industry (hereinafter "the maritime technology industry") encompasses all the enterprises involved in the design, construction, maintenance and repair of all types of ships and other maritime structures, including the complete supply chain of systems, equipment and services. The maritime technology industry in Europe consists of more than 22,000 companies, employs more than 1 million people (directly and indirectly) and generates an annual production value of € 114 .8 billion. European shipyards, maritime equipment manufacturers and service suppliers are today global leaders in the production and development of complex high-tech ship types, advanced and technology intensive maritime equipment, and sophisticated marine engineering solutions.

2. The relevance of public procurement: product segments

Although the customer base of civilian shipbuilding[15] is largely constituted by private commercial operators, public authorities have also a role as "buyers in the market" in niche product segments that are important for several European maritime technology companies. The range of contracts awarded by government contracting authorities for projects in the (civilian) maritime sector ranges from the procurement of dedicated vessels, e.g. for shipping and transport administrations, port, customs or fisheries inspection authorities, to repair work for ships and component procurement through to maritime services. Examples of vessels and related equipment that may be contracted by public authorities include local (public) ferry ships, LNG bunkering vessels, oceanographic research vessels, dredging vessels, buoy-tenders, ice-breaking vessels, "workboats" (multi-role vessels often used as auxiliary vessels in port construction, dredging and offshore construction projects), pollution control vessels, buoy tenders, pilot vessels, search & rescue vessels, training ships and salvage vessels.

3. Offensive and defensive interests

Being by nature a globally oriented sector, the European maritime technology industry thrives best when markets are open globally and when individual markets treat domestic and foreign suppliers at equal footing. Ensuing global level playing field, fair competition and open markets is therefore vital for this industry.

European shipbuilders and equipment manufacturers have been facing several barriers hampering *de jure* and *or/de facto* their access to third country public procurements markets. Localisation based policies in particular are common elements in the toolkit of several third countries governments to stimulate national shipbuilding industries (and their extensive supply chains) and thereby generate domestic employment and spin-off effects across upstream and downstream segments[16].

Non-exhaustive list of examples of market access barriers in third countries:

- **United States (US):** The US Federal Acquisition Regulations and Buy American Act state that all vessels procured by Government (e.g. icebreakers, ocean research vessels, marine training

[15] Although Navies are also important customers of the European maritime technology side, this note only focuses on civilian side of the industry given the different regulatory framework applying to defence/military procurement.

[16] OECD, *Local content requirements and their economic effect on shipbuilding: A quantitative assessment* (April 2019).

vessels etc.) have to be US built and require a 60% local content requirement. The latter means in practice that lots of European equipment with high value cannot be exported to the US (such as major dredging equipment). As a consequence of these and other US maritime restrictions (notably the "Jones Act" legislation) the European shipbuilding industry is effectively excluded from the American market[17].

- **Brazil**: Another widely known example of government procurement measure with local content provisions is Brazil's localisation-based policy in its oil and gas sector which was introduced to stimulate the domestic shipbuilding and marine equipment supplying industry[18]. The country's National Agency of Petroleum, Natural Gas and Biofuels (ANP) has been applying since 1999 local content requirements (LCR) for the stages of exploration and production development (E&P) of oil and natural gas blocks. LCR clauses are embedded in concession agreements which are contracted between ANP and winning companies. The percentages of local content procurement offered by competing companies count for scoring purposes during the bidding rounds for oil and gas blocks. The contractual commitments as part of these concession contracts (e.g. oil licenses) require oil companies to procure a minimum percentage of equipment and services from local suppliers.
- **South Korea**: the European shipbuilding industry has in the past alerted the European Commission to potential violations of the EU-South Korea FTA provisions caused by the methods used in a call for tenders organised by a public (state-owned) agency for the construction and lease of six LNG carriers, notably the requirements to use some specific Korean technology. Some European shipbuilding companies have in the past faced extensive Korean content and bond requirements which led them to resign from certain tenders.
- **India:** in 2015 the Indian government adopted a ten-year policy on shipbuilding and ship repair industry in India under the 'Make in India' initiative. This policy includes measures to favour local shipbuilders in taking up state-funded contracts/works. According to information reported in the press, government departments and agencies are required as from 2025 to procure only Indian-built vessels[19]. In 2018, the Government issued Public Procurement (Preference to Make in India) Order 2017 prescribing public procuring entities to implement various local content percentages for a vast range of ship equipment and ship repair items. The above order contains exemptions that apply to products manufactured in India under licence from foreign manufactures if there is transfer technology agreement for the indigenous development of the product in question.

While European maritime technology companies face barriers around the world, it is a fact that EU is the world's most open market for public procurement. In this respect, there have been cases in recent years of European public procurement contracts awarded to shipyards from third countries, like South Korea or China. Countries where massive state-linked finance and government support are generally provided to the domestic maritime technology industry, a sector considered of strategic importance, underpinning export-led strategies and enabling local companies (often state-owned companies) to compete globally for business with lower prices.

Although the industry's offensive interests (access to third country markets) currently prevail over the its defensive interests within the EU domestic markets, the European maritime technology industry supports the need to establish strong leverage to push for market opening and reciprocity and enforce effective safeguards from state-led distortions and unfair competition from 3rd countries based on low prices.

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[17] This is also negatively impacting the US Government interests. For instance, if ice-breakers could be procured in Europe, the US Government would be able to build up a modern icebreaker fleet within a reasonable time frame and budget while European advanced dredging vessels would allow US ports to meet modern requirements and reduce shipping bottlenecks.

[18] Local content requirements and their economic effect on shipbuilding: A quantitative assessment (April 2019).

[19] *Government issues guidelines for award of shipbuilding tenders*, Economic Times, 2 June 2016.

European Rail Supply Industry

With over 400.000 jobs in Europe, the European rail supply industry is a strategic sector for the EU competitiveness. The European rail industry is a top exporter on world markets, and many jobs based in the EU strongly depend on exports to key third countries.

Access to international procurement markets

Public procurement accounts for the vast majority of business as main clients are public rail operators/infrastructure managers, or local authorities (metros/tramways), and is therefore vital across the whole supply chain. However, the European rail supply industry is more and more concerned by the increasing lack of level playing field on non-European markets and the gradual closing of public procurement in third countries.

In 2018, only 63% of the entire world rail market is considered accessible to the European rail supply industry. For example, the accessibility of China's rail market has fallen from 63% (in 2009) to barely 18% (in 2017), while the South Korean and Japanese markets are almost closed to European rail suppliers…while there is major world competition with these industries, including in the EU.

The main public procurement-related barriers faced by European rail supply companies on international markets are as follows:

- Domestic content requirements – this is particularly the case in the US, China, India, South Africa, Russia, Brazil and Turkey. In China, localisation requirements have been increasing steadily in the past years, reaching 75% for metro rolling stock (70% in 2013), 50% for metro traction (40% in 2013) and 60% for metro signalling (55% in 2013). These requirements are often coupled with obligations to find local partners and/or to transfer technology. A recent trend is local content requirements emerging at sub-central (state/territory/local) level, particularly in the US; this makes it even more difficult for companies that already have national establishment.
- Lack of transparency or discrimination in the information given on procurement opportunities, on the applicable rules/procedures, technical specifications and evaluation criteria for tenders (again particularly the case in China).
- Difficult access to sub-central level or to state owned enterprises/public undertakings.

A lack of level-playing field, including on the EU market

This situation stands in sharp contrast with the EU, whose public procurement market is one of the most open and transparent in the world. In the past years, many competitors, especially from Asia (Japan, South Korea, China), have been able to establish in Europe, win major contracts and acquire European companies accelerating their market penetration.

This issue is double-sided:

- **Is there reciprocity between access to the EU market and to the third country in question?** In the case of South Korea, and in spite of the WTO Agreement on Government Procurement (GPA) and EU-South Korea Free Trade Agreement (FTA), it is today impossible for train manufacturers to do business because of discriminatory localisation or technical compatibility requirements; on the contrary, Hyundai-Rotem has recently won a major contract to deliver 123 tramways in Poland. A similar situation can be observed in Japan, and the implementation of the EU-Japan Economic Partnership Agreement will need to be carefully assessed.

- **Is there fair competition with other bidders?**
  Competition from State-owned companies, in particular from China, is increasing and creates distortions as these companies are heavily subsidised. Proposed tender prices can be cut by as much as 30%, which creates a significant advantage in a sector that is still strongly dominated by evaluation of tenders through the lowest price. Against this background of abnormally low tenders and an insufficient level of protection for the industry, it is simply impossible for European rail suppliers to compete. In the United States metro market, China's rolling stock manufacturer and SoE CRRC moved from absence to market dominance in 18 months, winning the Boston, Chicago and Los Angeles tenders with prices significantly below the competition. In the EU, there are also several examples of projects won by Chinese rail suppliers, including a recent a rail infrastructure contract won by CCCC in Bulgaria (February 2019) using EU Connecting Europe Facility budget with a 28% price difference.
  Furthermore, there are more and more cases of financing of major infrastructure projects by third countries, especially by China and Japan. These massive investments are often (direct or indirect) tied financing requiring manufacturing of companies from the country financing (e.g. with China's Exim or CDB). In the EU, this has led to precedents challenging of existing EU public procurement rules (e.g. Belgrade-Budapest rail line).

Steel Sector

China: The Belt and Road Initiative

A general concern of the steel industry is the fact that a significant number of countries (both EU and non-EU) have signed the Memorandum of Understanding with China in the framework of the Belt and Road initiative (BRI). In fact, following the agreement with China, in the respective countries, a number of situations occurred where Chinese companies – often SOEs – won the tenders regarding important infrastructure products, often through non-transparent processes. Infrastructure projects, such as the building of bridges, railways, ports, etc. involve a number of steel products, such as, for example, rails, sections, sheet piles, pipes and tubes[20]. The BRI hence threats the business opportunities of steel producers. Just to name a few:

1. In Greece, the infrastructure of the Piraeus Port has been expanded through an international tender for a 35 years concession. The SOE China's Cosco Pacific Shipping (COSCO) won the tender[21].
2. In Croatia, the winning of a tender for the construction of a bridge which was 85% financed by the EU was won by a Chinese consortium (Road and bridge Corporation) [22].
3. In Hungary, a Chinese-Hungarian consortium that has won a tender to upgrade a rail line connecting Budapest and Belgrade will sign the contract by May 25[23].

Japan

The Western Dedicated Freight Corridor or Western DFC is a broad-gauge freight corridor under construction in India by Indian Railways, which will connect India's capital, Delhi, and its economic hub, Mumbai. The project is financed by the Japan International Cooperation Agency (JICA), which ties the funding with a 100% Japanese content requirement. Therefore, for JICA projects financed in foreign countries, only Japanese suppliers are allowed to participate.
The JICA is a governmental agency that coordinates Official Development Assistance for the government of Japan. Since its completion on 1 October 2008, the new JICA has become one of the largest bilateral development organizations in the world with a network of 97 overseas offices, projects in more than 150 countries providing full assistance (loans, technical assistance, environmental assessment, feasibility studies) to major infrastructure projects: railways, bridges, airports, ports, flood management, etc.

Romania[24]

The 'BRUA pipeline' is a project of development, on the Romanian territory, of a national gas transmission system on the Bulgarian-Romanian-Hungarian-Austrian direction, with a total length of 1 318 km. The BRUA - Phase 1 project has begun from Romania and is managed by the state-own company Transgaz. Transgaz is the technical operator of Romania's national natural gas transmission system in charge of building the infrastructures. The pipeline is one of national interest because it helps to diversify the sources of gas. The total cost of Phase 1 is about EUR 500 million, partly financed

[20] Tubes and pipes are not EUROFER products, but a way to produce tubes ad pipes is through the welding of flat products, which EUROFER represents. Several EUROFER companies produce both, semi-finished flat products and tubes/pipes. Therefore, a lost business opportunity related to tubes and pipes can damage flat products as well.

[21] http://www.ekathimerini.com/58053/article/ekathimerini/business/piraeus-port-announces-cosco-is-tender-winner?_sm_au_=iMV2qQ82PV4DN2M6

[22] https://www.reuters.com/article/us-china-cee/china-says-won-disputed-croatia-bridge-project-with-fair-tender-idUSKCN1RN23A

[23] https://bbj.hu/economy/budapest-belgrade-rail-contract-to-be-signed-by-may-25_164829

[24] See footnote 1.

by the European Union. In 2016, Transgaz started the public procurement procedure for the supply of tubular products and curves. Only 2 Romanian manufacturers submitted an offer in the Public Tender Procedure, besides several manufacturers located outside the EU. Finally, the public market was awarded to Toscelik Spiral Boru, a Turkish company, which proposed a price of EUR 126 million.

A Project Substantially Financed by EU Funds Benefiting a Third Country

The first phase of the BRUA project is partly financed by EU and has been supported by various European institutions. Firstly, in October 2017, the European Investment Bank (EIB) lent EUR 50M to Transgaz. This operation was backed by the European Fund for Strategic Investments (EFSI) under the Investment Plan for Europe (IPE). The first phase project has also been awarded a grant of EUR 179M by the European Commission under the Connecting Europe Facility (CEF). Finally, the European Bank for Reconstruction and Development (EBRD) provided EUR 60M loan for the construction of the new gas pipeline to boost the development of regional European energy markets. In other words, the European Union financed the project for around EUR 290M. Such massive financial support granted by the European Union will unfortunately not support European manufacturers and economy. On the contrary, the European funds favor the employment and development of the industry of a third country.

I. No Reciprocity

Turkey – which is not a member of the European Union and not signatory to the WTO Agreement on government Procurement – won the tender being massively financially supported by EU. However, Turkey has implemented protectionist measures relating to procurement contracts by adopting domestic preferences which hit EU companies (see paragraph on Turkey). This means that while the European Union opens its market to Turkey and helps Turkey financing its investment, Turkey closes its market, protecting its own industries.

II. Transgaz, financed by the EU, chose to buy 100% pipes produced in Turkey and not to favor EU products by applying the 50% threshold offered by the EU Directive

Article 85 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sector provides for the possibility to impose the contracting authorities, i.e. Transgaz in this case, to apply for the threshold of at least 50% products to be from EU member states in public procurement tenders. Transgaz decided not to apply article 85 and did not split between Turkish and European products while the project was massively financed by European Union.

Turkey

Tenders within the scope of the Public Procurement Law No. 4734 are conducted partially or completely via Electronic Public Procurement Platform (EKAP). Hence registration to the EKAP is mandatory. With the Decision no 2018/DK.D-357, information regarding the registration of foreign natural and legal persons on EKAP has been provided. Foreign suppliers are entitled to participate and bid in Turkish public procurements. However, under certain conditions, the public authority is entitled to block foreign bidders from participating in a bidding process. The public authority my also apply a price advantage to domestic bidders or to those offering domestic products.

In line with article 63 of the Public Procurement Law No. 4734, particular regulations are put into effect for the domestic tenderers or local goods. For example:

- It can be regulated that only domestic tenders can participate in tenders of which estimated costs are below the threshold values,
- A price advantage of 15% can be applied in favour of domestic bidders in service and construction work procurements, and

- In the procurement of goods, a price advantage of up to 15% can be applied in favour of bidders offering domestic goods. The tendering authority is obliged to apply the price advantage if the goods subject to the tender are on the annual Ministry of Science, Industry and Technology list of certain goods selected from medium and high-tech industrial products.

Additionally, as per the Prime Ministry Circular on Using Local Product (No. 2011/13), in the practices related to the public procurement of goods, the following instructions have been provided:

- In technical specifications, any provision prohibiting the usage of the products manufactured in Turkey should not be included,
- Any provisions requiring the usage of the products imported or originated in another country should not be included.

Similar requirements are set for construction of the urban rail transport system, where at least 51% of products used in the project have to be domestic (Prime Ministry Circular on Using Local Product (No. 2017/22)).

Furthermore, it has been requested that the goods manufactured in Turkey are preferred in the procurement of the State Supply Office and in the purchases within the scope of the Public Procurement Law. To be considered as domestic, an industrial good must fulfil the following conditions:

- Produced by industrial enterprises having Industrial registration Certificate issued by the Ministry of Industry and Technology and include in the 'subject of production' part of the certificate,
- Completely produced in Turkey or underwent its last substantial, economically-justified processing or working in Turkey
- Minimum domestic participation rate must be 51% ((Cost of Final Good – Cost of Imported Goods in the Final Good) / Cost of Final Good *100).

In addition, on 3 April 2019, Turkey has published on the Official Gazette number 30734 an addendum[25] on the national public procurement law for imports (Notification on the Permission for Importation from State Institutions and Organisations, published on the Official Gazette number 30334, on 16 February 2018 [26]). A list of items was included in an appendix which are banned from imports by public authorities. The direct import by public authorities of these items is prohibited. However, contractors can still import these items for projects they are executing for the government. Included in the list of items are: rails, sheet piles, fabricated beams and pipes and welded beams.

Turkey and Russia: European Steel Pipe Industry

The European Steel Pipe producers are facing a difficult situation due to a number of factors such as:

- the over-capacity of the production of steel tubes in Turkey and Russia;
- the devaluation of the Russian and Turkish currencies;
- the underload of a number of mills due to the termination of some important projects involving the export of significant volumes to Russia (North Stream, Power of Siberia etc) and the TANAP/TAP project;

[25] Addendum, published on the Official Gazette number 30734, on 3 April 2019: http://www.resmigazete.gov.tr/eskiler/2019/04/20190403-10.htm

[26] Notification on the Permission for Importation from State Institutions and Organisations, published on the Official Gazette number 30334, on 16 February 2018: http://www.resmigazete.gov.tr/eskiler/2018/02/20180216-14.htm

- the redirection of trade flows caused by US protectionism. In this case, the EU steel safeguard measures are not sufficient to give relief to the European Steel Pipe industry[27]

A first example of the worsening situation is the result of the e-auction of the EUSTREAM Interconnector Poland Slowakia in July 2018:

- For Lot 1 (pipes 11,1 mm), the winner was a Turkish company, Noksel, against the national producer US Steel Kosice.
- For Lot 2 (pipes >16 mm), the winner was a Russian company, Izhora, against Borusan, Noksel, Erciyas, MGR and CPW with prices which were just above the material content, and hence abnormally low.

For the above mentioned reasons, in the upcoming big tenders (energienet.dk Baltic Pipe, Net4Gas Gazelle II, EUSTREAM Eastring, Bulgaria, Romania), the European Tube Producers are expected to face an increasing (and presumably unfair) competition from Russia and Turkey.

Given the situation, the solution for the European Steel Pipe producers would be to follow the approach of the Polish Gaz-System: in the Frame Contract for Phase II (2014-2019) and Phase III (2019-2017) a requirement for 50% EU origin clause was introduced (Article 85 of the Directive 2014/25/EU of the European Parliament and of the Council).

In fact, Article 85 of Directive 2014/25/EU enables (but does not oblige) Member States' authorities to reject bids submitted for the award of a contract for the supply of goods in the sectors of water, energy, transport and postal services, where the proportion of the products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries, exceeds 50 % of the total value of the products constituting the tender. The same rules apply for EU financed projects.

Since Turkey and Russia have not concluded any agreement on public procurement with the EU, Member States' contracting authorities would have no legal obstacles to apply Article 85 of Directive 2014/25/EU to public procurement contracts for pipelines when such contracts fall under that Directive.

United States

An Executive Order has been issued on January 31, 2019 to strengthen the Buy American Act for infrastructure projects in federal procurements with federal financial assistance. The policy specifies that iron and steel products for Infrastructure Projects (including roadways, bridges, railroads, ports, water resources projects, energy projects, pipelines, etc) must be produced in the United States across the supply chain from the melting stage (raw material) through the coatings (finished products)[28].

[27] The 2017 EU imports which were used to establish the quotas were abnormally high: the calculation of the quota in category 25 was based on Eurostat Comext import statistics that were featuring a total of 880 KT of imports originating in Russia in 2017; most of it consist of 851 KT imported in Finland for cement coating and then re-exported offshore in the line pipe project "NordStream" in Baltic Sea.

[28] https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-buy-american-preferences-infrastructure-projects

Medicines Sector

Public procurement in the medicines sector applies mainly to multisource (off-patent) prescription pharmaceuticals as single source (usually on-patent) drugs do not have competitors on the market. The global market for medicines is expanding rapidly due to higher rates of disease growth and an increasing number of governments intervening to subsidise the cost of drugs. As governments intervene to subsidise medicines for their patients, they seek tools to lower their costs such as tendering. For example, China has recently introduced the 7+2 cities procurement initiative which regroups large cities to procurement medicines through tendering. Many of these groups equate to populations of 100 million which is significantly larger than any procurement in the whole of the EU where typically procurement is done at a hospital or at a regional level (i.e. the Paris region hospitals). The total value of the global pharmaceutical market is around €1 trillion annually and generic and biosimilar medicines account for around 70% of the global volume of medicines and around 30% of their value. These proportions can vary considerably depending on the amount of expensive (on-patent) medicine that is actually available on the market. There is also procurement at the global level through which the World Health Organisation cooperates with different funds/charities to subsidise access to medicines for developing countries.

Europe has a large pharmaceutical sector accounting for approximately 700000 jobs. The generic and biosimilar sector (the off-patent sector) accounts for 190000 and supplies 63% of Europe's medicines. The off-patent sector represented by Medicines for Europe is increasingly exporting medicines and is specialised in the development and manufacturing of more complex forms of off-patent medicines like biosimilars (biological medicines) and combination products (medicines combined with devices or combining multiple active ingredients). The EU has just adopted an SPC manufacturing waiver to facilitate the manufacturing of off-patent medicines in Europe for export to markets with shorter exclusivity periods than the EU (which has the longest in the world). The EU has also agreed on a mutual recognition

The EU procurement policy for medicines is challenging for the industry. On the one hand, the EU procurement directive is poorly understood at national level and it typically leads to price only tender criteria. Efforts to adapt procurement to allow for the Most Economically Advantageous Tender (MEAT) even on simple issues like supply guarantees is difficult because tender authorities are concerned with non-compliance with EU law. This situation is creating a market barrier as companies are reluctant to enter into tenders and today, many tenders for essential medicines like antibiotics receive no bids from suppliers. In some cases, procuring agents have struggled to introduce multi-winner tenders (which are seen as a means to avoid over-reliance on a single manufacturer) because of the difficulties of interpretation of EU procurement law. In some cases, procurers cleverly get around EU procurement rules by claiming that tenders are somehow *voluntary* discounts offered by manufacturers. It would make sense for the European Commission to propose guidelines to clarify how EU procurement rules should apply specifically to life saving medicines.

As regards external trade, EU manufacturers face numerous hurdles to supply in rapidly growing emerging markets. These barriers are primarily dictated by local industrial policies that aim to foster drug manufacturing in the country procuring the medicines. While there is certainly some national security logic to having medicine manufacturing capabilities, it does not make sense to require local manufacturing for all medicines. And as the industry evolves toward more complex forms of medicines production, it would be very uneconomic to promote local production on a large scale. Local content requirements often require joint ventures and technology transfer activities. Usually market access or procurement rules enforce this type of cooperation. The EU medicines market is totally liberalised in terms of tariffs (0 tariffs) and procurement because this ensures high competition and lower costs. The only requirement for foreign suppliers is to demonstrate compliance with EU regulatory

requirements (all prescription medicines need to obtain a marketing authorisation licence from an EU or national medicines agency and all production must be compliant with EU GMP requirements and other regulatory requirements such as serialisation).

EU trade policy has attempted to tackle these restrictions through dialogue (i.e. through the Market Access Committee) or through trade dispute settlement such as the current challenge against Turkish local manufacturing requirements for medicines under WTO rules. Local content can also take more insidious forms, when for example, patient safety is compromised to favour local manufacturers in tendering or when religious rules are misused in the context of procurement as the examples below show.

- **Vietnam**: Hospital/provincial tendering systems disproportionately favor price competition over assurance of quality, safety and efficacy through compliance with internationally recognised standards, particularly bioequivalence of the generic medicine with its reference product. in the last years evolutions of the system have attempted at creating different "categories" or "lots" within tenders, to acknowledge differences in regulatory / GMP standards. While a clear distinction between products based on different levels of assurance of quality, safety and efficacy is welcome, it would be desirable that medicines produced according to internationally recognised standards become broadly available to the local population. Additionally, the current criteria to allocate volumes among the different "lots" appear unclear and the associated process arbitrary, with the consequence that hospitals need to reduce the volume of medicines produced according to internationally recognised standards already planned to be purchased, even when hospitals own estimates were based on clinical needs for the different products.
- **Indonesia:** Even if a company has been addressed as the winning one in the first place, this does not mean that the same company will be the final winner. Apparently local companies can be chosen as the winning one even if they are not the official winner, the reason behind these decisions are obscure. More in general with the Halal legislation (that has not been applied yet) all products have to be certified by the authority either to be Halal-compliant or Non-Halal-compliant. The bureaucratic and administrative burden for the Indonesian government is tremendous and will most definitely lead to long delays in the approval process of medicinal products. Eventually, patients may refuse to be treated with a certain life-saving medicine or parenteral nutrient, even though there may currently not be a Halal substitution product available on the Indonesian market. The same accounts for vaccines. Most medicinal products are generally prescribed by health care professionals, due to their medicinal value. A mandatory Halal-label may influence doctors to rather prescribe less effective and curing medicinal products on grounds whether a product possesses a Halal-Certificate or not.
- **WHO:** Recently, Medicines for Europe has also had issues with the WHO which establishes regulatory procedures to enable the procurement of medicines for different charities or funds that subsidise medicines for developing countries. The WHO has introduced a prequalification procedure for the approval of biosimilar medicines (follow on competition to reference biological drugs) which could then be listed for procurement by countries benefiting from different international funds. However, the WHO refuses to qualify products that have been approved on the EU or the US market but are not yet launched for sale. The delayed launch is simply a local patent issue because the US and Europe allow extensive patenting of medicines – including for different indications or methods of use – which is not the case in developing countries. In EU law, this refusal by the WHO would be considered a breach of competition law and of the directive on the transparency of medicines pricing and reimbursement.
- **China:** As stated above, China is fundamentally modifying its approach to medicines procurement with the 7+2 model of tendering. This process will combine tendering with more rigorous regulatory approval requirements and it is difficult to assess whether the process will be open to EU competitors or not. On a positive note, the first company to obtain a regulatory

authorisation under the new system was actually a European manufacturer with a generic medicine approval. We will monitor this situation to assess the level of competition on the market in the future.

- **USA:** Approximately 50% of medicines are purchased through government agencies or programmes in the USA such as Veteran's affairs, Medicare or Medicaid which supply medicines to specific categories of patients (retired people, former soldiers, very poor people that cannot afford health insurance). The Buy American Act (BAA) applies to drug contracts by the agencies for values above $200000 which provides a procurement preference for US manufactured drugs. The rules of origin for compliance with BAA are that 50% of the value of the drug must have been done in the US. This implies that you could import the chemical ingredient and do a substantial manufacturing transformation and packaging in the US to comply. In spite of this barrier, we have not received any complaints from our members on this issue. The US government exempts trading partners from some aspects of these rules depending on the agreement but the EU does not have a trade agreement with the USA.

The EU must also consider the impact of its own legislation on establishing a level playing field for competition. There is no clear definition of how governments are to implement pro-competitive policies in procurement (including competition from non-EU suppliers) while also avoiding predation from undermining the viability of the market. Keep in mind that there are some 1400 different molecules and multiple forms/presentations of those molecules available in Europe. Predation will therefore not lead to the withdrawal of all medicines on the market but this is definitely possible for specific molecules or presentations which may be vital (literally) in the treatment of a patient. Consequently, procurement agents struggle to introduce event very basic MEAT criteria into procurement procedures. This includes issues such as multi-winner approaches (to avoid reliance on a single manufacturer), reliability criteria (to ensure the manufacturer is able to supply the needed volume) or the ability to bring improvements or additional benefits associated with the product (i.e. a complex device associated with the medicine). This approach not only exposes the EU market to predation but is also undermines very basic objectives in terms of supply guarantees. You will note that key stakeholders in hospitals like hospital pharmacists (www.eahp.eu) are deeply concerned with supply availability and shortages in the hospital sector. The implementation of EU procurement law is part of the problem in this area.