EUROFER
THE EUROPEAN STEEL ASSOCIATION

Position Paper

EUROFER views on the International Procurement Instrument

October 2020

Introduction and objectives

While the EU is considered one of the most open and transparent procurement markets in the world, this is often not reciprocated by the EU's trading partners. This is creating a growing lack of level-playing field in world procurement markets, as third countries are increasingly restricting access to their markets while their companies are winning significant contracts in the EU, sometimes even on unfair pricing terms or by challenging EU public procurement rules.

In 2012, the Commission proposed the creation of an International Procurement Instrument (IPI). After a legislative deadlock, the Commission presented a revised proposal in 2016. In March 2019, in the context of a review of relations with China, the Commission called on the Council and Parliament to revive the trilogues based on the revised proposal, and adopt the IPI before the end of 2019.

In the light of the revival of the discussions on the 2016 proposal, **EUROFER would like to highlight its support to the International Procurement Instrument and urge the European institutions to reach an agreement in the shortest possible timeframe to ensure new market openings for European companies and a level playing field in both the EU and third countries' markets.**

More specifically, EUROFER believes that the key objective of the IPI should be twofold:

1. **Encourage the EU's trade partners to engage in negotiations with a view to opening their procurement markets:** the IPI can provide incentives for additional third countries to join the WTO Agreement on Government Procurement (GPA) or sign bilateral trade agreements including procurement chapters with the EU.
2. **Address the discriminatory measures against European companies in third countries and the lack of reciprocity in access to public procurement markets:** when attempting to access procurement markets in third countries, European companies face a substantial number of *de jure* and *de facto* barriers. Among the *de jure* barriers, the European steel companies have experienced issues related to the establishment of national requirements, "buy national" provisions, exclusion of certain projects from government procurement rules, implementation of price advantage measures for domestic bidders or import bans on foreign goods for public procurement purposes. Among the *de facto* ones

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are the lack of transparency, unpredictable enforcement of the relevant rules and corruption.

Overall, **EUROFER supports a comprehensive approach to public procurement** allowing all instruments at EU's disposal to function in a complementary and mutually reinforcing way. In fact, the steel sector is increasingly experiencing issues in the field of public procurement on the EU market 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), which is revealing its flaws, particularly when it comes to the **implementation and practical use of the rules on abnormally low tenders**, which are often left unexploited by EU Member States and contracting authorities.

Key messages

Covered and non-covered goods and services

Article 2 of the 2016 proposal makes a distinction between "covered" and "non-covered" goods and services, where covered goods and services are intended to be those originating in a country with which the EU has concluded an international agreement in the field of public procurement. The current IPI proposal only applies to non-covered goods and services.

EUROFER believes that **investigations into discriminatory measures should be applicable to all countries, irrespective of the fact that they are covered or non-covered**: being party to the GPA or having a trade agreement with the EU is no guarantee that a third country's public procurement market is *de facto* open. If the investigation concludes that European companies are being discriminated against in covered countries, a dispute resolution mechanism within the scope of the applicable agreement should be launched. In case there is only the WTO GPA, it is essential to safeguard EU interests should the WTO dispute settlement mechanism fail to address issues brought to appeal under a certain ruling.

EUROFER also calls on the European Commission to publish a list of countries concerned by an international agreement in the field of public procurement, where it should be explicitly mentioned that countries with which the EU has already concluded an international agreement, but which retain market reservations towards EU companies are considered "non-covered".

Existing safeguards

Article 17 of the 2016 proposal suggests to remove articles 85 and 86 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. Articles 85 and 86 allow 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.

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In our view, these articles constitute an essential – and already actionable – safeguard. For this reason, **article 17 of the revised proposal**, which suggests the deletion of articles 85 and 86 of Directive 2014/25/EU, **should be deleted**. Hence, articles 85 and 86 of Directive 2014/25/EU should be maintained.

A review clause could be also added to assess, for instance 4 years after the entry into force of the IPI, the efficiency of the Regulation to open new procurement markets and, in case the results would not be satisfactory, **make articles 85 and 86 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.

Penalties

1. Rules of origin

Article 8(1) of the 2016 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"*.

We think the proposed method will often lead to complex investigations and could cause new bureaucratic burden and legal uncertainties for EU businesses and contracting authorities. **The focus of price adjustment measures should be shifted from the origin of the goods to the bidding entity instead**. We suggest article 8 to be applied as follows:

- **Ex ante verification** - **implying a penalty (price adjustment measure or exclusion from EU public procurement) to be directly applied - in two situations**:
  a. If the bidding entity is legally established in (or controlled by a company from) a closed third country without an agreement with the EU on public procurement nor a GPA member;
  b. If the bidding entity is an SOE from a closed third country, or a foreign subsidiary controlled by an SOE of such a country, following the investigation and consultation processes foreseen in the IPI Regulation.
- **Ex post verification ensuring that the Regulation is not circumvented**: as a solution, we propose that winning bidders (including consortia):
  a. Commit not to source from targeted countries more than 50% of the value of the goods (including parts used in the assembly or production of the goods) used in the execution of the contract, and then
  b. Present the customs declaration relating to the execution of a project to verify that the commitment has been respected. In fact, all companies manufacturing goods are already subject to customs declaration rules and have to consequently file a customs

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declaration - allowing to trace the volume and value of imports originating from each supplier and each country - at the time of import.

In cases where winning bidders do not respect this obligation, the bidder would be exposed to a financial penalty during the execution of the present project and, additionally, to the exclusion from future public contracts for a certain period of time.

2. Threshold

Penalties under article 8(1) of the current IPI proposal shall only apply to tenders equal to or above EUR 5 million exclusive of value-added tax (VAT).

EUROFER supports this threshold, which is already a substantial amount for the steel sector. A possible solution would be to increase the threshold - only for a limited number of sectors - from EUR 5 million to a maximum of EUR 10 million. A review clause could be included in the Regulation, allowing for the reassessment of the threshold after a reasonable period of time following the entering into force of the Regulation.

3. Price adjustment measure / automatic exclusion

Article 8(2) of the 2016 proposal suggests a *"penalty of up to 20% to be calculated on the price of the tenders concerned"*.

EUROFER believes that **price adjustment measures should be of a magnitude of *"at least 20%"***, a threshold under which the measures will not create a sufficient economic deterrent for third countries to open their markets. Beyond price adjustment, the instrument should also incorporate the possibility of market exclusion in certain circumstances, notably when it comes to SOEs.

SOEs should in fact have a different treatment from the system of price adjustment measures. Should a third country refuse to open its market to EU undertakings after the consultation procedure, SOEs from that third country (including within a consortium) should be 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 draft a dedicated background report focusing on already identified barriers linked to SOEs to support Member States and contracting authorities. The burden of proof should not be borne by EU contracting authorities but by the bidding entities from the third country. The draft Regulation could use the definition of SOEs from an already implemented agreement, such as the EU-Japan Economic Partnership Agreement.

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Enforcement

The International Procurement Instrument should ultimately be an enforceable tool. For this reason, clear comitology rules should be defined. Clear procedures should be set up allowing a uniform implementation throughout the EU, which should be ensured by the European Commission.

About the European Steel Association (EUROFER)

EUROFER AISBL is located in Brussels and was founded in 1976. It represents the entirety of steel production in the European Union. EUROFER members are steel companies and national steel federations throughout the EU. The major steel companies and national steel federations in Switzerland and Turkey are associate members.

The European Steel Association is recorded in the EU transparency register: 93038071152-83.

About the European steel industry

The European steel industry is a world leader in innovation and environmental sustainability. It has a turnover of around €170 billion and directly employs 330,000 highly-skilled people, producing on average 160 million tonnes of steel per year. More than 500 steel production sites across 22 EU Member States provide direct and indirect employment to millions more European citizens. Closely integrated with Europe's manufacturing and construction industries, steel is the backbone for development, growth and employment in Europe.

Steel is the most versatile industrial material in the world. The thousands of different grades and types of steel developed by the industry make the modern world possible. Steel is 100% recyclable and therefore is a fundamental part of the circular economy. As a basic engineering material, steel is also an essential factor in the development and deployment of innovative, CO2-mitigating technologies, improving resource efficiency and fostering sustainable development in Europe.

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