

**International Procurement Instrument (IPI)**  
**AEGIS Europe statement in view of an agreement in Council**  
**April 2021**

As emphasised by AEGIS Europe in previous position papers, European businesses cannot always get equal access to procurement markets outside the EU due to several public procurement-related barriers, or, if access is granted, it comes with conditions which increase the risk in further investment from EU companies. This situation is expected to worsen in the wake of the COVID-19 crisis, which could accentuate protectionist tendencies.

**In view of a potential conclusion of negotiations in Council, AEGIS Europe calls on Member States to agree on a robust and effective instrument limiting and framing significantly the risk of circumvention.**

AEGIS Europe welcomes the efforts and acknowledges the positive dynamics of the discussions conducted by the Portuguese Presidency of the Council of the EU. AEGIS Europe also believes that the proposal as it stands could be an efficient instrument to open procurement markets for EU businesses provided that the messages below, based on recent proposals from the Presidency, are factored in.

**Investigations and consultations**

AEGIS Europe **SUPPORTS** a procedure holding investigation and consultations in parallel, for a total duration of up to 9 months after the date of initiation (up to 14 months in duly justified cases).

AEGIS Europe **OPPOSES** the possibility to suspend the investigation on the basis of '*commitments towards the EU*' to terminate practices or to negotiate a new international agreement. Suspension should only be possible in case unilateral actions – with foreseeable and concrete results – are taken by the third country, otherwise the instrument might become ineffective.

**IPI measures**

**Exclusion**

AEGIS Europe **SUPPORTS** exclusion as a fully-fledged IPI measure, and not confined to exceptional cases. This is a crucial aspect for the credibility of the instrument and its ability to create leverage.

AEGIS Europe **CALLS FOR** the type of IPI measure to be chosen on the basis of proportionality of the IPI measure with regard to the third country practice, availability of alternative sources of supply and presence on the EU procurement market of third country bidders from the sector under investigation. Indeed, a proven foothold on the European market without reciprocal openness of the market is an aggravating factor that should be sanctioned in a more deterrent way.

### **Score adjustment measures (SAMs)**

AEGIS Europe **SUPPORTS** a **shift to score adjustment measures taking into account the overall score of bidders originating in a third country subject to an IPI measure**. Such a system could be more effective than focusing only on the price-related criterion, while applying the adjustment across the usual weighing of the evaluation.

AEGIS Europe **SUPPORTS** a **downward adjustment of up to 40%** decided by the European Commission and applied by all contracting authorities and entities above agreed thresholds. In this respect, potential existing pricing practices of third country bidders on the EU market should be an important factor to define the appropriate downward adjustment.

### **Thresholds of application**

AEGIS Europe **SUPPORTS** freezing the proposed thresholds of application of **EUR 10 000 000 net of value-added tax for works and concessions, and EUR 5 000 000 net of value-added tax for goods and services**. Increasing these thresholds would exclude important sectors from the scope of the application of the IPI.

### **Consortia**

AEGIS Europe **SUPPORTS** freezing at **10% of the contract value** the share that entities originating from a third country subject to an IPI measure can represent for a consortium to be exempted from that measure.

### **Suspension of measures**

AEGIS Europe **OPPOSES** the possibility to suspend IPI measures if the targeted third country **'undertakes commitments' to terminate practices**. Suspension should only be possible on the basis of documented results that practices have ceased to exist and enable non-discriminatory participation of European economic operators on the third country market, otherwise the instrument might become ineffective.

### **List of contracting authorities or entities to be exempted**

AEGIS Europe **SUPPORTS** the shift from a positive to a negative list of contracting authorities or entities, as well as the need for a **'duly justified request'** for a Member State to submit such a list.

AEGIS Europe **CALLS FOR** an increase of the proposed procurement coverage to **85% of the total value of contracts above threshold and awarded in the three year period**.

### **Additional contractual obligations**

AEGIS Europe **SUPPORTS** additional contractual obligations to ensure that goods and/or services supplied or provided and originating in the third country subject to the IPI measure represent no more than **50% of the total value of the contract**, and that subcontracting to economic operators from this third country represent no more than **50% of the contract value**. Without these crucial additional guarantees, the instrument could be easily circumvented.

AEGIS Europe **SUPPORTS** a **penalty of at least 10% of the total value of the contract** in case of non-compliance with the commitments.

AEGIS Europe **CALLS FOR clear guidelines from the European Commission** on how to prove compliance, in order to provide legal certainty to contracting authorities and businesses.

## Exceptions

As they are currently designed, exceptions could be used extensively and without proper monitoring, thereby creating a major flaw in the mechanism and reducing its effectiveness.

AEGIS Europe **OPPOSES** the **possibility not to apply IPI measures if they ‘would lead to a disproportionate increase in the price or costs of the contract’ and calls for its deletion**. This exception goes against the very essence of the instrument, especially in case the IPI measure would be exclusion of third country bidders. Furthermore, many contracting authorities tend to award contracts based on (the lowest) price alone, and there are no appropriate tools at EU level to determine what is an abnormally low tender (based on foreign subsidies) and oblige contracting authorities to reject them. The attempt to ‘objectivise’ the use of this exception by adding a reference to objective criteria is nevertheless insufficient, as contracting authorities could artificially lower the estimated value of contracts to make use of the exception and favour a certain bidder. Criteria should be objective, but also market-based and verifiable.

AEGIS Europe **CALLS FOR the strengthening of reporting provisions** regarding the use of exceptions. Contracting authorities **should use exceptions upon duly justified request to the European Commission, and notification should by all means happen before the award of the contract**. Notifications after the award will make it more difficult to potentially challenge a decision, considering the time that may be needed for the Commission to analyse the case.

AEGIS Europe **CALLS FOR a stronger supervision role for the Commission** in monitoring the use of exceptions. In order to guarantee the uniform application of the Regulation and deter any abusive use, the Commission should be able to reject a request for the use of an exception, challenge an award decision and start an infringement proceeding if exception possibilities have been misused repeatedly.

## Review

AEGIS Europe **SUPPORTS** the introduction of a review of the scope and functioning of the instrument by the Commission. This would enable to correct potential inefficiencies related to IPI measures, e.g. by rendering exclusion automatic and/or by making Article 85 of Directive 2014/25/EU mandatory for EU-funded projects in order to reinforce the leverage on third countries that are not willing to cooperate.

AEGIS Europe **CALLS FOR an earlier deadline for the review**, e.g. of ‘no later than three years after the date of entry into force of the Regulation and every five years thereafter’. Indeed, the proposed maximum deadline for review is too long and this proposal would mirror the existing EU FDI screening Regulation.