

EIC Submission

to the public consultation on the

EU White Paper on levelling the playing field as regards foreign subsidies

(23 September 2020)

EIC welcomes the EU White Paper on Foreign Subsidies, COM(2020) 253 final, in particular its proposed Module 3, and calls upon the EU legislator to recalibrate the competitive framework for European international contractors

About EIC

European International Contractors (EIC) is a European industry federation, based in Berlin, with the mandate to promote the interests of the European construction industry in relation to its international business activities. EIC has as its members national construction associations from 15 European countries, to which the internationally active European contractors are affiliated, as well as several associated member companies from construction-related industries and professions. To advocate the positions and recommendations of European international contractors, EIC maintains close relations with EU and international policymakers, development finance institutions and other important organisations with policies relevant for the international construction business.

Introduction and Background

The European Commission has published on 17 June 2020 a White Paper dealing with the distortive effects caused by foreign subsidies in the Single Market, COM(2020) 253 final, with the intention to launch a broad discussion with Member States, other European institutions, all stakeholders, including industry, social partners, civil society organisations, researchers, the public in general and any other interested party on the best way to effectively address the challenges connected with distortive foreign subsidies. The paper sets out orientations for potential legal instruments to address (1) foreign subsidies distorting the internal market regarding (a) general market operation of economic operators active in the EU, (b) acquisitions of EU undertakings and (c) public procurement procedures; and (2) foreign subsidies in the context of access to EU funding. The EU Commission has sought views and input from all stakeholders on the options set out in the White Paper via a public consultation which could provide further insight for the EU Commission to prepare appropriate legislative proposals in this area.

EIC Response to the EU Survey

Questions relating to the three Modules - General questions

- 1. Do you think there is a need for new legal instruments to address distortions of the internal market arising from subsidies granted by non-EU authorities ('foreign subsidies')?**

Yes. There is no multilateral or EU instrument addressing distortions caused by 'foreign subsidies' in the services sector, when state-owned enterprises (SOE) in third countries benefit from government support, mainly in the form of low-interest loans, tax exemptions and direct subsidies. In the PR China, some giant construction SOEs with global activities, e.g. CSCEC, CREC, CRCC, CCCC, MCC, etc., are ultimately controlled by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), see <https://en.sasac.gov.cn>. The Party Committee of SASAC performs the responsibilities mandated by the Central Committee of the Chinese Communist Party. EU subsidiaries of these giant construction SOEs have won public tenders in several EU Member States, including Croatia, Hungary, Poland and Sweden, with offers calculated far below cost price. EIC also observes dumping prices on infrastructure tenders of European and international development banks financed with EU grants ('blending') outside the EU.

- 2. Do you think the framework presented in the White Paper adequately addresses the distortions caused by foreign subsidies in the internal market?**

Partially. EIC generally supports the proposed building blocks for new legal instruments tackling distortive foreign subsidies. But EIC also calls upon the EU legislator to implement in the area of public procurement additional redressive measures, such as anchoring stricter reciprocity rules and a definition of and a mechanism for 'abnormally low tenders' within the EU Procurement Directives with a mandatory ban of companies from countries which are not signatories of the WTO/GPA or have not signed a bilateral FTA with Procurement Chapter with the EU. The future International Procurement Instrument (IPI) should stipulate that, if a third-country bidder is an SOE or a subsidiary of an SOE, its offer should be automatically rejected following the investigation procedure and this should also apply to SOEs bidding as part of a consortium. On foreign subsidies in the context of EU Funding, the EU legislator should declare state-owned companies ineligible for participation in tenders financed fully or partially from EU ODA.

Module 1 – General Instrument to capture foreign subsidies

- 1. Do you consider that Module 1 appropriately addresses distortions of the internal market through foreign subsidies when granted to undertakings in the EU?**

EIC welcomes in principle a broad scope of application of Module 1. It should include all constellations in which third-country subsidies in the internal market distort competition. Having said so, insofar as facts and cases are subject to the examination according to the more specific Modules 2 and 3, these should be excluded from the scope of the Module 1 for the sake of legal security and the principle of protection of legitimate expectations. This is the reason why EIC will focus its reply on Module 3.

Module 3 – Foreign subsidies in public procurement

1. Do you think there is a need to address specifically distortions caused by foreign subsidies in the specific context of public procurement procedures?

Yes. The existing EU public procurement rules do not contain specific rules regarding the participation of economic operators benefitting from foreign subsidies. On a multilateral level, public procurement is sheltered from multilateral trade rules: The WTO Agreement on Government Procurement (GPA), of which the EU is a signatory, contrary to the 'BRIC' countries which all belong to the Top 10 global construction markets, is not covered by any multilateral WTO discipline. As far as works contracts are concerned, they are classified as services and are thus not covered under the Agreement on Subsidies and Countervailing Measures. Hence there is a regulatory gap where foreign subsidies distort the bidding process in EU public procurement procedures. Recently, Chinese subsidised SOE have won public tenders in several EU Member States, including Croatia, Hungary, Poland and Sweden, with offers that were calculated far below cost price and they have participated in others, including Germany.

2. Do you think the framework proposed for public procurement in the White Paper appropriately addresses the distortions caused by foreign subsidies in public procurement procedures?

Partially, because EIC doubts that the procedure outlined can cope with cases where economic operators fail to comply with the notification obligation. Whilst the White Paper entitles third parties and competitors to approach the contracting authority, respective submissions must provide prima facie evidence for the necessity of notification. This duty will be difficult to comply with in the case of third-country state-owned enterprises (SOE) which have intransparent balance sheets and pretend to operate legally and financially autonomous under commercial law and claim to be free from supervision of the state. Therefore, the framework should stipulate an assumption that the prima facie evidence criterion has been fulfilled in case that a SOE or one of its affiliated companies is managed and/or ultimately controlled by a government entity, such as e.g. the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), see <http://en.sasac.gov.cn/>.

3. Do you consider the foreseen interplay between the contracting authorities and the supervisory authorities adequate e.g. as regards determination of whether the foreign subsidy distorts the relevant public procurement procedure?

No. If the supervisory authority after its in-depth review confirms that the economic operator has received a foreign subsidy, there should be no more discretion for the contracting authority regarding its determination whether that subsidy has distorted the public procurement procedure. Contracting authorities might face a conflict of interest between accepting a low bid price and establishing fair competition and, therefore, they should be bound to exclude subsidised economic operator from the ongoing procurement procedure. However, the EU Commission needs to draw up a methodology for scrutiny which national supervisory authorities have to follow, and it must be empowered to check whether supervisory authorities have complied with such guidance. EIC would also sympathise with an exclusive competence of the EU Commission under Module 3 bearing in mind its in-depth expertise and experience as the supervisory authority responsible for EU competition law, including EU state aid law.

4. Do you think other issues should be addressed in the context of public procurement and foreign subsidies than those contained in this White Paper?

EIC also calls upon the EU legislator to implement three additional redressive measures:

- (1) The EU legislator should in the context of the EU Procurement Directives introduce strict reciprocity rules in relation to EU public procurement and prohibit the tender participation of companies from countries that are not signatories of the WTO-GPA or which have not signed a bilateral FTA with Procurement Chapter with the EU;
- (2) The EU legislator should provide for a definition of an 'abnormally low tender' and a straightforward approach that can be used to identify them and a modification towards an obligation of the national contracting authority to exclude such tenders;
- (3) In the context of the future International Procurement Instrument (IPI), which should be concluded under the German EU Presidency, if a third-country bidder is an SOE or a subsidiary of an SOE, its offer should be automatically rejected following the investigation and consultation procedures and this should also apply to SOEs bidding as part of a consortium.

Interplay between Modules 1, 2 and 3

1. Do you consider that Modules 1, 2 and 3 should operate as stand-alone module?

Yes. Given that each Module deals with a different context in which foreign subsidies materialise in the EU Internal Market and bearing in mind that Module 1 is designed as an ex-post control not restricted in its scope whereas Modules 2 and 3 are designed as ex-ante controls with specific areas of application, the different Modules need to be clearly separated from one another. Having said so, the provisions can be incorporated in existing pieces of legislation, e.g. Module 3 in the EU Public Procurement Directives, but all legislation related to the treatment of foreign subsidies in the EU Internal Market needs to be coherent, as regards definitions, thresholds, block exemptions, etc.

Questions relating to foreign subsidies in the context of EU funding

1. Do you think there is a need for any additional measures to address potential distortions of the internal market arising from subsidies granted by non-EU authorities in the specific context of EU funding?

Yes. EIC is concerned that the EU Commission transfers most of its EU ODA funds for infrastructure projects under the blending modality to non-EU financial actors and thus suffers a loss of visibility and control over project implementation. As the procurement process of the international lending institutions (AfDB, World Bank/IFC, EBRD, etc.) wins priority over the EU Commission's own procurement rules, tenders financed from EU grants, when mixed with loans from financial partners, are open to bidders from all countries and, eventually, EU grants can end up in the pockets of subsidised state-owned contractors submitting dumping offers. This is not only against the EU interest but also unacceptable given the huge amounts of non-EU funds flowing into partner countries not open for international competition but tied via government-to-government contracts or otherwise to companies resident in the financing country. Thus, EU should no longer "blend" its funds with those of non-EU financial institutions.

2. Do you think the framework for EU funding presented in the White Paper appropriately addresses the potential distortions caused by foreign subsidies in this context?

No. EIC asks the EU legislator to introduce strict eligibility rules for all EU internal and external funding to the extent that all EU funds are linked to the condition that the respective project is awarded to a company from either the EU or from a country that has concluded an agreement on market access for European companies. EU funds should only be untied to other OECD and to non-OECD countries on a reciprocal basis. In any case, EU funds should be used to finance, as a matter of principle, a substantial component of 'European content' or 'European interest'; otherwise EU funding should not become available. Moreover, the European development and export finance architecture should be restructured, as outlined in the so-called 'Wise Persons' Report in a way that it is capable of providing the full set of available financial instruments, including grants, loans, blended instruments and guarantees, with varying degrees of concessionality.

Conclusion

EIC welcomes the EU White Paper on foreign subsidies in the Single Market because this Commission initiative recognises that a strong European Union needs a powerful competition policy - both internally and externally. Unfortunately, EU law does not yet provide for any trade-related defence instrument tackling trade distortions in the services sector due to the fact that the WTO Agreements on Anti-Dumping and on Subsidies and Countervailing Measures only apply to goods. To make matters worse, EU competition law itself does not provide any protection against a distortion of competition by state-owned companies from third countries, as the ban on distortive public subsidies set out in Article 107 et seq. of the EU Treaty only applies to EU companies but not to those from third countries. Against this background, a new set of competition instruments makes sense and is necessary.

The proposed Module 3 is of particular interest for the European construction industry and responds to the campaigns of EIC and other European partner federations for fair and rules-based international competition for public works contracts inside and outside Europe. Over the past decades, European international contractors have lost significant market shares in the international construction business to subsidised state-owned construction companies from third countries which are able to submit tenders below production costs on a systematic basis. As we observe these unhealthy practices more and more in the EU Internal Market, we commend the EU Commission for proposing a mechanism whereby bidders or interested third parties need to report financial benefits received from the state to the national contracting authority.

However, whilst the EU proposals on levelling the playing field as regards foreign subsidies are highly appreciated, EIC calls upon the EU legislator to proceed swiftly with the adoption of an International Procurement Instrument (IPI) which comprises redressive measures against state-owned enterprises from third countries when their domestic public procurement market is protected against foreign competition.

A medium-target goal must be to make the European Procurement Directives more resilient against aggressive dumping offers by strengthening the rules on 'abnormally low tenders'. EIC remains available for any further discussion and advice.