



PLAN OF ACTION ***Protecting the EU-Services Industry***

European Construction Industry, FIEC
European International Contractors, EIC
European Dredging Association, EuDA

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1. RATIONALE

China's economic power and political influence has grown with unprecedented scale, speed and unopposed. The European Commission's recently published new strategic outlook on China has called it *"a cooperation partner with whom [to] closely aligned objectives, a negotiating partner with whom the EU needs to find a balance of interests, an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance."*¹

There is a growing realisation in the EU that China needs to be held accountable, especially for its continued unfair (trade) practices. As we – the FIEC, EIC and EuDA - greatly applaud this, we sincerely hope the momentum is not lost, as has been the case with previous initiatives and commitments. We understand that for many EU Member States China is a welcome investor and capital provider, but this must not come at a cost for or sacrifice of the EU services industry. Evidence is clear that China is not playing the trade game fairly. The EU needs a relationship/partnership with China that is on equal footing, non-discriminatory and competitive in nature.

For goods the EU can fall back on its Trade Defence Instruments (TDI) System and WTO procedures but for protecting services it has a void. Generally, services do not fall under the TDI system, although we believe the TDI can be extended to cover services (see below). Indeed, globally, the EU is a committed member of the WTO Agreement on Government Procurement (GPA) but others, like China are not. Despite China still being in the accession phase, it has been granted access to various procurement markets worldwide without feeling obliged to offer the same access in return. This pattern is likely to worsen with the Belt and Road Initiative.

Unfortunately, we - as the EU services industries - continue to be confronted with closed – *de jure or de facto* - procurement markets in third countries. We feel there is no level playing field. While China can to a large extent play on the EU procurement market, we face tough restrictions on China's. For instance, whilst Chinese state-owned contractors have been awarded large infrastructure tenders in EU Member States, financed mainly with EU funds, European and other foreign contractors are not even allowed to operate and to compete in China.²

Also, on the EU market we feel the effects of unfair competition as practically all large Chinese companies working internationally are state-owned enterprises, offer unrealistic cheap prices below direct costs and have differences in standards/compliances (labour, rights, environment).

¹ European Commission, 'EU-China – A strategic outlook' (March 2019) <https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf>

² See GATS Schedule of Commitments for Engineering and Construction Services, [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20gats/sc/*\)%20and%20\(\(%20Q@Title=%20china%20\)%20or%20\(@CountryConcerned=%20china\)\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20gats/sc/*)%20and%20((%20Q@Title=%20china%20)%20or%20(@CountryConcerned=%20china))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).



The participation of Chinese tenderers on the EU procurement market raises serious legal questions, as China - after almost twenty years of negotiations and six GPA accession offers – still has not become a Member of the WTO Agreement on Government Procurement (GPA). The GPA is not a multilateral agreement in the sense of Annex 1 of the WTO Agreement but a “plurilateral” agreement under its Annex 4. Consequently, the GPA is not part of the WTO’s “single undertaking” and thus not mandatory for all the 153 WTO Members but only for those countries that have ratified the Agreement. The EU itself has reiterated in its Note to Annex 6 [Construction Services] of the Revised GPA, which entered into force on 6 April 2014, that “*procurement by procuring entities covered under Annexes 1, 2 and 3 of any of the construction services covered under this Annex is a covered procurement in regard to a particular Party's provider of service **only to the extent that such Party has covered that service under its Annex 6***”[our emphasis].³

We thus hold that if the principle of reciprocity governs the relationship between GPA signatories, then *a fortiori* the principle must also apply between the EU and non-GPA members. All WTO members are eligible to accede to the GPA. Hence, any contracting authority or entity, as well as any EU Member State may, under the current *acquis communautaire*, rely on the principle of reciprocity to decide not to accept third country bidders' participation in its tenders when those are not covered by EU commitments under the GPA or other international trade agreements.

Regrettably, there is no corresponding obligation to actually exclude foreign bidders and Member States wishing to do so may waive this right. The fact that some EU Member States decided in the past that they do not wish to invoke the reciprocity principle in relation to public procurement and open their market unilaterally strengthens our view that the EU’s public procurement market can be closed to foreign bidders, especially those dealing in unfair trade practices and competition.⁴

In any case, the problem remains that procurement markets for foreign goods and services in third countries remain to a large extent closed - *de jure or de facto* – for EU services industries. Experience shows that it is difficult to receive real commitments from third countries.

An ideal situation remains that third countries become members to the GPA and undertake broad commitments as the EU has done. The EU must continue to advocate and apply diplomatic pressure for this to happen, especially for China.

We call on the EU to take action now. We advocate for a flexible, comprehensive but also assertive whole-of-EU approach enabling a principled defence of interests and values in the services industry.

We await the implementation and follow-up of the European Commission’s strategic outlook’s ten-point action plan, that stipulates: cooperation on common responsibilities, but also the enforcement of reciprocity, the safeguard of high standards and international agreements, the addressment of distortive effects, an engagement on reforms and deliverance on joint commitments in key policy areas ranging from the UN to WTO to Human Rights to Climate to Peace and Security to Trade to Development.

We also welcome Donald Tusk, President of the European Council, additionally underlining the fact that “*our aim is to focus on achieving a balanced relation, which ensures fair competition and equal market access.*”⁵

³ See GPA 2014 Coverage Schedules https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm

⁴ For example, see Germany, “*Drei-Minister-Erlass*,” (29 April 1960), Ministerialblatt des Bundesministers für Wirtschaft, p. 269.

⁵ European Council, ‘European Council Conclusions, 21-22/03/2019’ (March 2019) <https://www.consilium.europa.eu/en/meetings/european-council/2019/03/21-22/>



We observe with interest that during the Council Meeting of 21-23 March 2019, the European Council – the EU Member States – came to the conclusion that *“the EU must also safeguard its interests in the light of unfair practices of third countries, making full use of trade defence instruments and our public procurement rules, as well as ensuring effective reciprocity for public procurement with third countries. The European Council calls for resuming discussions on the EU’s international procurement instrument.”*⁶

We welcome this conclusion but want to strongly reiterate that as the proposal for an International Procurement Instrument (2016 version) now stands – with the elimination of the decentralised approach and the limitation of the Member States’ discretion to apply restrictive measures – it is inadequate in getting the required reciprocity from China and to hold it accountable for its unfair trade practices. The recent awards of the ‘Pelješac Bridge’ project in Croatia or the railway line in Bulgaria to consortia of state-owned construction enterprises from China, indicates this. It also proves that a price adjustment mechanism, as proposed by the European Commission in the IPI 2016 version, will not be sufficient to establish a level playing field and reciprocally equal market access to public procurement markets.

In any case, we strongly disapprove of Article 1 No. 5 of the IPI 2016 version which is unacceptable for us as it stipulates that *“Member States and their contracting authorities and contracting entities shall not apply restrictive measures in respect of third country economic operators, goods and services beyond those provided for in this Regulation”*. This provision effectively abolishes Member States’ right to invoke the reciprocity principle of the GPA.

We adamantly call for a more ambitious, robust and comprehensive IPI instrument, going beyond both the 2012 and 2016 proposals and enshrining the reciprocity principle of the GPA into the IPI Regulation. We would like to play a key role in advising the development of the IPI instrument as we can provide first-hand accounts from the ground of the impact of China’s unfair trade practices and one-way relationship in market access has had on our industry. We believe the development and application of the proposed legal framework and instruments to services would only add value to the GPA and once such a robust, ambitious and comprehensive EU IPI is in place. Furthermore, the one does not replace the other. Instead, they should be applied in conjunction with the GPA and IPI so as to provide a comprehensive rulebook for both the public authorities and the EU services industry to rely on when confronted with unfair trade practices and discrimination.

We also support that the European Council has called for action by the EU and its Member States to ensure *“fair competition ... within the Single Market and globally, both to protect consumers and to foster economic growth and competitiveness, in line with the long-term strategic interests of the Union. We will continue to update our European competition framework to new technological and global market developments. The Commission intends to identify before the end of the year how to fill gaps in EU law in order to address fully the distortive effects of foreign state ownership and state-aid financing in the Single Market.”*⁷

As we welcome this realisation within the EU that the EU services industries and procurement market needs adequate attention vis-à-vis other trade players, we have taken the initiative to set out below actions that can be considered to fill the void and establish EU mechanisms to protect services in general.

⁶ European Council, ‘European Council Conclusions, 21-22/03/2019’ (March 2019) <https://data.consilium.europa.eu/doc/document/ST-1-2019-INIT/en/pdf>

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2. PLAN FOR ACTION

Our position remains that the ultimate instrument for the EU services industry would be global adherence to the GPA. The International Procurement Instrument (IPI), as currently drafted, will not help opening third country procurement markets for European companies, but open the European procurement market completely for third country bidders. This is why we advocate for a robust, ambitious and comprehensive instrument that writes the principle of reciprocity enshrined in the GPA into the IPI. What has been proposed so far does not meet our expectations.

We therefore encourage to look within existing (European) instruments that are compatible with the WTO, so to fill the void. Even with GPA and IPI in place these measures can only add value to the EU's approach for open markets and free trade.

2.1. The Legal Framework:

Even if no EU commitments are made under the WTO/internationally, the EU can act because it has exclusive competence over the common commercial policy – international trade (**Lisbon Treaty – The Treaty on the Functioning of the European Union (TFEU) - Article 2(1), 3 and 207**).

Meaning the EU is the only one to decide or/and act on issues unless it's explicitly prohibited or stipulated as otherwise.

- **TFEU Article 2(1):** *When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union.*
- **TFEU Article 3:**
 1. *The Union shall have exclusive competence in the following areas:*
 - (a) customs union;
 - (b) the establishing of the competition rules necessary for the functioning of the internal market;
 - (c) monetary policy for the Member States whose currency is the euro;
 - (d) the conservation of marine biological resources under the common fisheries policy;
 - (e) **common commercial policy.**
 2. ***The Union shall also have exclusive competence for the conclusion of an international agreement** when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.*
- **TFEU Article 207:**
 1. *The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy **and measures to protect trade such as those to be taken in the event of dumping or subsidies.** The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*



In a way these exclusive powers and incorporation of EU law could be read as the EU being/acting like a sovereign. Meaning the EU – within its decision-making framework/institutions - is the only one to decide or/and act on issues unless it's explicitly prohibited or stipulated as otherwise. The EU does have the first and final say over a broad range of issues (falling within its competences). European institutions have the power to override national authorities over policies that are explicitly conferred to the Union or been defined as matters of shared competence between the EU and the Member States.

2.2. Action 1:

The gap left could be filled by applying the same procedure as under the **Trade Defence Instruments (TDI)**. Indeed, for now TDI is only applicable for goods but this can just as well apply/relate to services.

Could develop from the methodology set out for proving dumping and/or state interference via subsidies. Both the anti-dumping and anti-subsidy procedures can come into play here, either looking at them independently or combined. It largely depends on whether the burden of proof can be realistically determined.

The fact, why services were not included under TDI in the first place was largely due to the refusal from Member States. But this sentiment, due to China's encroachment of the European market, is changing. Member States are realising something needs to be done about China and its unfair trade practices. They may now be more open to applying TDI mechanisms to services.

2.3. Action 2:

Find inspiration from **Regulation (EEC) No 4057/86 on unfair pricing practices in maritime transport** and the currently under-repeal **Regulation of the European Parliament and of the Council on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004**. Since Regulation No 868/2004 is currently under repeal, Regulation 4057/86 should be given the main focus.

Regulation (EEC) No 4057/86 was a pioneer in that it extended concepts traditionally reserved for goods into the field of services. (Example of application of the Regulation in practice: Hyundai Merchant Marine Case).

Both regulations laid down certain procedures on how to respond to unfair pricing practices or the violation of applicable international obligations by certain third country service providers. If they affect the competition and cause injury to Union providers, the EU could investigate and apply redressive duties in order to protect Union service providers from these unfair trade practices and safeguard their interests.

More importantly these regulations can provide the basis or layout so to create similar instruments addressing other service sectors than just air and maritime transport, like construction, dredging and services involving contractors.



2.4. Action 3:

Indeed, this option may not always be easy to implement but we propose – as added value to a potential instrument/mechanism or to enhance the above actions – to incorporate the conditions set in the **public procurement and award concessions directives with specific focus on the selection of candidates as well as the new regard for social, labour, environment etc. considerations and responsibilities.**

Evidence has shown that countries/trade partners like China do not apply the highest standards as to respect for human rights, labour rights, social factors, and the environment. The EU should take account of these elements in its decision making when granting tenders and awarding concessions. We call that the provisions on meeting and respecting high standards, rights and the environment be actual/substantial and not merely rest on words.

Thus, if a service provider does not comply with the highly set national or EU social, health, labour or environmental standards, it can be excluded - at any stage - from the procurement procedure even if it has the economically most advantageous offer. The awarding of a contract will no longer be dependent on the price alone.

There is also a growing demand among EU citizens that public goods and services are provided by companies/contractors with high regard and respect for environmental, social, innovative and labour standards. By using their purchasing power to choose socially responsible goods, services and works, public authorities can set a positive example and encourage enterprises to make wider use of social standards in the management, production and provision of services by using the new opportunities to promote social inclusion.

This growing awareness should be reflected in the transposition of the directives by the Member States. Concerted action is needed.



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