"Zugangsbeschränkungen für Waren oder Unternehmen aus Drittstaaten?"

RA Ulrich Paetzold

FIEC
1905 1st meeting

29 countries
33 federations

Enterprises
- of all sizes
- active in all fields of building and civil engineering

Full member
Observer member
Co-operation Agreement
Market Access Regulation
Council adoption unlikely, unless ...

<table>
<thead>
<tr>
<th>“Nice” needs</th>
<th>for</th>
<th>against</th>
<th>sceptic</th>
<th>undecided</th>
</tr>
</thead>
<tbody>
<tr>
<td>Memb. States</td>
<td>173/345</td>
<td>147</td>
<td>155</td>
<td>24</td>
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<tr>
<td>block. min.</td>
<td>91/345 38% pop</td>
<td>44,2%</td>
<td>50,3%</td>
<td>3,1%</td>
</tr>
</tbody>
</table>
General Remarks
FIEC is in favour of

- fair competition
- on open markets
- world-wide
Trade and Public Procurement
some basics

● differenciate

■ for “defensive” interests
  ⇒ Abnormally Low Tenders (but …)

■ for “offensive” interests
  ⇒ giving good example?
Trade and Public Procurement
some themes for discussion

- possible ways forward:
  - discussions, good example, hope?
    ⇒ no real success, despite x years
  - try something else!
    ⇒ strengthen EU position
    ⇒ show EU willing/ able to defend
Trade and Public Procurement
some themes for discussion

- “would be the wrong message”?
- any better message available?
  - do not worry, just continue
  - we will never defend ourselves other than by political correctness
  - if necessary, we will reconsider!!!
Trade and Public Procurement
some themes for discussion

- protection = protectionism? No!
  - protection: against unfair practice
  - protectionism: also against fair pr.

- Example: surgical interventions
  - GBH, but necessary for health
Trade and Public Procurement
some themes for discussion

• risk of retaliation?
  ■ of course, always!
  ■ Sectors afraid of retaliation tend to enjoy open markets,
  ■ those not afraid do face barriers

• Who is to be sacrificed?
“EU market fundamentally open”?
- de facto, statement +/- correct
- de iure, no legal basis (despite ...)
- If markets were open de iure, why IM directives and trade negot.?

- No “leverage”, no opening!
Trade and Public Procurement

some themes for discussion

- Undermine EU’s credibility?
  - No, on the contrary, as long as targeted, specific and adequate showing that aim is opening markets and not protectionism
Trade and Public Procurement

some themes for discussion

- **Trade Defence Instruments?**
  - there is no anti-dumping procedure for services (incl. construction)
  - creating one would take decades
  - extension of existing procedures to services would be inappropriate
The Regulation
Market Access Regulation

3 main instruments (plus procedures)

- **Art. 6**, concerning specific tender, “Contracting Authority measure”
- **Art. 8-10**, concerning specific market “European Commission measure”
- **Art. 7**, Abnormally Low Tenders
Market Access Regulation
Art. 6 “Contracting Authority measure”

- indication in contract notice
  - call for tenders
    - (reception of tenders)
    - analysis, evaluation
      - ask tenderers for info on CoO
        - self declaration
        - documentation
  - exclusion
    - indication in award notice
- notification procedure
  - 2 months (+ 2 m)
    - may ask CA for additional info (8 d)
      - EC shall hear tenderer
        - shall approve …
          - no decision
          - not approved
          - approved
        - shall not approve …
Market Access Regulation
Art. 8 ff “European Commission measure”

- EC considers “in the interest of the Union”
- upon application of interested parties
- upon application of a Member State

EC: External Procurement Investigation (9m +3)
- based on the criteria laid down in Art. 6 (“CA proc.”)

Restrictive procurement measures maintained?

NO = investigation terminated

Article 9
YES + if EC considers “justified by the EU interest” = invitation to enter into consultations (max. 15m)
Market Access Regulation

Art. 9 “Consultation of a third country”

**invitation to enter into consultations**

- third country declines
- GPA or FTA
- third country takes satisfactory measures
- it appears that conclusion of internat. agreemt. is most appropriate
- third country undertakes, w EU international commitments
- third country has engaged in substantive negotiations PP

- Art. 10 decision: restrictive measure for non-covered
- follow procedures
- EC may suspend or terminate consultation
- negotiations in accord. with Art. 207 and 218 TFEU
- GPA bilateral agreem. expansion of comm. also if phasing out
- EC may adopt implementing act if impossible to exclude (Art.6)

after **15 months** no satisfactory results:
- EC shall terminate consultation and
- consider acting under Art. 10

EC may terminate consultation

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Market Access Regulation
Art. 10 “Adoption of measures”

lack of substantial reciprocity
(as defined in Art. 6.4)

EC may adopt implementing acts

measures may be limited to certain defined
- categories of contracting authorities/entities
- categories of goods or services
- thresholds

exclusion of tenders
- more than 50% of total value originating in the third country

mandatory price penalty
Committee procedure (Art. 17)

- EC shall be assisted by
  - Advisory Committee Public Contracts "CCMP"
  - Trade Barriers Regulation Committee "TBRC"

- by 1. both, 2. the one, 3. the other
If CA intends to accept ALT (no!), after verifying explanations of tenderer, if non-covered > 50% of value, then CA shall inform the other tenderers, incl. reasons for ALT character.

- Not really efficient!
- Art. 69 “class” changes nothing!
Would the proposed rules help? **No!**
The rules do not provide for
- forcing CA or EC to **commence** proced.
- **recourse** to have decisions checked

All depends on CA/ EC willingness and “the interest of the Union”
A Contracting Authority may exclude a non-covered tender without any reason other than that without any specific procedure.

Practice in several countries confirmed by national courts no known infringement procedure!