Global Counsel

The EU’s €2 trillion message

Blog post by Associate Alessandra Baldacchino, 30 July 2019

The European Commission’s new legal guidance on the participation of third country bidders in the EU procurement market sends an important signal. It signals that greater reciprocity in public procurement will be an important element of Brussels’ industrial policy agenda. As I set out in a recent GC paper, the commission is demonstrating that it is unafraid to put words into action.

As it is showing in other areas such as tax, research expenditure and competition policy, the European Commission is sending a strong message that it intends to act assertively to achieve a level playing field in public procurement markets. However, its message has different implications to its three main political audiences: the incoming European Parliament, member states and third countries.

The key audience for the guidelines is European capitals. The commission uses the guidance to ‘remind’ member states of the various instruments which are at their disposal within the EU public procurement toolbox. They provide a strong steer to European governments to restrict access to their public procurement markets to bidders from third countries who do not maintain an open market or comply with the bloc’s social and environmental standards.

The new guidance tacitly moves away from the 2014 public procurement Directive in an important way. At the heart of the 2014 public procurement Directive was efficiency in public spending, encouraging competition and innovation in public sector provision and a clear obligation to seek “the most economically advantageous tender”. The new guidelines blur this imperative with the clear politically motivated suggestion that reciprocal access and tackling unfair trade can trump this financial judgement.

Going beyond member states’ legal commitments, the guidelines encourage public buyers to investigate abnormally low tenders and identify third country bidders which do not have secured access to the EU procurement market through a bilateral agreement or the World Trade Organisation’s Government Procurement Agreement (GPA). They point to the potential of the hotly debated International Procurement Instrument (IPI) – if the European Council backs the commission’s proposals - to add further leverage for member states, including the use of restrictive measures such as price penalties and the Commission’s power to initiate public investigations in case of alleged discrimination of EU companies.

The second audience is the European Parliament. The IPI push belongs to the current outgoing Commission. It is possible that the incoming one backs it with less enthusiasm. But Ursula von de Leyen is closely aligned with Berlin on industrial policy and owes her job to IPI backer Emmanuel Macron. The guidelines are a reminder to the parliament that a tougher line with China and others is possible – especially when concerning the EU’s procurement market which is worth 14% of the EU Gross Domestic Product or €2 trn annually. Playing to the protectionist instincts of the new parliament, the commission can probably expect to see a demand for tougher action played back to it in September’s commissioner hearings.

Whilst taking aim at China – these guidelines are the first deliverable from the 10 actions set out in the recent EU-China relations communication - this approach could also significantly impact access to European procurement markets for Russia, Turkey, India, Indonesia, Japan and Korea. For Beijing and other capitals, the document is yet another signal that the EU institutions are taking the question of reciprocity and a level playing field more literally than in any policy cycle for several decades – and they know they have member state backing from Paris and Berlin to do so. A major theme of the next EU policy cycle will be the EU's search for leverage with trading partners like China. The commission's aim is to turn its €2 trn public procurement market into that leverage.