

DIE BAHNINDUSTRIE.

VDB VERBAND DER BAHNINDUSTRIE IN DEUTSCHLAND E.V.



CREATING AN EFFECTIVE, ROBUST IPI TO LEVEL THE PLAYING FIELD.

JOINT DECLARATION BY THE GERMAN RAILWAY
INDUSTRY ASSOCIATION (VDB) AND THE FÉDÉRATION
DES INDUSTRIES FERROVIAIRES (FIF) ON THE INTER-
NATIONAL PROCUREMENT INSTRUMENT (IPI)

CREATING AN EFFECTIVE, ROBUST IPI TO LEVEL THE PLAYING FIELD.

Joint Declaration by The German Railway Industry Association (VDB)
and the Fédération des Industries Ferroviaires (FIF) on the Inter-
national Procurement Instrument (IPI)

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A. Level Playing Field and Reciprocity

Clean mobility “Made in Europe” is key to climate protection. The rail industries in Germany and France are global market leaders in zero emission mobility. Our industries are built on innovation and excellence in research, development and production. We stand for the resilient **European high-tech industry of the future**. Clean mobility is the next European success story, but there is an important prerequisite: **a level playing field** to facilitate industrial leadership in the future and European strategic sovereignty. The Fédération des Industries Ferroviaires (FIF) and the Verband der Bahnindustrie in Deutschland (VDB) e.V are fully committed to a **market-based regulatory framework** in the EU, to free trade worldwide and to rule-based competition. Therefore, we are gravely concerned about competition-distorting asymmetries in the current EU competition framework.

FIF and VDB point out that

- as a result of a legal loophole, **EU state aid law** has so far only been applied to value added in the EU. In stark contrast, EU state aid rules do not apply to non-European state-owned enterprises (SOE), bidding for public tenders in the Single Market. We strongly advocate strict EU State aid legislation, which must apply to all bidders in the EU, under the aegis of the EU Commission.
- by the same token, equal **market access** in public procurement as rightly offered by the EU is not always granted reciprocally in third countries so that European companies cannot always get equal access to public procurement markets.
- **asymmetric framework conditions**, if not duly corrected, in the long run are likely to erode industrial structures within the EU.

FIF and VDB

- strongly **welcome the fact that with the International Procurement Instrument (IPI)** the EU is aiming to establish fair competitive conditions in international public procurement through more reciprocity. The approach is ground-breaking for making existing EU law fit for globalization.
- very much **appreciate the outstanding efforts of the Council** of the EU under the Portuguese Presidency reach an **agreement between the Member States** on the IPI, after years of negotiations. We believe that the Council’s final compromise forms an **excellent basis** for further discussions and improvements in the Trilogues.
- **promote a coherent IPI** that generates credible and proportionate leverage for EU negotiations on the reciprocal opening of public procurement markets.

B. Proposed Amendments by FiF and VDB to the IPI

The IPI must effectively complement existing EU law and include strong anti-circumvention provisions. However, we have concerns that the IPI would in relevant individual cases be rendered de facto ineffective by vaguely defined exemption provisions. Therefore, FiF and VDB call on the Members of the European Parliament to implement the following points during the upcoming Trilogue negotiations on the IPI and to urgently work for the rapid adoption of the IPI including these amendments.

FiF and VDB strongly support the **AEGIS Europe position paper** (June 2021) in view of the European Parliament's position and following the agreement in the Council. Against this backdrop, we particularly highlight the following priorities.

I. Recital 11 (protection of EU Acquis): additionally anchored in the normative section.

- Recital 11 of the IPI 2021¹ clearly states: The EU's existing Directives in public procurement as well as the "guidance on the participation of third country bidders and goods in the EU procurement market" remain **fully intact** irrespective of the application of the IPI.
- The inclusion of Recital 11 in the IPI during the consultations is an **important decision establishing legal certainty**. It makes the **Council's intention absolutely clear** that the IPI is intended not to substitute but to **supplement the EU Acquis** (i.e., open up an additional avenue).

Proposed Amendment 1

- In order to further optimise the verbatim clarification by the legislator that existing EU law remains fully valid, the definition of Recital 11 should additionally be anchored in the normative text of the law.

II. Art. 8² (exceptions): deletion and coherent EU competencies.

As they are currently designed, exceptions are too broad and could be used extensively and without sufficient monitoring, thereby creating a major flaw in the mechanism and in some cases unacceptably reduce its effectiveness. FiF and VDB are of the firm opinion that any exemption **without substantial supervision rights by the EU Commission** will result in a **lack of legal certainty and possibly a dysfunctional IPI** in relevant individual cases.

¹ In reference to amended Recital 11 in Council Proposal 2012/0060(COD)

² Corresponding to Art. 12 amended Commission Proposal COM(2016)0034

Art. 8 para 1 (exceptions)

- From the point of view of FIF and VDB, Article 8 para. 1 was **fundamentally improved in Council deliberations**. For it now clearly lays down: “Contracting authorities and contracting entities may **on an exceptional basis** decide not to apply the price adjustment IPI measure”. (Art 8 (1)). It is also clear that strict **objective** criteria should be applied.
- However, **Art. 8 para 1 (b)** states that **contracting authorities can decide** not to apply the IPI if **they consider** that IPI measures would lead to a **“disproportionate increase in the price or costs”** of the contract. FIF and VDB note that the criteria are by any means inadequate to provide for legal certainty.
 - **“Disproportionate increase”**. State subsidies by definition result in abnormally low prices. If these might justify not applying measures under the IPI, any offer based on third state subsidies could automatically legitimise its own exemption from the IPI.
 - **“Objective criteria”**, e.g., **“estimated value”** set by the contracting authority. Whereas this might work in general, in individual relevant cases subsidised bids by third country SOEs might gain unfair advantages if the estimated value of contracts, as could be imagined, might be set very low.

Art. 8 para 2 and para 3 (reporting provisions and role of EU Commission)

- In view of FIF and VDB, the reporting provisions as currently foreseen are likely to create **legal uncertainty** and to be **detrimental to a consistent European framework**. For Article 8 para 2 and para 3 stipulate the following provisions:
 - National contracting authorities must merely **inform** the EU Commission of the use of the IPI exception.
 - Contracting authorities may do so **ex post, 30 days after the award of the contract**. That makes it very difficult for the Commission to contest the use of the exception.
 - The EU Commission has **no effective options to reject** the request and to subsequently **enforce compliance**.
- In Recital (28), reference is made to the Commission’s possibility to apply the corrective **mechanism according** to Article 3 of Council Directive 89/665/EEC or Article 8 of Council Directive 92/13/EEC. These possibilities are not new and enable action “prior to a contract being concluded”, which would seem in contradiction with current provisions on reporting.

FIF and VDB

- oppose the possibility not to apply IPI measures if they “would lead to a disproportionate increase in the price or costs of the contract” and call for its deletion.
- consider it absolutely necessary to implement a mandatory ex ante notification, i.e. an approval by the EU Commission before the award of the contract.
- call for effective supervision options of the Commission (optional rejection, possibly linkage to European funding, e.g., CEF and NGE, for the particular project in question)
- and therefore, strongly advocate for the following proposed Amendments fully in line with the AEGIS position.

Council final text Article 8 (amending 2016 EC proposal)	VDB-FIF Proposal
	Proposed Amendment 2
<p>1. Contracting authorities and contracting entities may on an exceptional basis decide not to apply the IPI measure with respect to a procurement procedure if:</p> <p>(aa) there are only tenders from economic operators originating in the country subject to an IPI measure, or only such tenders meet the tender requirements; or</p> <p>(ab) this is justified for overriding reasons relating to the public interest; or</p> <p>(b) without prejudice to Article 69 of Directive 2014/24/EU and Article 84 of Directive 2014/25/EU, based on objective criteria taking into account, among others, the estimated value of the contract, the application of the measure would lead to a disproportionate increase in the price or costs of the contract that would render its execution economically unviable.</p>	<p>1 Contracting authorities and contracting entities may on an exceptional basis decide not to apply the IPI measure with respect to a procurement procedure if:</p> <p>(aa) there are only tenders from economic operators originating in the country subject to an IPI measure, or only such tenders meet the tender requirements; or</p> <p>(ab) this is justified for overriding reasons relating to the public interest; or</p> <p>(b) without prejudice to Article 69 of Directive 2014/24/EU and Article 84 of Directive 2014/25/EU, based on objective criteria taking into account, among others, the estimated value of the contract, the application of the measure would lead to a disproportionate increase in the price or costs of the contract that would render its execution economically unviable.</p>
	Proposed Amendment 3
<p>2. Where a contracting authority or contracting entity decides not to apply an IPI measure, it shall inform the Commission, in a manner to be decided by the respective Member State, no later than thirty days after the award of the contract.</p>	<p>2. Where a contracting authority or contracting entity decides not to apply an IPI measure, it shall inform the Commission, in a manner to be decided by the respective Member State, no later than thirty days after the award of the contract. after the publication of the contract notice and in any case before the award of the contract.</p>
	Proposed Amendment 4
<p>3. The notification shall contain information on the origin of the economic operators that have submitted a tender, due justification of the use of the exception and, where appropriate, any other information deemed useful by the contracting authority or contracting entity. The Commission may ask the Member State concerned for additional information.</p>	<p>3. The notification shall contain information on the origin of the economic operators that have submitted a tender, due justification of the use of the exception and, where appropriate, any other information deemed useful by the contracting authority or contracting entity. The Commission may ask the Member State concerned for additional information and may ultimately reject the request for exception.</p>

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