

Working Party on Competitiveness and Growth (Joint meeting of the Industry and Public Procurement groups)

Flash 31 October 2023

Dear colleagues,

We are happy to welcome you once again to a new meeting of the Working Party on Competitiveness and Growth (Industry).

It will be a morning meeting with interpretation on the 31 October, starting at 10:00 in the Justus Lipsius Building.

As announced in the monthly flash note, we will celebrate a joint meeting of the Public Procurement and Industry Working Parties, where we will have the opportunity to delve into the provisions of Access To Markets (Articles 19 to 22) of the Net Zero Industry Act (NZIA).

We will debate on the basis of the Presidency compromise text, taken also into account other proposals kindly presented by our colleagues from Austria, Denmark, Sweden and Germany, after the Coreper discussion on 13 October.

Firstly the Commission will make a short introduction of the Access to Markets chapter clarifying the core elements and the possible different approaches including a hybrid alternative with some of the advantages of each proposal.

Afterwards, delegations will be invited to comment and to express their preferences among the different alternatives. The Presidency would aim at having a clearer idea on the proposal that receives the widest support among Member States in order to take it as a basis to prepare a new revised proposal.

In order to facilitate the debate, delegations can find an executive summary of the proposals on the discussion paper attached to this note.

We look forward to seeing you on the 31st!

The Spanish Presidency NZIA team



Mushroom time in Gredos. Ávila. (Spain)

Discussion paper on Access to Markets

Net Zero Industry Act

31 October 2023

In this paper, delegations will find a short description of the different proposals under discussion that will be commented during the Working Party meeting on Access to Markets.

Proposals addressing only contracts (Art. 19)

1. Danish proposal

The Danish proposal aims at simplifying and providing further flexibility for public procurement procedures in Article 19, while being ambitious on non-price criteria.

Denmark therefore proposes to introduce **pre-qualification** criteria through obligatory minimum requirements (i.e. technical specifications) or contract clauses. Those requirements would have to comprise the contribution to resilience (defined as in the Commission's proposal) and at least one of the following criteria: environmental sustainability and/or innovation. Innovation criterion/requirement is simplified. "*Contribution to energy system integration*" is deleted.

The 10%-opt-out-threshold remains and it is specified that it may be assessed prior to the publication of a contract notice.

2. Austrian proposal

Austria proposes an alternative drafting for the procurement procedures under Article 19. The main points are:

- mandatory use of the environmental sustainability criterion, without a minimum threshold (significant weighting), other criteria made voluntary.
- **different handling of resilience**, maintaining its application only above 65% from a single source, but only in case it is a third country. Moreover, not more than 50% of the contract value should stem from that third country; otherwise, penalty payments shall be applied by contracting authorities.

Additionally, the proposal includes not only the 10% opt-out-threshold, but also supply bottlenecks as potential reason to not applying non-price

criteria. This would also address concerns on the impact of renewables deployment.

3. Swedish proposal

The proposal for Article 19, focuses on increasing the demand for net zero technologies instead of increasing the environmental sustainability of products (that already have significant less environmental impact) and securing a harmonized demand from public sector, lowering the risk for companies to invest in the technology.

The Commission is empowered to adopt **delegated acts** regarding environmental sustainability and resilience in the form of technical specifications or contract performance clauses.

The aim is that the assessment regarding GPA, possible conflict with provisions in Ecodesign, Battery regulation or Construction Products Regulation, and the application of the 65% rule, is handled by the Commission and not by the contracting authorities. Hopefully, the operational requirement set out in the delegated acts will be ready to use for the contracting authorities.

By leaving award criteria out, there would not be conflicts with the procurement directives and therefore no need for division into lots and weighting provisions.

Proposals addressing only auctions and other support schemes (Arts. 20 and 21)

4. German proposal

Germany suggests some changes to the NZIA proposal to give MS full flexibility so that they can decide when and where to introduce non-price criteria in the frame of renewable energy auctions (Article 20) and other schemes which incentivise the purchase of net-zero technology (Article 21).

In this regard they propose to make the resilience and sustainability **criteria voluntary** for Member States and, rather than a full instantaneous harmonization of EU procedures, to work on further cooperation of Member States around **best practices**.

5. Commission's original proposal

In the Commission's proposal, the sustainability and resilience contribution shall have a weight between 15 and 30%. **Four obligatory award criteria** are proposed: environmental sustainability, innovation, energy system integration, contribution to resilience. The contribution to resilience shall be assessed in relation to a supply concentration of more than 65% from one country and possibly other aspects. If applying those criteria leads to cost differences of more than 10%, the application can be presumed disproportionate.

6. Presidency compromise proposal

The Presidency compromise proposal is a **variant** of the Commission's original proposal, where some elements have been modified to address the demand for **flexibility** requested by Member States (MS):

- criteria are defined in a different way for articles 19, 20 and 21, in order to be able to adapt to the specificities of contracts, auctions and support schemes respectively.
- only the security of supply criterion is mandatory and contracting authorities can choose (at least one) among the other criteria.
- a minimum contribution of 5% is fixed for the criteria selected by MS.

7. Hybrid option

A hybrid option, addressing the mentioned concerns and taking up possible solutions from other proposals, could possibly look like this:

- The sustainability contribution is provided through harmonised minimum requirements (technical requirements/pre-qualification criteria) to be established by the Commission.
- Contribution to resilience has to be mandatory addressed while at least one of the other criteria has also to be applied by contracting authorities.
- The resilience criterion is defined as in the Commission's proposal.
- Supply bottlenecks is added as another reason to opt-out of applying these criteria.
- The 10%-opt-out-threshold is to be assessed on the basis of the estimated of procurement value (art. 5 of the classical Directive) and/or of the value of support under auction schemes before publication of the contract notice/auction.

This solution strives to get flexibility for MS while keeping the ambition.





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