

## CMS: Romania to restrict third country-bidders and products for public contracts

### **Romania is in the process of banning certain non-EU and non-EEA countries from participating in public procurement procedures in Romania.**

After a Memorandum outlining this ban was first approved by the Romanian government, on 20 March 2021 the national regulatory authority on public procurement (ANAP) published a legislative proposal in the form of a Government Emergency Ordinance (GEO), which the Romanian government is expected to approve with a binding law in a matter of weeks.

The GEO will amend the main legal framework on public procurement, including classic public procurement, public procurement in the utilities sector and concessions. The GEO will also introduce new rules whereby only economic operators can participate in public procurement award procedures, which are established in:

- the EU and EEA member states;
- non-EU and non-EEA countries, which are signatories of the Government Procurement Agreement (GPA), provided that the public contract is covered by Appendixes 1, 2, 4 and 5 and by the general notes on Appendix I referring to the EU;
- candidate countries for accession to the EU;
- other countries that are parties to international treaties whereby the EU is obliged to ensure free access to the market of public procurement in the respective field of application.

The GEO obliges contracting authorities to ensure equal treatment between products, works and services of operators from countries subject to the GEO and in the EU (implying that such an obligation would not apply to other third-country operators or products).

While the GEO is only a draft act, which is undergoing public debate and may be subject to amendments, it contains several inconsistencies. The GEO fails to explain the meaning of “established” and does not address implicit consequences, which follow from this concept. China, for example, is a non-EU country that does not fall within the scope of the GEO as an admissible potential bidder. In the current draft, however, a Chinese-owned company, established in the EU as a subsidiary, would be able to participate in public procurement in Romania. In the current draft's wording, such a subsidiary qualifies as an economic operator “established” in the EU.

Another question is whether products produced by a Chinese company could be purchased by an EU/EEA operator and subsequently supplied through a public procurement contract to a Romanian contracting authority. The answer is uncertain based on the current wording of the GEO, which does not prohibit such a purchase, but rather leaves the possibility open for evaluation by contracting authorities on a case-by-case basis.

The new law purports to address the problem of the avoidance of reduced warranties in the quality, environmental and other standards of public contracts, but the above inconsistencies prove the contrary. How these new rules will be applied is again uncertain. The GEO contains no provisions in this respect, although officials have stated that the GEO may be directly applied to on-going projects.

Despite its ambiguities, the current wording of the GEO clearly prevents operators established in non-EU and non-EEA countries that do not fall within the scope of the rules from directly participating as bidders or subcontractors in certain types of projects, such as infrastructure or telecommunication services and technology. This interpretation is supported by public statements of Romania's Minister of Transport and Infrastructure when referring to strategic infrastructure projects (e.g. 5G technology and Huawei's interest in the tender) for which Romania's “strategic choice” is to “choose European companies”, standing by its allies – NATO, the USA and the

EU – and distancing itself from China. See details here [\*Drula, despre interzicerea companiilor din China sa participe la licitațiile de autostrăzi și cai ferate: „E momentul sa facem o alegere strategica”\*](#) and here [\*Razboi pentru șefia ANCOM, organizatoarea licitației 5G, în plina ofensiva a Huawei \(europalibera.org\)\*](#).

Compared to the statements of government officials, the GEO provides a more neutral approach, without alluding to prohibitions directed at a particular country (China or otherwise) and citing general reasons for the adoption of the new rules, such as the need to ensure increased warranties on quality standards and compatibility with EU requirements, the example of other EU member states with similar rules, and risks to strategic projects due to reduced warranties and low standards.

It is debatable whether these grounds justify the “emergency” character of the GEO, a legal requirement necessary for the GEO's constitutionality. It is true, however, that the GEO is backed by the European Commission's Communication of 2019, which is available here [C\(2019\)5494/F1 - EN \(europa.eu\)](#), and the EU agenda that is set to reshape relations with China (among other countries). In the Commission's view, these economic relations lack commercial reciprocity and the Commission is determined to address obstacles to a level playing field for EU and non-EU companies in EU public procurement, and the distortive effects of foreign state ownership and state financing of foreign companies in the EU internal market (which is a distinctive feature of Chinese companies). Through this Communication, the European Commission clarifies that EU law does not prevent member states from taking measures to limit access of third-country bidders and products to national and EU markets.

The broader economic and political context of EU-China relations remains uncertain. The EU-China Investment Treaty (see here) has been under negotiation since 2013 and, for more than ten years, China has also been negotiating its accession to the GPA, adopted in the framework of the WTO. The main purpose of the GPA is to give reciprocal access to government contracts in the EU and Chinese markets. Although China has made significant progress to bridge the gap between conflicting legal provisions in the Chinese public procurement law and GPA standards, further amendments are required to complete negotiations and a successful agreement remains unlikely in the foreseeable future.

Against this background, many western European countries are rolling out the red carpet to certain third-country contractors (such as China) based on their economic interests. Romania is taking the opposite approach. Time will tell whether this is a bold move or careless decision, both from an economic perspective and as a matter of international policy.

For more information on public procurement in Romania, contact your CMS client partner or local CMS experts: **Horia Draghici, Cristina Popescu and Laura Capata.**