

16. forum vergabe Gespräche

18.-20.9.2013

**"Zugangsbeschränkungen
für Waren oder Unternehmen
aus Drittstaaten?"**

RA Ulrich Paetzold

FIEC






www.fiec.eu

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 ...

“Nice”	needs	for	against	sceptic	unde- cided
Memb. States	173/ 345	147	155	24	19
block. min.	91 / ³⁴⁵ 38% pop	44,2%	50,3%	3,1%	2,5%

General Remarks

Trade and Public Procurement

some clarification

- **FIEC is in favour of**
 - fair competition
 - on open markets
 - world-wide

Trade and Public Procurement

some basics

- **differentiate**

- 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?**

Trade and Public Procurement

some themes for discussion

- **“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

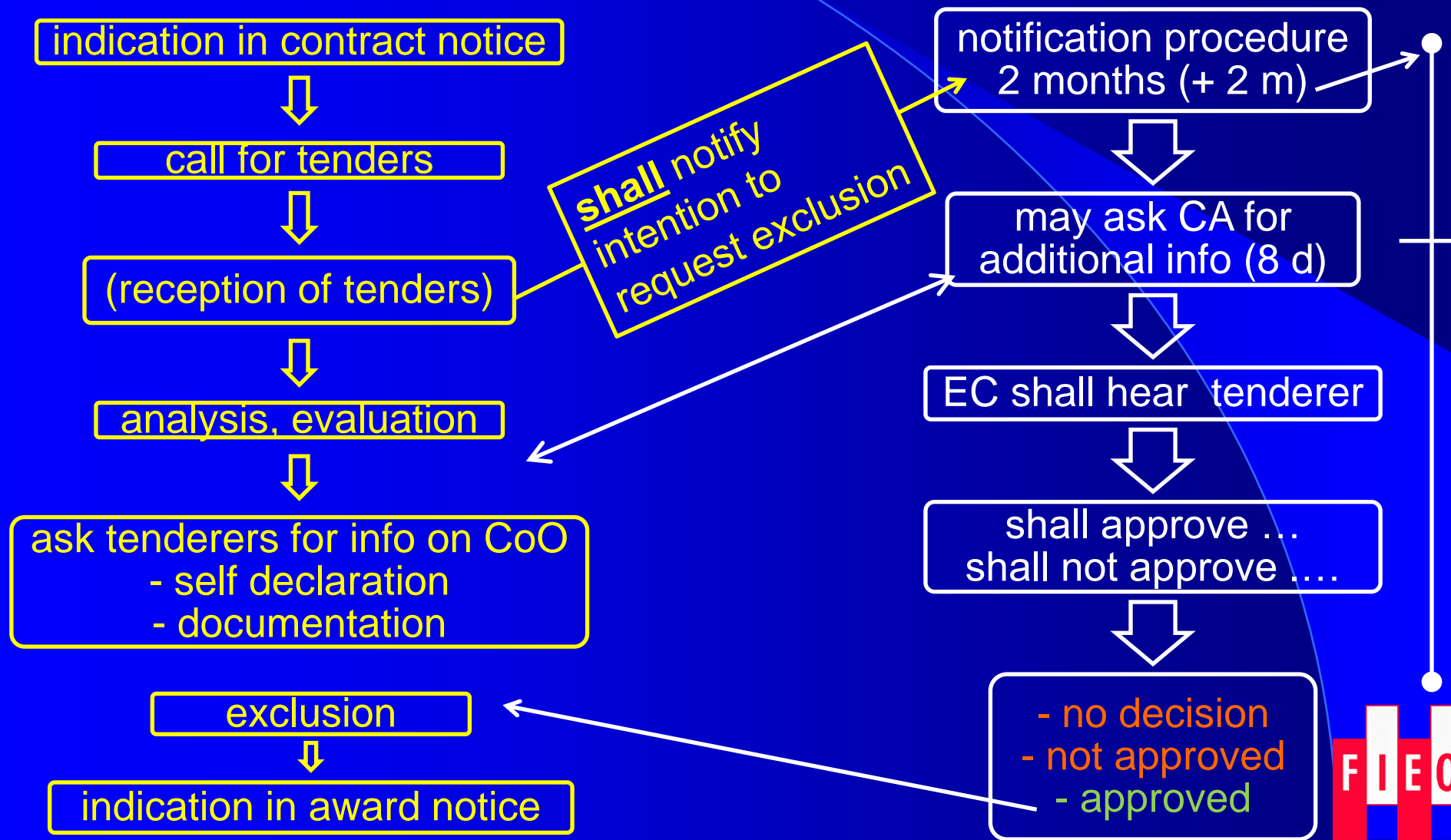
Market Access Regulation

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”



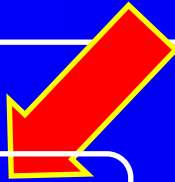
Market Access Regulation

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

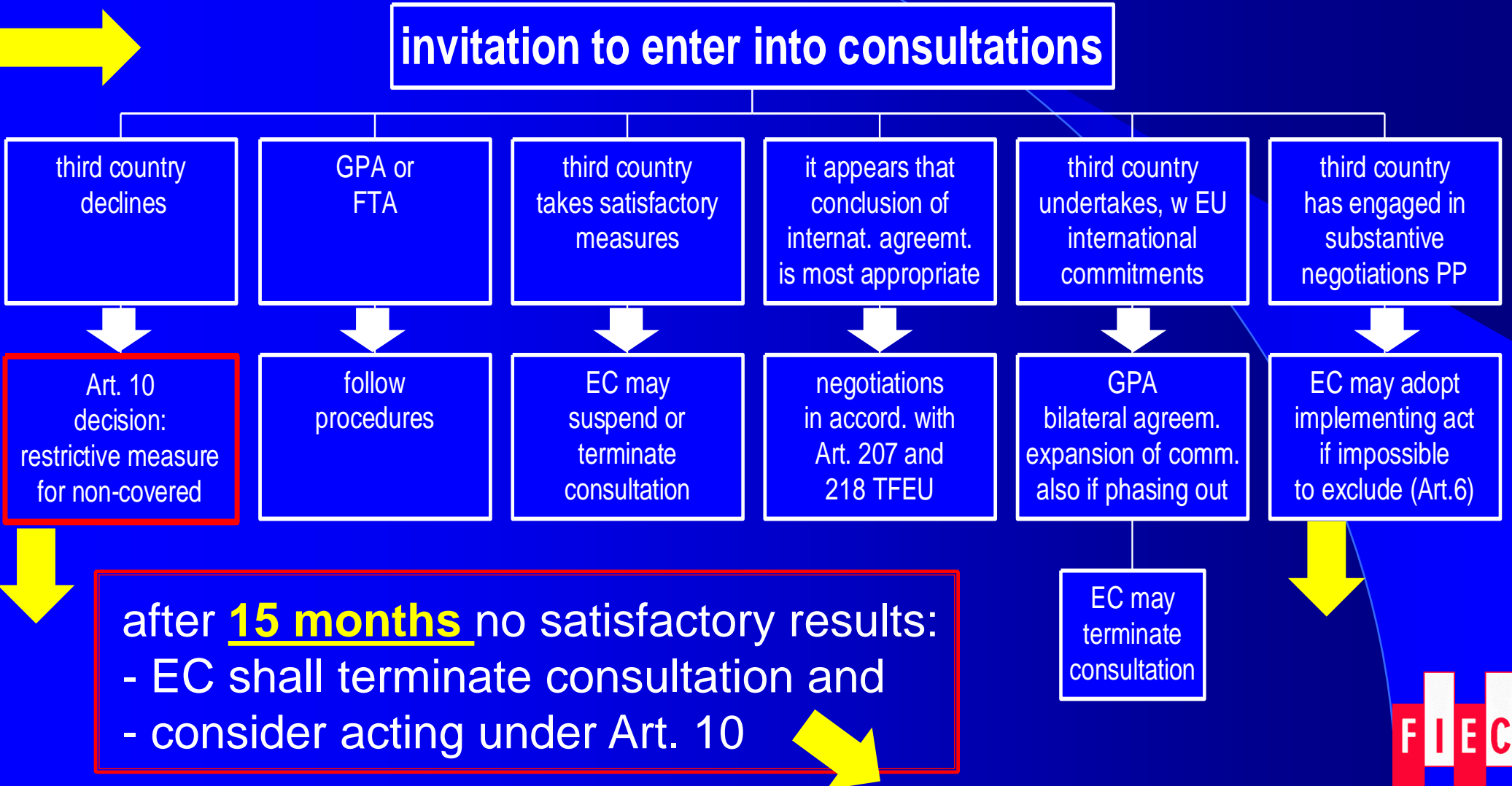
Article 9

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”



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/ entites
- catgeories of goods or services
- thresholds

exclusion of tenders

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

mandatory price penalty

Market Access Regulation

Art. 8-10 “Eur. Commission measure”

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

Market Access Regulation

Art. 7 “Abnormally Low Tenders”

- 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!

Market Access Regulation

“COVEC” test

- 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”

Market Access and today?

- **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!

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