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The European Commission Prevails Without Fighting in its First Probe into Chinese Train Manufacturer

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The FSR and public procurement

The primary objective of the Foreign Subsidies Regulation (FSR) is to address the influence of foreign subsidies that may distort the integrity of the EU's internal market. This encompasses scenarios where recipients gain an unfair advantage enabling them to secure public procurement contracts within the EU at the expense of equitable competition.

Since 12 October 2023, companies (whether or not established in a Member State) must notify their public procurement tenders in the EU to the Commission when the two following thresholds are met: (i) the estimated value of the contract exceeds €250 million and (ii) the company was granted at least €4 million in foreign financial contributions from at least one third country in the three years prior to notification.

Following the notification, the Commission initiates a preliminary analysis (20 days), which may result in an in-depth investigation where it exists sufficient indication that the bidder has been granted a foreign subsidy that distorts the internal market.

Where the in-depth investigation confirms that an economic operator benefited from a foreign subsidy distorting the internal market, the Commission may (i) adopt an implementing act rejecting the tender (thus preventing the adjudicating authority to contract with the bidder) or (ii) adopt a decision with commitments (where the tender is not rejected, subject to commitments which fully and effectively remedy the distortion, such as a commitment from the company not to submit any tenders in the EU for a definite period).

The *CRRC Qingdao Sifang Locomotive Co., Ltd.* probe

On 19 January 2024, the Commission issued a press statement on the occasion of the first 100 days of notification obligations. The short statement recalled the main features of the FSR mechanisms, announced that 100 submissions had been received so far and that an awareness-raising campaign designed *"to promote the FSR and how to apply it effectively"* was about to be launched.

A few weeks after this low-profile statement, the Commission announced the opening of its first in-depth investigation into the potentially market distortive role of foreign subsidies.

The investigation of a notification submitted by *CRRC Qingdao Sifang Locomotive Co., Ltd.* (a subsidiary of CRRC Corporation) in the context of a Bulgarian public procurement procedure relating to the supply of several electric "push-pull" trains as well as related maintenance (15 years) and staff training services.

All the ingredients needed for this inaugural procedure seemed to be present: a high-value public contract (around €610 million), a strategic industrial sector (since it relates to infrastructure and public transportation, as well as being key to a low-carbon economy) in which European industries are striving to maintain their market share and relevance against their foreign competitors (in particular CRRC, a Chinese state-owned conglomerate and the world's largest rolling stock manufacturer in terms of revenue, which had already appeared on the radar of the European competition authorities).

Yet, on 26 March 2024, the Commission published a brief statement announcing the closing of the in-depth investigation, following the withdrawal by CRRC Qingdao Sifang Locomotive Co., Ltd. from the public procurement procedure.

In the absence of any official statement by the company or further details from the Commission, the company's specific motives for its withdrawal, as well as the content of any potential prior discussions with the Commission remain confidential.

The first step of a long journey

Commissioner Breton underlined the effectiveness and the game-changing nature of FSR: *"In just a few weeks, our first investigation under the Foreign Subsidies Regulation has already yielded results"*.

One could argue that this first probe represents an obvious success for the Commission. This episode, as interesting as it is, needs nevertheless to be analysed with nuance, and placed in a broader context.

First, the closing of the in-depth investigation does not mark the end of the story of public procurement probes in the FSR context, but its very beginning. On 3 April 2024, the Commission announced the opening of two in-depth investigations in the solar photovoltaic sector, concerning two bidders in the context of a public tender for the design, construction and operation of a photovoltaic park in Romania. The two notifications emanate from (i) a consortium including the German subsidiary of ONGi Green Energy Technology Co. Ltd (listed on the Hong Kong Stock Exchange) and from (ii) a consortium of companies controlled by Shanghai Electric Group Co. Ltd, a Chinese state-owned company. The Commission has 110 working days as of 4 March 2024 (date of notifications) to adopt a decision in each of these procedures.

Second, Sun Tzu (ancient Chinese general and military strategist), wrote nearly 2500 years ago that *"To subdue the enemy without fighting is the acme of skill"*. Sure, the withdrawal of *CRRC Qingdao Sifang Locomotive* may appear as a victory, all the greater for the fact that it produced results quickly, with limited time and resources invested and without tangible loss. Sure as well, the "repellent" effect of the FSR (*i.e.* the fact that far-reaching transparency and collaboration obligations imposed on companies in the context of the in-depth investigation may lead them to withdraw or maybe to refrain from bidding) can be seen as a favourable feature of the new

European tool, allowing it to yield result in the short run (rather than depending on the outcome of long and hardly-fought judicial battles on the first applications of the new regime). Yet, in the long run, the Commission cannot reasonably expect the same complaint or fatalist attitude from all corporations under probe.

Third, and in connection with the former, the satisfaction of the Commission cannot hide the discontent generated among other stakeholders and completely ignore potentially adverse consequences for the EU's commercial position on the world stage. On 4 April 2024, the China Chamber of Commerce to the EU (CCCEU) issued its own statement and declared being *"gravely concerned about the consecutive in-depth investigations against Chinese enterprises conducted by the European Commission under the Foreign Subsidies Regulation"*. The short text also refers to an *"abuse of the new tool by the relevant EU authorities"* and a new *"tool of economic coercion to interfere with the reasonable and lawful economic operations of Chinese enterprises in the EU's green and low-carbon transition market"*. Ironically enough (if we take into account the European declarations describing an identical reality in opposite ways) the CCCEU stated that *"[the] situation is distorting the level playing field for Chinese enterprises operating in the EU"* and called *"for the EU to establish a legal and market environment that is fair, transparent, and non-discriminatory towards Chinese enterprises"*.

A pessimistic reading may identify the first signals of an inevitably-upcoming (trade) war for which all stakeholders should prepare and in which they all have much to lose (some more than others). A more optimistic approach would be that these oppositions are inevitable after the necessary and long-awaited strategic awakening of Europe. In that sense, the real question for the coming years is rather to what extent and at what pace the FSR may reconcile the colliding narratives, to shape a new paradigm on which both parties may reach a workable understanding: an EU internal market open to all companies ready to genuinely compete on fair grounds (whatever it may mean for each side).

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