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First International Procurement Instrument Case in China

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On 14 January 2025, the European Commission ("Commission") published the findings of its first investigation under the EU's International Procurement Instrument ("IPI"). Findings of the investigation concludes that China unfairly treated EU medical devices and suppliers in its public procurement.[1] The Chinese government did not contest these findings, but noted (accurately) that it had not undertaken any international commitments on public procurement.[2] Since the facts seem not to be materially in dispute, the intriguing question is: What does the EU do next?

Background

Adopted in 2022, the IPI allows the Commission to investigate into alleged non-EU country measures or practices against EU economic operators that limit access to the public procurement and concession markets of non-EU countries. If it finds problems in non-EU country procurement, the Commission has the power to impose measures to restrict access to companies from the non-EU country in EU public tenders.

On 24 April 2024, the Commission launched its first investigation under the IPI concerning the practices and measures of the Chinese public procurement market for medical devices.

Findings of the Investigation

On 14 January 2025, the Commission concluded that the existence and application of the following measures and practices limit the access of EU medical devices and suppliers to the Chinese procurement market.

'Buy China' policy

The Commission found that the medical devices industry, in particular the high-end segment, is considered a strategic sector in China, which is supported through various policy tools aimed at favouring domestic medical devices over the imported ones. For instance, the 'Made in China 2025' Strategy and the 'Made in China 2025 technology roadmap for key years' specify

incrementing targets for the share of domestically produced high-end medical devices procured by hospitals. The objective of replacing imported medical devices with domestic production is embedded in the '14th Five-year Plan for the Medical Equipment Industry Development' and other policy and legal documents.

The Commission considered that Article 10 of the Government Procurement Law, as the core of the 'Buy China' policy, "creates a legally binding obligation for contracting entities to procure domestic medical devices instead of imported ones whenever both types of medical devices are in competition and the domestic medical devices constitute a reasonable alternative". The difficulties for contracting authorities to procure imported medical devices also consist in "burdensome approval procedures" laid down in the 'Administrative Measures for the Procurement of Imported Goods'.

Centralised volume-based procurement

The Commission considered that the use of volume-based procurement of medical devices forces bidders to offer the lowest possible price, as the contracting authorities set a maximum reference price and maximum price margins for bid selection. Given that bidders compete solely on price, the mechanism "leads suppliers to offer extremely low bids to meet the selection criteria", which is "not sustainable in the long run for profit-oriented companies that cannot rely on State support".

The position of the Chinese Government

The Commission engaged in consultations with the Chinese government, as anticipated under the IPI. The Chinese government did not contest the existence of the measures and practices and the preference in public procurement for PRC-manufactured medical devices. The Chinese government however noted that it had not undertaken any international commitments on public procurement, which meant that its measures and practices were legitimate.

Interestingly, the Chinese government suggested two broader solutions: a future accession by China to the WTO Government Procurement Agreement, with accompanying market opening or a bilateral agreement on procurement between the EU and China. It seems highly unlikely that either could be implemented within the timeframes of the present IPI investigation.

What comes next?

Since the Commission has concluded that the identified measures result in a serious and recurrent impairment of access to the China's medical device procurement market and consultations with China have not resulted in any specific corrective action to remedy this impairment, the Commission now has to consider the possibility of adopting IPI measures.

The IPI measures may consist in either a score adjustment on tenders submitted by Chinese economic operators or an exclusion of tenders submitted by Chinese economic operators in public tenders in the EU. Once imposed, IPI measures may remain in force for five years, with a

possibility of a five-year extension (Article 6 of the IPI Regulation).

The Commission will have to consider whether it is in the EU interest to adopt any measures. Its proposal is subject to the examination procedure, with Member States getting to vote on the proposal – but there would need to be a qualified majority of Member States against the Commission's proposal to block it.

Given that this is the first IPI investigation, many stakeholders will be looking for a precedent to see what the IPI means in practice – notably what type of remedy the Commission proposes and how it approaches the EU interest test here. How this investigation fits into the broader geopolitical trade discussions between China and the EU is an interesting topic, but one that is well beyond the scope of this post.

** Emma Pessotto (White & Case, Legal Trainee, Brussels) contributed to the development of this publication.*

[1] Report from the Commission pursuant to Article 5(4) of Regulation (EU) 2022/1031 on the investigation under the International Procurement Instrument concerning measures and practices of the People's Republic of China in the public procurement market for medical devices ("**Report**"), and accompanying Staff Working Document, Factual findings of the IPI investigation on the procurement market for medical devices in the People's Republic of China ("**SWD**"), available here.

[2] SWD, paras. 75-76.

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