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Commission makes first use of IPI, targeting medical device procurement markets in China

On 24 April 2024, the European Commission (***Commission***) activated for the first time the International Procurement Instrument (***IPI***), opening an investigation into procurement procedures for medical devices in China.

What is the IPI?

The IPI is a recent addition to the Commission toolbox of trade-related instruments designed to promote access to foreign procurement markets (see our alert of June 2022). It empowers the Commission to examine third country measures that hinder access for EU businesses to non-EU procurement markets, and to engage in consultations with the country concerned to eliminate or remedy identified restrictions. If consultations fail, the Commission can take far-reaching measures – it can limit access for five years to public procurement procedures in the EU to businesses, goods or services originating in the third country either by introducing a score adjustment on bidders from that country or by excluding them completely from EU procurement projects.

On what grounds has the Commission decided to use the IPI?

The Commission's preliminary conclusion is that EU medical device makers may not have fair access to procurement processes in China. According to its press release, the Commission decided to make use of the IPI as a result of previously voiced concerns going unanswered by the Chinese authorities.

Stakeholders, especially those that have experienced restrictions in participating in public tenders in China, can complement the Commission's initial findings with further evidence, both concerning practices in China and the EU's interest in adopting measures. The Commission has published a guidance document for submissions, which can be used (ideally within 30 days but the Commission may also take into account any evidence received later) for this purpose.

What are possible IPI remedies?

If the investigation confirms a serious and recurrent impairment of access to procurement processes in China for EU medical devices makers and if discussions with the Chinese government do not remove access restrictions, Chinese medical device makers could be subject to measures under the IPI in EU public procurement procedures. In addition, any successful tenderer (regardless of its origin) would be prohibited from subcontracting more than 50% of the total value of the services contract to Chinese suppliers and from providing goods or services originating in China that represent more than 50% of the total value of the awarded contract.

What drives the Commission's choice between IPI and FSR investigations?

The IPI investigation comes a few weeks after the Commission opened its first ex officio investigations under the EU's Foreign Subsidies Regulation (***FSR***) (see our alert for further information), targeting potential distortions caused by Chinese subsidies in the context of EU public procurement procedures related to wind turbines and to airport security equipment. As for an IPI investigation, the Commission may use FSR ex officio investigations to impose significant remedies, including limiting the participation of Chinese bidders in future European tenders.

The choice of different instruments is presumably linked to specific concerns in each case. In the sectors targeted by the FSR ex officio investigations, Chinese suppliers have achieved a strong position in the EU at the expense of European competitors. The Commission is therefore relying on the FSR to protect European procurement processes against potentially distortive effects of Chinese subsidies. In medical devices, China is not a significant global supplier, while the EU is home to some of the world's leading players. Through its use of an IPI investigation, the Commission appears primarily to be aiming at improving access for EU medical device makers to Chinese markets

The Commission's aggressive use of novel trade-related instruments – Likely results?

There appears to be the clear political expectation that the Commission will aggressively use the powerful IPI and FSR tools to protect the ability of EU suppliers to compete on a fair basis with Chinese competitors in both EU public procurement processes and in Chinese procurement markets.

It is too early to predict the likely outcomes of the Commission's FSR ex officio investigations, which are likely to continue for well over a year. Commissioner Breton's statement welcoming the "results" of the first in-depth investigation under the FSR public procurement tool – the withdrawal of a Chinese bidder – suggests that at least some in the Commission hope that the investigations will significantly reduce participation of Chinese suppliers in EU procurement markets.

As for the IPI, if China is not concerned about losing significant European medical device sales opportunities, it remains unclear what incentive it would have to open Chinese procurement markets to EU competitors, thereby reducing sales opportunities for domestic medical device makers.

Thus, the Commission's multiple investigations may well result in more divided markets and less competition overall, while increasing the risk that European businesses might find themselves subject to similar measures when they are active in Chinese markets.

VBB is a top-tier independent law firm headquartered in Brussels. We are known for our highly experienced senior legal team, including 20+ partners, many with more than 20 years of expertise in trade and competition laws. Our experience through active involvement in FSR matters over the past two years and our trade and competition expertise – disciplines integral to the interpretation of the FSR – give us a unique ability to advise on all FSR and IPI matters.

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