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European Commission Investigates Chinese State-backed Company's Participation in a European Tender Using New Powers Under the Foreign Subsidies Regulation

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The European Commission has launched its first ever formal investigation into a potentially market-distorting foreign subsidy, exercising its powers under the 2023 Foreign Subsidies Regulation (FSR).

The investigation concerns the participation of a Chinese state-owned train manufacturer in a public tender organized by the Bulgarian Ministry of Transport and Communications. The outcome of this case will be of major relevance both for companies active in the EU that have foreign state or sovereign investors, and for EU-owned companies that compete with them.

The Commission's Powers Under the FSR

The FSR entered into force in January 2023 and became applicable in July 2023 (as covered in previous firm updates here and here). As the first measure of its kind in Europe, it empowered the Commission to investigate "foreign financial contributions" that directly or indirectly confer selective benefits on companies active in the EU – i.e., foreign subsidies – to the extent that they distort competition on the EU market.

More specifically, the FSR introduced an obligation on businesses to notify the Commission if they had received foreign financial contributions and they intended to either:

i. Acquire a target company in the EU with revenues over €500 million, if the acquirer had received foreign financial contributions of at least €50 million; or

ii. Participate in a public tender in the EU worth at least €250 million, if the bidder had received foreign financial contributions of at least €4 million.

The FSR also gave the Commission new powers to investigate *ex officio* any other potential distortions of the market caused by foreign subsidies.

The FSR was introduced with the aim of ensuring that competition is not distorted by subsidies granted by non-EU governments that give their recipients an unfair economic advantage when they compete in the EU. This was intended to close a "regulatory gap": the Commission has long had powers to monitor subsidies granted by EU member states, but prior to the FSR had no such control over subsidies granted by other countries.

The Current Investigation

The Commission's first in-depth investigation under the FSR concerns CRRC Qingdao Sifang Locomotive Co., Ltd. and its participation in a Bulgarian public tender. The company under investigation is a subsidiary of CRRC Corporation, a train manufacturer that is owned by the Chinese state and is the world's biggest manufacturer of rolling stock by revenue. CRRC Corporation competes globally with EU train manufacturers including Siemens and Alstom, who cited the threat of CRRC's expansion in Europe in defense of their attempted merger, which the Commission blocked in 2019.

CRRC Qingdao Sifang Locomotive Co., Ltd. is a bidder in a Bulgarian public tender for the purchase of 20 electric "push-pull" trains, as well as related training and maintenance services over 15 years. The estimated contract value is €610 million. In accordance with the FSR, the company informed the Bulgarian procuring entity that it had received foreign financial contributions in excess of the €4 million threshold and the Bulgarian authority, in turn, notified the Commission.

Following its preliminary review of the notification, the Commission found that there were sufficient indications that the company may have received a foreign subsidy that distorts the internal market to merit an in-depth investigation. The Commission will now undertake a detailed investigation comprised of two steps: determining whether the foreign financial contribution CRRC Qingdao Sifang Locomotive Co., Ltd. has received constitutes a subsidy (meaning that it confers a selective benefit that the company would not have received on the open market); and, if so, determining whether such a subsidy allows the company to submit an unduly advantageous bid in the ongoing procurement.

Should the Commission answer both questions in the affirmative, it has powers under the FSR to either:

i. Accept commitments from the bidder that remedy the identified distortion of competition; or

ii. Prohibit the award of the contract, effectively disbarring the bidder from the procurement.

Should the Commission conclude that CRRC Qingdao Sifang Locomotive Co., Ltd. has not received a distortive subsidy, it can issue a no-objection decision. The Commission has 110 working days from the date of the notification to adopt its decision, giving a deadline of 2 July 2024 for the outcome of the investigation.

Wider Implications and the Importance of the Case

The Commission's investigation into CRRC Qingdao Sifang Locomotive Co., Ltd. will merit close attention from both EU and non-EU businesses alike. As the first such investigation of its kind, the Commission's decision should provide important insights into how it will apply the FSR, especially with regard to two critical questions: when will a foreign financial contribution be regarded as a subsidy, and when will a subsidy be regarded as causing a distortion of fair competition on the EU market.

The fact that the investigation concerns a subsidiary of a Chinese state-owned company is also significant. Should the Commission decide that the financial contributions that the company has received from China are subsidies, and that these have a distortive effect on competition, it will call into question the compatibility with EU law of contributions or investments of a similar nature received by other Chinese companies that are active in the EU, and arguably raise doubts over these companies' participation in public tenders.

More broadly, the Commission's decision should be monitored closely by other companies that have significant non-EU state or sovereign investment. These would include, notably, US, Asian and Middle Eastern-backed businesses as well as UK businesses. The UK is treated the same as any other non-EU state for the purposes of the FSR, meaning that British businesses that have received substantial government financial support and are active in the EU, in particular through M&A or participation in public tenders, will fall within its scope.

Finally, EU-owned businesses should be aware of the implications of the FSR which, in principle, should protect them from unfair foreign competition. In particular, EU companies that regularly take part in public tenders and are concerned that their outcome is being distorted in favor of bidders backed by overseas funds now have recourse, under the FSR, to bring these concerns to the attention of the procuring authority, member states and the Commission.

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