

## **COLUMN:**

### **DEVELOPMENTS CONCERNING EU'S FOREIGN SUBSIDIES REGULATION**

The necessity of addressing market-distorting subsidies has been a subject of discussion in various international fora, such as the WTO, the OECD, and the G7. However, under the WTO Agreements, the only permitted avenues for addressing the adverse effects of subsidies are either through invoking the dispute settlement mechanism or by imposing countervailing duties. In response to market distortions caused by subsidies that cannot be adequately addressed within the existing frameworks, the EU has announced a new regulation known as the Foreign Subsidies Regulation and conducts reviews of subsidies under this regulation. This column provides an overview of the Foreign Subsidies Regulation, with a particular focus on case studies of reviews related to public procurement.

#### **1. BACKGROUND**

On June 17, 2020, the European Commission adopted a White Paper addressing the distortive effects of foreign subsidies on the internal market<sup>1</sup>. In the press release concerning the adoption of this White Paper, the European Commission pointed out that while subsidies provided by EU member states are subject to the EU State Aid rules, subsidies provided by non-EU countries fall outside the scope of these rules despite the fact that cases of adverse effects on competition due to such subsidies seems to be increasing. The European Commission also pointed out that trade remedies regulations governing anti-dumping and countervailing duty measures only apply to exports from non-EU countries, meaning such regulations cannot address all distortions caused by foreign subsidies<sup>2</sup>. In order to address the regulatory gap, the White Paper proposed the development of new tools aimed at addressing distortions caused by foreign subsidies in three key areas: (1) in the Single market generally, (2) acquisitions of EU companies, and (3) EU public procurement procedures.

Following the White Paper, on May 5, 2021, the European Commission, published a proposal for a new regulation designed to achieve a level playing field to address distortions in the internal market caused by subsidies from non-EU governments. In June 2022, the European Council and the European Parliament reached a provisional political agreement on the proposed regulation, which was subsequently adopted by both institutions in November of the same year. The regulation entered into force on January 12, 2023, and has been in effect since July 12, 2023. The notification obligations for companies came into effect on October 12, 2023. Furthermore, the Implementing Regulations, which outline the procedures and the content of the notifications, and the procedures for preliminary reviews, and in-depth investigations, were implemented on July 10, 2023.

#### **2. OUTLINE OF FOREIGN SUBSIDIES REGULATION**

##### **(1) THREE TOOLS**

The Foreign Subsidies Regulation establishes three tools for investigation: (1) Notification-based tool to investigate concentrations, (2) Notification-based tool to investigate bids in public procurements, and (3) *ex officio* investigation. Notifications are not required for all concentrations or public procurement cases; instead, specific thresholds listed below are set for when a notification is necessary. However, even if a case does not meet these notification thresholds, companies must compile a list of financial contributions received from foreign governments over the past three years (totaling 200,000 euros or more) and report that the case does not meet the notification thresholds.

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0253>

<sup>2</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1070](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1070)

(i) Notification-based tool to investigate concentrations

- at least one of the merging undertakings, the acquired undertaking or the joint venture generates an aggregate turnover in the European Union of at least 500 million euros
- all parties involved in the concentration were granted combined aggregate financial contributions of 50 million euros or more from foreign country governments in the past three years

(ii) Notification-based tool to investigate bids in public procurements

- estimated value of the public procurement is 250 million euros or more
- the economic operator, including its subsidiary companies without commercial autonomy, its holding companies, and its main subcontractors and suppliers involved in the same tender was granted aggregate financial contributions 4 million euros or more from third country government in the past three years.

The term “financial contribution” is defined broadly to include not only subsidies but also capital injections, loans, loan guarantees, fiscal incentives, the setting off of operating losses, and other transfers of funds or liabilities. Furthermore, in both (i) and (ii), the concentration or public procurement process cannot be finalized until the European Commission has completed its review.

(iii) *Ex officio* investigations

*Ex officio* investigations allow the European Commission to request reports from companies or conduct inspections both within and outside the EU if there is suspicion of distortive effects caused by foreign subsidies with respect to concentrations or public procurement cases (limited to awarded contracts) that fall below the aforementioned thresholds.

## (2) REVIEW PROCESS

The review process is divided into two stages. First, a preliminary review is conducted based on information collected through notifications or *ex officio* investigations. Next, if there are sufficient indications that a company has been granted foreign subsidy that distorts the internal market, an in-depth investigation will be initiated.

## (3) REDRESSIVE MEASURES

The European Commission evaluates whether financial contributions from foreign governments constitutes foreign subsidies and whether such subsidies distort the internal market. If distortion is confirmed, the European Commission may, if necessary, assess the positive effects of the subsidies and compare them with the negative effects caused by market distortion. If the negative effects outweigh the positive ones, the European Commission may impose redressive measures or accept commitments offered by the relevant company to eliminate the distortion. In the case of a notified transaction, if the notifying company does not propose effective remedies to fully remove the distortion, the European Commission may prohibit the notified concentration or the award of public procurement contracts to the subsidy-receiving bidder.

## 3. ACTUAL REVIEW CASES

### (1) BULGARIA RAILWAY PROCUREMENT

On September 4, 2023, the Ministry of Transport and Communications of Bulgaria launched a public procurement for a railway project with an estimated price of 610 million euros, which includes the

manufacturing of railway vehicles, 15 years of vehicle maintenance, and staff training. On January 22, 2024, the European Commission received a pre-notification from CRRC Qingdao Sifang Locomotive Co., Ltd. On February 16 of the same year, the European Commission initiated an in-depth investigation. In the announcement regarding the commencement of the in-depth investigation, it was indicated that there are sufficient indications suggesting the receipt of the following subsidies from foreign countries<sup>3</sup>.

- Public procurement contracts exceeding 7.5 billion euros awarded to the notifying party and to the CRRC Corporation Limited. The notifying party was unable to provide sufficient evidence demonstrating that these public procurement contracts were awarded based on market conditions.
- The total amount of government subsidies recorded as deferred revenue of 804 million euros as of June 30, 2023.
- In addition to subsidies closely related to the company's operations, CRRC Corporation Limited received other government subsidies amounting to 355 million euros in 2020, 301 million euros in 2021, 234 million in 2022, and 51 million euros in the first half of 2023.

The European Commission concluded that these subsidies are highly likely to enhance the competitive position of the notifying party and could have actual or potential adverse effects on competition within the internal market. Furthermore, it pointed out that the total amount of foreign subsidies indicated above amounted to approximately 1.745 billion euros, which is five times the bid amount submitted by the notifying party.

Considering the total amount of foreign subsidies and the fact that the bid amount of the notifying party was significantly lower than the estimated costs of the procuring authority and the bids of competitors, the European Commission, based on its preliminary review, concluded that there were sufficient grounds to believe that the notifying party had received foreign subsidies that could distort the internal market.

However, the case was closed following the withdrawal of the bid by the Chinese company on March 26, 2024.

## (2) CONSTRUCTION AND OPERATION OF A ROMANIAN PHOTOVOLTAIC PARK

On September 27, 2023, Romania's procuring authority launched a public procurement procedure for the design, construction, and operation of a photovoltaic park with an estimated value of approximately 375 million euros. On March 4, 2024, the European Commission received pre-notifications from (i) the ENEVO Group, which includes LONGi Solar Technologie GmbH, and (ii) Shanghai Electric UK Co., Ltd. and Shanghai Electric Hong Kong International Engineering Co., Ltd. On April 3, 2024, the in-depth investigation was initiated regarding the plans for the construction and operation of the Romanian photovoltaic park.

In the announcement of the in-depth investigation, sufficient indications were identified that the following foreign subsidies had been received<sup>4</sup>.

- Government grants made available to the notifying parties and their holding companies
- Tax refunds, fiscal incentives and levies made available to the notifying parties and their holding companies
- Financing made available to the notifying parties and their holding companies

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<sup>3</sup> Summary notice concerning the initiation of an in-depth investigation in case FSP.100147 pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C\\_202401913](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202401913)

<sup>4</sup> (i) Summary notice concerning the initiation of an in-depth investigation in Case FSP. 100151, pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C\\_202402830&qid=1714312613509](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202402830&qid=1714312613509) (ii) Summary notice concerning the initiation of an in-depth investigation in Case FSP. 100154, pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C\\_202402832](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202402832)

- Sales of goods and provision of services made available to the notifying parties and their holding companies (recognized in the (ii) Shanghai Electric case)

Based on these findings, the European Commission determined that the total amount of subsidies received by the Notifying Parties significantly exceeded the value of the contract bid by the consortium involving the Notifying Parties. It concluded that these subsidies were highly likely to enhance the competitive position of the Notifying Parties within the internal market and could have actual or potential adverse effects on competition within the internal market.

However, the case was closed following the withdrawal of the bid by the Chinese company on May 13, 2024.

### (3) *EX OFFICIO* INVESTIGATION INTO WIND POWER FACILITY DEVELOPMENT

On April 9, 2024, Executive Vice President Vestager announced the launch of an *ex officio* investigation on Chinese suppliers of wind turbine in relation to the development of wind power facilities in Bulgaria, France, Greece, Romania, and Spain<sup>5</sup>.

In July 2024, reports indicated that the scope of the investigation had been expanded to include the development of wind power facilities in other EU Member Countries, including Germany. However, as of now, no information regarding the progress of the investigation has been made public.<sup>6</sup>

### (4) ONSITE INSPECTION OF NUCTECH

On April 23, 2024, as part of an *ex officio* investigation, an unannounced inspection was conducted at the Dutch and Polish offices of Nuctech, a Chinese security equipment manufacturer. In its announcement regarding the inspection, the European Commission explained that the inspection was carried out unannounced and was aimed at conducting a preliminary review into potentially distortive foreign subsidies<sup>7</sup>.

## 4. CHINA'S RESPONSE

The Chinese government, in response to the announcement of the initiation of an *ex officio* investigation regarding the development of the aforementioned wind power facilities, issued a statement expressing “strong dissatisfaction and resolute opposition, and urging the EU side to immediately cease and rectify its erroneous actions” (Announcement by the Ministry of Commerce of the People’s Republic of China dated April 11, 2024). Additionally, regarding the on-site inspections of Nuctech, the government expressed “serious concern and strong opposition” and stated it would “take all necessary measures to firmly protect the legitimate rights and interests of Chinese companies” (Announcement by the Ministry of Commerce of the People's Republic of China dated April 24, 2024).

Furthermore, on July 10, 2024, based on an application by the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME), China initiated a foreign trade and investment barrier investigation on the EU’s Foreign Subsidies Regulation and its investigation and practices concerning Chinese companies. Six months after the investigation began, on January 9, 2025, the Ministry of Commerce of the People’s Republic of China determined that the measures under investigation constituted trade barriers. However, as of now, no specific measures based on this determination have been announced. In a foreign trade and investment barrier investigation, if, measures

<sup>5</sup> Speech by Executive Vice President Vestager on technology and politics at the Institute for Advanced Study, [https://ec.europa.eu/commission/presscorner/detail/en/speech\\_24\\_1927](https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1927)

<sup>6</sup> <https://www.mlex.com/mlex/articles/2224248/chinese-wind-turbine-makers-see-eu-foreign-subsidy-probe-expand-to-germany-other-countries>

<sup>7</sup> [https://ec.europa.eu/commission/presscorner/detail/sw/mex\\_24\\_2247](https://ec.europa.eu/commission/presscorner/detail/sw/mex_24_2247)

or practices subject to an investigation pursuant to Article 36, Chapter 2 of China's Foreign Trade Law and the "Regulations on Foreign Trade Barrier Investigations" are determined as trade barriers, the government may take actions such as (1) undertaking bilateral consultations, (2) initiating multilateral dispute settlement procedures, or (3) implementing other appropriate measures. Previous investigation cases include the investigation into Japan's seaweed import management measures (initiated in April 2005), the investigation into U.S. renewable energy support policies and subsidies (initiated in November 2011), and the investigation into Taiwan's import restriction measures against China (April 2023). In all these cases, the Chinese government did not take any measures.

## **5. RESPONSES OF OTHER COUNTRIES**

Prior to the implementation of the Foreign Subsidies Regulation, in May 2023, Korea expressed concerns to the EU during the WTO Committee on Subsidies and Countervailing Measures meeting, stating that the notification requirements under the regulation impose significant administrative burdens on businesses. Korea argued that the Foreign Subsidies Regulation places higher administrative costs on companies receiving subsidies from foreign governments compared to those benefiting from EU state aid, resulting in *de facto* discrimination against foreign suppliers and excessive burdens on free economic activities. Additionally, Korea pointed out that the current regulation lacks clarity on key elements such as the criteria for financial contributions and the effects of market distortion.

## **6. RELATIONSHIP WITH INTERNATIONAL RULES**

Regarding its relationship with international rules, Article 44 of the Foreign Subsidies Regulation stipulates that investigations and measures conducted under the regulation must not be implemented or maintained in a manner that conflicts with international agreements to which the EU is a party. The EU is a signatory to the Agreement on Government Procurement (GPA), and under GPA Article 4, it is obligated not to discriminate against products or companies from other signatory countries within the scope of its commitments under the GPA. Even if Japanese companies do not participate directly in bids, they may be involved in public procurement as subcontractors. It is therefore necessary to closely monitor future implementation to ensure that Japanese companies are not unduly impacted or placed under excessive strain.