

Medical Devices and Foreign Subsidies

New tools against heavily subsidised imports from outside the EU

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With trade war between China and the US on the doorsteps, implications for EU companies will be manifold. One possible consequence could be heavily subsidised Chinese products flooding the EU market. Particularly for medical devices, there is an increased probability that this might happen. However, such a development would not meet European companies defenceless.

To effectively tackle foreign subsidies that cause distortions and undermine the level playing field for EU companies, the EU introduced new tools in 2023. The Foreign Subsidies Regulation (*FSR*) allows the European Commission (*Commission*) to review third-country subsidies and take action against unfair subsidies from third countries such as China.

EU taking action against unfair subsidies

The Commission has the power to investigate any market situation if it suspects that foreign subsidies distort competition in the EU. If the investigation confirms the suspicion, the Commission may impose redressive measures against the subsidized firms to eliminate the distortion. The Commission may, for example, order the company to reduce its capacity or market presence in the EU, including a temporary restriction on commercial activity. Furthermore, possible measures include banning the company from certain investments in the EU. The measures available to the Commission under the FSR are therefore a heavyweight.

Experience has shown that the Commission is willing to make full use of its powers under the FSR, in particular in view of China: Since 2023, it has started two investigations in distorting Chinese subsidies, concerning the wind power and security equipment sector. In one of its investigations, the Commission has even carried out a dawn raid at the premises of a Chinese manufacturer to gather further evidence.

Course for action for EU companies

The Commission has discretion whether and in which sectors it initiates an investigation. When deciding about taking action, the Commission also takes into account indications from EU companies of unfair competition and the disadvantages caused by this. To persuade the Commission to intervene against foreign subsidies in the healthcare sector, it is advisable for EU companies to submit a complaint to the Commission, providing it with insights and information on unfair advantages of competitors from outside the EU.

In the health sector in particular, the Commission is likely to be receptive to such proposals due to its high strategic importance for the resilience of the EU. This is demonstrated not least by an ongoing investigation under the so-called International Procurement Instrument, with which the EU intends to take action against barriers to market access for EU medical device manufacturers in China.

Tackling unfair advantages of competitors in public procurement procedures

There is a particular risk that subsidies may give companies from third countries unjustified advantages over EU companies in mergers and public procurement procedures. Therefore, companies are obliged to declare third country subsidies to the authorities in these situations if certain thresholds are exceeded. In public procurement procedures, a notification of foreign subsidies is required if the contract value is at least EUR 250 million. Although contracting authorities are required to inform tenderers of the obligation to notify and ensure that the mandatory notification is made, in our experience, this is not always complied with. If information on the notification obligation is missing in a procurement procedure above the threshold, it is worth reminding the contracting authority of this obligation.

In procurement procedures in particular, the FSR offers effective means of taking action against unfair competitive advantages: If the Commission establishes that a company is benefiting from foreign subsidies that prevent fair competition in the award procedure, it can order that the company be excluded from the procurement procedure. In previous procedures, the mere announcement of an in-depth investigation by the Commission has led to the Chinese companies concerned withdrew from the respective award procedures.

For further information

BLOMSTEIN is keeping a close eye on developments. We are ready to help you and your business if you need it. If you have any questions in the meantime, [Florian Wolf](#), [Christopher Wolters](#) and [Ramona Ader](#) will be glad to advise you at any time.
