

## Introduction

European Aluminium represents the entire value chain of the aluminium industry in Europe. We welcome the opportunity to share our views and positions on the EU Commission's White paper on levelling the playing field as regards foreign subsidies.

This paper complements our response to the Public Consultation and addresses our call upon the European Commission to effectively address the distortive effects of foreign subsidies in the EU single market and help create a level playing field for the aluminium industry in Europe. The White Paper on an Instrument on Foreign Subsidies proposed by the EU Commission in July 2020 provides additional instruments, **but its ambitions must be urgently translated into effective measures.**

China has been building up excess capacity both in primary and semi-fabricated aluminium products for years, and this trend shows no sign of abating. This expansion is largely based on industrial subsidies granted by the Chinese government to both state-owned enterprises and independent Chinese firms<sup>1</sup>. A severe consequence of China's expansion of aluminium production combined with lower growth of China's internal demand has been the flood of semi-fabricated and final aluminium product exports to the rest of the world, often at unjustifiably low prices, indicating Chinese producers may be engaged in illegal 'dumping'.

**These practices distort the European aluminium industry with potentially devastating consequences in terms of loss across our value chain, production sites, jobs and know-how, and place the future of the entire industry at risk.**

Unfortunately, the existing legal tools are not able to fully address the impact of these government subsidisations and nor have multilateral mechanisms been able to reach consensus to even take up the issue of overcapacity. The structural subsidisation in the Chinese aluminium industry is well documented with several reports proving in-depth details. Thus, we also believe that the new legal instrument should make use of the quality data made available in these reports, and therefore rely on legal presumptions affirming the existence of distortive subsidies affecting the entire Chinese aluminium industry.

European Aluminium supports free and fair trade and a rules-based trade system. We welcome foreign direct investments, as long as these are based on market-oriented mechanisms. In the case of Chinese investments, it is clear that these requirements are not met. **We, therefore, ask the EU to adopt an appropriate trade policy including effectively implemented trade defence instruments as well as a robust investment screening mechanism.**

## Highlights on European Aluminium's position on the White paper on levelling the playing field as regards foreign subsidies

- **The White paper presents useful concepts aimed at capturing the impact of foreign subsidy on the Union market.**

---

<sup>1</sup> OECD (2019), "Measuring distortions in international markets: the aluminium value chain", OECD Trade policy paper, nr 218, OECD Publishing, Paris, January 2019.

- **In principle, a combination of the two first modules would indeed provide the broadest possible scope of protection for the EU.**
- **One particular concern is that definition of an industrial subsidy does not seem to be sufficiently broad to capture the variety of types of benefits granted in third countries. The definition is based on the WTO SCM Agreement’s definition, which, especially in view of the interpretations given by the Appellate Body, does not provide sufficient flexibility to reflect situations which arise in practice.**
- **Besides, since foreign subsidies are granted outside the jurisdiction of the EU, the success of any new legal tool would be highly depended on the resources made available to guarantee transparency and effective implementation.**
- **The current tools at EU and WTO level do not allow to adequately capture all consequences of distortive foreign subsidy on the internal market, that is why European Aluminium strongly believes that the EU should create a new legislative tool designed specifically for that purpose. In parallel, we encourage the EU to continue to work to strengthen international rules on subsidies both at WTO level and in the context of free trade agreements.**
- **We recommend using as a legal basis Article 207 TFEU only, in view of the exclusive competence of the EU.**
- **European Aluminium could support shared management of responsibilities between the Commission and the Member States. However, the operational aspects and competences should be clarified and strengthened.**

## European Aluminium’s positions on Modules 1 & 2

The White paper presents useful concepts aimed at capturing the impact of foreign subsidy on the Union market. European Aluminium agrees, in principle, that a combination of the two first modules would indeed provide the broadest possible scope of protection for the EU.

With regards to Module 1, European Aluminium believes:

- A general instrument to capture distortive effects of the foreign subsidies should apply to any undertaking active in the EU and not be restricted to those established in the EU.
- Certain categories of foreign subsidies should be listed prohibited as by their very nature causing distortions while for others the burden of proof should be on the beneficiary to show the distortive impact where reasonable indications of such effect exist.
- The investigation procedure should be governed by clear legal deadlines and short procedures that lead to effective remedies and provide legal certainty regarding a specific situation (e.g. acquisition) in a reasonable time.
- Strong reporting and transparency obligations on the beneficiary of foreign subsidies should, in any event, be part of any new legal tool.
- Sufficient resources and investigation powers should also be granted to the competent authorities to allow for in-depth, fact-finding missions and visits (non-cooperation by market payers should be heavily sanctioned through fines and penalties)

- The redressive measures should be fit to eliminate all distortive effects of the subsidy and thus restore the level playing field on the Union market.
- The substantive assessment criteria listed in section 4.1.3.2. (e.g. size of the subsidy, situation of the beneficiary etc.) is relevant for an overall assessment of the impact of a certain foreign subsidy.
- The European Commission should have exclusive competences to carry out the investigation under Module 1, and this in line with its exclusive competency in common commercial policy.
- *De minimis* threshold should not apply to prohibited subsidies and to a situation of systemic state-led promotion of domestic industry.

However, European Aluminium holds the opinion that certain criteria, such as the fact that beneficiaries are active in markets with structural excess capacities should be given more weight in the assessment and should lead to a legal presumption against beneficiaries linked to such markets (allowing for shorter procedures, not an application of union interest test, presumption of injury etc.). Moreover, we would like to draw attention to government subsidies granted in the context of climate protection policies. Such policies could be allowed, after an in-depth reviewed of policy and impact, in the context of an investigation, under the Union interest test.

## Combination of Modules 1 and 2

Furthermore, European Aluminium agrees that the broadest scope of protection for the Union would be obtained through a combination of Module 1 with Module 2.

With regards to Module 2, European Aluminium supports the following:

- An *ex ante* review of acquisitions involving “possible foreign subsidies” under a compulsory notification mechanism. The effectiveness of the scheme would depend on factors such as the resources and investigation powers. Filing fees could be considered to contribute to the available resources for the investigation.
- Acquisitions by operators that can be linked to third countries, where there is systemic state-led promotion of industry through government subsidization, should always be considered as possibly involving foreign subsidies, and thus reviewed. Proof of this should as much as possible be based on public reports and reports drafted by the European Commission (similar to the practice under the new anti-dumping investigation) in order to minimize the burden of proof on EU economic operators. Failure to notify subsidies should be sanctioned with significant fines and the obligation to unwind the transactions.
- A two-phased approach in the investigation of potentially subsidies acquisition, provided that there are clear deadlines for concluding the investigation and that these are reasonably short (in order to guarantee legal certainty on the market).
- The definitions of acquisition, which includes the acquisition of significant but non-controlling minority rights and the definition of ‘potentially subsidised acquisition’, should be reworded to take into account the fact that subsidies can take the form of a variety of benefits and are not always a ‘financial contribution’. Our concerns regarding the definition of a subsidy as formulated in Annex 1 applies here as well. The definitions should aim at capturing as many types of subsidies as possible and should, therefore be sufficiently flexible in their wording.

- Any *de minimis* threshold relating to the value of the EU target should take into account the fact that acquisition of smaller EU enterprises (directly or indirectly) through foreign subsidy can also be detrimental for the aluminium value chain, especially when considering niche markets.
- European Aluminium could support the option to only capture “potentially subsidised acquisition”, under certain conditions. For instance, European Aluminium would advise retaining a sufficiently large reference period during which subsidies have been granted/ will be granted: i.e. three years before or three years after the acquisition.
- Failure to notify should be sanctioned with significant fines and possibly other sanctions. The sanctions for non-notification should be significantly more stringent than the consequences of a finding of distortive impact, after notification.
- The substantive assessment criteria under section 4.2.3 can be relevant, but it is necessary to work with a legal presumption of distortions affecting the EU industry when structural distortions and governmental subsidies are already well documented (i.e. Chinese aluminium markets)
- Regarding the redressive measures, if commitments are accepted by the acquirer, the correct implementation of these commitments should be guaranteed. Any violation of commitments should be sanctioned by fine and/or the prohibition/unwinding of the acquisition.
- Entrusting the enforcement responsibility under Model 2 to the European Commission that would have exclusive competencies in the matter in order to guarantee a homogenous control across the EU for potentially subsidised acquisitions such as the introduction of a mechanism of information exchange to make sure Member States are adequately informed during the investigation and could be consulted before a final decision is taken
- Trade associations should receive information regarding the findings during the investigation in order to provide with comments and observations.

## Module 3

European Aluminium considers that distortions caused by foreign subsidies in the context of public procurement procedures should be addressed by a dedicated instrument. The main reasons are:

- the absence of disciplines on foreign subsidies, and their subsequent treatment in specific tendering procedures, in the EU public procurement framework.
- the importance of public procurement in Europe and its specific nature compared to traditional flows of goods or services: a project-based approach through procedures for which public authorities are responsible

As such, if a subsidy is confirmed and the competent authority finds that it distorts the procurement procedure, subsidised operator should be immediately excluded from ongoing procurement procedure and possibly future procedures.

Module 3 is important to assess whether foreign subsidies have been received by an economic operator and if these subsidies have distorted the specific procurement process. At the same time, this Module could have an impact on public procurement procedures (e.g. adding burden for companies and/or hindering investigations). Therefore, the right balance between effectiveness and burden is essential.

## Legal basis and Policy options

European Aluminium could support shared management of responsibilities between the Commission and the Member States, however the operational aspects and competences should be clarified and strengthened.

Guidelines for competent national authorities to guarantee a uniform practice of assessment of distortion across the EU would be useful, but the Commission should also bring in its expertise and knowledge in the investigation.

The Commission should always have the power to intervene if it finds that the procedure is not followed by national authorities (e.g. in case of diverging interests).

The Modules should operate in parallel in a coordinated manner to best address foreign subsidies and address circumvention most effectively.

We agree that Module 1 should be a “safety net” for module 2 (and 3): if something cannot be addressed under module 2 (and 3), it could still be done under Module 1. However, the legislation should make clear that if a decision has been notified under Module 2, it cannot be re-opened under Module 1.

We believe that the White Paper should be more focused on the accumulated impact of subsidies from the same source distorting the EU market through different economic operators. Redressive measures under each of the Modules must take adequately into account the situation where a single country repeatedly subsidizes different enterprises in different market segments.

There is an acceleration of a trend to award contracts to foreign entities benefiting from subsidies and proposing significantly lower prices. On top of the fact that these distortions are not addressed, non-EU companies benefit from EU funds while EU manufacturers cannot always equally access these third countries’ markets and thus benefit from local funding. Hence, additional measures in this specific context are welcomed.

In the current crisis recovery context and debate on strategic autonomy, EU funds and EU-supported International Financial Institutions should play a greater role in supporting EU companies who want to do business in the EU or abroad.

We believe that the proposed framework should be reinforced, and the Commission’s powers, in particular, should be strengthened as there are EU funds involved.

It will also be important to strengthen the role of the European Union’s Anti-Fraud Office to protect the Union’s financial interests when EU funds are involved. The main objective would be to conduct in full independence investigations to fight fraud affecting the EU budget and to avoid circumvention of measures, as it has been seen in previous trade defence cases. We also see the added value of including additional requirements related to the receipt of foreign subsidies to the EU funds implemented under indirect management. This approach, which is relatively new in the history of the EU financial rules, is becoming increasingly widespread and is fully justified.

## Recommendations on policy measures

As multiple sources suggest, Chinese aluminium companies' strategy aimed at entering the European Union market is based on state interference and subsidisation. These mechanisms are present in every part of the value chain, and in all segments of the market.

European Aluminium supports free and fair trade and a ruled based trade system. We welcome foreign direct investments, as long as these are based on market-oriented mechanisms. Our association also applauds the agreement between the European Union, Japan and the United States to work towards the strengthening of the existing World Trade Organization's (WTO) rules on industrial subsidies.

In the case of Chinese investments, we believe that these investments are not based on market-oriented mechanisms. We, therefore, ask the EU to adopt an appropriate trade policy including effectively implemented trade defence instruments as well as a robust investment screening mechanism.

The current WTO rules are inadequate to deal with today's trade realities and need to be updated.

- Most WTO rules date back to 1995 when the organisation was established, and before China was the dominant player it is now. The rules should be redesigned to address global market distortions resulting from subsidies.
- The WTO should also provide tools to assess the impact of government support throughout the whole value chain, and to better account for the influence of state actors given the dual role of some State-Owned Enterprises as both recipients and providers of support.
- The WTO's dispute-settlement mechanism is at risk despite attempts for interim solutions to overcome a US block of appointments to the WTO's Appellate Body.