

AS 660 - Anti-Dumping and Anti-Subsidy proceedings concerning imports of Stainless Steel Hot Rolled Sheets and Coils (SSHR) from Indonesia and PR China

SUMMARY

EUROFER and its stainless steel producers **requested the Commission to capture the massive raw material distortions** which are the root of dumped and subsidised imports in the Union of Stainless Steel Hot Rolled Sheets and Coils originating in Indonesia (and China) **through effective AD and AS measures.**

Although the Commission acknowledges the existence of a huge distortion on nickel ore in Indonesia at a level above 30%, this distortion has not been addressed in the proposed AD measures and, surprisingly, Commission considers that it would not be able to impose AS measures, as it would not be able to reach the legal standards to countervail the nickel distortion found to exist, and requests the Union stainless industry to withdraw its AS complaint.

The Commission's inability to capture those distortions, despite all the obvious evidences, is setting a dangerous precedent for any other trade defence initiative.

The Commission is acting against the clear intention and spirit of TDI modernisation adopted by the co-legislators in 2018 as well as against the public statements of the Commission to vigorously fight trade distortions.

The EU General Court has validated in its judgment of 10 April 2019 in case T-300/16, that an export restraint can be assessed as a delegation to private body to act on behalf of a government and therefore can be qualified as countervailable subsidy.

Accordingly, EUROFER believes that **the Commission is able to impose AS measures** and to reach the legal standards to countervail the nickel ore distortion since it has received all the necessary evidence to the effect that the aim of the Indonesian government pursued through this distortion is to lower the cost of the nickel input) in order to favour exports of stainless steel products, and the fact that support granted to the Indonesian upstream production side (NPI - Nickel Pig Iron).

On top, the Commission also found that domestic stainless steel producers failed to cooperate adequately with the Commission by refusing to respond to Commission's questions concerning their related suppliers of raw materials. This partial and insufficient cooperation should have been sanctioned by the systematic use of the best fact available.

At least in the AS proceeding, there is still some time to reconsider and impose effective AS measures, including the lifting of the Lesser Duty Rule (LDR).

We need the Commission's support to send the right signal to those countries which are creating these massive distortions, which State capitalism initiatives such as China's "one belt one road" are endangering today the Union stainless industry and tomorrow the whole European industry.

We need the Commission to apply firmly, without inhibition, the existing Trade Defence Instruments. By postponing, it would be too late for the European Industry and Jobs.

BACKGROUND

SSHR is a specialty flat steel product which exceptional characteristics are granted by its chemical composition and the share of alloys present in the product, most notably nickel and chromium for the most common grades, but also molybdenum (nickel alone can account up to 60% of the cost of production of standard austenitic grades!) .

In the European Union, SSHR is manufactured by integrated producers transforming stainless steel scraps into the final product. That process allows up to 100% of the previously produced stainless steel to be recycled, and helps minimise both the use of virgin resources and the quantity of untreated waste. Similarly, the process used by the Union industry helps minimise the quantity of energy used, thus fulfilling the EU policy objectives of reducing carbon emissions and of ensuring resource efficiency.

In 2019, imports from the countries concerned have surged in the EU, leading to a consistent increase up to more than 30% of the free Union market, a record level despite the existence of the EU safeguard measures.

Rather than using stainless steel scraps, imports from these sources are essentially produced using nickel pig iron ("NPI"), a semi-product developed on an industrial scale in China. The nickel content of the NPI is obtained through nickel ore, purified and refined through an energy-intensive and polluting process. That process, relying on virgin resources, also causes significant damage to vulnerable ecosystems.

As raw materials represent a significant share of the cost of production of SSHR, the local producers in China and, especially in Indonesia, have leveraged the major distortion implemented by the respective governments to set up an export-oriented industry relying on distorted inputs costs to sell on the export market at extremely low prices.

The continuous pressure on the Union Industry has been exacerbated by the very sudden developments of imports in the EU of Indonesian products at unprecedented low prices. These imports result from the development of an artificial Indonesian contender, prospering on the back of the control of raw material prices, through export restraints, exerted by the Indonesian government and of substantial investments made by Chinese stainless steel manufacturers in the context of the Belt and Road initiative.

On a market essentially driven by prices and by the costs of raw materials, these imports, which are immune to the raw material situation on international markets, have significantly impacted on the Union industry profitability, which felt to unsustainable levels, and further affecting production, investments and employment.

For the above reasons, the Union stainless steel industry had lodged an Anti-Dumping and an Anti-Subsidy complaint requesting the Commission to address those massive distortions and the dumped/subsidised imports with AD and AS measures.

COMMISSION's FINDINGS

Despite the cases concerned various unfair practices, involving classic dumping, subsidies and massive distortions resulting from manipulating the price of the raw material, in particular nickel,

1. **The Commission proposed to impose final AD duties at the level of the injury margin**, ranging from 9 to 19% (while the dumping margin ranges from 17.7 to 106%) for Chinese and Indonesian producers, **disregarding the impact of massive distortions affecting nickel ore in particular (around 30% in Indonesia)**. It did so to allegedly preserve the interest of users, while the conditions for not applying the Lesser Duty Rule (LDR) are clearly met.
2. In the anti-subsidy investigation, the Commission considers that **it would not be able to impose measures**, as it would not be able to reach the legal standards to countervail the nickel distortion found to exist in Indonesia. It explains, in particular, that its own findings would be insufficient to demonstrate that the export restraint on nickel ore is aimed at lowering the cost of that input, against all economic logic, and that it would be unable to link the export ban with the intent to favour the downstream stainless steel industry.

It follows that in its proposal for final AD measures and by proposing the Union stainless industry to withdraw the AS complaint, **the Commission is completely ignoring two top priorities of EU TDI policy, including:**

- a) **the effective implementation of the TDI Modernization legislation, notably the lifting of the Lesser-Duty-Rule (LDR) in case of significant raw material distortions; and**
- b) **the development of effective methodology and practice in anti-subsidy proceedings.**

AD PROCEEDING

We regret the Commission's position in the AD case for two main reasons:

- The Commission applies the LDR to allegedly preserve the interest of users. However, **the conditions for not applying the LDR are clearly met, given the huge distortion, given the massive over-capacity in the countries concerned and, moreover, given the availability of alternative and fair sources of supply of SSHR for the users, within and outside the EU**. This is implicitly admitted in the case of Indonesia, given the mere 0.4% difference between the injury and dumping margins. By not lifting the LDR, the Commission is acting against the clear intention and spirit of TDI modernisation adopted by the co-legislators in 2018.
- The Commission ignores two recent WTO reports (DS 493 and DS 494) confirming and widening the legal possibility to capture the above distortion under Article 2(5) AD ("normally"). The Commission **could have then captured the raw materials distortion in the dumping calculation**.

AS PROCEEDING

Based on its findings in the AD investigation and the informal information provided in the AS case:

- The Commission acknowledges the existence of distortions on nickel ore in Indonesia, including the one resulting from the export ban of this raw material.
- The Commission acknowledges that this export ban has significant impact on the cost of nickel in this country and a clear downward effect (beyond 30%) on the costs of production of domestic stainless steel producers.
- The EU General Court has validated in its judgment of 10 April 2019 in case T-300/16, that an export restraint can be assessed as a delegation to private body to act on behalf of a government and therefore constitute a countervailable subsidy.
- The Commission finds that the Government of Indonesia intended to support the development of the downstream processing industry through a general policy, including the export ban and other restrictive measures.
- The Commission finds that the Indonesian Government intended to support the NPI industry through better availability of nickel ore at reduced price. The Commission also knew or should have known (see below the lack of cooperation from Indonesia) that the Indonesian stainless steel producers are integrated with their own NPI smelting activities. Consequently, any benefit granted to these NPI producers are reputed to be passed through fully to their related stainless steel producers. The fact that some independent NPI producers might also benefit of the Indonesian policy support to the stainless steel industry does not affect that finding.
- This means that **the Indonesian Government's support to the stainless steel industry and its integrated NPI suppliers is effectively an objective of the Indonesian Government's policy** and certainly not merely a side-effect of the exercise of general regulatory powers.
- The Commission also found that domestic stainless steel producers failed to cooperate adequately with the Commission by refusing to respond to Commission's questions concerning their related suppliers of raw materials. The Commission also found that the domestic steel producers had refused to disclose their corporate structure therefore preventing the Commission to verify their relationship with upstream suppliers. **The Indonesian exporters therefore withheld documents and data from the Commission which were decisive for the Commission's analysis, especially regarding the existence and extent of the relationship between the domestic stainless steel producers and their suppliers.**
- The Commission admitted that due to the existence of a difference in legal standards, the lesser-duty-rule (LDR) assessment in the AD case is not necessarily binding for the AS case. In that sense, **the nickel ore distortion could be reflected in the AS duty without this duty being capped by the injury margin.**
- Assuming the Commission were to follow the Legal Service's excessively and unnecessarily cautious stance on "intent", it could nevertheless impose **temporary measures** based on the Indonesian exporters' selective cooperation or its COVID Regulation of March 2020, while at the same time setting a **"second chance" clause for Indonesia** through an interim or an ex-officio review by the Commission. It could also prefer to base its measures fully or partly on the "price or income support" concept, one of the legal basis also suggested by the Commission at the

beginning of the investigation. What is certain is that it cannot choose a path which **neutralizes** the legitimate protection provided to the EU industry by the trade defense instruments.

We therefore urge the Commission to immediately develop a reasonable, and in our view legally sound, proposal under the AS proceeding that can meet the industry's concerns.

If the Commission does not amend its position in the AS case, it will rightly be perceived as a complete reversal of the Commission's commitment to firmness and non-naivety in the implementation of trade policy and of the promises of the TDI modernisation and subsidy actions. The impact on our industry would be extremely negative.

Additional technical and legal information are addressed in the attached document 'Annex - AS660 SSHR - Response to the Commission Legal Arguments' which includes also the elements, addressed in EUROFER complaints, which clearly demonstrate the intention of the Government of Indonesia to develop its nickel downstream industry of stainless steel through the implementation of an export restriction on this raw material.