

**SEA EUROPE POSITION ON THE EUROPEAN COMMISSION PROPOSAL FOR
A REGULATION ON FOREIGN SUBSIDIES DISTORTING THE INTERNAL MARKET**

7 July 2021

Executive Summary

Part I

There is an urgent need for an effective sectoral solution which addresses unfair foreign practices in global shipbuilding¹ that adversely affect shipbuilding in Europe. Massive market distortions, particularly resulting from subsidies in Asia, have haunted global shipbuilding for decades. The EU has long acknowledged that no proper trade tools exist to address these distortions, but EU actions in the past four decades have failed to deliver any real solution, with devastating results for Europe.

Part II

The [Commission's Proposal for a Regulation regarding foreign subsidies](#) is promising but requires substantial clarifications and revisions before it can become an effective tool for addressing the foreign subsidies distorting the shipbuilding sector in Europe.

Once essential amendments are agreed and the new instrument enters into force, it needs to be applied to foreign shipbuilding subsidies without any delay. The shipbuilding sector needs an instrument that works in practice, as judged by its impact in the market.

Section A

Fundamentally, the scope of the Proposal and its interaction with the EU's international commitments needs clarification to ensure the instrument's full applicability to the shipbuilding sector, in particular to recognise and address the fact that other countries are frustrating recourse to WTO dispute settlement and that anti-subsidy import duties do not provide relief for this sector.

Section B

The scope of subsidies and distortions covered needs clarification to take into account the particularities of the shipbuilding sector so that the tool can be applied effectively. Also, there need to be presumptions in order to lessen evidentiary burdens in the face of the failure of other WTO Members to meet their transparency obligations, or to provide full cooperation in subsidy proceedings, and/or the fact that they have economies significantly distorted by State intervention.

Section C

The Proposal's provisions regarding interim measures, the balancing assessment, and redressive measures and commitments, need major strengthening in order to be capable of safeguarding a strong and strategic EU industrial base with sustainable and diversified supply chains, able to deliver

¹ The term "shipbuilding" includes the building, repair, maintenance, conversion and retrofitting of vessels, as well as the whole supply chain of maritime equipment manufacturers and other maritime sub-suppliers.

on the EU's political priorities (e.g. European Green Deal, Blue Economy, EU Digital Agenda, etc.). Remedies under the instrument must fully reflect the damage caused and establish a real deterrent.

Part III

The recognition of the shipbuilding sector's urgent need for EU-level action to address unfair trading practices of producers in third countries should also lead to the rapid adoption of separate measures against unfair pricing, e.g. through a revision of the sector-specific Regulation 2016/1035 on protection against injurious pricing of vessels.

Part IV

For decades, Europe's shipbuilding industry and hundreds of thousands of workers in maritime regions have paid a hefty price for the failure to address market distortions in global shipbuilding. While hopeful that the prompt adoption and use of the new instrument will lead to a much-needed level playing field, temporary measures to support the European shipbuilding sector are urgently necessary in the meantime to ensure that there is an industry left to benefit from the instrument.

Part I

There is an urgent need for an effective sectoral solution which addresses unfair foreign practices in global shipbuilding that adversely affect shipbuilding in Europe. Massive market distortions, particularly resulting from subsidies in Asia, have haunted global shipbuilding for decades. The EU has long acknowledged that no proper trade tools exist to address these distortions, but EU actions in the past four decades have failed to deliver any real solution, with devastating results for Europe.

Shipbuilding is a strategic sector for the prosperous and sustainable future of the EU economy, its access to trade, seas, and energy, and the security of its citizens, as well as for the Blue Economy and Europe's green and digital ambitions.

Because of massive subsidisation and predatory pricing from third country operators, mainly in Asia, the global shipbuilding sector has been significantly distorted and EU producers in particular have been seriously injured for the past four decades.

Compounding the problem is the fact that, in contrast with other goods manufacturers, European shipyards cannot benefit from trade defence instruments since ships are normally not "imported" into the EU customs territory.

This problem, already acknowledged by the European Commission in 1988², and the lack of a strategic EU response, has led to the takeover of entire shipbuilding market segments in Europe by subsidised Asian operators. Europe's market share has declined from 45% in the 1980's to 5% today. Asia has long understood the strategic importance of the sector, conquered one European market after another, and is now also aggressively expanding into Europe's remaining complex shipbuilding segments.

Multilateral approaches have failed in particular because those countries providing the most subsidies have blocked negotiations for a global solution and frustrated WTO dispute settlement, the latter in particular by a failure to respect WTO obligations regarding transparency about industrial subsidies.³

For the EU shipbuilding industry to survive in this context, a unilateral EU solution is now needed urgently, and must be put to effective use within a very short period, at least to address the distortions directly and severely impacting the EU market.

To be effective, there must be a unilateral tool which directly addresses the ability of subsidised third country shipbuilders to win tenders for ships operated in EU waters.

- The typical EU remedy in State aid cases (and which the Commission proposal appears to favour), repayment of the subsidy to the granting government, would be manifestly

² European Commission Press Release 1988, "Shipbuilding is a heavy industry enjoying no external protection at present. (...) The Commission could not refuse to allow the industry the trade defence weapons available to other industries" https://ec.europa.eu/commission/presscorner/detail/en/P_88_39

³ In this regard, Article 25 of the WTO Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") requires that Members notify all specific subsidies (at all levels of government and covering all goods sectors) to the SCM Committee. The lack of transparency regarding subsidies granted by South Korea and China in the shipbuilding industry is well-documented [E.g. [First Report from the European Commission to the Council on the Situation in World Shipbuilding, COM \(1999\) 474 final and ss](#); [OECD 2020 "State-owned enterprises in the shipbuilding sector"](#); [OECD 2021 "China's shipbuilding industry and policies affecting it"](#); [CSIS-Brief "Hidden Harbors" July 2020](#); ["China's Industrial Policy: an Empirical Evaluation", Panle Jia Barwick, Myrto Kalouptsi, Nahim Bin Zahur; July 2019](#)].

inadequate in the international context, especially given the failure of the countries with the most important market operators to respect transparency obligations.

- Regulation 2016/1035 on protection against unfair pricing of vessels foresees the imposition of an "injurious pricing charge" on the shipbuilder found to be engaged in unfair pricing, and further countermeasures in the form of the denial of loading and unloading rights in the event that charge is not paid. Those provisions reflect substantial discussions, including at international level, and should be taken as a starting point for the type of remedies needed for a unilateral tool to be effective for the shipbuilding sector.

Without prompt actions to address ongoing unfair foreign practices, Europe will lose its remaining global leadership in complex shipbuilding, with negative knock-on effects on its strategic maritime autonomy, its maritime supply chain, its military naval capabilities, the 1 million jobs that the sector provides in Europe's maritime regions, and the EU's ability to achieve its green and digital ambitions.

Part II

The Commission's Proposal for a regulation regarding foreign subsidies is promising but requires substantial clarifications and revisions before it can become an effective tool for addressing the foreign subsidies distorting the shipbuilding sector in Europe.

Once essential amendments are agreed and the new instrument enters into force, it needs to be applied to foreign shipbuilding subsidies without delay. The shipbuilding sector needs an instrument that works in practice, as judged by its impact in the market.

Section A

Fundamentally, the scope of the Proposal and its interaction with the EU's international commitments needs clarification to ensure the instrument's full applicability to the shipbuilding sector, in particular to recognise and address the fact that other countries are frustrating recourse to WTO dispute settlement and that anti-subsidy import duties do not provide relief for this sector.

SEA Europe welcomes the insertion in the proposal of a sector-specific provision, Article 40(4), which provides for a provisional application of the proposed "*ex officio* review" tool to the shipbuilding sector until Regulation (EU) 2016/1035⁴ becomes applicable. While welcoming this recognition of the need to address the specific situation of the shipbuilding sector, the interplay between that provision and Article 40 (7) on the EU's international commitments must be clarified to ensure that the latter does not prevent the full applicability of the proposed new regulation to the shipbuilding sector.

Article 40(7) of the Proposal presently prohibits any action under the new instrument if that "would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures". Article 32.1 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) provides in full that "No specific action against a subsidy of another

⁴ Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessels. The Regulation is legally in force but is not applicable because its Article 18(2) conditions the applicability on the entry into force of an OECD Shipbuilding Agreement concluded in 1994. The 1994 Agreement has never entered into force and has no prospects for doing so.

Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

Because the ASCM (which relates to trade in goods) covers both countervailing duties imposed on subsidised imports causing material injury to a domestic industry, and WTO dispute settlement to address any subsidies causing serious prejudice to the interests of another WTO Member, it is not clear to what extent actions would be possible under the Proposal in relation to foreign subsidies granted to shipbuilders by another WTO Member, regardless of the sector-specific provision in Article 40 (4).

This is very concerning because the ASCM has regrettably proven to be largely ineffective in ensuring normal competitive conditions in global shipbuilding and in addressing unfair trade practices in third countries under global trade rules. In particular, besides the fact that the shipbuilding industry cannot avail itself of the protection offered by countervailing measures under the WTO ASCM, WTO dispute settlement under the ASCM is also not effective for the shipbuilding sector:

- Typical subsidies in shipbuilding are only regarded as “actionable subsidies” for which adverse effects and injury must be proven (as opposed to “prohibited” subsidies). However, the specific features of the shipbuilding sector make it rather difficult to establish the full magnitude of the “adverse effects” caused by subsidies on other yards, especially when the government granting the subsidies does not fulfil its transparency obligations and provide full cooperation in the context of a proceeding.
- The key point is that by their failure to honour their WTO obligations of transparency with regard to industrial subsidies in the shipbuilding sector, South Korea and China in particular are frustrating the ability of other WTO Members to seek redress through WTO dispute settlement. It is essential for the new tool to be effective that its application is not held hostage by the failure of, for example, South Korea and China to respect their international (WTO) obligations.

The frustration of WTO dispute settlement is compounded by the manner in which these countries also block international negotiations on a framework for a level global playing field (e.g. in the OECD).⁵

To address this situation most effectively, and to motivate good faith negotiations by EU trading partners subsidising their shipbuilding sector, it would be appropriate at least:

- to provide for the express provisional application of the new tool to subsidies granted by trading partners which have systematically failed to respect their obligations of transparency at the WTO with regard to industrial subsidies to the sector in question, and this for as long as that failure continues; and,
- to clarify that Article 40 (7) shall not prejudice the application of Article 40 (4) which helpfully provides for the provisional application of the tool to the sector.

Given the tremendous challenges currently faced by Europe’s shipbuilding sector and the lack of effective trade remedies available, this is key to effectively safeguard the European shipbuilding

⁵ See e.g. [Lloyds List, 18.12.19 “South Korea frustrates OECD’s efforts in new shipbuilding competition regime”](#).

industry from foreign subsidies distorting the internal market and to build up negotiating leverage vis-à-vis third countries.

Section B

The scope of subsidies and distortions covered needs clarification to take into account the particularities of the shipbuilding sector so that the tool can be applied effectively. Also, there need to be presumptions in order to lessen evidentiary burdens in the face of the failure of other WTO Members to meet their transparency obligations, or to provide full cooperation in subsidy proceedings, and/or the fact that they have economies significantly distorted by State intervention.

A number of **clarifications** are needed regarding the Proposal's definitions of subsidies and distortions, and evidence thereof :

- Clarification is needed that each of the lists in Article 2(2) of the Proposal are **non-exhaustive**.
In addition, it should be clarified that the definition of a subsidy covers regulatory requirements which are lower than those in effect in the EU.
- With regard to third countries whose economies are significantly distorted through government intervention, the definition of subsidies must include all benefits derived from bodies which are not clearly demonstrated to be acting independently of government policy⁶.
- As a general matter, there must be a basic – rebuttable – presumption that all subsidies to producers of upstream inputs are passed through to the benefit of downstream operators, whether those operators are manufacturers or suppliers of services (or both).
- For the purposes of the new tool, it is essential that subsidies be recognised as existing already from the moment they can cause distortions. This can occur from the moment an operator is entitled, even if only conditionally, to a benefit or even before.
- Because of the extended period over which a given subsidy causes injury, as well as the challenges of identifying and quantifying foreign subsidies, the limitations period for taking action against a given subsidy should start only from the later of the actual moment of receipt of the subsidy or the moment at which a ship is delivered and openly operated in EU waters for the first time. While in the global shipbuilding sector the impact of a subsidy often begins already at the time a contract is concluded, a ship may only be delivered years later and the subsidy may also be paid only at a later date. The subsidy may even have been conditional on the signing of the contract and additional conditions to be fulfilled in relation to the ship's production and/or delivery.
- Given the difficulties of precise quantification of foreign subsidies, especially in the face of the failure of third countries to respect their WTO transparency obligations,
 - * an alternative threshold should be added to the EUR 5M which would, for example, be based on the amount of the distortive impact on the EU internal market, and
 - * Article 14(3) of the Proposal should be revised to provide that in case of non-cooperation, there is not only a presumption that a benefit has been received, but also

⁶ See "OECD Report on "State-owned enterprises in shipbuilding sector" (2020) which notes that "the vast majority of SOEs is based in Asia, and about 85% of the SOEs are located in non-OECD countries".

that the benefit is for a limited group of beneficiaries and that it exceeds the threshold of EUR 5M.

- A number of foreign subsidies should be considered to have distortive effects on a *per se* basis. In particular, this is true for all cases of export financing subsidies granted by countries which are not signatories to the OECD arrangement on officially supported export credits, as well as subsidies to beneficiaries active in sectors:
 - * characterised by structural excess capacity;
 - * featuring high-tech and/or dual-use products to a significant extent; or,
 - * designated as strategic by the government providing the subsidies.
- There should be a provision in the Proposal that would recognise as sufficient evidence of foreign subsidies *inter alia*: 1) DG Trade findings of subsidies benefiting third country producers in a given sector made in relevant and recent EU TDI investigations, 2) subsidies documented in reports published by international intergovernmental organisations (e.g. OECD), and 3) those established in investigations in third countries.

Section C

The Proposal's provisions regarding interim measures, the balancing assessment, and redressive measures and commitments, need major strengthening in order to be capable of safeguarding a strong and strategic EU industrial base with sustainable and diversified supply chains, able to deliver on the EU's political priorities (e.g. European Green Deal, Blue Economy, EU Digital Agenda, etc.). Remedies under the instrument must fully reflect the damage caused and establish a real deterrent.

While the Proposal allows the Commission a wide discretion in certain respects which could make it possible to apply the new tool in an effective manner, there are a number of points that need to be clarified and reinforced in favour of effective action.

Interim measures

Article 10 of the Proposal should be revised to allow the possibility of interim measures at any time after the opening of a preliminary review, as long as there are grounds for concluding that there is a foreign subsidy distorting the internal market, and in proportion to the risk of substantial damage to competition on the internal market. Sectoral specificities must be duly considered in the design of interim measures.

Balancing assessment

With regard to the balancing assessment, the Proposal should be revised to limit the Commission's discretion not to impose redressive measures. This should be the case at least where the distortions cause material harm to EU operators in a strategic sector such as shipbuilding which employs over 1 million persons in the EU.

The Proposal needs revision to provide for procedural rights of the relevant EU industries. First, there needs to be a procedure by which interested EU operators could request the opening of a review by the Commission. Second, there is a need for a full and timely consultation of relevant EU industries and consideration of their input concerning the Commission's findings and the balancing assessment.

The latter is essential in order to ensure an adequately transparent and coherent analysis of both short- and medium-term impacts of the distortions in question.

Further, the Proposal's provisions referring to the balancing assessment should be revised to set out an initial presumption that there is a fundamental EU interest in favour of removing the effects of distortive foreign subsidies, especially those endangering the preservation of sectors making a significant contribution to a strong and strategic EU industrial base with sustainable and diversified supply chains, as is the case in shipbuilding.

This initial presumption should be especially strong concerning subsidies in sectors such as shipbuilding that are targeted by national strategic plans in third countries (such as Made in China 2025), are affected by structural excess capacities, or feature a strong presence of State-owned enterprises.

Redressive measures

Article 6(3) of the Proposal should be clarified to say that the list of redressive measures set out there is **non-exhaustive**.

Article 6 should also be revised to include a presumption that **structural or other non-financial remedies**, e.g. in the form of "reduced market presence", would be the most appropriate base measure, at least when major subsidies, strategic and/or sensitive sectors, and/or State-owned or directed companies are involved, accommodating sector specificities (for example, access to EU ports in relation to foreign subsidies affecting the shipbuilding sector)⁷.

Article 6(6) of the Proposal should be revised to say that payments to the third country or countries are **not** an appropriate redressive measure, at least with regard to countries which are not subject to the jurisdiction of the European Court of Justice or the EFTA Court in State aid matters. In any case, a provision should be inserted to say that the Commission may not accept repayment as an adequate redressive measure with regard to

- subsidies granted by those countries which have not respected their WTO transparency obligations, or
- in any case where either the benefiting operator or the country which granted the subsidy has not given the Commission full cooperation.

To respect the principle of proportionality, and in order not to reward non-cooperation, the Commission should not be allowed to accept commitments from operators which have provided the Commission less than full cooperation. Similarly, Article 15 should be revised to remove the limit on fines and penalties in cases of insufficient cooperation or failure to comply with measures imposed.

With regard to the choice of redressive measures, as well as commitments to mitigate the distortion(s), the Commission should be obliged to consult in a timely manner with the affected EU industry and

⁷ As stated in Part I above, the sector-specific remedial action laid down in Articles 7-9 of Regulation 2016/1035, which also reflects the outcome of substantial discussions at international level, should be taken as a starting point for the type of remedies needed for a new EU tool to be effective for the shipbuilding sector. This should include the denial of "loading and unloading rights" in EU ports for a limited period of time to future vessels built by a shipbuilder found to have received subsidies distortive of the internal market (i.e. vessels contracted for during a given period of years after public notice in the EU Official Journal). As long as the principle is laid down clearly in the new Regulation, the details and limitations (period in which access is denied, all relevant conditions, clear information to all affected parties, etc.) can be provided through implementing acts following consultation with the sector.

allow effective input from that industry, especially into the assessment of whether or not commitments (and which ones) should be accepted.

When an *ex officio* review concerns public procurement, redressive measures must address the participation of subsidised operators in private procurement to the extent the latter represents a significant risk of circumvention (for instance, to cover situations where private operators or leasing companies acquire ships cheaply and lease them to public operators).

Moreover, the Proposal needs revision

- 1) to allow concerned EU industry standing to challenge Commission decisions, and
- 2) to allow rights of private legal action so that EU persons can obtain compensation for damages in relation to injury caused to them by distortive foreign subsidies established by the Commission (regardless of the redressive measures the Commission finally imposes or the commitments it accepts).

Part III

The recognition of the shipbuilding sector's urgent need for EU-level action to address unfair trading practices of producers in third countries should also lead to the rapid adoption of separate measures against unfair pricing, e.g. through a revision of the sector-specific Regulation 2016/1035 on protection against injurious pricing of vessels.

To provide effective protection to European shipbuilding against unfair foreign practices distorting the internal market, measures on State intervention alone are not enough. Effective means to avoid price undercutting through foreign ship price offers below cost are key. The EU has consistently defended this principle in decades-long discussions within the OECD, insisting that to be effective any global discipline for the sector must tackle both harmful subsidies and injurious pricing.

Experience has showed that extreme cases of indebtedness and consequent bailouts were mainly the result of long-lasting and unsustainable pricing policies. Particularly in a sector like shipbuilding, with a limited number of very large transactions, companies primarily suffer damage from unfair competitive conditions at the moment contracts are lost due to an abnormally low price offer by a competitor. The mechanisms (e.g. *ex ante* State aid) that have brought about the abnormally low price offer may ultimately be irrelevant to the damaged competitor. This is all the more the case when the mechanism surfaces only much later (*ex post*) as e.g. with a State-backed bailout.

As current WTO and EU anti-dumping rules do not offer effective remedies to counter unfair foreign pricing practices in shipbuilding, the adoption of a sector-specific instrument is essential. In fact, the EU legislator has already recognised the need for a sector-specific trade tool for the shipbuilding industry by adopting Regulation (EU) 2016/1035 on protection against injurious pricing of vessels. EU Regulation 2016/1035, indeed recalls that "(...) the special characteristics of ship purchase transactions have made it impractical to apply countervailing and anti-dumping duties", as provided for under the WTO" (Recital 3).

Besides filling a major regulatory gap in the EU domestic toolbox, such a tool would provide the EU with much-needed negotiating leverage vis-à-vis those third countries which have for decades been frustrating global efforts towards a concerted effective solution for the sector.

Part IV

For decades, Europe's shipbuilding industry and hundreds of thousands of workers in maritime regions have paid a hefty price for the failure to address market distortions in global shipbuilding. While hopeful that the prompt adoption and use of the new instrument will lead to a much-needed level playing field, temporary measures to support the European shipbuilding sector are urgently necessary in the meantime to ensure that there is an industry left to benefit from the instrument.⁸

Covid-19 has highlighted the fact that there are big risks for Europe in being dependent on foreign nations. This is also valid for shipbuilding. Without its own shipyards, Europe will become entirely dependent on Asian shipbuilding to build or retrofit zero-emission ships in line with the European Green Deal. The EU needs its own civil and defence shipbuilding technology base in order to defend its citizens and protect its maritime borders, as well as to access its seas, conduct trade and promote the Blue Economy.

About SEA Europe

SEA Europe, European Shipyards and Maritime Equipment Association, represents close to 100% of the shipbuilding industry in 16 nations, including EU Member States, Norway and Turkey. The industry, otherwise known also as "maritime technology industry", encompasses the building, maintenance, repair, retrofitting and conversion of all types of ships and floating structures – commercial as well as naval – including the full supply chain with the various producers of maritime systems, equipment material, technologies and services. For more information, see the SEA Europe website <https://www.seaeurope.eu/>

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⁸ A [study carried out by BALance](#), on behalf of the European Commission (DG GROW) in October 2017 already concluded that the next decade will be decisive as to whether Europe's shipbuilding sector will be able to survive or not. With the impact of Covid-19 and additional geo-political uncertainties, the survival of Europe's shipbuilding sector is – more than ever – a key issue, particularly at a time that Europe has been more clearly confronted with the risks of strategic dependencies.