

## USTR issues Statement asserting lack of legal basis in response to WTO Authorization of EU Countermeasures on US goods under Aircraft Dispute

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### Executive Summary

On 13 October 2020, a World Trade Organization (WTO) arbitrator authorized the European Union (EU) to impose countermeasures on nearly US\$4 billion<sup>1</sup> of US-origin goods in its decision on subsidies provided by the United States to domestic civil aircraft manufacturers.<sup>2</sup> Following the announcement, European Commissioner for Trade, Vladis Dombrovskis, announced that the EU would "vigorously pursue" negotiations to end US tariffs on EU exports, but, if unsuccessful, the EU would be prepared to enact similar tariffs on US goods.<sup>3</sup>

The United States Trade Representative (USTR) responded to the 13 October 2020 announcement stating that the United States (US) firmly disagrees with the finding and specifically noting that the WTO arbitrator did not authorize retaliation beyond certain subsidies which were repealed earlier this year.<sup>4</sup> Therefore, any action taken by the EU will be viewed as unlawful and will generate a response by the US. USTR Robert Lighthizer also acknowledged consideration of a recent proposal for resolution of the dispute and maintained that the US is intent on concluding an agreement that restores fair competition.

## Detailed discussion

The US and the EU have an ongoing dispute about subsidies provided for manufacturing civil aircraft. The US has maintained that the EU has provided subsidies which have harmed US aircraft manufacturers. Conversely, the EU has held the position that the US has provided subsidies to domestic civil aircraft producers, causing harm to EU manufacturers. The US filed an action in 2004 challenging the subsidies as violative of WTO obligations, with the EU filing a case against the US shortly after.

Following a series of WTO actions on these matters over the 15 years from the original complaint, the WTO arbitrators in October 2019 authorized the US to impose countermeasures on US\$7.5 billion of EU-origin goods.<sup>5</sup> Subsequent to the 2019 ruling, the US Trade Representative (USTR) took action under Section 301 of the *Trade Act of 1974* (Section 301) to impose an additional 10% tariff on certain new aircraft imports with countries of origin of France, Germany, Spain and the UK, as well a 25% punitive tariff covering more than 150 categories of non-aircraft goods from specified EU countries, including wines, single malt whiskey, olive oil, and other food stuffs, among others.<sup>6</sup> Since the initial imposition, the US has twice modified the products subject to the tariffs as part of a concept known as carousel retaliation. A modification that took effect 18 March 2020, with tariffs increased on new aircrafts from France, Germany, Spain and the UK to 15%, while prune juice imported under HTSUS5 2009.89.40 was removed from the punitive tariff list.<sup>7</sup> On 12 August 2020, the USTR announced further modifications to the tariff list, imposing 25% tariffs on certain cheeses, sweet biscuits, and jams imported from EU/UK countries.<sup>8</sup> The WTO's action on 13 October 2020, authorized the EU to determine potential countermeasures. In April 2019, the European Commission (EC) published a preliminary list of products considered for countermeasures that represent around US\$20 billion of US exports for consideration in the event of a favorable WTO decision.<sup>9</sup> This list included aircrafts, chocolate, condiments, fruit and fruit juice, luggage, nuts, plastics, seafood, spirits, tractors, tobacco, and wine, among others.<sup>10</sup>

In response to the WTO arbitrator's decision, the USTR announced that it does not believe the EU has the legal authority to implement countermeasures on the basis of the WTO decision, as it cites state-provided tax breaks which provided the subsidies are no longer available. In particular, USTR Lighthizer notes the only authorized basis for the

EU countermeasures, the Washington state tax break, was repealed on 1 April 2020, and thus there is no other basis to retaliate. The USTR further noted it continues to impose tariffs on EU goods, but that it has exercised restraint by declining to impose the full amount tariffs authorized in order to maximize chances on success in ongoing negotiations to end this dispute.<sup>11</sup> The EC remains open to working toward a fair and balanced settlement of this matter and on future disciplines for subsidies in the civil aircraft sector with the US. However, the EC is prepared to take the appropriate steps to allow them to exercise their retaliation rights in the event that a negotiated settlement cannot be reached.

### Actions for businesses

Companies exporting US-origin goods to the EU/UK region that have been contemplated on the EC's proposed list for countermeasures should remain vigilant in the event a negotiated settlement cannot be reached, and punitive tariffs are subsequently imposed.

Immediate actions companies should consider are:

- ▶ Reviewing options to mitigate the impact of any potential duties, such as:
  - Utilizing bonded warehouse storage mechanisms to provide tariff deferral, and eliminate tariffs on products re-exported
  - Usage of inward processing regimes

Companies that import EU/UK origin goods that have been proposed for punitive tariffs by the USTR, but are not currently subject to the actions, should remain vigilant in contingency planning in the event the USTR moves to include additional goods.

Immediate actions companies should consider are:

- ▶ Reviewing options to mitigate the impact of any potential duties, such as:
  - Utilizing US Foreign-Trade Zones or bonded warehouse storage mechanisms to provide tariff deferral, and eliminate tariffs on products re-exported
  - Structuring transactions to obtain refunds of the 301 tariffs paid through the US drawback program
  - Utilizing techniques to reduce the customs value of US imports such as first sale for export or adjustments to transfer prices
- ▶ Assessing whether US customs bonds are adequate to support any potential increase in tariffs.

## Transfer Pricing considerations

Additionally, companies who have operations in both the US and EU, with subsequent related party sales in both directions, will almost certainly have transfer pricing impacts. As each transaction flow would be subject to a different transfer price, companies should begin to evaluate the impact for imports into various jurisdictions.

Related party transactions into the EU have become particularly complex with a divergence in implementation amongst member countries around retroactive adjustments to the transfer price, and the impact on the value reported to the customs authorities. This contemplates the need for EU importers to review multiple transfer pricing policies not only for strategic mitigation of punitive duties, but as well as planning for potential adjustments that are likely to occur.

From a US import perspective, along with the strategic importance of mitigating duty impact while aligning the income tax and customs approaches, mechanics for reporting any transfer pricing adjustments to US Customs should also be reviewed. This process may be particularly complex when duties are present for only a portion of the year. US Customs has very specific rules for reporting adjustments to prices made after importation, such as transfer pricing adjustments. These rules require that the importer take specific actions before importation of goods for which prices may be adjusted, including adding customs specific language to transfer pricing policies. With proper planning, refunds may be obtained on duties paid should transfer prices be reduced. Importers are well advised to address these requirements now in order that they be in place if additional punitive duties are imposed.

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## Endnotes

1. The European Union may request authorization from the WTO to take countermeasures with respect to the United States at a level not exceeding, in total, US\$3,993,212,564 annually. Currency references in this Alert are to US\$.
2. [https://www.wto.org/english/tratop\\_e/dispu\\_e/353arb\\_conc\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/353arb_conc_e.pdf).
3. <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2192>.
4. <https://ustr.gov/node/10267>.
5. See WTO Dispute Number WT/DS316/ARB.
6. 84 FR 54245.
7. 85 FR 10204.
8. 85 FR 50866.
9. <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2011>.
10. [https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc\\_157861.pdf](https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157861.pdf).
11. <https://ustr.gov/node/10267>.



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