

EU responds to WTO authorization to impose countermeasures on US products

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Executive summary

On 13 October 2020, the World Trade Organization (WTO) authorized the European Union (EU) to impose countermeasures on United States (US)-origin products due to illegal US subsidies granted to the US aircraft manufacturer, Boeing. The WTO determined that the level of countermeasures "commensurate with the degree and nature of the adverse effects determined to exist" amounts to nearly US\$4 billion per year.¹ The EU is currently reluctant to impose countermeasures on US products and has decided to wait for the outcome of the negotiations with the US before moving forward with countermeasures.²

Detailed discussion

Background

The dispute between the EU and the US, the "Airbus-Boeing Dispute," started in 2004 when the US first filed a case at the WTO claiming that Airbus had received illegal subsidies from the EU.³ Since then the EU and the US have been alleging that each other provided illegal subsidies to their main aircraft manufacturers. When the WTO authorized the US to impose countermeasures on EU products in October 2019, the former Commissioner for Trade of the European Commission, Cecilia Malmström, made the following statement:

"(...) We remain of the view that even if the United States obtains authorisation from the WTO Dispute Settlement Body, opting for applying countermeasures now would be short-sighted and counterproductive. (...) Our readiness to find a fair settlement remains unchanged. But if the U.S. decides to impose WTO authorised countermeasures, it will be pushing the EU into a situation where we will have no other option than do the same."⁴

Despite the intention of the European Commission to find a fair settlement, the dispute transformed into increased trade tensions when the WTO authorized the US to impose countermeasures on EU products of nearly US\$7.5 billion per year.⁵ Subsequently, the US imposed additional tariffs of up to 25% on aircraft. In addition, the US also imposed tariffs on national products such as, cheese, liquors and wine. Now, a year later, in October 2020, the WTO has authorized the EU to impose similar countermeasures on US products valued at nearly US\$4 billion per year.⁶ The current Commissioner for Trade of the European Commission, Valdis Dombrovskis, made the following statement as a response to the WTO decision:

"This long-awaited decision allows the European Union to impose tariffs on American products entering Europe. I would much prefer not to do so - additional duties are not in the economic interest of either side, particularly as we strive to recover from the Covid-19 recession. I have been engaging with my American counterpart, Ambassador Lighthizer, and it is my hope that the U.S. will now drop the tariffs imposed on EU exports last year. This would generate positive momentum both economically and politically and help us to find common ground in other key areas. The EU will continue to vigorously pursue this outcome. If it does not happen, we will be forced to exercise our rights and impose similar tariffs. While we are fully prepared for this possibility, we will do so reluctantly."⁷

Under the current economic circumstances, according to Commissioner Dombrovskis, it is in the mutual interest of the EU and the US to avoid additional trade barriers. The EU has made specific proposals to reach a negotiated outcome to the long running transatlantic civil aircraft disputes, the longest in the history of the WTO. The EU remains open to working with the US to agree on a fair and balanced settlement, as well as on future disciplines for subsidies in the civil aircraft sector.⁸

If no agreement is reached, the EU has already published a list of products which would potentially become subject to the countermeasures, such as frozen codfish, billiard accessories, dried unions, certain types of chemicals, and planes exceeding a weight of 15,000 kilos.⁹

Actions for businesses

While engaging with the US, the European Commission is also taking appropriate steps and involving EU Member States so that it can use its retaliation rights if there is no prospect of bringing the dispute to a mutually beneficial solution. This contingency planning includes finalizing the list of products that would become subject to additional tariffs in the EU.¹⁰ Companies that are importing these or similar products to the EU or the United Kingdom should assess what the impact of the additional duties would be and if necessary, prepare for such scenario.

Immediate actions companies should consider are:

- A review of the options to mitigate the impact of any potential duties, such as:
 - Utilizing a customs warehouse or free trade zone (FTZ) to provide tariff deferral, and eliminate tariffs on products re-exported
 - Using inward processing regimes
 - Reviewing the country of origin rules and applied tariff codes to prevent unintended application of potential countermeasures and apply for a binding origin information and/or binding tariff information decision to obtain certainty about the country of origin and classification of the imported goods
 - Determining the viability of alternative sourcing and/or manufacturing
 - Utilizing techniques to reduce the customs value of EU imports such as changing the importer of record, value unbundling or adjustments to transfer prices

If the EU moves forward with imposing countermeasures on US products, companies that are importing products to the US that have been proposed for additional duties by the Office of the United States Trade Representative,¹¹ but are currently not subject to additional duties, should make a similar assessment and if necessary, prepare for such scenario.

Immediate actions companies should consider are:

- ▶ Reviewing options to mitigate the impact of any potential duties, such as:
 - Utilizing US FTZs 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 likely 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 among Member States 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 also for 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 should address these requirements now to have them in place if additional punitive duties are imposed.

Endnotes

1. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm.
2. <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2192>.
3. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm.
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7. <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2192>.
8. Ibid.
9. https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157861.pdf.
10. Ibid.
11. <https://ustr.gov/sites/default/files/files/Press/Releases/FRN081220.pdf>.

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