

WTO rules on US complaint regarding EU civil aircraft subsidies; US announces countermeasure duties on certain EU products and also takes further actions on China origin goods

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Executive summary

On 2 October 2019, the World Trade Organization (WTO) Arbitrator, comprised of a three-person appellate body, issued its report regarding the appropriate value of acceptable countermeasures the United States (US) could impose on the European Union (EU) for providing subsidies to non-US aircraft manufacturers. The WTO arbitrators determined that the US was entitled to impose tariffs on US\$7.5 billion¹ of EU-origin goods.²

Following the WTO announcement, the US Trade Representative (USTR) released a formal statement, noting that the arbitration award represented the largest ever in WTO history,³ and published a final product list with 15 different sections covering 160 different 8-digit Harmonized Tariff Schedule (HTS) codes.⁴ Certain aircraft from specified European countries are subject to a 10% ad valorem duty rate, and other products are subject to a 25% duty rate. All 15 Sections will have an effective date of 18 October 2019.

Also on 2 October, the USTR published newly granted exclusions for Chinese origin products subject to punitive tariffs on Lists 1 and 2, in two separate Federal Register Notices (FRNs).⁵ The FRNs include 92 new exclusions⁶ to products otherwise subject to a 30% punitive tariff as part of the 818 tariff lines covering the \$34b worth of imports from China annually (List 1⁷), and 111 exclusions to products otherwise subject to a 30% punitive tariff as part of the 279 tariff lines covering the \$16b worth of imports from China annually (List 2⁸).

Detailed discussion

US complaint regarding EU civil aircraft subsidies

The US has historically taken the position that the EU countries,⁹ and specifically four of its Member States (France, Germany, Spain and the United Kingdom (UK)), have unfairly subsidized non-US aircraft manufacturers to an extent that was damaging to the US and its economy. Following unsuccessful discussions with the EU to cease subsidization, the US submitted a formal challenge to the WTO of EU subsidies provided to large civil aircraft in 2004, asserting that the governmental subsidies caused an estimated \$11b per year in damage to US sales and market share.

The WTO subsequently determined that the assistance was inconsistent with the EU's obligations under the General Agreement on Tariffs and Trade (GATT) 1998 and Articles 5 and 6.3 of the Agreement on Subsidies and Countervailing Measures. The EU was granted until 1 December 2011 to become compliant with the WTO recommendations. While the EU did respond by adjusting some subsidies, the US requested a compliance panel in 2012 to evaluate the EU's overall actions and whether those remedies resolved the adverse effects as determined by the WTO. In May of 2018, the WTO concluded that there were additional violations. This result permitted the US to initiate the process to seek countermeasures.

On 8 April 2019, the USTR proposed tariff countermeasures in response to harm caused by EU aircraft subsidies.¹⁰ Pursuant to authority granted under Section 301 of the *Trade Act of 1974*,¹¹ the USTR proposed the imposition of additional ad valorem duties of up to 100% on a list of 326 HTSUS codes.¹² The list included products in addition to aircraft and aerospace parts, including certain industries such as liquors, agriculture, and cheeses, among others. The list focused on product categories that comprise the EU's \$440b exports to the US; the US in turn only exports approximately \$318b to the EU and therefore the tariffs as proposed were designed to meet the Administration's Trade Agenda objectives of improving trade imbalance.

Following the publication of the proposed tariff countermeasures, the USTR received over 600 comments and held a hearing on 15 and 16 May 2019. Based on the testimony and comments received, the USTR stated that some of the affected parties requested that the USTR consider additional products that were not included on the

initial list. The USTR subsequently published an additional list of products covering 89 tariff subheadings under consideration for Section 301 tariffs.

The USTR published a final product list of 8-digit HTS codes to be subject to punitive tariffs in response to the WTO Arbitrator's ruling on 2 October 2019. The list is broken into 15 sections, each covering different HTS codes and specific EU member countries of origin. Items included in Section 1, covering certain airplanes, will carry a 10% punitive duty while the remaining 14 sections covering a broad range of products, will impose a 25% punitive duty. In their publication of the final list, the USTR noted the information provided was for informational use only, and definitive determinations with applicable tariff numbers will be published in an upcoming FRN.

Examples of products included in the 15 sections are as follows:

- ▶ Section 1 at 10% ad valorem:
 - Certain airplanes and other aircrafts imported under 8802.40.00 from France, Germany, Spain, or the UK (10% ad valorem)
- ▶ Sections 2-15 at 25% ad valorem:
 - Olive oil imported under 1509.90.20 from France, Germany or the UK
 - Certain Irish and Scotch whiskies imported under 2208.30.30 from the UK
 - Wine imported under 2204.21.50 from France, Germany, Spain or the UK will receive a 25% ad valorem duty, while Italian wine is exempt
 - Gruyere-process cheese under 0406.30.51 from all EU member countries
 - Sweaters imported under 6110.11.00 from the UK

The USTR has notably removed certain products from the preliminary lists, either from one or more EU member countries. For example:

- ▶ Certain aircraft parts imported under heading 8803 from all EU member countries
- ▶ Olive oil imported under 1509.90.20 from Italy
- ▶ Wine imported under 2204.21.50 from Italy
- ▶ Gruyere-process cheese under 0406.30.51 from France
- ▶ Irish whiskey, other than whiskey produced in the UK (Northern Ireland)

It should be noted that the EU has an active complaint filed with the WTO against the US for unfairly subsidizing US aircraft manufacturing as well.¹³ While the WTO has not yet issued a final ruling on the case, they have found that the US failed to address illegal subsidies as well. EU leadership has signaled retaliatory measures are possible. For example, the EU has an active complaint filed with the WTO against the US for unfairly subsidizing non-EU aircraft manufacturers. Should the WTO issue a final ruling against the US, the EU could seek to impose tariffs against certain US-origin goods.

Product exclusions on Chinese origin goods

On 2 October 2019, the USTR announced in two separate FRNs new exclusions for products otherwise subject to Section 301 punitive tariffs on Chinese origin goods, outlined below. As further detailed in the last EY Global Tax Alert, [USTR grants new exclusions to Lists 1, 2 and 3 for China origin goods; US and Japan reach agreement on trade in goods and digital trade](#), dated 27 September 2019, the USTR continues to affirm that product exclusion decisions will be made based on the criteria stated in the notices establishing the exclusion process.

The FRN details regarding List 1 added a new specific Heading, 9903.88.19, for reporting the products now covered by the latest exclusions. The latest exclusions apply to 92 products by specific descriptions. See below for examples of some of the products granted exclusions:

- ▶ Certain gas treatment process modules imported under 8421.39.8040
- ▶ Snow plow blades and frames imported under 8431.49.9095
- ▶ Radio remote control apparatus of a kind suitable for opening or closing gates imported under 8526.92.5000
- ▶ Certain printed circuit board assemblies imported under 8529.90.1660
- ▶ Digital optical fiber cables, with connectors, imported under 8544.70.0000

The FRN details regarding List 2 added a new specific Heading, 9903.88.20, for reporting the products now covered by the latest exclusions. The latest exclusions apply to 111 products by specific descriptions. See below for examples of some of the products granted exclusions:

- ▶ Certain gates and panels of galvanized steel imported under 7308.90.9590
- ▶ Various AC/DC electric motors imported under 8501.20.4000
- ▶ Certain silicon solar panel kits imported under 8501.31.8010
- ▶ Digital clinical thermometers imported under 9025.10.8040
- ▶ Multimeters, without recording devices, imported under 9030.31.0000

As described in EY Global Tax Alert, [USTR announces formal submission process for List 3; Mexico formally ratifies USMCA and India formally retaliates against US](#), dated 26 June 2019, the USTR announced an exclusion procedure for List 3, which closed 30 September 2019.

The denied exclusions, as well as the total granted, are further illustrated in the below table. As, there has been no exclusion procedure yet announced for List 4, close monitoring is advised for companies impacted by covered items, and as such, List 4 is excluded from the below table.

	Total requested	Granted	Denied	Stage 2 ¹⁴	Stage 3 ¹⁵
List 1	10,814	3,622	6,864	1	419
List 2	2,869	800	1,585	9	586
Total	100%	32.3%	61.7%	0.1%	7.4%
List 3	16,519	61	94	16,346	0

Actions for businesses

With the expected implementation date of 18 October 2019, the impact of any imports of identified products should be immediately considered. Close monitoring of further developments, such as any EU retaliatory actions, along with the final product list once published in the Federal Register, is warranted for US importers of EU-origin products.

Immediate actions for such companies to consider include:

- ▶ Mapping their complete, end-to-end supply chain to fully understand the extent of products impacted, potential costs, alternative sourcing options, and to assess any opportunities to mitigate the impact, such as tariff engineering to address potential increases in tariffs.
- ▶ Identifying strategies to defer, eliminate, or recover the excess duties paid such as bonded warehouses, Foreign Trade Zones, substitution drawback and Chapter 98.
- ▶ Where goods are sourced and/or manufactured in multiple countries, conducting comprehensive origin determinations to facilitate compliance as well as to consider opportunities for mitigation.

- ▶ Exploring strategies to minimize the customs value of imported products potentially subject to the additional duties such First Sale for Export.
- ▶ Re-evaluating current transfer pricing of imported products, being careful to align the income tax transfer price with the customs value to avoid inventory basis limitations under Internal Revenue Code Section 1059A.

US distributors who purchase from related parties will almost certainly have transfer prices impacted by the imposition of 301 duties. 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, and in many cases actions need to be taken in advance of importations. Companies should address the impact of duties on transfer prices proactively.

We also note considering recent exclusions granted, companies importing Chinese origin goods which are granted exclusions should take action to seek refunds on any punitive duties previously paid.

Endnotes

1. Currency references in this Alert are to US\$.
2. See WTO Dispute Number WT/DS316/ARB.
3. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/us-wins-75-billion-award-airbus>.
4. https://ustr.gov/sites/default/files/enforcement/301Investigations/EU_Large_Civil_Aircraft_Final_Product_List.pdf.
5. Punitive tariffs of Lists 1, 2 and 3 are executed by the USTR under Section 301 of the *Trade Act of 1974*.
6. See 84 FR 52567.
7. <https://ustr.gov/sites/default/files/2018-13248.pdf>.
8. <https://ustr.gov/sites/default/files/enforcement/301Investigations/2018-17709.pdf>.
9. EU member countries are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.
10. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/ustr-proposes-products-tariff>.
11. 19 U.S.C. § 2411.
12. See 84 FR 15028.
13. See WTO Dispute Number WT/DS353/33.
14. Stage 2: Initial Substantive Review of whether the exclusion request should be granted, based on the substantive criteria set out in the Product Exclusion Notice.
15. Stage 3: Administrability Review, based on consultations with U.S. Customs and Border Protection, the request is further reviewed to determine whether an exclusion would be administrable.

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