

Review of EU anti-dumping and anti-subsidy measures following the withdrawal of the UK from the EU

On 1 January 2021, the transition period specified in Article 126 of the “Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community” (“Withdrawal Agreement”) ended. As from the same date, the relationship between the European Union and the United Kingdom is governed by the “Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part” (“TCA”), which was concluded on 24 December 2020.

On 18 January 2021, the European Union published a [“Notice”](#) regarding the application of anti-dumping and anti-subsidy measures in force in the European Union following the withdrawal of the United Kingdom and the possibility of a review” (“Notice”) which affirms the possibility of requesting a review of the existing EU anti-dumping and/or anti-subsidy measures on the grounds of the withdrawal of the United Kingdom from the European Union (“Brexit”). This Client Alert briefly analyses the conditions that must be met in order to request the initiation of such a review.

1. PROCEDURAL ASPECTS

Anti-dumping and anti-subsidy measures that were adopted before 1 January 2021 to protect the EU market, including the United Kingdom, may no longer be justified after Brexit. Accordingly, the Notice makes clear that the Commission is prepared to review the relevant measures. However, reviews will not be initiated *ex officio*. Rather, interested parties will have to request the initiation of an interim review.

The standard requirements set out in Article 11(3) of the Anti-Dumping Regulation and Article 19 of the Anti-Subsidy Regulation will apply. In particular, the interim review request will have to contain sufficient evidence that, following Brexit, the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or to recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.

An interim review of an anti-dumping or anti-subsidy measure may be requested one year after the definitive measure has been imposed. As a result, anti-dumping and/or anti-subsidy measures that were imposed in 2020 will only become reviewable during the course of 2021. A review may result in the measure being repealed, maintained or amended for all producers in the exporting country or for individual exporters (depending on the grounds invoked to initiate the review).

2. SUBSTANTIVE ASPECTS

Importantly, the Notice clarifies that “the withdrawal of the UK *per se*, in the absence of any additional evidence, is not a sufficient basis for a review to be initiated”. Instead, the request must contain “evidence that the measures would have been significantly different if they had been based on information excluding the United Kingdom”.

In other words, a party seeking the review of an existing EU anti-dumping and/or anti-subsidy measure will need to demonstrate that the analysis of the Commission that led to the measure being imposed is affected by the UK no longer being part of the EU market and that this change is “significant” enough to invalidate at least one of the conditions on which the measure is based. For instance, the following elements may be affected by Brexit:

- **Standing.** To initiate an anti-dumping and/or anti-subsidy investigation on behalf of the EU industry, the complainants must represent a minimum share of EU production of the product concerned. As from 1 January 2021, UK companies may no longer act as complainants in EU trade defence investigations and their production is no longer counted as EU production. Brexit may therefore deprive an existing measure from the support of the EU industry.
- **Dumping.** To determine whether imports are dumped, the Commission compares the normal value of the product in the country of export with the export price. From 1 January 2021 onwards, sales to UK customers may no longer be used to determine the export price. If the export price calculated in the original investigation was based, *inter alia*, on sales made to UK customers, Brexit may have an impact on the dumping margin.
- **Subsidy.** Brexit does not directly impact the Commission’s determination of whether a product benefits from a financial contribution in the country of export. Moreover, the subsidy margin is in principle not impacted by Brexit, since it is calculated independently from the size of the European Union. However, in particular circumstances, e.g., when the exporting producers only sell to the United Kingdom, or when the subsidy scheme is *de facto* contingent on exporting to the United Kingdom, Brexit may affect the subsidy determination.
- **Injury.** A measure can only be imposed if dumping or subsidization causes or risks causing material injury to the EU industry. For this purpose, the Commission assesses the effect of dumped and/or subsidized imports based on aggregated data concerning the EU industry. Following Brexit, the level of the measures necessary to remove the injury may be higher or lower than the level determined in the original investigation. This may happen especially when the UK production represented a significant share of the overall EU production in the original investigation.
- **Union interest.** The adoption of anti-dumping and/or countervailing duties must not be against the Union interest. This requires the Commission to balance the benefits of imposing duties for Union producers against any negative effects on downstream users, importers and consumers. Therefore, if the benefits of a measure were concentrated, for

instance, on UK producers and adverse effects concentrated on EU 27 users and consumers, Brexit may affect the determination whether the continuation of the measure is in the Union interest.

Whether a change in any of the above-mentioned factors due to Brexit will be enough to justify the review of a measure requires a case-by-case assessment. In this regard, it may be useful to recall that following the accession of Croatia, the Commission issued [guidance](#) explaining that a review of a trade defence measure to account for the enlarged EU market would be warranted only if the parties submitted evidence covering a period sufficiently long to show a structural change.

3. CONCLUSION

The Commission has confirmed that the withdrawal of the United Kingdom from the European Union represents a valid ground to request a review of anti-dumping and/or anti-subsidy measures adopted before 1 January 2021, insofar as parties can show that it would not have been imposed in the same form had the United Kingdom not been part of the European Union and that the resulting difference is significant. Because the factual findings supporting the imposition of anti-dumping and/or anti-subsidy measures are manifold and complex, the likelihood of obtaining the initiation of an interim review on the grounds of Brexit largely depends on the circumstances of each case.

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Van Bael & Bellis has extensive experience with EU trade defence investigations. The Firm also regularly represents clients before the EU Courts in challenging EU trade defence measures. Van Bael & Bellis is also the author of the leading treatise on EU trade law – “EU Anti-Dumping and Other Trade Defence Instruments”, now in its sixth edition (Kluwer Law International, 2019).

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