
STATUTORY INSTRUMENTS

2019 No. 450

**The Trade Remedies (Dumping and
Subsidisation) (EU Exit) Regulations 2019**

PART 3

Subsidisation

CHAPTER 2

Determination of whether there is a countervailable subsidy

Meaning of financial contribution by a foreign authority

20.—(1) For the purpose of paragraph 3 of Schedule 4 to the Act, a foreign authority makes a financial contribution where—

- (a) the practice of a foreign authority involves a direct or potential direct transfer of funds or liabilities;
- (b) subject to paragraph (2), revenue otherwise due to a foreign authority is foregone or is not collected;
- (c) a foreign authority provides goods or services other than general infrastructure;
- (d) a foreign authority purchases goods; or
- (e) a foreign authority makes payments to a funding mechanism or entrusts or directs a private body to undertake one or more of the type of functions in sub-paragraphs (a) to (d), which would normally be vested in the foreign authority, and the practice in no real sense differs from practices normally followed by foreign authorities.

(2) Where revenue due is foregone or not otherwise collected, the TRA may determine that no financial contribution has been made and in doing so the TRA must, in particular, have regard to footnote 1 and Annexes I to III to the Agreement on Subsidies and Countervailing Measures (being part of Annex 1A to the WTO Agreement)(1).

(3) For the purpose of—

- (a) paragraph (1)(a), the direct or potential direct transfer of funds includes grants, loans, equity infusions and loan guarantees;
- (b) paragraph (1)(b), revenue otherwise due, which is foregone, includes fiscal incentives such as tax credits.

Benefit conferred

21.—(1) The TRA is to determine whether a financial contribution by a foreign authority confers a benefit for the purpose of paragraph 3 of Schedule 4 to the Act in accordance with this regulation.

(1) Available from: https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

(2) The TRA must determine whether a person has directly or indirectly had a benefit conferred by a financial contribution or income or price support within the meaning of Article XVI of the General Agreement on Tariffs and Trade 1994 (being part of Annex 1A to the WTO Agreement).

(3) Where a foreign authority provides equity, the TRA may determine that a benefit is conferred where it considers that the investment decision is inconsistent with the usual investment practice, including for the provision of risk capital, of private investors in the foreign country or territory where the financial contribution was granted.

(4) Where a foreign authority grants a loan, the TRA may determine that a benefit is conferred where it considers there is a difference between the amount that the recipient receiving the loan pays on the loan from the foreign authority and the amount that the recipient would pay for a comparable commercial loan which the recipient could actually obtain on the market.

(5) When making a determination under paragraph (4), the TRA may make adjustments for fees payable by the recipient to receive the loan.

(6) Where a foreign authority guarantees a loan, the TRA may determine that a benefit is conferred where it considers there is a difference between the amount that the recipient receiving the guarantee pays on a loan guaranteed by the foreign authority and the amount that the recipient would pay on a comparable commercial loan in the absence of the government guarantee.

(7) When making a determination under paragraph (6), the TRA may make adjustments for fees payable by the recipient to receive the guarantee.

(8) Where a foreign authority makes a financial contribution by way of the provision of goods or services, the TRA may determine that a benefit is conferred where the remuneration for the goods or services is inadequate, as determined by reference to the prevailing market terms and conditions for the goods or service in the foreign country or territory where the financial contribution was made.

(9) Where a foreign authority makes a financial contribution by way of the purchase of goods, the TRA may consider that a benefit is conferred where the remuneration paid by the foreign authority for the goods is more than adequate, as determined by reference to the prevailing market terms and conditions for the goods in the foreign country or territory where the financial contribution was made.

(10) For the purpose of paragraphs (8) and (9), in considering whether remuneration is inadequate or more than adequate the TRA may have regard to price, quality, availability, marketability, transportation and other conditions of purchase or sale.

(11) For the purpose of this regulation, where the TRA considers that the prevailing market terms and conditions for the goods or services in question in the foreign country or territory are not an appropriate benchmark, the TRA may—

- (a) adjust the terms and conditions on the basis of actual costs, prices and other factors available in that country or territory, by an appropriate amount which reflects normal market terms and conditions; or
- (b) use the terms and conditions prevailing in the market of another foreign country or territory or on the world market, which would be available to the recipients.

Specificity

22.—(1) The TRA must determine whether a subsidy is specific for the purpose of paragraph 3 of Schedule 4 to the Act in accordance with this regulation.

(2) In order to determine whether or not a subsidy is specific, the TRA must consider whether—

- (a) the subsidy is explicitly—
 - (i) in terms of access, limited to certain enterprises or industries;
 - (ii) contingent on export performance;
 - (iii) contingent on the use of domestic over imported goods;

- (iv) limited to a specific geographical region within the jurisdiction of the granting authority; or
 - (b) the subsidy is in fact applied in a specific manner.
- (3) For the purpose of paragraph (2)(b), the circumstances in which a subsidy is in fact applied in a specific manner include—
- (a) where it is or has been used or granted disproportionately to certain enterprises or industries or regions;
 - (b) where there is discretion as to its granting, such discretion has been exercised in favour of specific enterprises or industries or regions.
- (4) When determining whether or not a subsidy is specific, in addition to the matters referred to in paragraph (2), the TRA must consider—
- (a) whether the foreign authority establishes objective criteria or conditions governing the eligibility for and the amount of the subsidy;
 - (b) whether the criteria or conditions are clear and verifiable;
 - (c) whether the terms of the subsidy are strictly adhered to;
 - (d) whether eligibility for the subsidy is automatic; and
 - (e) any other factors it considers relevant.
- (5) For the purpose of this regulation—
- (a) the setting or changing of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy;
 - (b) “objective criteria or conditions” means criteria or conditions that are neutral, do not favour certain industries or enterprises over others, and which are economic in nature and horizontal in application, such as the number of employees or size of enterprises;
 - (c) a subsidy is contingent on export performance where, in law or in fact and whether solely or as one of several conditions, it is tied to actual or anticipated exportation or export earnings, but the mere fact that a subsidy is granted to enterprises which export does not for that reason alone mean the subsidy is contingent on export performance;
 - (d) a subsidy is contingent on the use of domestic over imported goods where, in law or in fact, and whether solely or as one of several conditions, it is tied to the use of domestic over imported goods.
- (6) When determining whether a subsidy is a subsidy that is contingent on export performance the TRA must, in particular, have regard to footnote 1 and Annexes I to III to the Agreement on Subsidies and Countervailing Measures (being part of Annex 1A to the WTO Agreement).