



**NON-CONFIDENTIAL**

**AD0049**

**Applicant's Response to Oxy Vinyls' Comments on Registration of Imports**

15 October 2024

1. This submission is a response to Oxy Vinyls' Comments on the Registration of Imports of 20 August 2024, published on the public file on 26 September 2024.<sup>1</sup> Oxy Vinyls' comments raise issues to do with the registration of imports of Suspension Poly(vinyl chloride) (S-PVC).
2. On 31 July 2024, the Trade Remedies Authorities (TRA) published a notice to the public file notifying parties that the TRA had requested that all imports of Suspension Poly(vinyl chloride) originating from the United States of America (USA) be registered.<sup>2</sup> Pursuant to the TRA's request, the Secretary of State published Trade Remedies Notice 2024/07, instructing HM Revenue & Customs to register the importation of S-PVC from the USA.<sup>3</sup>
3. Oxy Vinyls alleges that there was both a procedural and substantive error with regard to the decision to register imports. The Applicant will address each of the alleged errors in turn and show that: (i) the registration decision did not contain procedural errors; and (ii) there has not been a substantive error in the decision to register imports.

(i) *The registration decision did not contain procedural errors*

4. Firstly, the Applicant wishes to recall the legal basis for the decision to make imports subject to registration. Schedule 4 to the Taxation (Cross-border Trade) Act 2018 provides the requirements for registration. Under paragraph 29(1) of Schedule 4, the Secretary of State may publish a notice of goods which are the subject of an investigation,<sup>4</sup> and to which an anti-dumping amount may be applied.<sup>5</sup> According to paragraph 29(2), HMRC must register goods in respect of which such a notice is published. This notice will hereinafter be referred to as the 'registration notice'.
5. The legal provision states that it is within the discretion of the Secretary of State to publish such a notice. There is no legal requirement in the provision mandating the TRA or the Secretary of State to consult the parties before publishing such a notice.

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<sup>1</sup> VVGB, Oxy Vinyls' Comments on Registration of Imports (Case Number: AD0049), 20 August 2024

<sup>2</sup> TRA, Notice to the Public File (Case Number: AD0049), 31 July 2024

<sup>3</sup> Department for Business & Trade, Trade remedies notice 2024/07: registration of imports on suspension poly(vinyl chloride) from the United States of America, 25 July 2024

<sup>4</sup> Taxation (Cross-border Trade) Act 2018 c. 22 ('Taxation Act'), Schedule 4, paragraph 29(1)(a)

<sup>5</sup> Ibid. paragraph 29(1)(b)

6. The Applicant wishes to highlight that this assessment is distinct both in time and in legal basis from the decision to apply retroactive duties, contained in Regulation 91 of the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019.<sup>6</sup> Regulation 91 specifically deals with the time from which an anti-dumping duty *can apply*.
7. According to regulation 91(1), the TRA may recommend that an anti-dumping amount should apply to goods from, *in a case where a notice registering imports has been published*, either: (i) a date during the period of 90 days before the beginning of the period of the provisional remedy provided it is not a date before the date of publication of that note;<sup>7</sup> or (ii) a date during the period of the provisional remedy.<sup>8</sup> Thus when regulation 91(1)(a) makes reference to the registration notice, it does so merely to preserve the possibility of applying duties to a period prior to the imposition of a provisional remedy.
8. Regulation 91(2) does go further when assessing the circumstances under which an anti-dumping duty can apply, prior to the date of the provisional remedy, when the Secretary of State *has published a notice of registration*. In such cases, the TRA must consider that certain requirements are met:
  - (a) There is a history of dumping which caused injury or the importer is, or should have been, aware that the overseas exporter practises dumping and that such dumping would cause injury to a UK industry;<sup>9</sup>
  - (b) The injury caused to a UK industry was caused by a massive volume of dumped goods in a short period of time;<sup>10</sup> and
  - (c) In light of the timing and volume of the dumped goods and other circumstances (for example a rapid build-up of inventories of the dumped goods), the application of anti-dumping amount to be applied is likely to seriously undermine the remedial effect of that amount.<sup>11</sup>
9. It is clear that this evaluation comes once the registration has already taken place, as it refers to the *prior* publication of a notice.
10. Regulation 91(3) states that before making the recommendation to apply a duty retroactively, the TRA must allow importers to submit any evidence they consider relevant. This procedural step unambiguously relates to regulation 91(1) – a

<sup>6</sup> The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 No. 450 (Trade Remedies Regulations)

<sup>7</sup> Taxation Act Schedule 4 paragraph 19(3)(a)(i)

<sup>8</sup> Taxation Act Schedule 4 paragraph 19(3)(a)(ii)

<sup>9</sup> Trade Remedies Regulations regulation 91(2)(a)

<sup>10</sup> Trade Remedies Regulations regulation 91(2)(b)

<sup>11</sup> Trade Remedies Regulations regulation 91(2)(c)

recommendation by the TRA to apply an anti-dumping amount – and not paragraph 29(1) of Schedule 4 – the publication of a notice of registration.

11. In this way, the two acts are distinct – first, there is the recommendation to publish a registration notice and second, there is the decision to impose retroactive duties prior to the provisional remedy. The legal requirement to allow importers to submit any evidence they consider relevant is explicitly related to the second act – the imposition of retroactive duties.
12. The Applicant therefore submits that Oxy Vinyls has misunderstood the law when it says *‘no details, much less analysis, have so far been provided that would demonstrate that the substantive requirements for registration – as encompassed in UK law (the aforementioned regulations 91 and 92) – have actually been met.’* [own emphasis added]<sup>12</sup> The substantive requirements in regulation 91 relate to the imposition of a retroactive duty and is an evaluation that takes place at a point in time after the registration decision.
13. With regard to the alleged procedural rights that have been violated, the Applicant alleges that there is thus no requirement for the TRA to *‘notify interested parties of its request to the Secretary of State’*<sup>13</sup> when taking a decision to register imports. This requirement is clearly set out in regulation 91 and is distinct from the registration requirements in paragraph 29.
14. In the EU, an analogous argument arose concerning exporting producer’s procedural rights in relation to a decision to register imports of certain pneumatic tyres originating in China. The exporting producer argued that *‘no information regarding the Commission’s intention to make imports subject to registration had been communicated to it before the entry into force of the registration regulation.’*<sup>14</sup> As a result, the exporting producer claimed that there was a breach of the right to good administration contained in Article 41 of the Charter of Fundamental Rights of the European Union.
15. The Commission in that investigation observed that:

*‘prior disclosure is mandatory under Article 20(2) of the basic Regulation before the imposition of definitive measures. The same does not apply to a registration decision under Article 14(5) of the basic Regulation. [...] Moreover, the right to be heard under Article 41(2)(a) of the Charter of Fundamental Rights of the European Union only applies to individual adverse measures. In this case, the Commission directed the Union*

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<sup>12</sup> Oxy Vinyls submission p. 3

<sup>13</sup> Oxy Vinyls submission p. 4

<sup>14</sup> Commission Regulation (EU) 2018/683 imposing a provisional anti-dumping duty on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China, and amending Implementing Regulation (EU) 2018/163 *OJL* 116, 7.5.2018, recital (8)

*customs authorities to register imports. The registration regulation is not an individual measure affecting the Hankook Group adversely. It was neither addressed to the Hankook Group nor did it produce individual negative effects for that group. Therefore, neither the rights of defence of the Hankook Group nor Article 41 of the Charter of Fundamental Rights of the European Union were violated.* [own emphasis added]<sup>15</sup>

16. Therefore, the Applicant maintains that the registration notice does not produce any adverse effects for Oxy Vinyls. As such, neither the rights of defence of the exporting producer, nor the right to good administration have been infringed.

17. Moreover, there is no general duty under common law in the UK to give reasons for every administrative decision that is taken, as this would lead to a great burden to public officials. The courts have held that fairness demands a reasoned explanation for a determination where: (i) an interest of a person is affected;<sup>16</sup> or (ii) some “trigger factor” exists, such as an apparently aberrant decision.<sup>17</sup> *In casu*, it is clear that the mere decision to subject imports of a product to registration does not meet the threshold of affecting the interest of a person or an aberrant decision. The case would be different if there were no reasons produced in the decision to collect duties retroactively to the date of registration.

(ii) *There has not been a substantive error in the decision to register imports*

18. With regard to the supposed substantive error made by the TRA, the Applicant submits that Oxy Vinyls has misunderstood the registration requirements in the UK and has applied the legal standard for the retroactive imposition of duties. This standard is a distinct legal standard, evaluated at a distinct time in the investigation as regards registration.

19. The distinction between registration and retroactive duties is now reflected in the Commission’s practice regarding registration, in light of a recent change. On 24 September 2024, the Commission announced that it *‘decided today to register all imports of products under anti-dumping or anti-subsidy investigations, including ongoing investigations where provisional determinations have not yet been made’* [own emphasis added].<sup>18</sup> This policy change by the European Commission is relevant to the extent that it shows that registration does not require an in-depth evaluation of the retroactive duty criteria as the two actions are distinct.

<sup>15</sup> Ibid. recital (8)

<sup>16</sup> *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 Appeal Cases 531

<sup>17</sup> *R v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All England Reports 310.

<sup>18</sup> Directorate-General for Trade (24 September 2024) ‘*Commission to register imports of all products under trade defence investigations in bid to fight unfair competition*’, available at: [https://policy.trade.ec.europa.eu/news/commission-register-imports-all-products-under-trade-defence-investigations-bid-fight-unfair-2024-09-24\\_en](https://policy.trade.ec.europa.eu/news/commission-register-imports-all-products-under-trade-defence-investigations-bid-fight-unfair-2024-09-24_en), accessed on 10 October 2024

20. Oxy Vinyls refers to the fact that the Commission found that there was no basis for the registration of imports in the anti-dumping investigation concerning imports of PVC originating in *inter alia* the USA. The Applicant submits that this reference should carry no weight considering the Commission's change in practice. Likewise, any reference to the Commission's previous practice as a relevant basis to understand the substantive requirements for registration are no longer relevant and should be disregarded.
21. Thus, there is no basis to assert that the TRA is required to verify whether the importers were aware or should have been aware of such dumping.<sup>19</sup> Nor, is the assertion that there should be a comparison of the post-IP import flows with the volumes in an analogous period within the IP.<sup>20</sup>
22. The Applicant recalls that prior WTO case law sets out the requirements in registration decisions. As determined in *US – Hot-Rolled Steel*, Article 10.7 of the Anti-Dumping Agreement (ADA)<sup>21</sup> allows the authority to *'take certain necessary measures of a purely conservatory or precautionary kind which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6. Unlike provisional measures, Article 10.7 measures are not primarily intended to prevent injury being caused during the investigation. They are taken in order to make subsequent retroactive duty collection possible as a practical matter.'*<sup>22</sup>
23. In this way, the level of evidence required for the registration of imports is 'sufficient evidence' rather than the higher standard of an affirmative determination as required by regulation 91(2). In this regard, the Panel noted in *US – Hot-Rolled Steel* that *'given the precautionary nature of the measures that may be taken under Article 10.7', it 'can perceive of no reason ... why that same information [for the purposes of the initiation of the Complaint] might not justify a determination of sufficient evidence of dumping and consequent injury in the context of Article 10.6 as required by Article 10.7.'*<sup>23</sup>
24. According to paragraph 9(1) of Schedule 4, the TRA may initiate a dumping investigation in relation to goods only if it is requested to initiate an investigation in an application made by or on behalf of a UK industry in the goods and it is satisfied that the application contains sufficient evidence that the goods have been or are being dumped in the United Kingdom and the dumping has caused or is causing injury to a UK industry in those goods.<sup>24</sup> The TRA thus determined that there was sufficient evidence to initiate an investigation.<sup>25</sup>

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<sup>19</sup> Oxy Vinyls Submission p.6

<sup>20</sup> Oxy Vinyls Submission p.7

<sup>21</sup> Agreement on the Implementation of Article VI of GATT 1994 1868 U.N.T.S. 201 ('ADA')

<sup>22</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ('US – Hot-Rolled Steel'), WT/DS184/R, 28 February 2001, para 7.155-7.156

<sup>23</sup> *US – Hot-Rolled Steel*, para. 7.158

<sup>24</sup> Taxation Act Schedule 4 paragraph 9(1)(a) and 9(1)(b)

<sup>25</sup> Notice of Initiation Suspension Poly(vinyl chloride) Imported into the United Kingdom and originating in the United States of America Initiation of an Investigation into Alleged Dumping Investigation No. AD0049 (8 January 2024)

25. The Applicant submits that the evidence in support of the opening of the investigation is sufficient evidence of dumping and consequent injury in the context of Article 10.6, as required by Article 10.7 of the ADA.