

European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft

1. The European Union¹ refers to the recommendations and rulings of the WTO Dispute Settlement Body (“DSB”) with respect to the dispute *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316), as well as the compliance panel report (WT/DS316/RW), as modified by the recent Appellate Body report (WT/DS316/AB/RW),² in that same dispute.

2. The European Union would like to inform the DSB that it has taken appropriate steps to bring its measures fully into conformity with its WTO obligations, and to comply with the DSB’s recommendations and rulings. By taking appropriate steps to bring the measures at issue into conformity with the European Union’s WTO obligations, as required by Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) and Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), the European Union has ensured full implementation of the DSB’s recommendations and rulings, and has consequently eliminated any nullification or impairment attributable to non-compliance with those recommendations and rulings.

3. In this communication to the DSB, the European Union uses the term “adverse effects” in the same sense as that term is used in Articles 5, 7.8, 7.9 and 7.10 of the *SCM Agreement*. Consistent with those provisions, achieving compliance by withdrawing the subsidy or taking appropriate steps to remove the adverse effects also achieves the elimination of nullification or impairment within the meaning of Article 5(b) of the *SCM Agreement* and Articles 22.4, 22.7 and 22.8 of the DSU.

¹ Where the context so requires, as a matter of WTO law, references in this document to the European Union include the “certain member States” (France, Germany, Spain and the United Kingdom) against which the United States commenced this dispute.

² References in this communication to the compliance panel report, as modified by the Appellate Body Report, also encompass the compliance Appellate Body Report itself.

4. The relationship, in this dispute, between achieving compliance by withdrawing the subsidy or taking appropriate steps to remove the adverse effects, on the one hand, and the elimination of nullification and impairment, on the other, is also underscored by:

(1) the specific and unique character of proceedings under Part III of the *SCM Agreement*;

(2) the specific terms of the Recourse to Article 7.9 of the *SCM Agreement* and Article 22.2 of the DSU by the United States,³ and the Recourse to Article 22.6 of the DSU by the European Union;⁴ and,

(3) the Agreed Procedures under Article 21 and 22 of the DSU and Article 7 of the *SCM Agreement* that the European Union and the United States adopted for the purposes of this dispute on 12 January 2012.⁵

5. Given that this communication concerns, in part, the withdrawal of subsidies and/or the removal of adverse effects, it is relevant for “the original panel” within the meaning of Article 21.5 of the DSU, in the event that it is called upon, for a second time, to adjudicate a “disagreement”, within the meaning of Article 21.5.

6. At the same time, given that this document also concerns the elimination of nullification and impairment, it is equally relevant for “the original panel” within the meaning of Article 22.6 of the DSU, in the event of arbitration panel proceedings.

I. Background

7. The European Union recalls that the recommendations and rulings of the DSB, adopted in June 2011, cover a number of subsidies in the form of member State financing (“MSF”) from France, Germany, Spain and the United Kingdom (“UK”) for the development of various families of Airbus large civil aircraft (“LCA”). In particular, the DSB’s recommendations and

³ WT/DS316/18 (“[T]he United States requests authorization from the Dispute Settlement Body (‘DSB’) to take countermeasures with respect to the European Union (‘EU’) at an annual level *commensurate with the degree and nature of the adverse effects caused to the interests of the United States* by the failure of the EU and certain member States to *withdraw subsidies or remove their adverse effects* in compliance with the recommendations and rulings of the DSB. This amount corresponds to the annual value of lost sales, of imports of US large civil aircraft displaced from the EU market, and of exports of US large civil aircraft displaced from third country markets. The amount will be *updated annually* using the most recent publicly available data.”) (emphasis added).

⁴ WT/DS316/20.

⁵ WT/DS316/21.

rulings called upon the European Union to secure compliance with its WTO obligations in respect of MSF for the A300, A310, A320, A330/340, A330-200, A340-500/600 and A380. The recommendations and rulings also covered certain infrastructure measures, equity infusions and a number of regional development grants.

8. On 1 December 2011, the European Union informed the DSB of the steps taken to implement the DSB's recommendations and rulings.⁶ A disagreement arose between the United States and the European Union regarding the sufficiency of the compliance steps communicated by the European Union to the DSB. Following consultations, and at the request of the United States, on 13 April 2012, the DSB referred the parties' disagreement to a compliance panel established under Article 21.5 of the DSU.

9. The compliance panel circulated its report on 22 September 2016. The report of the compliance panel was appealed by both parties, and the Appellate Body circulated its report on 15 May 2018.

10. In the compliance proceedings, the panel report, as modified by the Appellate Body report, confirms that the European Union has achieved substantial compliance with much of the DSB's recommendations and rulings.⁷ However, the panel report, as modified by the Appellate Body report, also found that the European Union had not yet fully complied with all of the DSB's recommendations and rulings in respect of adverse effects arising from A380 MSF, and added recommendations and rulings in respect of A350XWB MSF (with respect to which the European Union has yet to receive a reasonable period of time in which to comply, within the meaning of Article 21.3 of the DSU).

11. In considering appropriate steps to bring these remaining and additional measures into conformity with its WTO obligations, the European Union took note of all elements of the DSB's recommendations and rulings, and the Appellate Body's guidance on the content and nature of the applicable compliance obligation under Article 7.8 of the *SCM Agreement*. In particular, the European Union notes the Appellate Body's confirmation that a Member found to

⁶ WT/DS316/17.

⁷ Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.1-5.25, 5.351-5.383, 5.384-5.404, 5.710, 5.716, 5.719-5.722, 5.731, 5.732-5.737, 5.742, 6.2, 6.11, 6.12-6.13, 6.19, 6.26-6.29, 6.32-6.35, 6.39-6.40.

have acted inconsistently with Articles 5 and 6.3 of the *SCM Agreement* can achieve compliance under Article 7.8 by either (i) withdrawing the subsidy, or (ii) taking appropriate steps to remove the adverse effects of the subsidy. The European Union also notes the Appellate Body's findings on the meaning of the term "withdraw" in Article 7.8. In relation to the removal of adverse effects, the European Union has also given close consideration to the Appellate Body's guidance on the delineation of product markets, the requirements of a proper causation assessment, and the preconditions for a finding of displacement or of impedance. The European Union has also closely monitored and assessed LCA product and market developments in the months and years following the period covered by the panel's review.

12. Taking all of these factors into account, the European Union has taken appropriate steps to address the remaining and additional elements of the DSB's recommendations and rulings, either through the withdrawal of subsidies or the removal of the adverse effects.⁸

13. In Section II, the European Union lists the measures taken to comply with the DSB's recommendations and rulings. In Section III, the European Union explains that these measures achieve the withdrawal of the subsidies at issue, constitute appropriate steps to remove their adverse effects, or both, and achieve the elimination of nullification and impairment.

14. By taking appropriate steps to bring the measures at issue into conformity with the European Union's WTO obligations, as required by Article 7.8 of the *SCM Agreement* and Article 19.1 of the DSU, the European Union has ensured full implementation of the DSB's recommendations and rulings, and has consequently eliminated any nullification or impairment attributable to non-compliance with those recommendations and rulings.

II. List of Measures Taken to Comply

15. The European Union sets out below a list of measures taken to comply with the recommendations and rulings of the DSB in the present dispute.

⁸ The European Union has done so "immediately" to the extent "practicable". However, with respect to the additional elements of the DSB's recommendations and rulings, this is without prejudice to the European Union's right to a reasonable period of time, within the meaning of Article 21.3 of the DSU.

A. Measures that Achieve Withdrawal of the Subsidies under Articles 7.8, 1 and 2 of the *SCM Agreement*, and Contribute to Removal of their Adverse Effects, under Articles 7.8, 5 and 6.3 of the *SCM Agreement*⁹

- i. A 2018 amendment to the French A380 MSF Agreement;
- ii. A 2018 amendment to the German A380 MSF Agreement;
- iii. A 2018 amendment to the Spanish A380 MSF Agreement;
- iv. A 2018 amendment to the UK A380 MSF Agreement;
- v. A 2018 amendment to the German A350XWB MSF Agreement;
- vi. Full repayment of the UK A350XWB MSF in 2018;
- vii. Withdrawal through amortisation or otherwise of the “benefit” conferred by the French, German, Spanish and UK A380 MSF Agreements; and,
- viii. Withdrawal through amortisation or otherwise of the “benefit” conferred by the French, German, Spanish and UK A350XWB MSF Agreements.

B. Measures that Constitute Appropriate Steps to Remove Adverse Effects, under Articles 7.8, 5 and 6.3 of the *SCM Agreement*

- ix. Withdrawal, through amortisation or otherwise, of the “benefit” conferred by the French, German, Spanish and UK A380 MSF Agreements;
- x. Non-subsidised investments in A380 family aircraft;
- xi. Reduced draw down of the loan amounts under the French A380 MSF Agreement;
- xii. Cancellation or completion of A380 deliveries corresponding to the Transaero 2012 and Emirates 2013 orders, and delivery of any outstanding A380 aircraft to certain country markets covered by the finding of impedance in the Very Large Aircraft (“VLA”) market;
- xiii. Attenuation, through the passage of time and events that occurred during that time, of the causal link between A380 MSF and the launch of the A380 and the A350XWB, as and when they were launched;
- xiv. Withdrawal, through amortisation or otherwise, of the “benefit” conferred by the French, German, Spanish and UK A350XWB MSF Agreements;
- xv. Non-subsidised investments in A350XWB family aircraft;

⁹ As noted at paragraph 16, below, through the withdrawal of subsidies, these measures also contribute to the removal of adverse effects.

- xvi. Reduced draw down of the loan amounts under the French and UK A350XWB MSF Agreements;
- xvii. Attenuation, through the passage of time and events that occurred during that time, of the causal link between A350XWB MSF and the launch of the A350XWB as and when it was launched; and,
- xviii. Completion or conversion to other aircraft of A350XWB deliveries corresponding to the Cathay Pacific 2012, Singapore Airlines 2013 and United Airlines 2013 orders of the A350XWB.

III. The Measures Taken to Comply Achieve Full Compliance within the Framework of Article 7.8 of the *SCM Agreement*

16. As noted above, in its report in the compliance proceedings, the Appellate Body clarified that a Member found to have provided subsidies that have resulted in adverse effects, under Articles 5 and 6.3 of the *SCM Agreement*, can come into compliance by either withdrawing the subsidy, or by taking appropriate steps to remove the adverse effects of those subsidies.¹⁰ In part II.A, below, the European Union explains that measures i-viii listed above achieve the withdrawal of the subsidy from A380 MSF and A350XWB MSF. Through the withdrawal of the subsidy, these measures also contribute to the removal of adverse effects, and to the elimination of nullification and impairment. For any subsidies that have not been withdrawn, the European Union explains in part II.B, below, that measures ix-xviii listed above constitute appropriate steps to remove their adverse effects, which would also contribute to the elimination of nullification and impairment.

A. Withdrawal of the Subsidies

17. The Appellate Body clarified that a Member found to have provided subsidies that have resulted in adverse effects, under Articles 5 and 6.3 of the *SCM Agreement*, can achieve full compliance by withdrawing the subsidy.¹¹ The European Union notes that measures achieving the full or partial withdrawal of subsidies at issue would also contribute to the removal of adverse effects, and to the elimination of nullification and impairment.

¹⁰ Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.383.

¹¹ Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.383.

18. The European Union has procured full withdrawal of the subsidy from French, German, Spanish and UK A380 MSF, and of the subsidy from German and UK A350XWB MSF, and at least partial withdrawal of the subsidies from French and Spanish A350XWB MSF.

19. **A380 MSF:** France, Germany, Spain and the UK have agreed amendments with Airbus to each of the A380 MSF Agreements (Measures i-iv, listed above). In each case, the parties have agreed amendments to achieve prospective consistency with a contemporaneous market benchmark. Therefore, the European Union has procured withdrawal of the subsidies conferred by each of the A380 MSF loans.

20. In any event, the benefit from the French, German, Spanish and UK A380 MSF subsidies has been withdrawn through amortisation or otherwise, achieving the withdrawal of these subsidies (Measure vii, listed above).

21. **GERMAN A350XWB MSF:** Germany, through Kreditanstalt für Wiederaufbau (“KfW”), and Airbus have concluded an amendment to the German A350XWB MSF agreement (Measure v, above). The amendment achieves consistency with a contemporaneous market benchmark, such that the subsidy conferred by German A350XWB MSF is withdrawn. Additionally, the European Union also notes that the benefit conferred by the German A350XWB MSF loan has now substantially amortised (Measure viii, listed above).

22. **UK A350XWB MSF:** Airbus has repaid in full amounts outstanding under the UK A350XWB MSF Agreement (Measure vi, above), such that the subsidy conferred by UK A350XWB MSF is withdrawn. Additionally, the European Union also notes that the benefit conferred by the UK A350XWB MSF loan has now substantially amortised (Measure viii, listed above).

23. **FRENCH AND SPANISH A350XWB MSF:** The benefit from the French and Spanish A350XWB MSF has now substantially been withdrawn through amortisation or otherwise (Measure viii, listed above).

B. Appropriate steps to remove the adverse effects

24. The Appellate Body also clarified that a Member found to have conferred subsidies that have resulted in adverse effects, under Articles 5 and 6.3 of the *SCM Agreement*, can come into compliance by taking appropriate steps to remove the adverse effects.¹²

25. In the present dispute, the United States advanced its adverse effects claim based on an allegation that the provision of the subsidies at issue caused the launch of several families of Airbus aircraft. The June 2011 recommendations and rulings adopted by the DSB reflected these arguments, and were based on the finding that the subsidies at issue were a genuine and substantial cause of the sale and delivery of certain Airbus aircraft, and consequently certain adverse effects to the United States found to have resulted from those sales and deliveries.

26. In the compliance proceedings in the present dispute, the panel report, as modified by the Appellate Body, found that the MSF subsidies were a genuine and substantial cause of certain sales and deliveries of A380 and A350XWB aircraft that were held to trigger adverse effects. For the A380, these adverse effects were attributed to the “direct effects” of A380 MSF alone. For the A350XWB, these adverse effects were attributed to the “direct effects” of A350XWB MSF, and the “indirect effects” of A380 MSF.

27. As the European Union has already discussed above, the European Union has now withdrawn the A380 MSF subsidies, the German and UK A350XWB MSF subsidies,¹³ and has, therefore, achieved full compliance in respect of these subsidies (Measures i-vii, above). Therefore, the question whether these withdrawn subsidies are presently a cause of adverse effects is irrelevant as a matter of law.

28. Nonetheless, the European Union has also taken appropriate steps to remove any adverse effects attributable to any or all of the subsidies in respect of which the European Union incurred compliance obligations in light of the compliance panel report, as modified by the Appellate Body report (*i.e.*, A380 MSF and A350XWB MSF). Currently, neither A380 MSF nor

¹² Appellate Body Report, *EC – Large Civil Aircraft (Article 21.5 – US)*, para. 5.383.

¹³ As discussed above, the European Union has also achieved at least partial withdrawal of the French and Spanish A350XWB MSF subsidies.

A350XWB MSF is a genuine and substantial cause of any adverse effects. Below, the European Union explains this conclusion with reference to the A380 and the A350XWB.

29. **A380:** As discussed above, the A380 MSF subsidies have now been withdrawn through amendments that prospectively align the A380 MSF loans with the relevant contemporary market benchmark (Measures i-iv). Without prejudice to that observation, the European Union considers that, in any event, any benefit from A380 MSF has been withdrawn through amortisation or otherwise (Measure vii, above). These demonstrate that the subsidies can no longer be considered a genuine and substantial cause of sales or deliveries of A380 aircraft, or any associated adverse effects.

30. The European Union also notes that Airbus did not draw down the full amount of the French A380 MSF loan (Measure xi, above). This shows, once again, that the subsidy can no longer be considered a genuine and substantial cause of sales or deliveries of A380 aircraft, or any associated adverse effects.

31. Airbus has also undertaken significant non-subsidised investments in the A380, and in A380-related continuous support and development (Measure x, listed above). Currently, neither A380 MSF nor any other subsidy at issue is a genuine and substantial cause of sales or deliveries of A380 aircraft, or any associated adverse effects.

32. The Transaero 2012 order for A380 aircraft, which formed the basis of lost sales findings confirmed by the Appellate Body, has been cancelled; many of the deliveries corresponding to the 2013 order by Emirates have already been made (Measure xii, listed above). These measures again constitute appropriate steps for the removal of adverse effects in the form of lost sales.

33. The passage of time has also attenuated the causal link between the A380 MSF subsidies and the launch of the A380 as and when it was launched, such that A380 MSF is no longer a cause of sales or deliveries of A380 aircraft or any associated adverse effects (Measure xiii, listed above).

34. **A350XWB:** As the European Union discussed above, A380 MSF, which the compliance panel report, as modified by the Appellate Body, considered to be a cause of the launch of the

A350XWB as and when it was launched, and of resulting sales or deliveries of the A350XWB aircraft and associated adverse effects, has now been withdrawn, either through the prospective alignment of the A350XWB MSF loans with the relevant contemporary market benchmark, or otherwise (including by amortisation) (Measures i-iv and vii, above).

35. As the European Union discussed above, German and UK MSF subsidies for the A350XWB have now also been withdrawn (Measures v and vi, listed above). As such, they can no longer be considered a cause of the launch of the A350XWB as and when it was launched, and of resulting sales or deliveries of A350XWB aircraft or any associated adverse effects.

36. As discussed above, the European Union has also achieved at least partial withdrawal of the French and Spanish A350XWB MSF subsidies (Measure viii, listed above).

37. While appropriate steps for the removal of the adverse effects are not necessary in respect of subsidies which have been withdrawn, the European Union has, in any event, taken such steps in relation to all of the A350XWB MSF subsidies.

38. The European Union notes that Airbus did not draw down the full amount under the French and UK A350XWB MSF Agreements (Measure xvi, above). This demonstrates that there is very little, if any, benefit remaining from the A350XWB MSF subsidies, such that the A350XWB MSF subsidies can no longer be considered a cause of the launch of the A350XWB as and when it was launched, and of resulting sales or deliveries of A350XWB aircraft or any associated adverse effects.

39. Additionally, any benefit from the A350XWB MSF subsidies has now substantially amortised (Measure xiv, above). Once again, this demonstrates that the A350XWB MSF subsidies can no longer be considered a cause of the launch of the A350XWB as and when it was launched, and of resulting sales or deliveries of A350XWB aircraft or any associated adverse effects.

40. The passage of time has also attenuated the causal link between the A380 and A350XWB MSF subsidies and the launch of the A350XWB as and when it was launched, such that A380 MSF and A350XWB MSF can no longer be considered a cause of the launch of the A350XWB

as and when it was launched, and of resulting sales or deliveries of A350XWB aircraft or any associated adverse effects (Measures xiii and xvii, listed above).

41. Additionally, Airbus has undertaken significant non-subsidised investments in the A350XWB, and in A350XWB-related continuous support and development (Measure xv, above). Neither A350XWB MSF nor any other subsidy at issue is currently a genuine and substantial cause of sales or deliveries of the A350XWB or any associated adverse effects.

42. Moreover, the Cathay Pacific 2012, Singapore Airlines 2013 and United Airlines 2013 orders, which formed the basis of lost sales findings confirmed by the Appellate Body, have been delivered or converted to other aircraft (Measure xviii, above). These measures again constitute appropriate steps for the removal of adverse effects in the form of lost sales.

IV. Conclusion

43. In light of the above, and in light of the “Agreed Procedures under Article 21 and 22 of the DSU and Article 7 of the SCM Agreement” adopted by the European Union and the United States on 12 January 2012 for purposes of this dispute, the European Union notifies the DSB that it has achieved full compliance with the recommendations and rulings in the present dispute.¹⁴

¹⁴ As noted above, this notification is without prejudice to the European Union's right to a reasonable period of time, within the meaning of Article 21.3 of the DSU.