

# The EU plans to respond to the Trump tariffs – what you need to know

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## The Trump tariffs

Early in his second term, President Donald Trump has already imposed tariffs on a range of imports into the US and directed his administration to undertake investigations concerning the imposition of further tariffs. In particular, he has:

- imposed an additional 10% tariff on all imports from China (effective 4 February);
- imposed a 25% tariff on imports of steel and aluminium worldwide (effective 12 March);
- imposed a 25% tariff on imports from Canada and Mexico, although after countermeasures, counterthreats and negotiations, these tariffs were not applied and have been suspended until 4 March;
- requested the Department of Commerce to investigate the potential imposition of tariffs on copper imports worldwide;
- directed his administration to consider actions such as tariffs in response to the foreign treatment of US digital companies, especially by the EU; and
- most recently, confirmed his intention to impose a 25% tariff on EU imports.

In addition, President Trump has directed his administration to study how the US might impose 'reciprocal tariffs'. In essence, this involves the US identifying countries that impose higher tariffs than the US and, in respect of each such country, the US imposing equivalent tariffs on imports from that country.

It is presently unclear whether the 'reciprocal' tariff plan would be imposed on a product by product basis, which would be administratively extremely burdensome, or on an averaged basis. Moreover, in an unprecedented move, the US has proposed to

treat internal value added taxes, which are imposed on a non-discriminatory basis by most other countries, as though they were tariffs.

Regardless of how extensive this 'reciprocal' tariff plan turns out to be, it will not be consistent with WTO law. In the WTO, WTO members negotiate with each other the maximum tariffs that they can each impose on products from other WTO members. These tariffs differ according to the importing country. For example, the US has bound itself to a maximum tariff of 25% on imports of trucks and 2.5% on cars, while the EU has bound itself to a maximum tariff of 22% on trucks and 10% on cars. This means that, for example (a) the US cannot impose a 30% tariff on imports of trucks, and (b) according to the 'most favoured nation' rule, the US cannot impose a 30% tariff on imports of trucks from one WTO member, and only 25% on trucks from another.<sup>1</sup>

The Trump administration's approach to tariffs is novel in scope and intent. But it also differs from the approach adopted under the first Trump administration (2016 – 2020). Unlike then, these tariffs:

- have no exceptions;
- are cumulative; and
- have no rebate for imports used to produce US exports, making them cumulative for back-and-forth cross-border production lines (leading to a potentially major multiplier effect).

## Target country reactions

These tariffs have provoked reactions from affected countries. Canada and Mexico immediately responded to the US tariffs against them (albeit suspended) with threatened tariffs of their own, but have held off on imposing retaliatory tariffs for so long as the US

<sup>1</sup> There are exceptions for free trade agreements, where the tariff can be less (usually zero), and under voluntary schemes for products from developing countries.

continues to suspend its own tariffs. China (and Hong Kong, an independent WTO member) have both commenced WTO proceedings against the US concerning the tariffs imposed against imports from China, which also apply to imports from Hong Kong. And a number of other countries have similarly indicated their intention to retaliate to any US tariffs imposed against them, as and when these arise.

## **EU response: the legal framework**

The EU has signalled that it will react “firmly and immediately” against “unjustified barriers to free and fair trade, including when tariffs are used to challenge legal and non-discriminatory policies”. This briefing explains the two main tools that the EU has at its disposal to respond to the Trump tariffs, both, incidentally, with a history dating back to the first Trump administration.

The first tool is the EU’s Enforcement Regulation (Regulation 654/2014), which permits the EU to adopt ‘rebalancing measures’ in several scenarios, including when another country adopts safeguard measures against an unexpected flood of imports. The EU imposed tariffs under this regulation in response to the 2018 US tariffs on steel and aluminium, and could easily reimpose these tariffs now.

The second tool is the EU’s Anti-Coercion Instrument (Regulation 2023/2675) (the ACI). The ACI was inspired by the US threatening to impose tariffs on EU imports during the first Trump administration in response to EU member state digital services taxes. The EU has already confirmed that it is prepared to invoke the ACI if it is struck by ‘coercive’ US tariffs.

### **The Enforcement Regulation**

The Enforcement Regulation was established in 2014 to enable the EU to respond quickly to ‘safeguard’ measures (which are a type of ‘force majeure’ import restrictions to protect domestic industry).<sup>2</sup> As noted, when the first Trump administration imposed global 25% steel and 10% aluminium tariffs, the EU invoked the Enforcement Regulation to impose ‘rebalancing’ tariffs, valued at €2.8bn annually, on a set of US products chosen for their economic and/or political importance. These included steel and aluminium, agricultural products, denim jeans, Harley Davidson motorcycles, bourbon whiskey, as well as makeup, tobacco and various other products.

In 2020, following a negotiated exemption from US tariffs under the Biden administration, the EU retaliatory tariffs were suspended – but only until 31 March 2025. This makes it likely that the EU may

simply allow its rebalancing tariffs to revive on 31 March in response to the latest Trump tariffs.

But there is a twist. The US justifies its tariffs as a national security measure, not a safeguard measure. If this characterisation is correct, then, under EU law, the Enforcement Regulation would be inapplicable. Moreover, the US may have good grounds for this. In 2018, China instituted WTO dispute settlement proceedings against the US steel and aluminium tariffs. The WTO panel in that case agreed with the national security rationale (even though the conditions of the national security exception in the GATT were not met).<sup>3</sup>

In an additional twist, this ruling is not formally binding as a matter of WTO law, because the US appealed it to the (currently non-existent) WTO Appellate Body. Formally, then, this ruling exists in limbo. It is therefore an open question whether the EU would consider itself bound not to treat the new steel and aluminium tariffs as safeguard measures even though their stated rationale is identical to that of the 2018 tariffs.

However, if the EU decides that the new steel and aluminium tariffs are in fact safeguard measures, then under the Enforcement Regulation it can not only allow its existing ‘rebalancing’ tariffs to revive, but it can also impose additional rebalancing tariffs equal to any new damage caused by the new US tariffs.

### **Anti-Coercion Instrument**

‘Rebalancing’ under the Enforcement Regulation has the advantage of precedent and speed. But – as discussed – it only applies to safeguard tariffs. Quite aside from whether it can apply to the steel and aluminium tariffs, it cannot apply to any ‘reciprocal’ tariffs or the recently announced ‘general’ 25% EU tariff, which are not designed to protect domestic industry.

In this situation, the EU is likely to reach for its second main tool, the 2023 Anti-Coercion Instrument (the ACI). As noted, this instrument was adopted when the EU realised that it was difficult to respond quickly and effectively to tariff threats by the first Trump administration (in that case designed to prevent France and other EU member states from adopting digital services taxes). Those threats never materialised, and in the intervening period the ACI was more often cited in the context of ‘coercion’ by China. But it is now front and centre of the EU’s likely response to any ‘coercive’ tariffs by the US.

<sup>2</sup> In 2021, the Enforcement Regulation was amended to allow the EU to respond to failures of its trade partners to engage with WTO and FTA dispute settlement procedures in good faith.

<sup>3</sup> WTO Panel Report, *US - Steel and Aluminium Products*, WT/DS544/R.

## What is 'coercion', and how can the EU respond?

The ACI defines 'coercion' as an attempt to pressure the EU or a member state into making a particular choice by applying, or threatening to apply, measures affecting trade or investment against the EU or a member state in order to affect its sovereign policy choices.

Where coercion is established, the ACI authorises the EU (acting by qualified majority) to adopt 'rebalancing' measures. The menu of rebalancing measures which the EU may choose to adopt includes:

- goods: imposing duties and other charges, as well as other restrictions on imports and exports;
- services: imposing restrictions on trade in services, which includes limiting the rights of investors in services;
- intellectual property: withdrawing IP protection or commercial exploitation;
- government procurement: restricting the award of government contracts; and
- foreign investment: withdrawing foreign investment protections.

These measures can also be specific to an entity where that entity is 'linked' to a given state (usually state-owned enterprises, or similar). Otherwise they must be measures of 'general application'. This means that they must be drafted as applicable to objectively defined economic interests (e.g. a given service sector). However, in practice even measures of 'general application' can be very targeted at specific economic sectors.

## ACI decision-making process – room for exemptions?

The ACI appears to be a strong basis for the EU to respond to the Trump tariffs, but it suffers from a lengthy set of procedures that need to be followed before the EU is able to react. In fact, the ACI's own suggested timeline is 10 months, even if it is possible that it can act much more quickly, perhaps even in a matter of days or weeks, in an emergency situation. Importantly, though, these procedures open an opportunity for businesses to argue for exemptions from any rebalancing measures.

## Determining 'coercion'

The ACI decision-making process begins with an examination by the European Commission (the Commission) as to whether there is coercion, taking into account a variety of factors, such as the degree of harm caused and the intention of the coercing state. The final decision rests with the EU Council, where EU member states have to vote in favour by qualified majority vote.

## Consequences of a determination of 'coercion'

If the EU Council decides that there is coercion, the Commission must notify the coercing country, share relevant information, and invite it to consultations for a reasonable period, seeking cessation of the coercion and a potential mutually agreed solution. This mandatory engagement offers a diplomatic resolution pathway before countermeasures are imposed.

If consultations fail, the Commission may propose 'rebalancing' measures, taking into account factors such as proportionality, reducing harm to the EU, and the broader EU interest. This proposal is also not the final word: EU member states can reject it by qualified majority vote.

## Assessment

Unlike individual countries, the EU suffers from the need to reconcile the interests of 27 member states, and this can bog down its decision-making. But – as Brexit showed – where there is agreement, at least among a strong majority of its member states, the EU is capable of acting with speed and determination.

In the case at hand, it is likely that the EU will react under the Enforcement Regulation, by not renewing the existing suspension of tariffs on US imports when this suspension expires on 31 March. Should further tariffs be applied by the Trump administration, and in particular the 'reciprocal' tariffs, the EU will then be faced with a more difficult question: whether to apply the ACI for the first time.

If there is sufficient political support, and the EU invokes the ACI procedures, it will have a large range of options for retaliation, including freezing US companies from procurement contracts, additional tariffs, and even taxing or otherwise restricting US services. Importantly, multiple factors are likely to feed into the decision as to which sectors to target, including proportionality and potential harm to the EU itself. Businesses will want to be ready to put a case to the EU as to why they should not be included in any EU measures.

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