O'Connor & Company
European Lawyers

NON- CONFIDENTIAL

AD0012: Aluminium Extrusions

15 July 2022

Comments on the submissions of other parties on the Statement of Essential Facts

By

The Applicant

O'Connor & Company
T +32 2 285 46 85
www.oconnor.eu

1 Avenue de la Joyeuse Entrée
B-1040 Brussels
Belgium

Introduction

Comments on the Statement of Essential Facts (SEF) from a number of interested parties have been placed on the public file. The TRA has set the deadline of 15 July for parties to comment on these submissions.

The Applicant has identified submissions by:

- The Government of the People's Republic of China
- The Press Metal Group
- Shandong Nanshan Aluminium
- Guangdong JMA Aluminium
- 3o Limited

These submissions will each be addressed by the Applicant in turn.

1. The Government of the People's Republic of China

Scope of goods covered by the investigation is aluminium extrusions

The Government of the People's Republic of China (GOC) claims that extrusions having a maximum cross-sectional diameter of greater than 310mm, and a weight per metre of greater than 14kg should be excluded from the scope of the measures because they are not manufactured by the UK Industry and have not caused injury to the UK Industry.

First, and as a matter of fact, the UK industry has the ability to manufacture all types of aluminium extrusions including those with a maximum cross-sectional diameter of greater than 310mm, and a weight per metre of greater than 14kg.[1] Dumping of this type of extrusions has caused injury to the UK industry which may limit production of these types, but that is a different consideration.

Second, as a matter of law, the UK industry did supply the UK market from production within the relevant customs territory which included the 27 EU member states. The Applicant has provided detailed evidence, in its Comments on the SEF, to show that it supplied the UK market with extrusions >310mm and >14kg/m from production sites from within the Single Market, the relevant customs territory.

Third, and again as a matter of law, the question whether the range of goods considered in a particular investigation can exceed the limits set by the notion of like goods have been analysed in WTO Panel reports: *EC – Salmon (Norway)*, para. 7.48; *US – Softwood Lumber V*, para.

[1] See the Applicant's Comments on the SEF as well as those of Garnalex.

7.157; *Korea – Certain Paper*, para. 7.220 with respect to Article 2.1. and 2.6. of the WTO Anti-dumping Agreement.

These WTO panels found that there is no obligation concerning the scope of the goods concerned in Article 2.1 and Article 2.6. There is simply nothing in the text of Article 2.1 that provides any guidance whatsoever as to what the parameters of that product should be.[2] Furthermore, the assessment whether goods are like in the sense of Article 2.6 allows an investigating authority to consider whether there is some other good which "has characteristics closely resembling those of the product under consideration".

In *EC – Salmon (Norway)*, the Panel stated "Moreover, Norway's position would result in the absurd situation of requiring fragmentation of the product under consideration, and a consequent fragmentation of the like product, and ultimately the domestic industry, which would render the possibility of imposing dumping duties consistent with the AD Agreement a nullity. We see nothing in Article 2.6, which as discussed, defines "like product", which would support this view. In this regard, it is noteworthy that, while the AD Agreement specifically defines "like product" by requiring a comparison between domestically-produced (or foreign) goods and the imported products that are the subject of the investigation, there is no specific definition of "product under consideration".[3] In our view, the very fact that there is a definition of like product in the AD Agreement indicates that Members were well able to define terms carefully and precisely when considered necessary. The absence of a definition of product under consideration indicates that no effort was undertaken in that regard. In our view, this consideration supports the conclusion that it would be absurd to impose the definition of like product from Article 2.6 onto the undefined term product under consideration. We simply see no basis in the text of Articles 2.1 and 2.6 for the obligations Norway seeks to impose on investigating authorities with respect to product under consideration.[4]

Export restrictions on industrial raw materials creates a particular market situation on primary aluminium in China

The Chinese government influences the supply, and the prices of, raw materials in the aluminium sector. This is achieved through export restrictions, the Five-Year Plans, rules on State Trading Enterprises, setting of prices by the Chinese government, and the prevalence of SOEs (State Owned Enterprises) in this sector.[5]

---

[2] WTO Panel reports: *EC – Salmon (Norway)*, para. 7.48

[3] We note that proposals regarding definition of "product under investigation" have been made in the context of the negotiations on anti-dumping pursuant to the Doha Development Agenda, which supports our view that the existing text cannot be understood to contain such a definition. See, e.g., document TN/RL/W/143 at page 11, paragraph 17.

[4] *EC – Salmon (Norway)*, para. 7.59

[5] In addition, it is clear that the GOC and the CCP influence the commercial behaviour of individual Chinese foreign producers to achieve political ends through commercial means. The Applicant has shown evidence of such influence in the Application initiating this investigation. Since the Application, the Applicant notes that the Director General of MI5 has also warned that that GOC controls the commercial behaviour of enterprises so as to capture business, see generally: https://www.mi5.gov.uk/news/speech-by-mi5-and-fbi

The GOC criticises the OECD comprehensive study from 2019 to be too old for the purpose of this investigation. But the GOC does not contest that export restrictions, and numerous other distortive practices, are still imposed by the GOC on key raw materials for the production of the Goods Concerned. It even justifies the existences of such distortions to "*regulate the excessive and disorderly export of some products [] and ensure China's supply*."[6]

The GOC totally misses the point when it says "*According to this logic, there are tariffs on the import of aluminum extrusions in China. The import tariff restrictions artificially reduce the domestic supply of these products in China, which is likely to have lowered prices. Therefore, the domestic sales price of aluminum extrusions in China has been artificially increased.*"[7]. This statement is simply incoherent. The TRA found that the existence of an export tax applied by the GOC on key industrial raw materials such as unwrought aluminium created a PMS on the domestic aluminium market in China. The key function of export restrictions is to lower the price for domestic users, thus favouring domestic industries downstream that rely on these products as inputs or intermediates.

China's export taxes and the limited rebates for value-added tax (VAT) for exporters serve to discourage exports of primary aluminium while encouraging exports of certain semis and fabricated aluminium products such as aluminium extrusions. The combination of limited VAT rebates and export taxes implies a de facto export tax on primary aluminium well in excess of 15% (around 30%). This is in contrast with more processed aluminium products (e.g., semis), for which VAT costs and export taxes are generally both lower.[8]

The GOC did not address why it considers that export restrictions on unwrought aluminium do not influence prices of key industrial raw materials on the domestic market and consequently why this does not create a PMS for aluminium extrusions in the PRC.

The GOC further claims that the existence of the Shanghai Futures Exchange (SHFE) and its price quotations for primary aluminium are evidence that the upstream market for aluminium is based on market forces and open.

This claim has been analysed by several trade defence investigating authorities. The conclusion is that the GOC does interfere with the price setting mechanisms in the SHFE. For example the Australian anti-dumping investigating authority has determined that the aluminium prices paid in the SHFE did not 're*asonably reflect competitive market costs*' and that, aluminium being a globally traded commodity product, the nature and correlation of prices identified between the SHFE and the LME '*was not consistent with the forces of supply and demand*'.[9] It also appears from certain investigations that pure Chinese downstream producers (excl. joint ventures with foreign ownership) do not pay the price quoted on the SHFE but benefit from lower domestic prices for unwrought aluminium.

Moreover, the SHFE is not an open market as foreign firms are not allowed to trade on this marketplace. Chinese producers do not pay the price quoted on the SHFE but benefit from lower domestic prices. Moreover, contrary to the GOC's claim, the rules to be admitted trading

---

[6] Government of the People's Republic of China, Comments on the Statement of Essential Facts, page 2.
[7] *Ibidem*, page 2.
[8] OECD (2019), "Measuring distortions in international markets: the aluminium value chain", *OECD Trade Policy Papers*, No. 218, OECD Publishing, Paris, https://doi.org/10.1787/c82911ab-en. p. 25
[9] Australian Customs and Border Protection Service: Certain aluminium extrusions exported to Australia from the People's Republic of China, REP 148; 15.4.2010, p. 35

on the SHFE are not open to foreign firms, such firms are not allowed to trade on this marketplace.

China's energy market is still largely controlled by the State and not determined by market forces

In China, the OECD found that QPIG (Qinghai Provincial Investment Group) was able to obtain electricity from the province at cheaper rates; for 2016 that rate was lowered to CNY 0.28 per kWh instead of the prevailing CNY 0.33 per kWh. Yunnan Aluminium, another provincial SOE, likewise obtained cheaper hydroelectricity.[10]

The relationship in China between the government and companies generates opacity around the form and scale of government support. One example is the provision of inputs such as coal, alumina, or electricity by Chinese SOEs to other companies - public or private - for prices that are below market, and for which it can be very difficult to identify the specific policies that underlie support. This example illustrates a broader tendency for "provincial and municipality governments [in China to] subsidize purchases of raw materials by requiring other SOEs or pressuring their own suppliers to provide these inputs at below-market or even below-cost prices".[11]

The existence of a particular market situations unavoidably affects price comparability

The GOC claims that the existence of a particular market situation does not affect price comparability. This claim is totally irrelevant and contradicts the provisions in the WTO and in the corresponding UK legislation.

As a matter of law, Regulation 7(2)(b) of SI 2019/450 provides that it is not appropriate to use the comparable price to determine the normal value of the goods concerned where "because, of a particular market situation (…) such sales do not permit a proper comparison between the like goods destined for consumption in the exporting country or territory and the goods concerned".

The Applicant fails to see how the GOC considers that this provision breaches Article 2.2 of the WTO Anti-Dumping Agreement. In fact, there is no attempt, in the submission made by the GOC, to argue in law that there has been a breach. All there is, is an unsubstantiated claim.

The injury caused to the UK industry is material

The GOC argues that the volume of goods concerned imported from China decreased and therefore no injury can be attributed to dumped imports from China. The GOC analysis is

[10] OECD (2019), "Measuring distortions in international markets: the aluminium value chain", *OECD Trade Policy Papers*, No. 218, OECD Publishing, Paris, https://doi.org/10.1787/c82911ab-en. Page 85.
[11] OECD (2019), "Measuring distortions in international markets: the aluminium value chain", *OECD Trade Policy Papers*, No. 218, OECD Publishing, Paris, https://doi.org/10.1787/c82911ab-en. Page 91

flawed for various reasons. It focuses on the evolution of imports in absolute terms. It only looks at end-point to end-point comparisons and does not analyse the evolution of imports in details. It also ignores the impact of COVID-19 restrictions on the economy during the POI.

As a matter of law, the WTO Panel in *Korea – Pneumatic Valves (Japan)*, Japan alleged that Korea's injury and causation determination was flawed because, on an end-point to end-point basis, there was no significant increase in dumped imports. The Panel stated that "*a decrease in dumped import market share on an end-point to end-point basis would not necessarily undermine, much less disprove, a causation determination, particularly when, as in this case, the market share of imports increased in the last year of the period of trend analysis, albeit to a level lower than at the beginning of the period".*[12] The Panel further noted that "*The first sentence of Article 3.2 sets out three parameters for the consideration of the volumes of the dumped import: in absolute terms, or relative to production, or relative to consumption in the importing country. The use of the disjunctive 'either ... or' in the first sentence of Article 3.2 suggests that an investigating authority need only to consider whether there is a significant increase either in absolute terms or in relative terms under the first sentence of Article 3.2.*"[13]

As a matter of fact, the imports of the PRC in relative terms to UK production have increased between Year one (56%) and Year three (63%). The comparison with the POI performed by the GOC shows a decrease, but this comparison totally ignores the impact of COVID-19 on the world economy as well as by the introduction of new border controls and administrative requirements due to the exit of the UK from the EU, and the exceptional rise in transport costs caused by the scarcity of containers to be even able to ship the Goods Concerned. Data is presented by the GOC as if none of this happened.

This partial approach is neither objective nor reasonable and cannot satisfy the TRA.

Furthermore, the evolution of volumes of dumped imports is among the many other factors that must be analysed by the TRA to determine whether material injury is being suffered by the UK industry. This factor, taken in isolation, cannot provide decisive guidance on the matter. The focus on this single factor taken in isolation cannot provide decisive guidance on the injury determination which result from a complex and comprehension overview of all relevant factors mentioned in Article 3 of the WTO ADA. The GOCC claim should therefore be dismissed.

The significant price difference highlighted by the GOC confirms the existence of detrimental price effects of dumped goods on the UK market

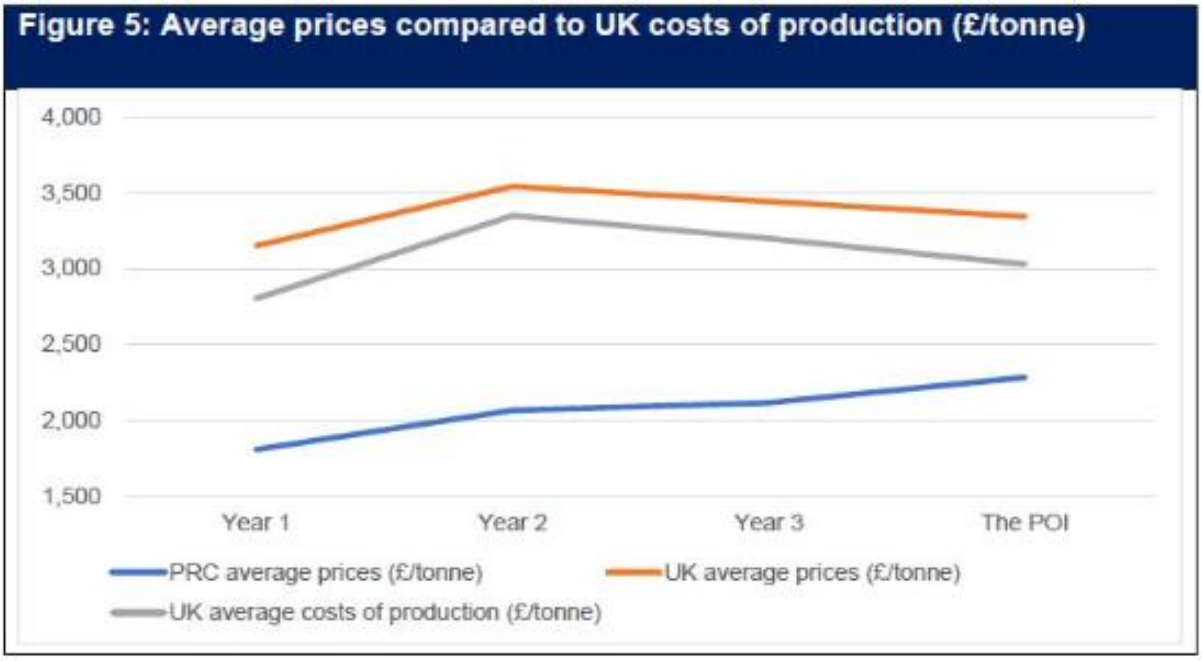
The GOC argues that the price of the goods concerned imported from China increased by 26%, while the price of like products in the UK increased by only 6% is a sign that no injury is suffered by the UK industry.

This reasoning falls short of establishing whether price effects of dumped imports have been material on the UK market. The GOC fails to mention that the price difference between the

[12] WTO Panel Report, *Korea – Pneumatic Valves (Japan)*,
[13] WTO Panel Report, *Korea – Pneumatic Valves (Japan)*, fn 358

goods concerned imported from the PRC and the like goods produced in the UK on one hand, and the average cost of production in the UK on the other hand remain significant:

Figure 5: Average prices compared to UK costs of production (£/tonne)



As shown on the graph above, the average price of Chinese extrusions at the UK border remains below the £2,500/tonne throughout the period, while and the UK industry average prices for the like goods oscillates between £3,000 - £3,500/tonne and is very close to the average cost of production. This graph reveals significant the price effects of the dumped goods is significant. It takes the form of undercutting the average UK prices, underselling with respect to average cost to make in the UK, and a price depression effect over time. These effects are long lasting as they are observed throughout the period of analysis, including during the POI.

Price movements in the injury period and in the POI have also been influenced by other factors and in particular the opening and preliminary conclusions (provisional measures) of an anti-dumping investigation into the dumping of the Goods Concerned in the EU. The imposition of provisional measures and the anticipation of those measures have clearly affected pricing during the injury period. In addition, one of the sampled foreign producers in the UK investigation was also a sampled exporting producer in the EU investigation due to the volume of trade of that producer. It is reasonable to consider that pricing behaviour on the UK market was influenced by the negative impact of the pricing behaviour leading up to the imposition of measures in the EU.

2. The Press Metal International Group (PMI)

The Applicant has argued in its Comments on the SEF dated 30 June, a non-confidential version of which has been posted on the public file, that there is a particular market situation (PMS) in the market for the Goods Concerned and in all the markets for the factors of

production of aluminium extrusions. The Applicant has shown that the markets to be examined by the TRA to determine if it is subject to a particular market situation includes not only the market for aluminium ingots but all markets.

The Applicant will not repeat the arguments in the 30 June Comments on the SEF and will consider them as part of the public file and taken as read. The Applicant notes that PMI has not contested the finding by the TRA that the market for energy in China is subject to a PMS.

Particular market situation

The Applicant considers that PMI has not shown that the reasoning of the TRA, in SEF Section E3, is in error.[14] In SEF §132 and §133, the TRA examined the arguments made by Shandong Nanshan and GMS Aluminium and rejected them for the reasons set out in SEF §134 to §139. PMI merely repeats the claims of Shandong Nanshan and GMS Aluminium and does not address the reasons the TRA rejected them.

The TRA based its findings on Insights published by the LME to show the differences in price setting between the LME and SHFE.[15] These are not contested by PMI. Nor does PMI address the fact that price limitations are regularly used on the SHFE to restrict the impact of price volatility.[16] The Applicant affirms the findings of the TRA that the SHFE price is managed by the exchange itself and cannot be the basis of a value for the construction of normal value for Good Concerned in China.

Brazil as the representative country

Regulation 8 of SI 2019/450 authorises the TRA to construct the normal value where it is not appropriate[17] to use prices on the market of origin. In SEF §149 the TRA set out the basis for choosing Brazil as the source of benchmark values for the purposes of constructing the normal value. PMI does not contest the findings in SEF §149. Rather, PMI argues that because Japan is geographically close to China, values from Japan should have been used. The approach taken by the TRA is appropriate. The issue is not geography but markets. Can a market be considered to represent the distorted market? PMI does not address the nature of the market in Japan and whether that market can be considered to represent the market in China.

The looseness in the PMI submission can be seen in reverence to the 'Japan Premium'.[18] PMI does not explain what this premium is. It then claims that whatever this premium is, it is determined by factors in relation to delivery. This may, or may not, be correct in relation to the

[14] The Applicant notes that the PMI submission does not make reference to the specific findings of the TRA paragraph by paragraph, making it somewhat difficult to follow exactly the finding in the SEF being contested in PMI's Comments.
[15] See SEF §134 and §135.
[16] See SEF §138.
[17] See Regulation 7 of SI2019/450
[18] See §12 to §14 in the PMI Comments.

'Japan Premium'. However, it does not address the issue of the correct market in which to find a benchmark value for constructing the normal value.

The use of scrap metal in the production of the Good Concerned

The Applicant is not in a position to comment on the details of the PMI claims in relation to the use and the value of scrap aluminium. However, a number of general comments are appropriate.

PMI seems to state that the scrap that it uses is generated in its own production processes. In that situation deducting scrap costs because they are not a 'cost' is saying that there is a lesser amount of aluminium input before the scrap is produced (and therefore there is a lower input cost for the production of the Goods Concerned).

If PMI is arguing that it is purchasing aluminium scrap on the market for scrap in China the TRA cannot use the cost of that scrap for the construction of the normal value. As the market for the aluminium ingot is distorted, the market for aluminium scrap must also be distorted as both compete as inputs for the production of the Goods Concerned.

The reasonable level of profit

The Applicant has shown in detail in its Comments on the SEF, and in particular on page 12 of that document, that the profits of the PMI Group as a whole are 18%. Given the relationship between the companies in the PMI Group and the very likely incidence of transfer pricing the TRA must use the Group profit level.

Conclusion

In conclusion in relation to the PMI Comments on the SEF, the Applicant considers that the PMI Group arguments do nothing to undermine the findings of the TRA in relation to the PMS in the markets of Aluminium ingots and in Energy but calls on the TRA to revise its position in relation to the exclusion of sub-categories of the Goods Concerned, to take the group profit in the POI as the appropriate profit to apply, and apply benchmark values for the other inputs for the production of aluminium extrusions.

3. Shandong Nanshan Aluminium

The Applicant has addressed in detail the situation of Shandong Nanshan Aluminium in its Comments on the SEF. The Applicant reaffirms those considerations in the present Comments. The Applicant's Comments on the Shandong Nanshan reaction to the SEF must be read in that light.

Fair Comparison

Shandong Nanshan claims that the TRA did not compare fairly the normal value and the export price. The Applicant considers that the TRA has not constructed the normal value in line with the requirements of SI 2019/450 (or the WTO Anti-Dumping Agreement). In that sense, the Applicant agrees that if the normal value is not properly constructed there can never be a fair comparison.

The Applicant is not in a position to understand exactly what Shandong Nanshan is claiming. However, to the extent that Shandong Nanshan is claiming that because certain costs were deducted to arrive at an ex-works export price, they must also be deducted from the normal value, this is simply not correct.

For example, freight, handling, credit adjustments, bank charges and even packaging costs can legitimately be deducted to arrive at an ex-works export price and not be deducted for constructing the normal value so as to comply with the fair comparison rules. The Applicant is not in a position to make further comment.

Right of due process

Shandong Nanshan claims that their right of defence has not been respected in that they have not been given access to certain revised calculations. The Applicant is not in a position to comment on this. The TRA must determine the extent to which Shandong Nanshan is in a position to effectively defend its interests. It appears to the Applicant, that Shandong Nanshan is in such a position as it has been able to determine the exact calculations carried out by the TRA in calculating the ex-works export price and the normal value. This is in line with normal anti-dumping practice where an administrative order system (as in the US allowing lawyers from all parties to examine in detail methodologies and calculations) is not in place.

4. Guangdong JMA Aluminium

Guangdong JMA considers that the TRA has engaged in zeroing and that zeroing is not compatible with UK or WTO law.

The Applicant considers that the TRA has erred in excluding PCNs not produced in the United Kingdom from the calculation of the dumping margin. The TRA is not entitled to exclude goods produced in China and exported to the UK from its calculations.

The Applicant notes that the TRA has applied an anti-dumping duty of 10.1% to the non-sampled cooperating overseas producers such as Guangdong JMA. 10.1% appears to be the weighted average of the 3 duties applied to the 3 sampled overseas producers as 10.1% is not the mathematical average of the 3 duties. It therefore appears that the TRA has complied with the requirements of Regulation 37 of SI 2019/450.

Thus, to the extent that the TRA has or has not zeroed, it does not appear to have a material impact on the duty applicable to Guangdong JMA Aluminium. Thus, there is no need to comment on Guangdong JMA's reference to Article 2.2 of the WTO Anti-Dumping Agreement.

5. 3o Limited

3o Limited argues that it is not in the economic interest of the UK to impose measures and any duty would be passed on to upstream users.

As the TRA has rightly concluded, the object and purpose of imposing anti-dumping measures is to eliminate the effects injurious dumping by imposing a duty on imports. A number of comments on 3o Limited's submission are appropriate.

The impact on prices is not as straightforward as 3o Limited claims. The Applicant has submitted to the TRA concrete evidence in its Comments on the SEF to show that some importers have promised their customers that they will absorb the duties proposed by the TRA. Clearly these companies are making sufficient profits on the UK market (or their overseas suppliers are willing to lower their prices) to be able to do so.

A trade defence measure does not, and should not, stop trade. The Good Concerned can be imported into the UK from origins other than China without paying an additional duty. It is always likely that other origins will take up any fall off in trade from the country dumping.

A fall in the market share from the origin of the dumping of the Goods Concerned is a normal consequence of an anti-dumping measure and cannot be an argument against that measure once dumping, injury and causation have been found. In addition, trade in the Goods Concerned was affected by other factors. The Applicant has shown in its Submission on the SEF that patterns of trade were affected by the Covid 19 pandemic, by the introduction of new border controls and administrative requirements due to the exit of the UK from the EU, and the exceptional rise in transport costs caused by the scarcity of containers to be even able to ship the Goods Concerned.

Conclusions

The Applicant does not consider that the Comments on the SEF on the public file from other interested parties are such as to undermine the overall approach proposed by the TRA.

The Applicant does consider, however, that the TRA has erred on issues not addressed in the comments of other interested parties and that these errors must be corrected:

- The market for aluminium extrusions (the Goods Concerned) in China is distorted;
- The markets for all the inputs for the production of the Goods Concerned are distorted;
- The calculation of the normal value for all the sampling overseas producers is flawed;
- The exclusion of PCNs not produced in the UK is not in line with SI 2019/450;
- The profit margins used by the TRA are out of line with published dates from the sampled overseas producers;
- There is no justification to exclude extrusions >310mm or heavier than 14kg/m;
- The proposed duties are not in the best economic interest of the UK.

END