

## Analysis

# Trade remedies: the new UK regime

## Speed read

After Brexit, the UK will operate its own system of trade remedies. The essential scheme of the new regime is that a new Trade Remedies Authority will act as the gatekeeper, investigator and first-line decision-maker, while the secretary of state will have general powers of supervision and the ability to block any proposal to impose a trade remedy on broad public interest grounds. Those who wish to challenge the TRA's or the secretary of state's decision must do so by way of judicial review application to the Upper Tribunal. The operation of the new trade remedies regime is going to provide significant challenges both for the TRA and for advisers to both UK companies seeking trade remedies and importers and foreign governments seeking to contest them.



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After Brexit, the UK will operate its own system of trade remedies. Since trade remedies involve tax – the imposition of higher import duties on certain products – tax professionals should know about them. This article examines what's proposed and the challenges ahead.

## Introduction and a bit of history

Since 1973, the United Kingdom has been part of the EEC, and then the EU, customs union and common commercial policy. That involved renouncing any power to impose trade remedies on imports from other member states (including, under the EEA agreement, imports from non-EU EEA states of products within the scope of that agreement), while applying common trade remedies, set by the Council and the Commission, on imports from third countries.

For some time after the Brexit decision, it was not clear whether the decision of the UK to leave the EU would necessarily mean operating a separate trade remedies policy. Indeed, under the 2018 Withdrawal Agreement, the then UK government agreed to remain in a customs union with the EU under which the UK would continue to apply EU trade remedies (and be unable to apply trade remedies to imports from the EU).

Nonetheless, the May government decided early on that the UK would need to have the protection offered by a trade remedies regime (which was not necessarily an automatic decision; indeed, several WTO members, including Switzerland, do not impose trade remedies at all). So there had to be in place some form of system in the event the UK left the EU with no withdrawal agreement or final agreement in place.

Despite its difficulties in getting legislation through the 2017–19 parliament, the May government did succeed in enacting the Taxation (Cross-border Trade) Act 2018 (the Act), which set out a framework within which a new Trade Remedies Authority (TRA) and the secretary of state for international trade would operate. However, for reasons that remain obscure but which may be related to a (failed) attempt to have the Bill classed as a 'money Bill' and hence immune to delay or obstruction in the House of Lords, the legislation setting up the TRA was contained in a separate Trade Bill – and that Bill became so overlaid with amendments unacceptable to the government that progress on it stalled and the Bill fell at the end of that Parliament. Indeed, the TRA still does not exist in law, and it awaits being set up by the new Trade Bill (stripped of all unwelcome amendments) that is currently going through Parliament. In the meantime, the then secretary of state used his power under the Act to make consequential and transitional provisions to confer the functions of the TRA on himself – in reality to a Trade Remedies Investigations Directorate (TRID) within his Department – until the TRA could be set up (see the Taxation (Cross-border Trade) Act 2018 (Appointed Day No. 4 and Transitional Provisions) (Modification) (EU Exit) Regulations, SI 2019/429).

Those legal difficulties paled behind some of the administrative difficulties that those setting up the new regime faced. The UK has no living experience of operating trade remedies. Expertise in that area – both among officials and among lawyers and other experts – was concentrated in Brussels. The UK government was therefore faced with the task of recruiting from across the world or training up a sufficient number of officials with sufficient technical expertise (on public sector salaries in areas where expertise is expensive and scarce) to operate a new regime. That task was complicated by the fact that, until the Conservatives won a majority at the end of 2019, it was not at all clear when the TRA would need to start work, or even if it would ever start work. Depending on your views of Reading, you may or may not also feel that the decision to locate the TRA there, rather than in London, added a further level of difficulty in recruitment.

However, as of today it does seem to be certain that the new regime will be up and running as of 1 January 2021. As it is a practical certainty that the Trade Bill will have been passed by then, I shall ignore the fact that the TRA still does not exist in law and that the functions it will have are still being exercised by the TRID. I shall also concentrate on the anti-dumping and subsidies aspects of the regime, as those are, in practice, likely to be more important than the aspects relating to safeguarding measures.

## Basic structure of the new regime

The new regime is largely contained in Sch 4 to the Act and in the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations, SI 2019/450, as amended ('the regulations'). In essence, the TRA acts as the gatekeeper, investigator and first-line decision-maker, while the secretary of state has general powers of supervision (including the power to make relevant secondary legislation) and the ability to block any proposal to impose a trade remedy on broad public interest grounds.

The Act imports the trade remedies available under the WTO rules and it sets out the process for imposing them. The trade remedies are:

- 'anti-dumping duties', as permitted by Anti-Dumping Agreement (WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994: 'ADA');

- anti-subsidy measures (known as ‘countervailing measures’), designed to deal with goods that have been subsidised by exporting governments, as outlined in the WTO Subsidies and Countervailing Measures Agreement (SCMA); and
- ‘safeguards measures’, which aim temporarily to protect domestic industry against a sudden wave of competition from abroad.

(For more on the WTO rules, see my article ‘Trade remedies: the WTO framework’ published on taxjournal.com.)

### Starting an investigation

The ADA requires (as does the SCMA) that investigations can be started only if producers with 25% of domestic production apply for them to be started (and if the investigation is not opposed by producers with a higher proportion of production): that requirement is implemented by Sch 4 para 9 and reg 52 of the regulations. That application has to provide a considerable amount of information, unless that information is not reasonably available. The secretary of state does, however, have power in ‘exceptional circumstances’ to apply herself for an investigation to be opened: it is not clear when that power would ever be used (though see below in relation to the transitional reviews).

### Conduct of the investigation

The TRA will examine the application to ensure that the requirements are complied with and that the thresholds for the volume of imports and amount of subsidy or dumping margin appear to be met. If they are met then the TRA may start an investigation if it is satisfied that there is ‘sufficient evidence’ of dumping or subsidisation (or of both: it is common for allegations of, and investigations of, dumping and subsidisation to run in parallel), and of injury.

Schedule 4 and the regulations make detailed provision for the conduct of the investigations, as well as making detailed provisions as to how calculations and assessments are to be carried out. The following features are worth noting in particular:

- In the case of a subsidisation investigation, the TRA must consult the exporting country before initiating an investigation. In the case of a dumping investigation, the TRA will notify that country when it does so. The exporting country is entitled to play a full part in the investigation as an interested party.
- Once the investigation has started, the TRA will publicise it and give an opportunity for interested parties (the exporting country, the exporting country’s producers, domestic producers, and producers’ trade associations) to register. Other entities (for example, trade unions representing workers in the affected industry) can register as contributors, though they have fewer procedural rights.
- The TRA will send out questionnaires to interested parties and others, or to a sample: it may seek to verify information provided by site visits.
- The TRA can disregard information provided by anyone found not to have cooperated with its investigation, and in any case where there are gaps in information provided base its conclusions on ‘facts available’.
- The TRA can hold a hearing, either on its own initiative or at the request of an interested party.
- The TRA will (if it does not decide to close the investigation) issue a ‘statement of essential facts’ to the interested parties (with a non-confidential version made available to contributors) setting out the intended decision and a summary of the facts found), and allow interested parties the chance to comment on that.
- The TRA can recommend a provisional remedy to the

secretary of state: if she agrees, then importers of the products at issue will be required to give a guarantee of the envisaged duties pending the final decision.

- According to current guidance, investigations will typically take 11–13 months, and cover the period going back 36 months before it is started.

### Final determination and economic impact

In its final determination, the TRA first has to satisfy itself that the conditions laid down in WTO law (as imported into UK law) for the imposition of a trade remedy are met, and calculate the recommended amount of duty accordingly. But it also has to consider an additional question, not required by WTO law, namely whether it is in the economic interest of the UK to impose the remedy. The presumption is that imposing the duty will be in the UK’s economic interest (see Sch 4 para 25(3)). But that presumption can be displaced after consideration of a number of factors set out in para 25(4), which include both the impact of the injury on the affected industry but also the regional impact of imposing or not imposing the remedy and the impact on customers and consumers of doing so. In its guidance, the TRA says that it interprets that provision as requiring it to show that the negative impacts of the proposed remedy are disproportionate to the benefits, rather than merely that the negative impacts outweigh the positive impacts: and it should also be noted that although the equivalent EU legislation allows the EU to refrain from imposing a trade remedy on the basis of the ‘Union interest’, that provision has rarely been used.

It should also be noted that Sch 4 para 18(6) requires the TRA to apply the ‘lesser duty’ rule, discussed in the previous article (i.e. the duty should be no more than is necessary to prevent injury, even if that amount is less than the dumping margin or subsidy).

### Role of the secretary of state for international trade

If the TRA decides that the conditions for a remedy (including the economic interest test) are not met, then that is, subject to appeal, the end of the matter. But if it decides that duty should be imposed, it will make a recommendation to that effect to the secretary of state. The secretary of state may reject that recommendation only if she considers that it is not in the public interest to impose the duty. In assessing the public interest, she must accept the TRA’s assessment of the UK’s economic interest unless she considers that that assessment is *Wednesbury* unreasonable (Sch 4 para 20(2), (3)). The obvious case of a public interest that would not be covered by the TRA’s economic assessment is wider foreign policy considerations against the imposition of a trade remedy. If she does reject the recommendation, she must provide a statement to the House of Commons giving her reasons. If the secretary of state accepts the recommendation, it is then imposed as a duty on all the relevant imports by a public notice given under s 13 of the Act.

### Transition reviews

One immediate issue facing the TRA is how to deal with cases where, as of the end of transition, imports are already covered by EU trade remedy decisions imposing duty. Schedule 7 para 1(4) of the Act provides that all EU trade remedies measures cease to apply at the end of transition. In cases where those measures were imposed with a view to protecting UK industry, that would leave UK industry exposed until replacement UK trade remedies could be put in place.

To deal with that issue, there is a system of ‘transition reviews’ set out in the regulations. In broad terms, the secretary of state has power (reg 96A) to list extant EU trade

remedies in force as at the end of transition and to provide for duty to continue. But the TRA must conduct a 'transition review' into all such measures – a process that has already started (at the time of writing, the TRID website listed five reviews on products ranging from Turkish trout to welded tubes and pipes from Belarus, Russia and China). That review requires it to consider whether there is still dumping or subsidisation, whether the duty is required to prevent industry applies to UK industry (bearing in mind that the EU measure will have been based on the risk of injury to EU industry), and the economic interest test. On completion of that review, the TRA must recommend to the secretary of state whether to retain the measure or remove the measure, a recommendation that she must accept unless she is satisfied that it is not in the public interest to do so.

One point that may arise is that, until the TRA has completed its review (which may well not be until some time after the end of transition), the UK will, under reg 96A, be applying EU trade remedies on a legacy basis without there having been any rigorous investigation of whether the subsidies or dumping concerned injure UK (as opposed to EU) industry. It could well be argued that that result is not consistent with the requirements of the SCMA and ADA that duty be imposed only where injury to domestic industry has been found (in a process complying with procedural guarantees). That argument, being based on international law, might have some difficulty in founding a domestic challenge, but the UK could be challenged on the point in the WTO dispute mechanism (or the multi-party interim appeal arbitration process, if the UK government decides to join that). Whether any state will choose to take the point remains to be seen – and since the point would be of historic interest only by the time any dispute comes to be resolved, they may well not choose to do so.

### Challenging, and review of, a trade remedy

If those affected by a trade remedy – or, in the case of a refusal or discontinuance of the investigation, those who think one should have been imposed – wish to challenge the TRA's or the secretary of state's decision, then the route of challenge is an application to the Upper Tribunal. Three important points should be flagged up.

- That challenge is – as set out in reg 18 of the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations, SI 2019/910 ('the appeals regulations') – by way of judicial review, and the Upper Tribunal's powers are confined to setting aside and remitting the decision at issue.
- An appeal to the Upper Tribunal only lies in relation to decisions set out in the appeals regulations, which are (in essence) final decisions or recommendations. Decisions as to other matters, such as procedural decisions or use of powers of investigation, will be challengeable only by way of judicial review in the Administrative Court or Court of Session.
- Before an appeal can be made against a TRA decision, the TRA has to be asked to reconsider its decision, and the appeal is then made against its reconsidered decision. An application for reconsideration has to be made within one month of notice being given. In the case, at least, of decisions to recommend imposition of a duty, there may well be some concern that that requirement will lead to delay without much purpose: such decisions will have been taken at a high level within the TRA and after those concerned have commented on a preliminary draft, so a further rethink is at that stage rather unlikely in the absence of powerful new evidence. However, the relevant

guidance does say that reconsideration will be carried out by a different team.

Perhaps as important as challenge, however, are the provisions for review or suspension. Those provisions allow importers to ask the TRA to revise or remove its recommendation to impose duty, or to suspend the duty, in the light of new developments, such as market developments or the ending of a subsidy.

A further set of provisions provide for review in the light of the outcome of an international dispute resolution process (such as the WTO or multi-party interim appeal arbitration process).

### Northern Ireland

Although the UK legislation refers throughout to the 'United Kingdom', that is in fact somewhat misleading: that is because, by virtue of para 5 of Annex 2 to the Ireland/Northern Ireland Protocol, Northern Ireland remains within the scope of EU trade defence instruments (a provision that, by virtue of s 7A of the EU Withdrawal Act 2018, overrides any contrary provision of UK law). One result of that is that any exports of goods from Great Britain to Northern Ireland that are covered by EU trade defence remedies (either imposed on UK exports or on third country goods that are being re-exported from Great Britain) will be subject to those duties. That paragraph overrides the provisions of the Protocol that disapply EU tariffs for goods that are not to be commercially processed in Northern Ireland and which are not at risk of being moved into the EU.

## The operation of the new trade remedies regime is going to provide significant challenges both for the TRA and for advisers

### Conclusion

The operation of the new trade remedies regime is going to provide significant challenges both for the TRA and for advisers (to both UK companies seeking trade remedies and importers and foreign governments seeking to contest them). Advising on the legal issues will require consideration of complex international case law, both at WTO level and in jurisdictions such as the US and EU with a long history of grappling with the relevant concepts, as well as grappling with the detailed UK provisions. A large number of procedural and substantive issues are likely to arise (and the fact that appeals are only on a judicial review basis will encourage taking procedural points). Any investigation will also throw up a range of economic and accounting issues that will require expert analysis, as well as, typically, a need to translate large numbers of documents and obtain advice on law and practice in exporting countries. Both the TRA and the UK legal and accounting professions will face considerable challenges in operating, and representing clients in, this new regime. ■

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- ▶ Trade remedies: the WTO framework (G Peretz QC, 28.8.20)
- ▶ Customs and the Northern Ireland Protocol (G Peretz QC & A Artley, 8.4.20)
- ▶ The Cross-Border Trade Bill (S Luder & P Higham, 31.1.18)
- ▶ Trade remedies: the government's proposals (G Peretz QC, 10.5.18)