UK TRADE REMEDIES

1. Until the UK's departure from the European Union and its customs union, United Kingdom trade remedy policy was determined at a European level by the European Commission, applying various European Union regulations.[1] Following the end of the post-Brexit transition period, the United Kingdom now conducts its own independent trade remedy policy.

2. This note provides a broad (and non-technical) overview of the new UK system of trade remedies and suggests a number of ways in which the UK authorities' approach to trade defence policy might differ from that of the European Commission.[2]

Overview – what are trade remedies?

3. Trade remedies are measures which states use to protect their domestic industries from foreign practices which are considered abusive. Trade remedies (or "trade defence measures") typically take the form of an additional tariff levelled on imports of specific products from specified countries, which is paid in addition to regular customs duties. They may be imposed on imports of goods but not of services.

4. Members of the World Trade Organisation are allowed to impose certain trade remedies on one another so long as they conform to the relevant WTO agreements.[3]

5. The three types trade remedies provided for in WTO law are:

   (a) "Anti-Dumping" remedies which apply to exporters who sell their goods at a price lower than that normally charged in the exporter's home country.

[1] The most important of which are Regulation 2016/1036 (the "**Dumping Regulation**"), Regulation 2016/1037 (the "**Anti-Subsidy Regulation**") and Regulations 2015/478 and 2015/755.

[2] This note is intended as a general and high-level summary only and is not legal advice. It is not exhaustive of the potential issues that may arise in future trade remedies investigations decisions. Any party that may become involved in a trade remedies investigation should seek legal advice.

[3] Respectively, the Anti-Dumping Agreement (Implementation of Article VI of the GATT), the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards.

(b) "Countervailing" remedies which apply to imported goods which are subsidised by foreign governments.

(c) "Safeguard" remedies which may be imposed as a temporary measure in response to an unforeseen surge of imports.

6. In addition, various additional "level playing field" provisions have been included in the UK-EU Trade and Cooperation Agreement. These are distinct from the trade remedies provided for in WTO law and are not discussed in this note.

The UK's trade remedy regime

7. The UK's trade remedies regime is currently administered by the Trade Remedies Investigation Directorate ("**TRID**"), which is part of the Department for International Trade. Once the Trade Bill 2019-21 receives Royal Assent, the relevant powers will be exercised by the Trade Remedies Authority ("**TRA**").

8. The power to impose trade remedies is found in Schedule 4 of the Taxation (Cross-border Trade) Act 2018 (the "**TCBT Act**").

9. Detailed rules are set out in the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (the "**D&S Regulations**") and the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019 (the "**Safeguarding Regulations**"). Rules governing appeals of TRID decisions are found in the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019 (the "**Appeal Regulations**").

10. Some of these provisions were modified by the Taxation (Cross Border Trade) Act 2018 (Appointed Days No. 4 and Transitional Provisions) (Modifications) (EU Exit) Regulations 2019 (the "**TP Regulations**").

11. These Regulations are supplemented by the Guidance found on the TRID's website.

12. In very broad outline, TRID will initiate an investigation when a UK industry makes an application requesting that it do so. The application must be supported by at least 25% of

UK producers, and not be opposed by a greater share of UK producers.[4] TRID will only investigate if the UK industry's market share is at least 1%.[5]

13. The application must be supported by a large volume of information, including (i) details of the goods in question, (ii) details of the exporting companies and countries, (iii) details of UK producers of like goods, (iv) information showing that the imported goods have been dumped or subsidised, or are the subject of unforeseen developments which have triggered a surge in imports (as relevant), (v) and evidence that the import of these goods has caused injury to the UK industry.[6]

14. TRID encourages potential applicants to use its Pre-Application Office ("**PAO**"), which can advise applicants on what information should be supplied. Once the PAO advises that the application is properly documented, it should be formally submitted to TRID.[7] TRID will then assess whether the application meets the requirements for TRID to initiate an investigation. If it does, the TRID may begin its investigation.

15. In a dumping investigation, TRID will assess whether the relevant foreign exporters have set their export prices below the normal value of those goods (being the price of the goods or like goods in the ordinary course of trade in the home market of the exporting country). If they have done so, then TRID will calculate a "dumping margin". In practice, many Anti-Dumping disputes concern how these prices should be assessed and, in particular, what adjustments should be made to them to reflect the costs of trade. There is room for considerable dispute: this analysis will often involve large volumes of data and both accounting and economic evidence.

16. In a subsidy investigation, TRID will assess whether the imported goods have been subsidised and, if so, whether that subsidy is "countervailable" (ie. whether it is one of the subsidies which, per the WTO's Agreement on Subsidies and Countervailing

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[4] As measured by "total production": r.52(2) of the D&S Regulations, r.23(2) of the Safeguarding Regulations.

[5] Being the share of the market for like goods for consumption in the United Kingdom (whether produced there or elsewhere): s. 9(2)(a) of Sch. 4 TCBT Act. See r.51 of the D&S Regulations. For safeguarding investigations, the market includes goods which are directly competitive with the like goods: r.22 of the Safeguarding Regulations.

[6] Schedule 1 of the D&S Regulations and the Schedule to the Safeguarding Regulations, as applicable.

[7] The PAO is independent from the TRA's investigation

Measures, entitles the UK to impose a countervailing tariff). If TRID concludes that the subsidy is countervailable, then it will calculate the amount of benefit that has been conferred on foreign exporters by that subsidy.

17. In both dumping and subsidy investigations, TRID then assesses whether UK industry has been materially injured by the dumped or subsidised imports.[8] The injury must have been caused by the import of the dumped or subsidised goods, and not by some other factor (for example, the import of non-dumped goods, or poor productivity in UK industry).[9] The tests applied in a Safeguarding investigation are slightly different and are not considered here.

18. For the purposes of the investigation, TRID may use information provided by the UK industry so long as that information is verifiable.[10] TRID will also issue questionnaires to all interested parties (eg. foreign exporters or UK importers) which have made themselves known to TRID. TRID may verify information by making site visits within the UK or, with notice to any foreign exporters and their government's consent, overseas.[11] TRID may also conduct hearings in person.[12]

19. If TRID concludes that the conditions are satisfied, then it will calculate the amount of the applicable anti-dumping or anti-subsidy duty. The recommended duty must correspond to the minimum increase in import prices of the dumped or subsidised goods that would remove the injury to UK producers.[13] This is known as the "Lesser Duty" rule.

20. TRID will then assess whether imposing the proposed remedy would be in the economic interests of the United Kingdom. This "*Economic Interest Test*" is found in s.25 of the TCBT Act. The test is presumed to be met unless TRID is satisfied that the application of the remedy is not in the economic interests of the United Kingdom. When assessing this question, TRID must have regard to factors including (i) the economic significance

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[8] "Material injury" includes the threat of material injury, or the material retardation of the establishment of the industry: s.5(1) of Schedule 4 TCBT 2018.

[9] r.35 of the D&S Regulations.

[10] r.47(2)(a) of the D&S Regulations.

[11] r.58 of the D&S Regulations.

[12] r. 61 of the D&S Regulations.

[13] r.36(2) of the D&S Regulations.

of the affected industries, (ii) the likely impact on industry and consumers, (iii) the geographical distribution of any impact, and (iv) the likely impact on competition and market structure for the goods within the United Kingdom.[14]

21. If TRID decides that imposing the proposed anti-dumping or countervailing duty would be in the economic interests of the United Kingdom, it will make a preliminary decision to that effect. The matter will then be passed to the Secretary of State, who must give effect to the preliminary decision unless she is satisfied it is not in the public interest to give effect to it.[15]

22. An applicant or interested party may request that TRID reconsider its decision.[16] A reconsidered decision may be reviewed by the Upper Tribunal which must apply the same principles as would be applied by a court on an application for judicial review.[17]

Possible differences with EU system

23. The UK system of trade remedies is very similar in design to the European Union's. This is not surprising as both are intended to be compliant with the relevant WTO agreements. Although the systems are very similar in design, there are a number of areas where TRID's practice may diverge from that of the European Commission.

Treatment of competition law issues

24. Trade defence and competition policy have a complicated relationship with one another. Anti-dumping and anti-subsidy measures are responses to some measures which are normally considered to be anti-competitive (eg. predatory pricing or price discrimination). The measures in question are typically the result of state action (eg subsidies or preferences). The imposition of a trade remedy will inevitably have short-term implications for competition and will inevitably raise prices and limit foreign competition. Indeed, that is the very purpose of imposing a trade defence measures. There is therefore a trade-off between protecting domestic industry from unfair competition

[14] s.25(4) TCBT 2018.

[15] s.19 of Schedule 4 of TCBT 2018, as amended by the TP Regulations.

[16] r.9 of the Appeal Regulations.

[17] rr.16-18 of the Appeal Regulations.

albeit that the short-term consequences could easily be higher domestic prices and less choice.

25. The European Commission has generally ascribed only limited weight to the domestic consequences for prices and choice, placing the producer interest uppermost when imposing trade defence measures. Although the relevant European Regulations impose a "Union interest" which is similar in drafting to the UK's economic interest test,[18] this is rarely used as a reason not to impose a trade remedy.[19] In particular, the European Commission will only, in its Union interest analysis, take into account competition policy where "t*here is concrete evidence of a dominant position and possible abuse thereof that those considerations require further investigation*."[20] This is a very high threshold to meet.

26. There are practical reasons to think that TRID may take a different approach when applying the Economic Interest Test. The United Kingdom economy is only a fifth as large as the European Union's. The impact of any given trade defence measure on UK competition is therefore likely to be greater. The UK's manufacturing sector is also relatively small. When assessing the UK's economic interests and the factors listed in s.25(4)(a), TRID might therefore place relatively greater weight on competition and the consumer interest than does the European Commission.

27. If so, then the Economic Interest Test (and the TRID's practice in applying it) might provide a useful tool to interested parties (eg. foreign exporters and UK importers) which seek to prevent UK trade defence instruments from being imposed.

Causation

[18] See Articles 7(1), 9(4) and 21 of the Dumping Regulation.

[19] One leading commentator notes simply that "*the imposition of anti-dumping measures is rarely refused or modified on the grounds of Union interest*." Van Bael & Bellis on EU Anti-Dumping and Other Trade Defence Instruments (6th edition) at [6.02].

[20] See Commission Implementing Regulation (EU) 2017/336: *Certain heavy plate of non-alloy or other alloy steel originating in the People's Republic of China* at [163].

28. Under the UK regime, a trade remedy will only be imposed if the injury to UK industry has been caused by dumping or foreign subsidies. A trade remedy will not be imposed if the injury has been caused by some other factor. [21]

29. This is mirrored in Articles 3(6) and 3(7) of the EU's Dumping Regulation, whereby measures will not be imposed if the injury to Union industry is caused by some other factor.

30. The European Commission considers it an established practice that a simple coincidence of increasing dumped imports and poor performance by Union industry is enough to establish causation,[22] and arguments in favour of other causal factors rarely succeed. In particular, the argument that the Union industry's predicament has been caused by its own poor management or lack of competitiveness have never succeeded.[23]

31. It is by no means clear that TRID will adopt the same approach. It is perfectly conceivable that, in appropriate circumstances, TRID will conclude that any injury to UK industry was self-inflicted. TRID might also pay more regard to the impact of exchange rates than does the European Commission. To the extent that Sterling is more volatile than the Euro, TRID may, during times of Sterling strength, conclude that any injury to UK industry was in fact caused by the prevailing exchange rate.[24]

32. In the near term, TRID might also take into account the impact of Covid-19 and of UK trade policy, which is in a state of flux. In investigations conducted over the next few years, TRID might conclude that any injury is attributable to (i) Covid-19, (ii) the end of the Brexit transition period or (iii) the entry of new free trade agreements.

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[21] r.35 of the D&S Regulations.

[22] See Council Regulation (EC) No 1472/2006: *Certain footwear with uppers of leather originating in the People's Republic of China and Vietnam* at [219].

[23] See Van Bael & Bellis on EU Anti-Dumping and Other Trade Defence Instruments (6th edition) at pp.260-261.

[24] In Commission Regulation (EC) No 1662/2002 *Certain filament yarns of cellulose acetate originating in Lithuania and the United States of America*, one party submitted that UK producers' poor performance was due to a strong exchange rate. The Commission noted at [79] that "*the production facilities in the United Kingdom constituted only a small part of the Community production whereas most of the production capacity as well as the consumption is located in Italy and Spain. Therefore, it was provisionally concluded that this had only a minor impact on the Community industry, if any.*"

Foreign regulatory practices

33. TRID might also be relatively more willing to take into account the practices of foreign trade remedy authorities.

34. Various statutory provisions require TRID to take into account provisions of relevant WTO agreements.[25] These WTO agreements are similarly binding on other members of the WTO. TRID (and, on appeal, the Upper Tribunal) might therefore consider foreign jurisprudence concerning these provisions to be persuasive authority.

35. TRID might also take into account any future anti-dumping or countervailing measures put in place by the European Commission. Given the proximity of the UK and EU and their similar economies, TRID may consider relevant findings by the European Commission to be persuasive.

36. Given the integrated nature of UK and EU supply chains, UK industry might also argue that third-country exporters subjected to EU trade remedies could divert their exports from the EU to the UK. They might therefore argue that the imposition of trade remedies by the European Commission is itself enough to establish a threat of injury. The European Commission does not generally consider that trade defence measures imposed by third countries are, on their own, enough to establish a threat of injury. [26] The TRID's practice may prove to be different, at least where the European Commission has imposed trade defence measures. TRID might therefore end up shadowing European Commission decisions in many areas.

Concluding remarks

37. Although TRID has provided clear guidance as to how it intends to conduct trade remedies investigations, there is much uncertainty about the approaches it will take.

[25] E.g. r.93(4) of the D&S Regulations.

[26] The converse is unlikely to be the case. In Joined Cases T-163 and T-165/94 *NTN Corp*, the Commission had concluded that US anti-dumping measures against Japan were likely to lead to a diversion of Japanese exports to the Europe. The General Court held at [106] that this fear was "*mere hypothesis and is not sufficient to justify a finding of threat of injury*."

There is yet more uncertainty about the technical methods it will use when calculating the various prices and margins necessary for its assessments.

38. This uncertainty is likely to persist until TRID (or more likely, the TRA once the Trade Bill 2019-21 receives Royal Assent) adopts settled practices. This may happen relatively quickly as the current climate means that TRID is likely to be busy.

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