

**EXPLANATORY MEMORANDUM TO**  
**THE TRADE REMEDIES (RECONSIDERATION AND APPEALS) (EU EXIT)**  
**REGULATIONS 2019**

**2019 No. 910**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for International Trade and is laid before the House of Commons by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 The Taxation (Cross-border Trade) Act 2018 (“TCBTA”) sets out the framework for the UK’s trade remedies system once the UK operates its own trade policy after the withdrawal of the UK from the European Union (“EU”). This instrument specifies the mechanism through which interested parties will be able to request reconsideration of and/or appeal against trade remedy decisions made by the Trade Remedies Authority (“TRA”) and the Secretary of State.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Select Committee on Statutory Instruments*

- 3.1 None.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

**4. Extent and Territorial Application**

- 4.1 The extent of this instrument is the United Kingdom. Trade remedies measures under the TCBTA would take the form of an additional rate of import duty and are therefore a matter of reserved competence.
- 4.2 The territorial application of this instrument is the United Kingdom.

**5. European Convention on Human Rights**

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

**6. Legislative Context**

- 6.1 World Trade Organization (“WTO”) Agreements<sup>1</sup> enable WTO Members to apply trade remedy measures where domestic industry is suffering from injury caused by

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<sup>1</sup> The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ([https://www.wto.org/english/docs\\_e/legal\\_e/19-adp\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm)), the Agreement on Subsidies and Countervailing Measures ([https://www.wto.org/english/docs\\_e/legal\\_e/24-scm\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm)) and the Agreement on Safeguards ([https://www.wto.org/english/docs\\_e/legal\\_e/25-safeg\\_e.htm](https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm)).

imports that are being dumped (exported at prices below the selling price in the exporter's domestic market or below the normal commercially viable selling price); where the imports have been subsidised; or where there is an unforeseen surge in imports.

- 6.2 As a member state of the EU, the UK currently applies trade remedy measures set by the EU. Once the UK leaves the EU, it will be responsible for operating its own independent trade policy and will need to be able to take action in respect of such imports to be able to continue to protect domestic industry. The relevant WTO Agreements set out specific obligations that Members must meet when applying trade remedy measures.
- 6.3 The TCBTA sets out the framework for the UK's trade remedies system, and details of the system are set out in the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019<sup>2</sup> ("Dumping and Subsidisation Regulations") and the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019<sup>3</sup> ("Safeguards Regulations"). The former, along with Schedule 4 to the TCBTA, are intended to implement the UK's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("ADA") and the Agreement on Subsidies and Countervailing Measures ("SCMA"); the latter, along with Schedule 5 to the TCBTA, are intended to implement the UK's obligations under the Agreement on Safeguards<sup>4</sup> ("SGA").
- 6.4 Paragraph 30 of Schedule 4 to the TCBTA provides for regulations to be made for the TRA to reconsider its anti-dumping and countervailing decisions, and for the TRA's and Secretary of State's decisions to be appealed. Paragraph 29 of Schedule 5 to the TCBTA provides for identical regulation-making powers in relation to the TRA's and the Secretary of State's safeguarding decisions<sup>5</sup>.
- 6.5 These Regulations provide for decisions made by the TRA under the TCBTA, the Dumping and Subsidisation Regulations and the Safeguards Regulations to be first subject to reconsideration before being appealable to the Upper Tribunal, and for the Secretary of State's decisions to be appealable to the Upper Tribunal. The Tribunal Procedure (Amendment) Rules 2019, made by the Tribunal Procedure Committee, will come into force on the same date as these Regulations, make the necessary amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended), for the Upper Tribunal to hear trade remedies appeals.

## 7. Policy background

### *What is being done and why?*

- 7.1 The WTO provides a rules-based system which supports free and fair trade globally. The relevant WTO Agreements set out the basis on when and how Members may act to protect domestic industry against injury caused by dumped or subsidised goods, or unforeseen surges in imports, by imposing measures (usually an additional amount of

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<sup>2</sup> S.I. 2019/450.

<sup>3</sup> S.I. 2019/449.

<sup>4</sup> The ADA, SCMA and SGA are in Annex 1A to the Marrakesh Agreement establishing the World Trade Organization (concluded on 15 April 1994, entered into force 1 January 1995)

<sup>5</sup> Paragraph 30 of Schedule 4 and paragraph 29 of Schedule 5 to the TCBTA have been commenced by the Taxation (Cross-border Trade) Act 2018 (Appointed Days No. 7 and Transitional Provisions) (Modification) (EU Exit) Regulations 2019.

import duty) to be placed on imports of specific products. Trade remedies currently fall within the European Union's (EU) exclusive competence, and investigations, decisions and monitoring of trade remedy measures are performed by the European Commission on behalf of all EU member states.

- 7.2 WTO rules provide a broad framework for Members to follow in setting up their trade remedies system, with specific requirements in certain areas - for example, certain factors that must be considered when establishing the existence of injury to domestic industry. The ADA and SCMA expressly require Members to have independent procedures in place to review decisions taken by their investigating authority under anti-dumping and countervailing provisions. However, the Agreements allow discretion on the types of appeal system that can be put in place, and in particular whether it should be administrative, arbitral or judicial. In the Trade White Paper<sup>6</sup>, the Government committed to creating a system based on the principles of impartiality, proportionality, efficiency and transparency. In designing the UK system, the Government has examined the systems used by other WTO Members, in particular the US, Canada, Australia, and the EU.
- 7.3 In the UK's system, the TRA, when established after the Trade Bill receives Royal Assent and after the relevant provisions in the resultant Trade Act are commenced, will make independent recommendations to the Secretary of State on whether to impose trade remedies measures. The Secretary of State will decide whether to accept the recommendations
- 7.4 Where any interested parties, such as an overseas exporter or a relevant foreign government, disagree with the methodology or facts used by the TRA or Secretary of State to come to a decision, the reconsideration and appeals process will allow them to challenge that decision. All recommendations made by the TRA following the conclusion of an investigation or a review will first be subject to a reconsideration, and this may be followed by an appeal to the Upper Tribunal. Any challenge against a decision by the Secretary of State, but not the TRA would be lodged directly with the Upper Tribunal. The Upper Tribunal will apply judicial review principles when determining such appeals.
- 7.5 The Government has proposed this hybrid model consisting of reconsideration and appeals as the TRA's decisions will be based on complex and technical data and evidence, and the inclusion of a reconsideration process would enable administrative and procedural errors to be resolved more quickly and cost-efficiently than going straight to judicial process. However, interested parties will always be able subsequently to appeal to the Upper Tribunal, regardless of the outcome of the TRA's reconsideration. The hybrid model and judicial review principles being the standard of review, reflect elements of international best practice.
- 7.6 The Government has decided that, although the SGA does not require WTO Members to provide for independent reviews of decisions made on safeguards measures, these procedures should be extended to include decisions made under Schedule 5 to TCBTA and the Safeguards Regulations. This ensures a domestic route of appeal for decisions across all trade remedy provisions of the TCBTA and secondary legislation made under it.

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<sup>6</sup> Trade White Paper: our future UK trade policy (<https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy>).

7.7 Until the TRA is formally established, the TCBTA, the Dumping and Subsidisation Regulations and Safeguards Regulations temporarily confer functions on the Secretary of State that would otherwise be exercised by the TRA if it were established. These Regulations similarly provide for such decisions taken by the Secretary of State to be subject to reconsideration and appeal, as would be the case if the TRA were to make those decisions.

## **8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union**

8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the United Kingdom from the European Union as it sets out the detail of the trade remedies system the UK will operate once it is responsible for operating its independent trade policy.

## **9. Consolidation**

9.1 Not applicable.

## **10. Consultation outcome**

10.1 The Government held a series of meetings during Spring 2018 with bodies representing interested parties, i.e. UK producers, downstream users and consumers, to understand their specific concerns and provide an opportunity for them to feed in their thoughts to the detailed design of the system. Those bodies were: the Manufacturers Trade Remedies Alliance (MTRA), including UK Steel and the British Ceramics Confederation; Renewable Energy Association; International Steel Trade Association; Society of Motor Manufacturers and Traders; British Retail Consortium; Which?; and Retail Economics. Stakeholders generally welcomed the design of the hybrid system and the provision of statutory appeals, as opposed simply to resorting to judicial reviews.

## **11. Guidance**

11.1 The TRA, when established, will publish guidance on how it will handle reconsideration and appeals. This guidance will be available on the TRA web page on Gov.uk.

## **12. Impact**

12.1 The impact of the trade remedy system on business, charities or voluntary bodies was assessed in an Impact Assessment<sup>7</sup> accompanying the TCBTA when the Bill was introduced in the House of Commons. This instrument provides the specific detail on how the UK system will operate and does not place any additional burdens on business, charities or voluntary bodies.

12.2 An Impact Assessment has not been prepared for this instrument because the expected impact of the UK trade remedies system has already been assessed in the Impact Assessment accompanying the TCBTA. This covered the expected impact of the key policy decisions taken.

12.3 There is no, or no significant, impact on the public sector. The impact on the public sector was also assessed in the Impact Assessment accompanying the TCBTA which

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<sup>7</sup> <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0128/IA17-013.pdf>

consisted of the cost of setting up and running the TRA. This instrument does not affect the previous assessment.

- 12.4 In addition, as outlined in the previous Impact Assessment, the powers in the TCBTA on trade remedies relate to the imposition of duties, which fall under the exemption for tax measures set out in the Small Business, Enterprise and Employment Act 2015. As such, they do not count as regulatory provisions and are out of scope of the Business Impact Target. The same applies to this instrument therefore there is no requirement to complete an IA.

### **13. Regulating small business**

- 13.1 These regulations do not add any specific regulatory burdens for small businesses. They set out a mechanism for trade remedies decisions to be reconsidered and/or appealed.
- 13.2 Although the process brings no additional regulatory burden, the resulting reconsiderations and appeals may affect activities that are undertaken by small businesses in that the outcome might affect the prices and duties that they pay on certain types of product, from certain foreign countries.

### **14. Monitoring and review**

- 14.1 These Regulations do not include a statutory review clause as they are made under the Secretary of State's power to make regulations relating to tax legislation and are therefore exempt from the requirements under Section 28(3) of the Small Business, Enterprise and Employment Act 2015.
- 14.2 However, this will be the first time that the UK has operated its own trade remedies system in over 40 years. The system has been designed in compliance with our obligations as a WTO Member, as well as to meet Government objectives for a system that protects UK industry in a balanced and proportionate way, while at the same time giving the TRA sufficient flexibility to build and develop expertise in this area.
- 14.3 The Government will monitor the system to ensure that it operates as intended. If it concludes there are changes it could make which would improve the system, then the Government may consider this and review this instrument accordingly.

### **15. Contact**

- 15.1 Adam Gray at the Department for International Trade Telephone: 020 7215 1670 or email: Adam.Gray@trade.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Gaynor Jeffery, Deputy Director for Trade Remedies and Import Controls, at the Department for International Trade can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 George Hollingbery MP, Minister for Trade Policy at the Department for International Trade, can confirm that this Explanatory Memorandum meets the required standard.